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Extending the Scope of EU Merger Control

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Contents

Summary

In June 2013, the Commission proposed that the scope of merger control in the EU should be extended to include non-controlling minority shareholding acquisitions. The purpose of this thesis is to assess whether the proposed legal reform is motivated from a legal perspective.

There is proof that non-controlling minority shareholdings may have significant anti-competitive effects. Indeed, such acquisitions could be incompatible with the common market and merit prohibition under the current merger regulation. However, the current scope is limited to controlling acquisitions. The purpose of the merger regulation to maintain effective competition motivates the conclusion that there is a regulatory gap.

However, the gap in the law is narrow. First, there are some instances where non-controlling minority shareholdings can be assessed under the current merger regulation. Second, articles 101 and 102 in the Treaty on the Functioning of the European Union are applicable in some circumstances. Finally, the number of problematic non-controlling minority shareholding acquisitions is likely very small.

The merger control process system is demanding in that the acquirer have to submit a mandatory notification attached with detailed information. Moreover, the transactions cannot be implemented until the Commission has cleared them. The Commission considers using an alternative process system for non-controlling minority shareholding acquisitions. One of these options does not require ex-ante control as the current system does. Instead, the Commission would assess market compatibility after the transaction is implemented. However, it cannot be proven that alternative systems would be sufficiently effective in this thesis. Furthermore, negative aspects of the control systems might not make legal reform proportionate.

It is uncertain how the reform should be implemented to remedy the regulatory gap. Concerns with the control system is only one of the concerns. There is also not enough legal evidence to establish what non-controlling minority shareholdings would merit scrutiny. Considering the concerns for implementation and that the regulatory gap is very narrow, it is not proven that the proposed legal reform is motivated from a legal perspective.

Sammanfattning

I juni förra året föreslog Europeiska kommissionen att tillämpningen av Koncentrationsförordningen skulle utvidgas till att omfatta icke-kontrollerande minoritetsförvärv. Syftet med den här uppsatsen är att bedöma huruvida den föreslagna reformen är motiverad från ett rättsligt perspektiv.

Det finns belägg för att icke-kontrollerande minoritetsförvärv kan ha väsentliga negativa effekter för konkurrensen. Sådana förvärv skulle kunna vara oförenliga med den gemensamma marknaden och därmed kunna förbjudas enligt Koncentrationsförordningen. Emellertid gör begräsningarna i tillämpligheten av förordningen att alla sådana förvärv inte kontrolleras. Koncentrationsförordningens syfte att upprätthålla effektiv konkurrens motiverar slutsatsen att det finns en lucka i lagen.

Bristerna i lagen är däremot små. Till att börja med finns det möjligheter att utreda vissa icke-kontrollerande minoritetsförvärv enligt koncentrationsförordningen. Vidare är artikel 101 och artikel 102 i Funktionsfördraget tillämpliga under vissa omständigheter. Slutligen är troligen ett mycket litet antal icke-kontrollerande minoritetsförvärv problematiska.

Det gällande kontrollprocessen är mycket krävande genom att förvärvaren måste skicka ett meddelande om det tänkta förvärvet till kommissionen med omfattande information. Förvärvet får inte fullbordas innan kommissionen godkänner förvärvet. I samband med förslaget att utvidga tillämpningen av Koncentrationsförordningen föreslog även kommission alternativ till den gällande kontrollprocessen. Ett av dessa förslag är att meddelandeplikten skulle avskaffas för icke-kontrollerande minoritetsförvärv och att kommissionen skulle få utreda transaktionerna i efterhand istället. Emellertid har inte utredningen i denna uppsats kunnat bevisa att alternativa system kan vara tillräckligt effektiva. Vidare skulle negativa effekter av kontrollprocessen kunna göra en reform oproportionerlig.

Det är oklart hur reformen skulle implementeras för att läka bristerna i gällande rätt. Eventuella problem relaterade till kontrollprocessen är inte den enda orsaken till oklarheterna. Det finns inte tillräckligt med bevis för att kunna fastslå exakt vilka typer och icke-kontrollerande minoritetsförvärv som borde kontrolleras enligt Koncentrationsförordningen. Med anledning av att det finns oklarheter och att bristerna i gällande rätt troligen är mycket små så är det inte visat att reform är motiverad från ett rättsligt perspektiv.

Preface

This contribution marks the end of my studies in the Master of Laws programme at Lund University. It has been a journey of significant personal development and self-discovery in many aspects. I have grown genuinely interested in law from only regarding the studies as a means to an end. Now, I know that whatever legal profession I choose, I will have no regrets. It has been a great time much thanks to the setting in Lund with fellow students and friends. Thanks to you all.

Special thanks to my supervisor Katarina Olsson, who has provided guidance not only during the course of writing this thesis but also during preceding courses in the programme. I am also immensely grateful to Lund University United Exchange Program (LUUP) and the University of Auckland, New Zealand, for providing the opportunity to study abroad. It was probably the most rewarding experience of my life.

Henrik Sylvan

Lund, May 2014

Abbreviations

CJEU	Court of Justice of the European Union
Commission	European Commission
Concentration Notice	Commission Consolidated Jurisdictional Notice under Council Regulation No 139/2004 on the control of concentrations between undertakings [2008] OJ C95/1
Consultation Document	Commission Staff Working Document 239 *Towards more effective EU merger control* [2013]
Council	Council of the European Union
ECLF	European Competition Lawyers Forum
ECR	European Court reports
EEC	European Economic Community
ECIR	Commission Regulation No 802/2004 implementing Council Regulation No 139/2004 on the control of concentrations between undertakings [2004] OJ L133/1
EUMR	Council Regulation 139/2004 on the control of concentrations between undertakings [2004] OJ L24/1
GWB	Gesetz gegen Wettbewerbsbeschränkungen (German for *Act against Restraints on Competition*)
IBA	International Bar Association
ICC	International Chamber of Commerce
NCA	National competition authority
OFT	The Office of Fair Trading in the United Kingdom
OJ	Official Journal of the European Union
SIEC	Significant impediment of effective competition
TEU	Consolidated version of the Treaty on the European Union [2012]
TFEU	Consolidated version of the Treaty on the Functioning of the European Union [2012]

1. Introduction

1.1 Background

Mergers and acquisitions may have a number of purposes, such as being investments that can yield future profits. Undoubtedly, these investments may contribute to economic growth. However, mergers and acquisitions can cause changes to market structures if the target firm is a competitor. As a result, the acquirer may become less dependent on competitors, causing decreased effective competition in the concerned market. Consequently, there is a need to regulate transactions involving mergers and acquisitions of competing undertakings. The regulative process is provided by competition law and is commonly referred to as *merger control*.

This thesis concerns the application of merger control in the EU with regard to recent proposals by the Commission to reform the current merger control regime. In June 2013, the Commission published a Working Staff Document, *Towards More Effective Merger Control* (the Consultation Document). Most notably, it proposes that the application of the EUMR should be expanded to include *structural links*. The concept refers to *non-controlling minority shareholdings*, although the Commission concedes that not all non-controlling minority shareholdings should necessarily qualify as structural links.[1] In other words, the Commission did not specify the exact extent of the proposed reform. As will be explained in [2.4], there is currently a requirement for transfer of control over an undertaking for a transaction to be subject to merger control according to the EUMR. Therefore, application of the EUMR is currently limited. The Commission argues that some minority shareholdings may be harmful to competition despite lack of control and refers to economic theory to support the claims inter alia.

[1] Consultation Document, p 8.

1.2 Purpose

The purpose of this thesis is to assess if the proposal by the Commission to extend the scope of EUMR to structural links is motivated from a legal perspective. One important task is to investigate whether there may be a gap in the law that the Commission's proposed legal reform would remedy. Thus, the study requires the examination of the current content and purposes of the EUMR and the effects of non-controlling minority shareholdings. In order to assess if legal reform is proportionate it is also important to consider issues concerning the merger control legal process system.

The following research questions are discussed for the purpose of the thesis:

1. Should non-controlling minority shareholding acquisitions be subject to EU merger control considering the purpose of EUMR to protect competition and the effects of the acquisitions?
2. To what extent is current law insufficient for merger control of non-controlling minority shareholdings?
3. Could issues with the legal procedure of merger control discourage reform?

1.3 Method

The primary research method used in this thesis is the legal dogmatic method. Dogmatism means that conclusions are inferred from widely accepted principles. The legal dogmatic method requires the study of legal sources. The law itself is the highest authority and is a legal source that has to be regarded. Legal practice is secondary, since it provides interpretation of the law in the implementation in practice. Legal practice should be regarded, and judgements of courts higher in the court hierarchy have more authority than lesser courts or public agencies.[2] Commentary in legal doctrine and other material may be regarded as legal sources but have less authority.[3] The legal sources used in this thesis and their source authority are discussed below in [1.4].

The legal dogmatic method may be used to prove what the law is, and contribute to discussions of what it should be.[4] Consequently, the meanings and purposes of law are investigated from the inside out by interpreting

[2] Peczenik, p 35.
[3] Ibid, p 42–43.
[4] Lehrberg, p 167.

legal sources.[5] The rest of this section explains my approach to answering each of the research questions.

Answering the first research question requires studying the meaning of current law. I examine the meaning of non-controlling minority shareholdings with reference to the notion *control* in EUMR. To determine the level of competition that the EUMR purposes to protect, I investigate the conditions for prohibition, the Recitals in the ingress of the law, contents of the TFEU and interpretations in legal doctrine. The anti-competitive effects of non-controlling minority shareholdings are examined by investigating assessments in legal practice and the Commission's economic study.

Assuming that extending the scope of merger control to structural links is consistent with the purposes and contents of EUMR, it remains to be proven that the reform would make a difference in practice. For if very few non-controlling minority shareholdings would cause problems for competition, reform would perhaps not be needed. I believe that analysing statistics could provide indications of the amount of problematic structural links. Thereby, the magnitude of any problem could be identified. Relevant statistics is the number of minority shareholdings that have not been scrutinised for being non-controlling but concern high turnover businesses in related markets within the EU.[6] Furthermore, the Commission's economic study compares the magnitude of anti-competitive effects of structural links the effects of controlling acquisitions. Thus, statistics of the current portion of merger cases that lead to prohibitions can be used to predict if a larger or smaller portion of the total number of structural links could be prohibited.

Comparisons with law and legal practice in other jurisdictions may reveal similarities and differences between the studied legal systems.[7] I examine jurisdictions that currently apply merger control to structural links. The comparative method can be used to prove that solutions in other legal systems work well and are motivated by empiricism.[8] The comparative method is used in this thesis to help prove or disprove that merger control of structural links can be effective in practice, thereby contributing to the assessment concerning the need for reform and proportionality. The comparative study may also provide inspiration as to what non-controlling minority shareholdings should qualify as structural links and be subject to EU merger control.

The second research question regards the uses of current law for the Commission to control non-controlling minority shareholdings. Any pre-existing possibilities to control non-controlling minority shareholdings might motivate a less comprehensive reform. Otherwise, the reform would

[5] Vranken, p 112.
[6] Consultation Document, paras 92-93; also see [1.4] about what statistics are studied.
[7] Bogdan, p 18.
[8] Ibid, p 27.

arguably be unnecessary and excessive. On the other hand, if the possibilities derive from other legal provisions than the EUMR, one may argue that there is a risk for ambiguity or lack of palpability. The latter argument could motivate extending the scope of the EUMR for practical reasons. I use the legal dogmatic method for answering the second research question. The study concerns both the uses of EUMR and other provisions in EU law, more specifically articles 101 and 102 TFEU.

With the third research question, I consider issues related to the system of control. With *system of control*, I mean what tools the Commission is provided with by law to identify and prohibit transactions that may harm effective competition in markets. The Commission considers alternative options as to the system of control in the Consultation Document.[9] It is assumed that the system of merger control needs to be effective to allow any remedying effect of extending the scope of merger control. The legal dogmatic method is used primarily to examine the current system of control. Negative aspects of the alternative control systems are discussed with reference to organisations that have replied to the Consultation document. If reform could have negative aspects, then the reform may be discouraged.

1.4 Material

As implied in the previous section [1.3], the study concerns current law to a great extent. The EUMR and TFEU are particularly important for the study since they are primary sources of law for competition law and merger control in the EU. The TEU and TFEU are the most authoritative sources of law in the EU since they establish the EU as a legal body and independent jurisdiction.[10] EUMR is a Council Regulation. Regulations are directly applicable for all Member States in the Union according to article 288 TFEU. It is the Commission's duty to investigate and decide on infringements of competition law.[11] Likewise, the Commission is responsible for merger control under the EUMR.[12] Decisions by the Commissions are legally binding according to article 288 TFEU. Consequently, Commission decisions relating to mergers and acquisitions provide legal evidence for how merger control law is implemented in practice. Therefore, Commission decisions are very important materials.

[9] See [2.1].
[10] See article 1 TEU and article 1 TFEU establishing the EU and providing the authority of the EU. See also article 13 TEU that declares the European institutions as subordinate entities to act in conformity with the treaties and within the powers conferred to them by the treaties.
[11] See article 17 TEU providing the general duties of the Commission article 105 TFEU providing the authority for competition control more specifically.
[12] See for example articles 2, 6 and 8 EUMR.

Cases from the Courts of the European Union, the General Court and the CJEU are also important. The Courts' controlling function enables review of Commission decisions that may result in that the Commission's decisions are overruled.[13] Court cases may thus also provide legal evidence as to the implementation of merger control law in practice.

Several Commission documents are studied. The most significant is the Consultation Document since it is the publication of the Commission's proposal for an extended scope of EUMR and the object of analysis. There are two annexes to the document. *Annex I* presents economic theory that supports the claim that non-controlling minority shareholdings may negatively affect effective competition. It is the only material I use to explain anti-competitive effects of non-controlling minority shareholdings according to economic theory. *Annex II* contains review of relevant Commission legal practice among other investigations. The Consultation Document with its annexes thus contributes to investigations relating to all research questions. Other Commission documents are studied as well. For example, the Concentration Notice contributes to ascertaining the meaning of non-controlling minority shareholdings since it provides conclusions from legal practice related to the EUMR. The Green Paper can also be mentioned as an example. It presents a review by the Commission about past control of non-controlling minority shareholdings. Generally, Commission documents are tools that may help explain current law and review legal practice. However, they are not authoritative sources of law.[14]

Legal doctrine on EU merger control law supplement the treaties, Commission decisions and Commission documents to explain and interpret current law.[15] However, legal doctrine is no authoritative source of law in that legal doctrine is only concerned with explaining and interpreting more authoritative sources. Nonetheless, legal doctrine may provide more elaborate explanation and legal arguments.[16] Unfortunately, legal arguments regarding the need to apply merger control to structural links have not been found in legal doctrine. Instead, legal doctrine is used more for explanation in this thesis. For example, Cook and Kerse is studied for discursive accounts on the uses of the current EUMR. Whish is studied for similar purposes. On the other hand, Bishop and Walker contribute to more economic perspectives and the purposes of EU competition law.

There is little guidance in legal sources on the suitability of the proposed legal change. On the other hand, there is criticism in the consultation replies. I recognise that the source authority of the consultation replies may be limited. Moreover, bias may have influenced the comments more or less

[13] See article 19 TEU about the controlling function of the Courts and the authority to interpret EU law.
[14] It is evident from article 288 TFEU that only regulations, directives and decisions are legally binding.
[15] Peczenik, p 42–43.
[16] Vranken, p 111.

significantly. For example, law firms may reflect interests from their clients in the business community for good or for bad. NCAs may be restricted by reflecting the view in domestic law. The Consultation replies would hardly qualify as reflecting legal doctrine since the authors in legal doctrine gain authority as a legal source from legal research and formulating principles that become widely accepted.[17] Thus, the replies are not significantly influential for my conclusions. Only a selection of the replies are presented to provide overview. Replies from several different types of organisations have been selected, including NCAs, law firms and lawyers associations. The replies from law firms have been selected randomly. Replies from the NCAs of Germany and the UK have been chosen since German and UK law is studied to some extent in the thesis. The reply from ICC has been chosen since it reflects views by representatives of the business community. Finally, the lawyer's associations ECLF and IBA have been selected since they reflect views by independent lawyers in Europe and worldwide respectively.

Statistics in the *Zephyr database* are studied for the statistical study of the amount of non-controlling minority shareholdings that have been outside the scope of the EUMR but concern high turnover businesses in related markets within the EU. The study refers to conclusions of the data made by the Commission and presented in Annex II to the Consultation Document. The statistics regarding the portion of transactions currently within the scope that infringe the EUMR are provided by merger statistics found on the Commission website.

The comparative study concerns law in Germany and the UK. For example the Enterprise Act (2002) in the UK is relevant material. A few examples from legal practice in the UK and Germany are also used. The statistics on number of scrutinised non-controlling minority shareholdings are provided by the Commission in Annex II to the Consultation Document.

There is limited availability of material for the study presented in this thesis. After all, it concerns a very recent proposal for changing the law. Some sections may only refer to one or two sources. The limited amount of material makes it impossible to stick to the legal dogmatic method and compare views in legal doctrine. Proof has to found by using additional means. The lack of sources in legal doctrine is also why I choose to study the consultation replies for any criticism on the commission's proposals that can be discussed in the analysis.

[17] Peczenik, p 42-43.

1.5 Delimitations

Since this thesis is written at advanced level, elementary EU law cannot be elaborated more than what is necessary for the background to the study and relevant for the analysis. It is presumed that the reader is familiar with basics in EU competition law, merger control and merger control procedure. Most importantly, the principle for proportionality in EU law cannot be described within the boundaries of the thesis. It is presumed that the reader is familiar with this basic principle.

However, the contents of EU competition law that relate to Commission's proposal will be explained. For example, the concept *undertaking* is a concept in the current EUMR that will be explained. The concept relates to the scope of the EUMR and the meaning of controlling influence, but an in-depth investigation is not required since the proposal to extend the scope of EUMR does not affect how an undertaking is defined. A similar motivation applies for limited descriptions of other discussed features of the current EUMR.

Economic aspects are especially relevant to consider in the thesis for assessing the effects on competition by non-controlling minority shareholdings. The Commission has made such a study, and it is published in *Annex I*, as is also mentioned in section [1.4]. However, Commission's study economic study will not be challenged. I do not possess the qualifications to provide in-depth analysis in economics as opposed to legal research. As a result, I will accept the contents of the Commission's economic study as fact.

One part of this contribution regards perspectives about the control of non-controlling minority shareholdings in other legal systems than the EU. The purpose is to identify the main features only. An in-depth study may be relevant to make. However, it is not possible to make such a comprehensive study within the boundaries of this contribution.

In the Consultation Document, the Commission also considers other changes to the EUMR than extending to scope of merger control to include structural links. Primarily, the other proposals concern the case referral system between the Commission and Member States. However, I have chosen not to investigate these proposals since the propositions about the referral system are independent of the propositions regarding structural links. In other words, the issues regarding changes to the referral system are not so closely related to the issues regarding extending the scope to structural links that the main purpose of the thesis motivates an investigation of the reform proposals regarding the referral system.

1.6 Outline

To begin with, the proposal by the Commission to extend the scope of merger control is described. In addition, some notes on the concept structural links is presented to provide background for the continued investigation. In the same chapter, I present relevant contents and purposes of the current EUMR. First, the current application of the EUMR is described and thereby also the meaning of non-controlling minority shareholdings.

The last sections in chapter [2] describe the substantial criteria in the EUMR for prohibiting acquisitions. The purposes of the EUMR are closely linked with the assessment. Therefore, the level of competition that the EUMR purposes to maintain is examined at this point as well.

In the following chapter [3], I investigate anti-competitive effects by non-controlling minority shareholdings. The chapter begins with the Commission's economic investigation. Then, experiences from EU legal practice are examined. Moving on, I present the statistical investigation of the Zephyr database. More statistics are presented in the following section [3.4], which contains the comparative study of German and UK law. The chapter ends with a short discussion regarding the need to extend the scope of merger control with reference to Consultation replies.

Chapter [4] contains the investigation on the uses of current law for regulating non-controlling minority shareholdings. First, the limitations of EUMR are discussed. The investigation illustrates the limitations with examples from legal practice. In the following section [4.2], I consider whether the EUMR is used exclusively for merger and acquisitions, and if so why. Then I move on to discuss the possibility to apply articles 101 and 102 TFEU to non-controlling minority shareholding acquisitions.

Chapter [5] regards issues related what system of control to apply for structural links in case of reform. The chapter begins with an investigation of the current notification system in the EUMR. The merger statistics are also presented in the first section. Moving on, alternative systems as proposed by the Commission are presented in [5.2]. Finally, the issues and benefits with the alternative options are discussed with reference to Consultation replies.

All research questions are answered in order in the analysis in chapter [6]. Finally, in [6.4] I provide concluding remarks on whether the proposed reform is motivated from a legal perspective.

2. Structural Links and Current Purpose and Application of the Merger Regulation

2.1 The Commission's Proposal and General Notes on the Concept Structural Links

This section summarises the proposal by the Commission presented in the Consultation document to extend the scope of merger control to structural links. Thus, it provides background for the continued study. Many of the concepts and terms that are used in the Consultation Document relate to contents of current merger control law. Explanations are provided in subsequent sections of the chapter.

The consultation document is not a law proposal in the sense that it is not directed to the Council for decision, but to third parties for analysis and comment.[18] Consequently, the Consultation Document is discursive and inquiring. One of the objectives of the Consultation Document is to make proposals and seek comments on the following issue:[19]

- Whether to apply merger control rules to deal with the anti-competitive effects stemming from certain acquisitions of non-controlling minority shareholdings;

The background of the Commission's proposals regarding structural links is that the Commission believes that some non-controlling minority shareholding acquisitions may have anti-competitive effects, and that the Commission is currently not able to control such acquisitions according to current law. In other words, the Commission believes that the law does not provide sufficient tools to allow control of certain transactions that may harm effective competition. To support the claim that non-controlling minority shareholdings may harm effective competition, the Commission refers to economic theory, its own practice and the practice in Member States. Referrals to these issues are discussed in subsequent chapters.

It must be emphasized that the Commission does not make any proposal as to specifically what non-controlling minority shareholdings should qualify as structural links and thus be subject to the application of the EUMR.[20] In

[18] The Consultation Document, p 1.
[19] Ibid, p 3.
[20] Ibid, p 7.

other words, the exact extent of any proposed reform is not given. However, the Commission identifies two alternative methods. The first is to simply put a fixed percentage threshold for what size of a non-controlling minority shareholding that should be considered structural links in the reformed EUMR. The other option would be to use other substantive criteria instead.[21]

Now, some background as to the concept structural links can be found in EU law. The concept *links* is often used in EU competition law to imply that anti-competitive relationships exist between undertakings. The test for the existence of links in EU competition law is currently made in investigations concerning both cartels under article 101 TFEU and collective dominance under article 102 TFEU.[22] Three types of links have been distinguished in EU law. *Economic links* is used to describe economic interdependence between undertakings in a market. Economic links do not require any agreement or other legal relationship. Instead, economic links exist where the behaviour of the competing undertakings is adapted to the competitors, as opposed to challenging the competitor.[23] On the other hand, *commercial links* require the existence of an agreement, which for example may involve cross-licensing. Finally, *structural links* involves cross-directorship between undertakings, such as cross-shareholdings, participation in joint ventures, or participation in trade associations.[24] In the context of tests for collective dominance under article 102 TFEU, the concept structural links have been used to describe the ability to influence the *commercial conduct* in the competing undertaking resulting from one of the relationships listed in the previous sentence.[25] Consequently, I would conclude that the concept structural links relates to the concept market structure. For the definition of structural links, as described above, implies that the *distribution* of market power is affected as opposed to only affecting the *use* of market power.

[21] Consultation Document, p 8.
[22] Nazzini, p 362 and 366-367.
[23] See for example Joined Cases T-68/89, T-77/89 and T-78/89 *Società Italiana Vetro and others v Commission* ("*Italian Flat Glass*") ECR II-1403 [1992] where the Court of First Instance discusses economic links.
[24] Nazzini, p 366.
[25] See for example Case T-102/96 *Gencor Ltd v Commission* ECR II-753 [1999], where the Court of First Instance could not establish the existence of *structural links* when assessing if several undertakings were collectively dominant.

2.2 Applicability of the Merger Regulation for Concentrations with Community Dimension

The following accounts examine the conditions for application of the EUMR. The conclusions contribute to ascertain what transactions are not subject to the current EUMR and the meaning of non-controlling minority shareholdings. Moreover, I explain conditions in the EUMR that could be considered later concerning the statistical study that predicts the amount of non-controlling minority shareholdings that would be regulated if the scope of merger control is extended.

The latest version of the EUMR (139/2004) entered into force in 2004.[26] A principle of vital importance in the EUMR is the one-stop-shop principle, which means that either the NCAs or the Commission have exclusive authority or, in other words, sole jurisdiction.[27] The Commission is the competent authority for *concentrations* with a *Community dimension* according to article 1.1 EUMR. The exclusive jurisdiction is provided by articles 21.1 and 21.2. Thus, the Commission is not bound by any decision by NCAs in a case where the Commission has jurisdiction.[28] The Commission proposes that the one-stop shop principle should remain unchanged in the event the scope of merger control is extended to structural links.[29]

The EUMR defines the meaning of concentration in article 3.1. Firstly, a concentration is the merger of two or more previously independent undertakings or parts of undertakings. Secondly, a concentration is the acquisition by one or more persons already controlling at least one undertaking, or by one or more undertakings of direct or indirect control of one or more other undertakings. The explanations about the meaning of undertakings and control are provided in [2.3-4] below.

Community dimension is a condition for the aggregate combined turnover of the undertakings that are part of a concentration.[30] There are four ways to achieve the turnover threshold, and the conditions are provided in article 1.3 EUMR. First, the turnover threshold is achieved if the aggregate worldwide turnover exceeds €2500 million. Second, the aggregate turnover is sufficient if it exceeds €100 million in at least three Member States. Third, €25 million suffices if it is earned by at least two concerned undertakings in at least three Member states. Fourth, concentrations have community dimension if

[26] Council Regulation 139/2004 on the control of concentrations between undertakings (the EC Merger Regulation) [2004] OJ L24/1.
[27] Cook and Kerse, p 6-7.
[28] Case C-202/06 *Cementbouw v Commission* ECR I-12154 [2007], para 56.
[29] Consultation Document, p 7.
[30] Cook and Kerse, p 97-98.

the aggregate turnover within the ECC is more than €100 million. However, a transaction does not have community dimension if all concerned undertakings earn more than two thirds of its aggregate turnover in the ECC in only one Member state.[31]

The Commission proposes that the turnover thresholds remain unchanged in case of reform.[32] I believe that the thresholds are important to consider in any conclusions related to the brief comparative legal studies in [3.4] below. The account in this section shows that the combined turnovers of the parties limits the application of EU merger control in ways that may not be similar to the compared jurisdictions. Therefore, evidence as to the amount of non-controlling minority shareholdings that would be subject to control under the reformed EUMR may be less than in jurisdictions without turnover thresholds.

2.3 Concerned Undertakings

It is imperative to know the meaning of the concepts *concerned undertakings* and *control* to understand the meaning of concentration according to the EUMR. It is the change of control over undertakings that can cause concentrations according to article 3.1 EUMR and fall within the scope of merger control. This section begins with a short description of the meaning of undertaking according to the EUMR, before moving on to describing the control concept.

The Commission defines an undertaking as "any business with a market presence, to which a market turnover can be clearly attributed".[33] The definition relates to the principle of an autonomic economic entity.[34] Undertakings may be subsidiaries to other undertakings, thereby not constituting an autonomic economic entity.[35] Consequently, an undertaking may be one or several legal persons.[36] Moreover, a business may constitute an autonomic entity without constituting a legal entity at all.[37]

The form of a business is irrelevant.[38] This means that a single individual without any additional material assets may be considered an undertaking

[31] Cook and Kerse, p 101.
[32] Consultation Document, p 7.
[33] Concentration Notice, para 24.
[34] Ibid, para 24; Drahos, p 59; Cook & Kerse, p 30.
[35] See for example Case 48/69 *Imperial Chemical Industries v Commission* ECR 619 [1972], paras 132-133.
[36] Cook and Kerse, p 116.
[37] Concentration Notice, para 24.
[38] Case C-41/90 *Höfner & Elser v Macrotron* ECR I-2010 [1991], paras 21-23.

provided the person offers services on a market that fulfils the requirements of market presence and market turnover.[39] Moreover, assets may constitute undertakings despite not currently being organised into a business, as long as it is possible to attribute a market turnover to them. Consequently, it is also irrelevant whether assets are organised into a legal entity. For example, a base of customers or clients can be considered assets that constitute an undertaking.[40] Furthermore, franchise and licence agreements may constitute undertakings either in conjunction with additional assets or independently.[41] However, the agreements have to be exclusive to be considered undertakings in themselves.[42] The outcome of the test for whether business organisations, assets, agreements or individuals have market presence and market turnover depends on the effects on the concerned market. It is decisive that the market structure is affected for a lasting period. For example, the condition for lasting period is especially relevant to consider for transactions of exclusive licenses since they are generally given for a limited period.[43]

2.4 Controlling Influence

This section presents an investigation of the conditions for gaining control over undertakings according to the EUMR. The following account establishes the definition of non-controlling minority shareholdings. Shareholdings of less than half of the total shares that fail to achieve the threshold for controlling influence are non-controlling minority shareholdings.

As mentioned above in [2.2], a concentration may occur from the acquirement of control both by single or several undertakings. Acquisitions by natural persons can only be considered a concentration if the individual already controls at least one other undertaking or is engaged in economic activity on his or her own account.[44] There are cases where the formal acquirer of control is controlled by another individual or undertaking with the real power to exercise the controlling interests.[45] The provision in article 3.1(b) provides that control can be gained indirectly, thus including such

[39] See for example cases *Asko/Jakobs/Adia* (Case IV/M.82) [1991] OJ C132 and *Vaessen/Morris* (Case IV/C-29.290) [1979] OJ L19/32.
[40] Concentration Notice, para 24; See also for example cases *ECS/Sibelga* (Case COMP/M.3318) [2003] OJ C272, and *ECS/IEH* (Case COMP/M.2857) [2002] OJ C286.
[41] Concentration Notice, para 24; Cook & Kerse, p 30; See also case *Blokker/Toys"R"Us* (Case IV/M.890) [1997] OJ C71, para 13.
[42] Concentration Notice, para 24.
[43] Ibid, paras 18 and 24.
[44] Ibid, para 12; see also *Asko/Jakobs/Adia* (Case IV/M.82) [1991] OJ C132.
[45] Cook and Kerse, p 44.

transactions into the scope of the EUMR.[46] According to article 3.2 EUMR, control is acquired when the ability to exercise *decisive influence* on an undertaking is gained. The CJEU has narrowed the provision by stating that the ability must be effective.[47] However, it is irrelevant whether the decisive influence is actually exercised.[48] Article 3.2 EUMR lists examples of what decisive influence is:

(a) Ownership or the right to use all or part of the assets of an undertaking;
(b) Rights or contracts which confer the decisive influence on the composition, voting or decisions of the organs of an undertaking.

It is clear from the text in article 3.2 EUMR that the examples are non-exhaustive and that the Commission may consider both legal and de facto circumstances in the assessment of whether control has been acquired.[49] It is important to distinguish what type of influence is relevant for the assessment. The Commission explains that the influence must concern the target undertaking's business strategy by providing "control over decisions that determines strategic commercial behaviour".[50] The background for this reasoning can be found in Recital 20 in the EUMR, which implies that control has to result in a change in the market structure. Recital 20 also provides that several transactions may count as one if they are interrelated. *Interrelated* means that the same parties are involved in the transaction regarding the same undertakings and that the transactions are concluded closely in time.[51] Therefore, non-controlling minority shareholding acquisitions must not be confused with interrelated acquisitions that provide control in conjunction.

It is important to note that it is possible to gain control over strategic business decisions without complete ownership or a majority of voting rights. It because minority shareholdings may grant control according to the EUMR that it is necessary to use the attribute *non-controlling* to distinguish what shareholding acquisitions are not currently subject to merger control. Now, it is necessary to consider how minority shareholding may provide control. Firstly, a minority shareholding may be empowered by specific legal rights. For example, in *CCIE/GTE* a transaction of only 19 per cent of the shares was considered a concentration because the acquirer had a permanent seat in the board and additional rights of appointment to organs.[52] In addition, veto rights for strategic business decisions are special rights that provide control according to the EUMR. The power to block decisions by veto right is an example of negative control. The concept negative control implies that the controller cannot enforce new decisions of his own accord in contrast to active control. Negative control may be shared

[46] See also *Anglo American Corporation/Lonrho* (Case IV/M.754) [1997] OJ L149.
[47] Case T-282/02 *Cementbouw v Commission* ECR II-319 [2006], para 58.
[48] Concentration Notice, para 16.
[49] See also Concentration Notice, para 16; and Cook and Kerse, p 37.
[50] Cook and Kerse, p 38.
[51] Ibid, p 34.
[52] *CCIE/GTE* (Case IV/M.258) [1992] OJ C258.

by several parties. For example, an equal number of shares between two shareholders and no casting vote makes it possible for both shareholders to block any decision. Veto rights also provide negative control within the meaning of the EUMR. The concept *joint control* is often used to refer to scenarios where several parties have control over a single undertaking.[53]

A minority shareholder may have positive or negative control from de facto circumstances. For example, other shareholders may be passive in that they generally do not participate at the shareholders meeting despite holding voting rights. The other shareholders may also hold very small shares in relation to a dominant shareholder, as is common in large public firms. The dominant shareholder will then be able to exercise positive or negative control in practice.[54] Consequently, a shareholding of 35 per cent of the voting rights in companies with a large number of shareholders is often sufficient to gain control according to the EUMR.[55] However, differences in national legislation is taken under consideration as there may be differences as to what legal power is granted by a certain portion of owned shares and whether contracts between shareholders have legal effect.[56]

Considering the presentation so far, one may assume that joint ventures where parties have joint control generally fall within the scope of the EUMR. However, the EUMR only applies to joint ventures that perform the functions of an autonomic economic entity on a lasting basis, according to article 3.4. In legal doctrine, the condition is often referred to as a requirement for the joint venture to be *full-function*. Article 101 TFEU may be applicable for joint ventures that may harm effective competition but are not full-function according to article 2.4 EUMR, since such joint ventures have characteristics of cooperation rather than concentration.[57] However, joint ventures that are not full-function from the start may be considered concentrations if the requirements are expected to be fulfilled in the near future.[58] Full-function means that the joint venture "has the financial resources, staff and assets necessary to operate as an independent business on a lasting basis".[59] Furthermore, the joint venture must operate on a market, perform similar functions on the market as other undertakings in the same market, and finally be commercially independent from the parents.[60] In fulfilling these requirements, the joint venture is likely to result in a change in the market structure.[61] As already mentioned above, Recital 20 in the EUMR highlights the importance of a change in the market structure for

[53] Concentration Notice, para 62; see also Case T-282/02 *Cementbouw v Commission* ECR II-319 [2006], paras 42, 52 and 67.
[54] Concentration Notice, para 18.
[55] Cook and Kerse, p 48-50; see also for example *Alfred C. Toepfer/Champagne Céréales* (Case IV/M.557) [1995] OJ C104.
[56] Cook and Kerse, p 39.
[57] Ibid, p 8, 209-210.
[58] See for example *Toray/Murata/Teijin* (Case COMP/M.2763) [2002] OJ C25, para 10.
[59] Cook and Kerse, p 8.
[60] Concentration Notice, paras 93-94.
[61] Sinan and Uphoff, p 37.

the assessment of whether a concentration has occurred. The effect on the market structure is thus a decisive criterion for whether a concentration has occurred for both joint ventures, mergers and acquisitions.

2.5 The Test for Significant Impediment on Effective Competition

The Commission can only prohibit concentrations that are not compatible with the common market. A concentration is incompatible with the common market if it would significantly impede effective competition, according to articles 2.2 and 2.3 EUMR. The test for compatibility is widely known as the *SIEC test*, although the Commission refers to it as the substantive test in the Consultation Document. The Commission proposes that the SIEC test should be retained in case of reform.[62] Therefore, it would have to be proven that non-controlling minority shareholding acquisitions may fulfil the criteria for incompatibility for the reform to be compatible. These considerations are made in chapter [3] below. The two final sections of this chapter investigate how transaction may be deemed incompatible with the common market considering the conditions of the SIEC test and purposes of the EUMR.

The SIEC test does not limit the scope of the EUMR since it is only made for transactions that have already been determined to be within the scope according to article 3 EUMR. Nonetheless, the SIEC test is highly relevant to consider in the context of extending the scope. For if non-controlling minority shareholdings would never be capable of significantly impeding effective competition according to the EUMR, the extended scope would be without practical effect. This section describes the SIEC test generally.

The Commission has the burden of proof to justify incompatibility with the common market, and has to refer to the prospective economic effect.[63] Moreover, there is no prejudice against compatibility from the start.[64] It is evident from articles 2.2 and 2.3 EUMR that the SIEC test can only result in that a concentration is declared either compatible or incompatible with the common market. Thus, there can be no in-between judgement. Although the Commission has discretion to provide and assess the economic evidence, the Community Courts can review the evidence as to sufficiency and accuracy.[65] To allow the Commission to find the evidence required to make

[62] Consultation Document, p 7.
[63] See for example C-413/06 P *Bertelsmann and Sony Corporation of America v Impala* ECR I-04951 [2008]; Whish, p 849; Cook and Kerse, p 214.
[64] Case T-210/01 *General Electric Company v Commission* ECR II-5575 [2006], para 61.
[65] Case C-12/03 P *Commission v Tetra Laval BV* ECR I-01113 [2005], para 39.

its assessment, article 11 and 13 EUMR grant the Commission extensive powers to demand information from the acquirer, including interviews.

There are several alternatives as to how to assess the level of competition. One alternative is to consider the level of rivalry between undertakings. Another option is to consider the existence of restrains on an undertakings economic activity by another firm. A third possibility is to test the ability of undertakings to influence the market price.[66] Factors that are relevant to consider when performing the SIEC test are listed in article 2.1a and b EUMR, though the list is not exhaustive. Guidelines are also provided in the Recitals. It is evident from article 2.1 and Recital 26 that the alternatives for assessment mentioned above are all used in the SIEC test. The outcome of the test often depends on the market definition. For example, if the market definition implies that there are few competing undertakings (oligopolistic or monopolistic market structures), there is naturally a larger chance that a concentration is considered harmful.[67]

Bishop and Walker point out that there are weaknesses with only assessing the levels of competitiveness that are discussed in the previous paragraph above. Competition may be satisfactorily effective despite less rivalry, existing restraints on competing undertakings or the possibility to influence market prices. In addition, it is unknown as to what extent of decreased rivalry, for example, would harm competition to the extent that effective competition no longer exists.[68] Therefore, the outcome for consumer welfare should be considered an important factor to investigate.[69] Indeed, the outcome for consumer welfare is a decisive factor in the SIEC test.[70] Benefit for consumers is an efficiency restriction that applies to the EUMR according to Recital 29.[71]

In the event that the Commission comes to the conclusion that a concentration would significantly impede effective competition, the concentration does not necessarily have to be prohibited. Articles 6.2 and 8.2 EUMR provides the possibility for *remedies*, which allow the parties in a notified concentration to make commitments that obviate competition issues. Thus, a problematic concentration can become acceptable without the need for the parties to make a new notification. In practice, remedies are very common. A very high portion of problematic transactions are cleared as compatible with the common market because of commitments.[72]

[66] Bishop and Walker, p 17-20.
[67] Recital 25 EUMR; Cook and Kerse, p
[68] Bishop and Walker, p 20-21.
[69] Ibid, p 20-21; See also Nazzini, p 92-94; and Whish, p 4.
[70] Whish, p 863-864; Zimmer, p 24-25.
[71] See also for example *Ryanair/Aer Lingus* (Case COMP/M4439) [2007] OJ C47, para 1100.
[72] Merger Statistics; Cook and Kerse, p 282.

2.6 Effective Competition and Other Purposes

The assessment of whether effective competition has been significantly impeded depends first and foremost on the definition of effective competition. The investigation below suggests a definition that could be used with regard to the purposes of the EUMR and other purposes in EU law. Thereby, the account presents conclusions about the level of competition that the EUMR purposes to maintain.

According to economic theory, perfectly effective competition exists where there is complete absence of *market power*, which is defined as "the ability to raise prices above the competitive price level".[73] Consequently, any ability or practical effect in a market that could cause prices to increase above the competitive price level in a market would qualify as a threat to effective competition. However, most undertakings possess at least some degree of market power in practice, and this is perhaps not always a problem where market power is not significant. Therefore, economists often make the distinction between significant and insignificant market power.[74]

Economic theory about effective competition cannot fully explain the meaning of the concept in EUMR. For according to article 2.1, the assessment according to the SIEC test must be conducted with consideration to the objectives of the regulation. The Recitals in the Preamble to the EUMR show that the purpose to protect effective competition is limited by several other purposes. Recital 6 refers to article 5 TFEU that requires proportionality and subsidiarity in EU legal policy and practice. Consequently, Recital 7 provides that the EUMR should only apply to significant structural changes.[75] Furthermore, Recital 3 refers to consideration for the objectives to promote trade in the internal market. This relates to the objective in EU competition law for *market integration*. The main objectives for EU competition law are provided by article 119 TFEU: "[…] economic policy [should be] based on the close coordination of Member States' economic policies, on the internal market […] and conducted in the accordance with the principle of 'open market economy with free competition'". The article shows that the objective for effective competition is stipulated in relation to goals for market integration. One feature of the goal for market integration is approximation of the competition policies of the Member States. The other feature of the objective for market integration is promotion of cross-border trade and expansion of territorial markets for products. The objectives for effective

[73] Bishop and Walker, p 6.
[74] Ibid.
[75] Compare with the condition for controlling influence for application of the EUMR as discussed in [2.4].

competition and market integration may conflict with each other.[76] For example, the objective for a common policy could dissuade legal reform that diverges too much from the competition policy of Member States. Moreover, a concentration might cause anti-completive effects while contributing to increased cross-border trade.[77]

Since the assessment of harm on competition is subject to considerations to other objectives makes it less simple to assess whether effective competition has been significantly impeded. In case of conflict, the Commission considers the conflicting goals separately and then tries to find a balance considering the net outcome for economic efficiency.[78] Considering all that has been discussed in this section and above in [2.5], significant impediment on effective competition according to the EUMR could be defined as *the creation of an ability to exercise significant market power that may harm consumer welfare and cause an overall negative effect on economic performance*.

[76] Drahos, p 54; Bishop and Walker, p 8.
[77] Ibid.
[78] Ibid; Whish, p 4.

3. The Need to Regulate Structural Links

3.1 Anti-competitive Effects by Non-controlling Minority Shareholdings According to Economic Theory

This section describes the economic investigation presented by the Commission in Annex I to the Consultation Document on anti-competitive effects by non-controlling minority shareholding acquisitions. To begin with, it is evident from the investigation that non-controlling minority shareholdings cause less significant anti-competitive effects than controlling shareholdings, and that the magnitude of the effects are often proportional to the level of influence or size of the shareholding.[79] Nonetheless, the Commission argues that the economic investigation shows that economic theory supports that non-controlling minority shareholdings may cause significant impediment on effective competition.[80]

A non-controlling minority shareholdings may provide influence over the target undertaking's commercial conduct. Consequently, a lack of decisive influence (control) does not exclude a level of influence that may significantly impede competition. The Commission uses the concept *material influence* to refer to such influence that does not achieve the threshold for decisive influence.[81] A minority shareholding may not grant the ability to block strategic business decisions to the extent that decisive influence is achieved according to EUMR, but still be used to exercise negative control sometimes. If the target undertaking has no dominant shareholder and shares are well spread among the shareholders, there may be much fluctuation as to the level of influence at the shareholders meeting. The ability to block a decision in a few cases would not be decisive influence, but the commercial policy of the target undertaking could have been significantly influenced nonetheless. For example, a minority shareholder may be able to form informal coalitions that can affect commercial decisions. In addition, some strategic business decisions might require qualified majority decisions, thereby also allowing negative control is some but not all instances.[82]

[79] Annex I to Consultation Document, paras 3 and 5.
[80] Ibid, para 3.
[81] Ibid.
[82] Ibid, paras 29, 32-36.

Moving on, non-controlling minority shareholdings could cause *unilateral effects*, both in horizontal and non-horizontal relationships. Unilateral effects means that one undertaking's market power is increased from a merger or acquisition without coordination or cooperation with the target undertaking.[83] In horizontal relationships, a non-controlling minority shareholding acquisition could reduce the incentive to compete because the acquirer would share profits with the other undertaking.[84] Thus, passive investments without any commercial influence on the competing undertaking could cause unilateral effects. There would be a similar effect in non-horizontal relationships if the acquirer owns shares in a supplier to the competing undertaking, thereby also sharing profits.[85] If the non-controlling minority shareholding would be as large as to conferring commercial influence, the unilateral effect in horizontal relationships would be "severe".[86] As to non-vertical relationships, commercial influence in a supplier from non-controlling minority shareholdings could result in price discrimination to the acquirer's advantage.[87] Unilateral effects are highly relevant to consider under the current merger regulation, as is evident from Recital 25 EUMR.

Another argument provided by the economic investigation is that non-controlling minority shareholdings can cause *coordinated effects* in horizontal relationships. In contrast to unilateral effect, coordinated effects means that market power is increased by "tacit collusion" between two or more undertakings in a market.[88] For example, the acquirer may gain insight in the target undertakings commercial policy and adjust its own policy accordingly to enable higher prices.[89] In addition, aggressive competition with the target undertakings that could cause losses for the target undertaking would negatively affect the acquirer. Therefore, the acquirer would adjust its competitive behaviour towards the target undertaking.[90] A problem related to coordinated effects concern the barriers to entry. The investigations suggests that non-controlling minority shareholdings in undertakings that are not currently competitors decrease the probability that the target undertaking enters the market and becomes a competitor because of tacit collusion. Another possibility is that the target undertaking may found itself at disadvantage in relation to the acquirer due to what previously has been said about material influence.[91]

[83] See [2.6] for definition of *market power*.
[84] Annex I to Consultation Document, para 4.
[85] Ibid, para 11.
[86] Ibid, para 6.
[87] Ibid, para 11.
[88] Ibid, para 8.
[89] Ibid, para 9.
[90] Ibid, para 37.
[91] Ibid, paras 76-78.

3.2 Assessment of Non-controlling Minority Shareholdings in Commission Legal Practice

Non-controlling minority shareholdings that are in a related product market as a notified concentration and either provide interlocking directorship or include at least 10 per cent of the shares must be included in notifications of concentrations.[92] Thus, the Commission currently considers non-controlling minority shareholdings under the EUMR to some extent. This section provides a few examples of the assessment of anti-competitive effects of non-controlling minority shareholdings in past legal practice that relates to the EUMR. The examination shows whether the results of the Commission's theoretical economic investigation can be supported by experiences in legal practice.

Non-controlling minority shareholdings that are investigated may be significant or even decisive for the outcome of the SIEC test as will be illustrated below. Indeed, many of the anti-competitive effects that are discussed in the Commission's economic investigation have been assessed in legal practice. The conclusions regarding non-controlling minority shareholdings in legal practice relies on the Commission's ability to allow remedies by requiring divesting shares for example.[93] For example, where the divestment non-controlling minority shareholding has been sufficient as remedy, the shareholding was decisive for the assessment that a concentration would significantly impede effective competition.

In *Siemens/VA Tech*, the acquisition of VA Tech by Siemens was considered compatible with the common market after Siemens made promises to dispose of corporate rights related to a non-controlling minority shareholding of 28 per cent in SMS Demag, a close competitor to VA Tech.[94] Thus, the non-controlling minority shareholding in SMS Demag was the decisive factor in the assessment that Siemens' acquisition of control in VA Tech would significantly impede effective competition if there had not been any remedies.[95] Despite the fact that Siemens did not have control over SMS Demag, the minority shareholding was deemed likely to affect the competitive behaviour of Siemens/VA Tech towards SMS Demag. The effect on competitive behaviour was explained partly because of the financial interest in SMS Demag and the resulting unilateral effects, but also because of the access to strategic business information.[96]

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[92] Form CO Relating to the notification of a concentration pursuant to regulation No 139/2004, sections 4.2.1 and 4.2.2; Schmidt, p 211.
[93] See chapter [2.5] about remedies.
[94] *Siemens/VA Tech* (Case COMP/M.3653) [2005] OJ L353; Annex II to the Consultation Document, paras 31-33.
[95] *Siemens/VA Tech* (Case COMP/M.3653) [2005] OJ L353, paras 222 and 306.
[96] Ibid, paras 326-328 and 335.

Siemens VA tech concerned competition issues from a non-controlling minority shareholding in a horizontal relationship. However, *E.ON/MOL* proves that non-controlling minority shareholdings may cause significant impediment on effective competition as well.[97] E.ON acquired control over subsidiaries to MOL, in which MOL would retain 25 per cent of the shares. MOL was in a vertically related market as E.ON, and the non-controlling minority shareholdings would cause price discrimination by MOL to E.ON's competitors. MOL agreed to divest the previously retained minority shareholdings as remedy.[98] Consequently, the non-controlling minority shareholdings were decisive for the assessment that effective competition would be significantly impeded in similarity to the scenario in Siemens/VA Tech.

It has also been proven by legal practice that a non-controlling minority shareholding may entail influence as to the target undertakings commercial policy. For example, in *IPIC/MAN Ferrostaal* a 30 per cent shareholding held by MAN Ferrostaal in a third undertaking provided "significant" influence in that some strategic business decisions could be influenced due to corporate statutes that required very high majorities.[99] The influence was not controlling since it was only significant and not decisive. Nonetheless, the minority shareholding in the third company had to be divested for the notified concentration to be cleared. Thus, the non-controlling minority shareholding was decisive for the assessment that competition would be significantly impeded in similarity to *Siemens/VA Tech* and *E.ON/MOL*. IPIC/MAN Ferrostaal arguably proves that material influence may exist and cause significant anti-competitive effects, thus supporting theories presented in the Commission's economic investigation.[100]

As regards the required size of a non-controlling minority shareholdings for the possibility to cause competition concerns, legal practice confirms that very small shareholdings may be sufficient. For example, a non-controlling minority shareholding of only 7.79 per cent was considered causing unilateral effects in *Glencore/Xstrata*, where Glencore would gain control over Xstrata.[101] The non-controlling minority shareholding was in a third party company in the same market. However, it is uncertain exactly how significant the non-controlling minority shareholdings was in the assessment, since divesting the shareholding was only one of the measures Glencore had to take for not significantly impeding effective competition by

[97] *E.ON/MOL* (Case M.3696) [2005] OJ L253; Annex II to the Consultation Document, paras 27-30.
[98] Annex II to the Consultation Document, para 30.
[99] *IPIC/MAN Ferrostaal* (Case M.5406) [2009] OJ C114; Annex II to the Consultation Document, para 20.
[100] See [3.1].
[101] *Glencore/Xstrata* (Case M.6541) [2012] OJ C19; Annex II to the Consultation Document, para 16.

gaining control over Xstrata.[102] Examples of assessments in legal practice where smaller non-controlling minority shareholdings than 25 per cent have been proven to be decisive for the outcome of the SIEC test have not been found. However, since 17 per cent of the shares could provide decisive influence in *CCIE/GTE* as mentioned above in [2.4], one could speculate that very small non-controlling minority shareholdings could provide material influence as well. The speculation is supported by the conclusion in [2.4] that rights or other de facto circumstances related to a shareholding may grant influence and become subject to the EUMR.

3.3 The Commission's Predictions as to the Amount of Problematic Acquisitions

The investigation presented above in [3.2] have proved that non-controlling minority shareholdings can significantly impede effective competition. Now, it will be considered to what extent the Commission's proposal to extend the scope of merger control to non-controlling minority shareholding acquisitions could be assessed in practice considering the turnover thresholds and amount of transactions. For if non-controlling minority shareholding acquisitions are few or rarely achieve the requirements for community dimension in practice, then reform would arguably be without effect anyway.

In 2001, the Commission conducted a competition review in which it commented on the need to extend the scope of merger control to non-controlling minority shareholding acquisitions.[103] The Commission considered the amount of non-controlling minority shareholding acquisitions with community dimension that could significantly impede effective competition. The investigation was supported by experiences in its own practice and hypothetical possibilities to use articles 101 or 102. The results made the Commission predict that the amount would likely be small.[104] The fact is that the Commission has only assessed non-controlling minority shareholdings on 53 occasions in relation to notified concentrations until last year. The shareholdings were considered "problematic" in only about 20 of those assessments, of which even less were decisive for the outcome of the SIEC test.[105] According to merger statistics, the mean number of assessed transactions every year since 2000 is about 300.[106] The

[102] Annex II to the Consultation Document, paras 15-17.
[103] Green Paper.
[104] Consultation Document, p 6; Green Paper, paras 106-109.
[105] Annex II to the Consultation Document, para 3.
[106] Commission Merger Statistics.

competition review from 2001 needs to be challenged to prove that reform would have a larger effect in practice than is suggested by the data above.

There are numerous factors that contribute to an argument that the prediction from 2001 is outdated and not credible. First of all, the Commission conceded that the investigation that resulted in the prediction was based on limited data.[107] Second, the cases discussed in [3.2] that prove that non-controlling minority shareholdings may significantly impede effective competition have all been assessed after 2001. Third, and most importantly, experiences from legal practice as to non-controlling minority shareholdings under the EUMR do not provide credible data for predicting the amount of problematic transactions.

The amount of non-controlling minority shareholdings that would be subject to control under a reformed EUMR could be predicted by studying statistics of ownership transactions within the EU. That would allow calculation of the number of minority shareholding acquisitions in related markets that achieve the turnover thresholds. This is exactly the kind of study that the Commission has conducted recently and presented in Annex II to the Consultation Document. The statistics are found in the *Zephyr database*. It contains information of transactions of ownership in registered companies in all 27 Member States.[108] Moreover, the database contains information about "sectorial activities" of the companies, which means that the database provide indications of relevant markets.[109] Thereby, potential competition concerns could be identified.[110] The Commission's research method was to identify transactions between companies in horizontal relationships that achieve the turnover thresholds for community dimension but could not achieve controlling influence.[111] The results show that about 5 per cent of the number of notified concentrations per year is the number of non-controlling minority shareholdings that could have been controlled if the EUMR applied to non-controlling minority shareholdings.[112] Undoubtedly, the investigation shows that the number of problematic non-controlling minority shareholding acquisitions would be considerably less than transactions that are already within the scope. However, the limitations of the study as to only considering horizontal effects in registered companies suggest that the number of problematic non-controlling minority shareholding acquisitions could be somewhat higher in reality.

[107] Green Paper, para 109.
[108] Annex II to the Consultation Document, para 91.
[109] Ibid, para 92.
[110] Ibid.
[111] Ibid, paras 94-95.
[112] Ibid, paras 97-100.

3.4 Comparative Perspectives with Germany and the UK

The Commission is by no means a pioneer in proposing that non-controlling minority shareholding acquisitions should be subject to merger control. Indeed, non-controlling minority shareholdings are regulated in several major national jurisdictions both within and outside of the EU.[113] Studying how non-controlling minority acquisitions have been regulated and how many such transactions have been scrutinised in legal practice will provide evidence for what effect the Commission's reform proposal may have. Current regulations of non-controlling minority shareholdings thus provide sources of empirical data. This section presents the main features of the regulations in Germany and the UK as to non-controlling minority shareholding acquisitions.

In the UK, the relevant provisions on merger control are found in the Enterprise Act (2002). Merger control applies to transactions that cause enterprises to cease being distinct enterprises, which according to article 26.3 may occur from *material influence*. The criteria for merger control application are in many ways similar to the EUMR in that the level of influence is a significant factor. For in the assessment of the existence of material influence exist, the NCA considers both legal and practical circumstances that may confer influence, such as right of appointment to company organs or veto right. Any minority shareholding acquisition that makes the acquirer owner of at least 15 per cent of the shares merits control. However, smaller acquisitions are not excluded since the level of influence is the decisive criterion.[114] Material influence in the UK requires less influence than decisive influence under the EUMR. Instead of *decisive* influence, it is sufficient for a transaction to provide *significant* influence.[115] The difference can be illustrated by a case from UK legal practice concerning an acquisition of 17.9 per cent.[116] The possibilities for negative control were assessed although the shareholding did not legally provide such influence. Like in merger control under the EUMR, de facto circumstances were considered. Although the acquirer did not have veto right in all circumstances, the threshold for material influence was achieved.[117] The case shows how the condition for material influence is less strict than decisive influence under the EUMR.

The substantive test under the Enterprise Act 2002 is also similar to the test under the EUMR as implied by the wording "substantial lessening of

[113] Consultation Document, p 5-6.
[114] Annex II to the Consultation Document, para 70; Slaughter and May, p 3-4.
[115] Annex II to the Consultation Document, para 70.
[116] *ITV PLC/British Sky Broadcasting Group PLC*, Report of the Competition Commission to the Secretary of State [2007].
[117] Ibid, p 29.

competition".[118] In the UK about 5 per cent of all investigated transactions under the Enterprise Act 2002 are non-controlling minority shareholding acquisitions.[119] Thus, statistics from legal practice in the UK supports the Commission's prediction on the amount of transactions that could possibly impede effective competition but are currently not within the scope of the EUMR.

There are many similarities between control of non-controlling minority shareholdings in the UK and Germany. The relevant legal provisions are provided in GWB. According to §37 and §39, *concentrations* are subject to merger control. Non-controlling minority shareholdings constitute concentrations if they either include 25 per cent of the total shares in the target undertaking or provide "competitively significant influence" according to §37(1) no 3 and 4. Competitively significant influence is similar to material influence as described in [3.1] in that both legal and de facto circumstances may be considered for the assessment that the acquirer gains influence in the target undertaking that may give cause to prohibition. For example, in *A-Tec Industries AG/Norddeutsche Affinerie AG*, a shareholding of about 13 per cent provided negative control from the fact that there was low participation at the shareholders meeting.[120]

Two other cases show how German law applies merger control to non-controlling minority shareholdings. In *Mainova/Aschaffenburger*, a shareholding acquisition of 17.5 per cent could cause coordinated effects in a vertical relationship.[121] The German NCA believed that the coordinated effects derived from de facto circumstances that would increase the acquirer's dominant position. However, the acquirer would have only limited ability to influence the commercial policy of the target undertaking. Nonetheless, the transaction was prohibited. Another example in German legal practice, *M. DuMont Schauberg/Bonner Zeitungsdruckerei*, illustrates how unilateral effects were sufficient for the assessment that the transaction should be prohibited.[122] The acquirer only acquired 18 per cent of the shares. The shareholding provided additional rights of profits, but no ability to influence the commercial policy.

More than 10 per cent of all transactions that are assessed in German Merger Control are minority shareholdings that achieve the threshold for 25 per cent total shareholding and are prohibited for anti-competitive effects.[123] However, it is uncertain how many of the minority shareholdings that would fulfil the conditions for controlling influence under the EUMR. Only 0.6 per cent of all transactions are assessed for providing competitively significant influence. On the other hand, 11 per cent of those assessments lead to

[118] Slaughter and May, p 17-21.
[119] Annex II to the Consultation Document, para 71.
[120] Case B5- 198/07 A-Tec Industries AG / Norddeutsche Affinerie AG [2008].
[121] Case B8-27/04 *Mainova AG/Aschaffenburger Versorgungs AG* [2004].
[122] Case B6- 27/04 *M. DuMont Schauberg/Bonner Zeitungsdruckerei* [2004].
[123] Annex II to the Consultation Document, para 46.

prohibition.[124] Moreover, some transactions that provide competitively significant influence may fall into the other category for including 25 per cent of the shares.[125]

3.5 Views by Consulted Organisations

The Commission's proposal to extend the scope of merger control have received mixed feedback. This section highlight some arguments raised by consulted organisation as presented in their replies to the Consultation Document. It is perhaps unsurprising that the NCAs in the UK and Germany are supporters to extending the scope of merger control. Both have backed the possible anti-competitive effects of non-controlling minority shareholdings and the need to control such acquisitions under the EUMR.[126] OFT favoured that non-controlling minority shareholdings that grant material influence should be subject to merger control, as in domestic law. In similarity Bundeskartellamt asked for the same level of protection of competition as in domestic law, but also argued for the need to establish that any gaps in EU merger control law can be remedied in practice.[127]

ICC and IBA are altogether critical for two main reasons. First, they do not believe that the Commission has sufficiently proved that there is a need to control non-controlling minority shareholdings. Second, they believe that current law allows sufficient tools for control.[128] The second aspect is further investigated below in [4]. About the insufficiency of proof, IBA stated that the investigations of statistics in the Zephyr database and past legal practice under EUMR show that very few non-controlling minority shareholding acquisitions are likely to significantly impede effective competition. It would not be proportional to extend the scope considering the increased burden on the business community.[129] The final aspect that considers the burden on the business community is actually recognised in many of the studied Consultation replies, including OFT and Bundeskartellamt.[130] OFT thus proposed that few non-controlling minority shareholdings should qualify as structural links to minimise the burden.[131]

[124] Annex II to the Consultation Document, para 46.
[125] Ibid.
[126] Reply by OFT; Reply by Bundeskartellamt.
[127] Reply by Bundeskartellamt, p 3.
[128] Reply by ICC, p 3; Reply by IBA, p 3-4.
[129] Reply by IBA, p 3-4.
[130] Reply by OFT, p 3; Reply by Bundeskartellamt, p 2.
[131] Reply by OFT, p 3

The law firms are also generally critical towards the Commission's proposal.[132] According to Vinge and Linklaters, a gap in the law is "very narrow" in that very few transactions would merit prohibition.[133] On the other hand, Mayer Brown rejects that there is a gap in the law altogether.[134] Moreover, Mayer Brown identified the problem with changing the law as to legal clarity. Possibly, legal reform could create much uncertainty due the upheaval of the well-established legal practice related to the threshold of controlling influence.[135]

ECLF presents a nuanced view in that it recognises that non-controlling minority shareholdings may have anti-competitive effects. On the other hand, the ECLF is not persuaded that it has been proven that legal reform would have significant effect in practice due to the requirements in the SIEC test for example.[136] The purpose for proportionality could discourage reform. The ECLF predicts that many Member states will tag along and extend merger control scope. The Commission's reform may thus cause a greater effect than is anticipated in the Consultation document. The Commission have not presented sufficient research as to the practical effects of legal reform that concern other aspects of society than the effects for competition.[137]

Despite being against an extended scope of merger control, the IBA commented on the best way to qualify what non-controlling minority shareholdings are structural links. Concepts like material influence are problematic in that their meanings are subject to interpretation. Legal uncertainty should be avoided, and it would therefore be better to set a fixed percentage as a threshold for application.[138] For legal uncertainty may "dissuade much needed capital market investments".[139]

[132] See for example Reply by Mayer Brown; Reply by Vinge; and Reply by Linklaters.
[133] Reply by Vinge,p 1; and Reply by Linklaters, p 1.
[134] Reply by Mayer Brown
[135] Ibid, p 2-3.
[136] Reply by ECLF, p 1.
[137] Ibid, p 2-3.
[138] Reply by IBA, p 4.
[139] Ibid.

4. The Uses of Current Law for Control over Non-controlling Minority Shareholdings

4.1 Exposing the Limitations of the Merger Regulation

This chapter relates to the second research question about the uses of current law. The previous chapter has already explained that non-controlling minority shareholdings have been assessed under the EUMR in some cases despite the fact the EUMR only applies to concentrations. However, all cases that are discussed in [3.2] are similar in two ways. First, the non-controlling minority shareholdings were only assessed in relation to a notified concentration. It is evident from the introductory paragraph in [3.2] that the Commission relies on the notification of a concentration for the assessment of non-controlling minority shareholdings. Furthermore, the shareholdings have to be related to any of the concerned parties in the transaction that does involve the transfer of controlling influence.[140]

The second similarity between the discussed cases in [3.2] is that all non-controlling minority shareholdings that could be controlled were shareholdings in undertakings other than the concerned undertakings. Furthermore, the method the Commission used for control was not prohibition, but agreement with the concerned undertakings that the concentration would be cleared if the non-controlling minority shareholdings were divested. What if the problematic non-controlling minority shareholding was a pre-existing shareholding in an undertaking targeted for controlling influence? Could the Commission require the divestment of the pre-existing shares in an assessment of a subsequent gain of controlling influence? The scenario was identical in *Ryanair/Aer Lingus*, where Ryanair intended to buy all shares in Aer Lingus and acquire control by launching a public bid.[141] In other words, Ryanair intended to make a hostile takeover. Before the public bid, Ryanair had acquired about 19 per cent of the shares. The acquisition was not a concentration according to the EUMR. However, when Ryanair subsequently launched a public bid with the intent of acquiring control over Aer Lingus, the Commission prohibited the concentration according to article 8.3 EUMR since the concentration

[140] Consultation Document, p 4.
[141] *Ryanair/Aer Lingus* (Case COMP/M4439) [2007] OJ C47; and Case T-411/07 *Aer Lingus v Commission* ECR II-3691 [2010].

would be incompatible with the common market.[142] Since the EUMR allows an exception from the suspension rule for public bids, Ryanair had acquired additional shares before the Commission declared the concentration incompatible. Ryanair would thus be required to divest shares that provided control according to article 8.4 EUMR, but 29.4 per cent of the shares were retained. The Commission did not order Ryanair to divest the remaining shares since they did not achieve the threshold for controlling influence.[143] Aer Lingus then appealed to the General Court against the Commission's decision. However, the Court provided an extensive account that declared that the Commission's assessment had been correct.[144] Nonetheless, the Court did not reject the fact that Ryanair could influence the commercial policy of Aer Lingus with its non-controlling minority shareholding and that it could potentially significantly impede effective competition. The assessment would be irrelevant to do though since the EUMR could not be applied.[145]

4.2 The Illusive Exclusivity of the Merger Regulation

The following accounts provide proof that limitations in the EUMR may not mean that other legal provisions are not applicable to non-controlling minority shareholdings. The Commission had performed merger control since long before the Merger Regulation of 1989 by using articles 101 and 102 TFEU.[146] The use of the articles for merger control have not been clear historically though, and in the end the ambiguity fuelled the Council to adopt the Merger Regulation.[147] However, there were also other problems in using the TFEU to regulate concentrations. One of the main issues was that articles 101 and 102 TFEU arguably did not allow sufficient scope of control. Another major issue was the sanctions that are possible to enforce according to the articles. Concentrations were prohibited by declaring the transaction null and void, a result that perhaps was inappropriate in many cases.[148] Nevertheless, the articles are the only provisions other than the EUMR that may be applicable to mergers and acquisitions, and they may allow merger control of certain non-controlling minority shareholding acquisitions as will be elaborated below.

[142] *Ryanair/Aer Lingus* (Case COMP/M4439) [2007] OJ C47, para 1240.
[143] Case T-411/07 *Aer Lingus v Commission* ECR II-3691 [2010], para 58.
[144] Ibid, paras 61-67.
[145] Ibid, see for example paras 84-87.
[146] Previously articles 81 and 82 TEU, and before that articles 85 and 86 respectively.
[147] Cook and Kerse, p 4.
[148] Ibid, p 3.

The Commission has not used articles 101 and 102 TFEU for merger control since the first Merger Regulation entered into force. The Merger Regulation was, and still is, regarded by the Commission as the one and only legal catalogue with provisions applicable for mergers and acquisitions.[149] After all, the Merger Regulation is intended as, and designed to be, the only required tool for the Commission to perform merger control. Thus, subsequent changes to merger control in the EU have been implemented by amending the Merger Regulation as opposed to using other provisions of competition law.[150] However, there is no legal obligation for the exclusive status of the Merger Regulation for merger control procedures.[151] In fact, the applicability of articles 101 and 102 TFEU for some concentrations is supported by Recital 7 in EUMR itself. The background for the exclusive use of the EUMR is better explained as the result of diplomacy, since the Member States had struggled to agree on a uniform legal tool for the Commission's merger control since the seventies.[152] One could speculate that the adoption of the Merger Regulation was such a significant political accomplishment that the Commission became cautious and unwilling to move outside of the confines of the EUMR in merger control procedures.[153]

4.3 Application of the Cartel Prohibition for Shareholding Acquisitions

The provisions in article 101 apply to agreements and concerted practices between economically independent undertakings (cartels). An obvious limitation for the use of the article for merger control is that the concerned parties in mergers and acquisitions are often shareholders acting in their own capacity rather than that of the undertaking.[154] Therefore, transaction agreements of shares in limited companies should not be subject to scrutiny under article 101 by default. Moreover, the Commission has claimed that there is a need to distinguish between concentrations and cartels, and thus initially believed that article 101 had no application for mergers and acquisitions.[155] After about 20 years since the Commission's notice on the inapplicability of article 101, the certainty regarding the application was

[149] Bos and others, p 90-91.
[150] Ibid, p 119-222; Cook and Kerse, p 1, 4-5
[151] Schmidt, p 211.
[152] Cook and Kerse, p 4; Drahos, p 80.
[153] Compare with the view reflected in Bos and others, p 90: "the Commission has never dared to apply article [101] to concentrations […] as the Regulation 4064/89 now purports to do".
[154] Bos and others, p 75.
[155] Commission Information Memo P-1/66 *Concentration of Firms in the Common Market* [1966].

thwarted by the CJEU in the *Philip Morris* judgement.[156] The Court stated:[157]

> Although the acquisition by one company of an equity interest in a competitor does not in itself constitute conduct of restricting competition, such an acquisition may nevertheless serve as an instrument for influencing the commercial conduct of the companies in question so as to restrict or distort competition […].

The issue in the *Philip Morris* case was the acquisition of a minority shareholding of 30.8 per cent (but 24.9 per cent of voting rights) by Philip Morris in the competing undertaking Rothmans, and special rights granted by the transactions agreement. Although the CJEU ruled that the transaction in the case did not constitute an agreement that restricted competition, the circumstances that could offend article 101 were discussed. Notably, the discussion suggested that a lower level of influence than is required in the current EUMR was sufficient for the assessment that the transaction could prevent, restrict or distort competition according to article 101. The CJEU stated that a transaction of shares could harm competition in an oligopolistic market since a shareholding acquisition may provide commercial influence to the acquirer due to the "establishment of links" between the competitors.[158] Any rights granted by a shareholding might be considered harmful for competition, provided that the rights allowed influence of the commercial conduct of the competing undertaking. The CJEU identified that the acquisition of control in particular could harm competition, but did not exclude the possibility that a lower level of influence could be sufficient.[159] However, a purely passive investment would not offend article 101 according to the CJEU.[160] Consequently, the *Philip Morris* judgement suggested that a non-controlling minority shareholding might harm competition if it grants commercial influence.

However, The *Philip Morris* judgement was clouded by ambiguity. Commentators disagreed on the interpretation of the legal precedent conveyed by the CJEU. Some believed that the case proved a broad interpretation of article 101, meaning it was applicable to shareholding acquisitions. Others argued for a continued restrictive interpretation.[161] Indeed, *Philip Morris* was the spark for the ambiguity of merger control law that paved the way for the Merger Regulation, which entered into force just two years after the judgement.[162] The main argument by the commentators that favoured the restrictive interpretation was that the CJEU would never have applied article 101 to any acquisition of control. The argument referred to the principle that article 101 only applies if parties in a transaction are

[156] Joined Cases 142 and 156/84 *BAT and Reynolds v Commission* ("*Philip Morris*") ECR 4487 [1987].
[157] Ibid, para 37.
[158] Ibid, para 32.
[159] Ibid, para 38.
[160] Ibid, para 34.
[161] Bos and others, p 70.
[162] Ibid, p 119; Cook and Kerse, p 4.

independent undertakings, and that a controlling acquisition would disrupt the criterion of independent undertakings.[163] The However, the criticism did not concern the application of article 101 to non-controlling minority shareholdings. Apparently, there is no disagreement that agreements between undertakings that provide non-controlling stakes may be subject to article 101.

4.4 Mergers and Acquisitions Constituting Abusive Behaviour

In contrast to article 101, the view on the application of article 102 has been rather consistent throughout history. The provision applies to abusive behaviour by undertakings that enjoy a dominant position on a market. In *Continental Can*, the CJEU concluded that the acquisition of a competitor by a dominant undertaking may qualify as abusive behaviour.[164] However, an offence against article 102 could only be established if effective competition in the market would become virtually eliminated because of the transaction.[165] Thus, article 102 TFEU has two significant limitations for merger control. First, an offence cannot be established unless the acquirer is already dominant, regardless whether the acquisition would result in dominance or monopoly. Second, the additional condition for virtually eliminated competition further narrowed the scope of control. Notably though, the CJEU admitted that the condition for virtual elimination of competition would not necessarily apply in all cases, but the condition was not fully eroded before the first merger regulation entered into force.[166]

The ambiguous requirement for virtual elimination of competition concerned the overall market structure, but not the level of influence in a competitor that is required for the assessment that an acquisition could constitute an abuse. The Commission established an infringement of article 102 in *Gillette/Wilkinson Sword*, where the transaction involved a non-controlling minority shareholding.[167] The Commission referred to the assessment by the CJEU in *Philip Morris* that some influence of the competitor's commercial policy could be sufficient.[168] Thus, article 102 applies to non-controlling minority shareholding acquisitions in limited

[163] Bos and others, p 77.
[164] Case 6/72 *Europemballage and Continental Can v Commission* ECR 215 [1973], para 26.
[165] Ibid, para 29.
[166] Ibid.
[167] *Warner-Lambert/Gillette* (Case IV/33.486) and *BIC/Gillette* (Case IV/33.486) [1993] OJ L116/21 (*Gillette/Wilkinson Sword*).
[168] Ibid, para 24; Joined Cases 142 and 156/84 *BAT and Reynolds v Commission* ("*Philip Morris*") ECR 4487 [1987], para 65.

circumstances. It is interesting that the criterion used in *Continental Can* that competition would have be virtually eliminated for application of article 102 is nowhere to be found in the *Gillette/Wilkinson Sword* decision. Considering the reservation in *Continental Can*, the condition might not apply in all cases and the assessment in *Gillette/Wilkinson Sword* strengthens this view. Thus, it is possible that some influence over the commercial policy could be sufficient without the need for virtual elimination of competition.

Despite the limitations of article 102, the Commission used it regularly to control concentrations. The means of control was provided partly by a system of self-assessment, where experts analysed the levels of market power and concentrations in the common market and reported to the Competition Directorate.[169] However, the Commission was also reliant on complaints by competitors or voluntary notification by a party wanting to guarantee the pursuance of a transaction with article 102 TFEU.[170] The Commission's formal legal powers to investigate transactions that may infringe articles 101 or 102 are very extensive. For article 337 TFEU provides that the Commission may collect any information or perform any checks required to fulfil its obligations.

[169] Cook and Kerse, p 4.
[170] Bos and others, p 113.

5. The Control System

5.1 The Main Features of the Requirement for Mandatory Prior Notification

The means for merger control at the Community level is provided by a system of prior notification according to article 4.1 EUMR. Since 2004, there have been from 274 to 402 notifications of concentrations to the Commission every year. None of the notified cases since 2004 has been excluded from control for being outside the scope of the EUMR, although a total of 52 notifications have been outside the scope since the first merger regulation entered into force in 1989. Until April 2014, the Commission has received 5504 notifications in total, of which 4888 of the transactions have been declared compatible with the common market (without need for commitments).[171] Consequently, only about 9 per cent of all notified concentrations would significantly impede effective competition.

All concentrations with a community dimension must be notified to the Commission, either by the acquirer of sole control or jointly by the acquirers of joint control or parties to a merger according to article 4.2 EUMR and article 2.1 ECIR. Such notification is mandatory and the concentration cannot be completed until the Commission has declared the concentration compatible with the common market, according to article 7 EUMR. Thus, article 7 stipulates a period of *suspension*, during which it is forbidden to implement the transaction that causes the concentration. Article 7 provides some exceptions and derogations from suspension for practical reasons. For example, an exception applies for public bids according to article 7.2. Since public bids may involve very many transactions with many concerned parties, it would be highly unpractical to require notification in case no shareholders would accept the bid and sell. Thus, a public bid may be launched and transactions may be completed before the Commission's assessment as long as voting rights are not exercised in the meantime. Moreover, the Commission can order that shares must be divested that provide controlling influence and may significantly impede effective competition according to article 8.4 EUMR.[172]

The procedure involving both notification and assessment may take up to several months depending on the complexity of the case.[173] In some cases, the parties will be allowed several months just to provide the information

[171] Merger Statistics; Also see [2.5] above about commitments as remedies for market compatibility.
[172] Cook and Kerse, p 166-167.
[173] Ibid, p 158.

required in the notification file.[174] The notification must contain substantially detailed information about the parties and the transaction for the Commission's assessment.[175] It takes additional weeks or months for the Commission to provide its decision.[176] The decision process can be divided into two phases of examination. Phase II is only initiated in cases where there are serious doubts as to the concentration's compatibility with the common market according to article 6.1c EUMR. A phase II investigation may take up to 90 working days according to article 10.3, and even longer if some exceptions are applicable.[177] The Phase I examination is generally restricted to 25 working days according to article 10.1, but may also be extended according article 10.2. Only about 5 per cent of all notified concentration cases require a phase II examination in practice.[178]

In some cases, a short form notification can be submitted according to article 3.1 ECIR and its Annex 2. The short form notification is less demanding on the notifying party.[179] The annex provides that short form notification can be submitted by acquisition of sole control from previous joint control, and also joint ventures of limited impact within the European Economic Area. Furthermore, a short form notification can be submitted for concentrations where the parties are not active in vertically nor horizontally related markets. Finally, concentrations can be notified in short form if the combined market share is less than 15 per cent and the parties are in horizontally related markets, or the market share is less than 25 per cent if the parties are in vertically related markets.

It is possible to make pre-notification inquires to the Commission according to Recital 11 in the ECIR. This possibility is often used by prospective acquirers in transactions that fulfil the criterion for community dimension, but where it is uncertain whether the transaction causes a concentration. Pre-notification inquires help the parties assess the likelihood of compulsory notification and the likelihood of declaration of incompatibility with the common market.[180] A notification may be withdrawn at any time if a transaction is modified or aborted.[181] It is possible that the prospect of notification makes the parties want to refrain from the concentration altogether because of the costs and time related to the notification procedure. Withdrawal may also be useful in some cases where a modified transaction may avoid a phase II examination, as was done in *Procter&Gamble/VP Schickedanz* for example.[182] Finally, withdrawal is

[174] For example in The Post Office/TPG/SPPL (Case COMP/M.1915) OJ L82, see para 1.
[175] See ECIR article 4 and annexes for details regarding the content requirements of a notification; also for further study see Cook and Kerse, p 147-154.
[176] See article 10 EUMR for timetable rules; Cook and Kerse 158.
[177] Whish, p 819.
[178] Cook and Kerse, p 187.
[179] Ibid, p 155.
[180] Ibid, p 318.
[181] Ibid, p 161-162.
[182] *Procter&Gamble/VP Schickedanz* (Case M.398 and M.430) [1994] OJ C19; and *Procter&Gamble/VP Schickedanz* (Case M.430) [1994] OJ L354.

often used in cases where prohibition seems likely during an ongoing phase II investigation, which may also explain the low number of prohibitions presented above.[183]

5.2 Alternative Systems

The Commission proposes three main options as to what system of control to apply for non-controlling minority shareholdings in case of reform. The first option is to stick to the *notification system* as it is currently regulated. Consequently, the first main option suggests that the current limits of application set by the definition of the concept concentration should be expanded to include structural links without any other changes.

The second option suggests that the Commission itself should identify non-controlling minority shareholdings to control (*self-assessment system*). As a result, the current notification system for concentrations would remain unchanged so there would be two separate systems providing means for control of concentrations and structural links respectively. The self-assessment system relies on complaints by third parties and the Commission's own ability to search for potentially problematic structural links. A significant difference between the notification system and self-assessment system is that the transactions causing structural links would not be subject to control until after the transaction is completed under the self-assessment system. As a result, it would be impossible to prevent structural links on beforehand under the self-assessment system. The self-assessment system can be compared to the system for control under articles 101 and 102 TFEU as briefly discussed in [4.4].

The third reform option can be described as a hybrid between the other two (*transparency system*). It would be mandatory for the parties to notify the Commission of prima facie problematic transactions that are not concentrations but can cause structural links. The notifications would be published for the public. However, in contrast to the notification system the transactions would not be subject to merger control before completion. Moreover, the Commission would choose which of the notified transactions to investigate.[184] For the self-assessment and transparency options, the Commission ponders on implementing a system of *voluntary notification*. The purpose of voluntary notification would be to allow parties to receive a clearance decision before the transaction is completed. Finally, it is suggested that voluntary notification should be possible regardless if the transactions has been completed or not.

[183] Cook and Kerse, p 162.
[184] The Consultation Document, p 7-8.

5.3 Views by Consulted Organisations

As is evident from the account in [5.1] above, the notification system is demanding in several aspects. In essence, the notification system requires that every transaction that is within the scope of EUMR is checked and cleared before implementation. There are requirements for the parties in transactions to afford time and effort by providing information and wait for the decision. Many of the consulted organisations believe that it would not be a good idea to use the current notification system in case of reform. The trend is that organisations that are critical of extending the scope to begin with, all favour the self-assessment system.[185] For example, ECLF believes that the notification system would be too much of a burden for the business community and cause "detrimental impact on the effective and efficient operation of equity markets".[186] Similarly, Linklaters discusses that a notification system for structural links would be "clearly disproportionate".[187] OFT uses a similar reasoning for supporting the self-assessment system instead of the current notification system, despite being generally positive to extending the scope of merger control to structural links.[188]

IBA notes that a negative aspect with the self-assessment system is that a decision of incompatibility after implementation (ex-post control) is generally more problematic than ascertaining the compatibility of the transaction before (ex-ante control). This relates to the required efforts and possible costs for the acquirer to divest shares and uncertainty as to whether the transaction is compatible.[189] To avoid legal uncertainty, the possibility of voluntary notification would be motivated.[190] A voluntary notification would likely limit the number of scrutinised non-controlling minority shareholding acquisitions to the most problematic ones.[191] Therefore, ECLF supports the self-assessment system. Since very few non-controlling minority shareholding acquisitions are likely to significantly impede effective competition, the voluntary notification would be proportionate.[192]

Vinge and Mayer Brown do not believe that a possibility for voluntary control is preferred for the self-assessment option. Vinge believed that voluntary notification is against EU legal development, since such possibilities have been restricted under competition control under article

[185] See Reply by ICC; Reply by ECLF; Reply by Vinge; Reply by Mayer Brown; and Reply by Linklaters.
[186] Reply by ECLF, p 4.
[187] Reply by Linklaters, p 8.
[188] Reply by OFT, p 3.
[189] Reply by IBA, p 4.
[190] Ibid.
[191] Reply by ECLF, p 5.
[192] Ibid.

101.[193] One the other hand, Mayer Brown predicts that the possibility for voluntary notification might result in more caution in the business community resulting in "inefficient use of resources".[194]

ICC argues that ex-post control may actually not be problematic at all. Ex-post control will provide incentives for the acquirer of a potentially problematic acquisition to contact the Commission, thereby allowing effective control in practice.[195] Moreover, divesting incompatible non-controlling minority shareholdings is less problematic than divesting controlling shareholdings. For "[non-controlling minority shareholdings do] not normally involve integration of the parties' businesses".[196] Bundeskartellamt rejects the ICC's views, and instead refers to the problems concerning ex-post control in German legal practice to motivate that the current notification system should apply to non-controlling minority shareholding acquisitions as well.[197] Bundeskartellamt also argues that the notification system is considerably more effective for merger control because of the substantial amount of information in the notification form.[198]

The transparency system is not favoured in any of the studied consultation replies. ECLF provide a line of argument that highlights the problems with the hybrid option. The transparency system would make the Commission reliant on the limited information provided by the notifications. If less information was required, the system would probably be ineffective. If more information was required, the system would be too much of a burden for the business community for similar reasons as why the current notification system would be problematic.[199] Moreover, Linklaters and Mayer Brown predict that the transparency system would not necessarily be less demanding than the notification system even if less information is required in the initial notification. The parties would likely need to submit more detailed information in many cases. Thereby, the less demanding implications of the transparency system would be deceptive.[200]

[193] Reply by Vinge, p 2.
[194] Mayer Brown, p 3.
[195] Reply by ICC, p 8.
[196] Ibid.
[197] Reply by Bundeskartellamt, p 4.
[198] Ibid, p 5-6.
[199] Reply by ECLF, p 4.
[200] Reply by Linklaters, p 8-9; Reply by Mayer Brown, p 3.

6. Analysis

6.1 The Need to Regulate Non-controlling Minority Shareholdings for Maintaining Effective Competition

This final chapter presents my views with reference to the investigations presented above. The first three sections present analyses related to each of the three research questions. When all questions have been discussed, I make final conclusions as to whether an extended scope of merger control is motivated from the legal perspective.

The meaning of non-controlling minority shareholding acquisitions as explored in chapter [2.2-4]. There is currently a threshold for the transfer of controlling influence over undertakings for merger control application. Control is defined as the ability to exercise decisive influence over strategic business decisions on a regular basis. Thus, non-controlling minority shareholdings are shareholdings that fail to provide control as defined under the EUMR. The condition for community dimension would not be an obstacle for applying merger control to non-controlling minority shareholdings. For the investigation has shown that the criteria concern the combined turnover thresholds of the concerned undertakings rather than the size of the transaction. On the other hand, the condition that a concentration needs to significantly impede effective competition for market incompatibility makes it necessary to consider the anti-competitive effects of non-controlling minority shareholdings. If the condition could never be achieved, then the extended scope would have no practical effect.

The conditions in the SIEC test have been proved to be closely tied to the purposes of the EUMR and purposes of EU competition law as discussed in [2.5-6]. The requirement of significant impediment relates to the principle for proportionality in EU law as implied in the Recitals in EUMR. In other words, it would seem that only significant structural changes merit merger control at the community level. It is thus important to prove that non-controlling minority shareholdings acquisitions are capable of such significant structural changes. The assessment depends on the extent that the acquisitions can harm effective competition. The examination of the meaning of the concept effective competition under the EUMR established a definition for what significant impediment of effective competition is: the creation of significant market power that harms consumer welfare and causes an overall negative effect for economic efficiency.

The effects of non-controlling minority shareholdings are explored in chapter [3]. I believe that the Commission's economic investigation shows that non-controlling minority shareholdings may have numerous effects. First, a lack of decisive influence does not exclude the possibility of a lower level of influence over the target undertaking's strategic business decisions. Second, there may be anti-competitive effects even if no influence is acquired. The investigation shows that any ownership in a competitor may cause unilateral effects. For the rights to profits from the competing undertaking decreases the incentives for an aggressive competition policy. Moreover, cross-shareholdings may increase the risks for coordinated effects, both in horizontal and vertical relationships. Now, does the economic investigation prove that non-controlling minority shareholdings can significantly impede effective competition? In my view it does not. Surely, it proves that there may be anticompetitive effects, but that does not prove that non-controlling minority shareholdings may significantly impede effective competition. I make this conclusion from the fact that the economic investigation does not present data that shows how the conditions in the SIEC test may be achieved by non-controlling minority shareholdings.

However, the possibility for non-controlling minority shareholdings to significantly impede effective competition has been assessed in legal practice as discussed in [3.2]. The non-controlling shareholdings were only assessed in relation to notified concentrations though. The declaration of incompatibility would concern the acquisition of control and not the related non-controlling minority shareholdings. On the other hand, there are cases where the Commission required non-controlling minority shareholdings to be completely divested for the main transaction to be compatible. Three such cases were found: *IPIC/MAN Ferrostaal*, *Siemens/VA Tech*, and *E.ON/MOL*. In all these cases, no other commitments were required than the divestment of related non-controlling minority shareholding acquisitions (or corporate rights provided by the shareholding) for the main transaction to be cleared. In *IPIC/MAN Ferrostaal* it is clear that the possibility to influence the commercial policy of the target company was the decisive factor. I believe that these cases prove that non-controlling minority shareholdings are indeed capable of achieving the criteria in the SIEC test. Therefore, I believe that there is a gap in the law.

However, what types of non-controlling minority shareholding acquisitions should be subject to merger control? In other words, what acquisitions should qualify as structural links for effective remedy? As mentioned in [2.1], one proposed option of qualifying structural links is to require a fixed percentage of the total shareholding. In all cases mentioned in the previous paragraph, the shareholdings constituted at least 25 per cent of the total shares. Consequently, the evidence does not support a lower threshold than 25 per cent of the shares. Thresholds in Germany and the UK of 25 and 15 per cent respectively means that a 25 per cent threshold would not be a completely unproven method of qualification for application.

The Commission also proposed another alternative for qualification. That option entails the use of method that is similar to the existing threshold for controlling influence. The required level of influence could simply be lower than decisive influence. The conclusions from *IPIC/MAN Ferrostaal* provides clear evidence that such an option could be considered. The investigation in [2.4] shows that the size of a shareholding may be irrelevant. For in current merger control, legal and practical circumstances may prove that even a very small minority shareholder may have controlling influence. Why could not a shareholding of less than 25 % in theory provide the same level of influence as the 30% shareholding that significantly impeded effective competition in *IPIC/MAN Ferrostaal*? After all, it was not the size of the shareholding but the level of influence that was decisive for the assessment that effective competition would be significantly impeded in IPIC/MAN Ferrostaal. Arguably, a 25 per cent threshold might thus not be sufficient. For sufficient remedy, legal reform should thus extend the scope of merger control to non-controlling minority shareholding acquisition that either include 25 per cent of the total shares or provide the same level of influence was sufficient in *IPIC/MAN Ferrostaal*. We might use the notion significant influence to refer to the undefined required level of influence after legal reform. That implies that a lower level of influence than decisive influence suffices for application.

The conclusions above regarding how to qualify what non-controlling minority shareholdings for effective remedy can be challenged. First, the possibility for non-controlling minority shareholdings to significantly impede effective competition is proven with reference to only three cases. Thus, it is hardly possible to establish exactly what types of non-controlling minority shareholding acquisitions that would merit control. Moreover, the source authority of the cases are limited in that they only reflect the views of the Commission and not the CJEU.[201] One may consider to use the models used in Germany and the UK as templates. However, the suitability of models from other jurisdiction requires that the substantive tests in the other jurisdictions can be compared to the SIEC test under the EUMR. Otherwise, it cannot be proven that the transactions that have been made subject to the EUMR by legal reform would be capable of significantly impeding effective competition. My comparative study in this thesis is not comprehensive enough to provide such evidence. Considering the lack of evidence, I believe that I cannot determine how reform should be implemented for effective remedy.

Moving on, the statistics on the number of non-controlling minority that are assessed in Germany and the UK indicate the portion of all scrutinised transactions that are non-controlling acquisitions. The results presented in [3.4] prove that only a very small portion of all scrutinised transactions concern non-controlling minority shareholdings. Likewise, the statistics

[201] See [1.3] regarding the authority of legal sources.

from the Zephyr database presented in [3.3] show that only about an additional 5 per cent of the total number of acquisitions that are currently within the scope of the EUMR would be subject to merger control after reform. Moreover, it is unlikely that all scrutinised non-controlling minority shareholding acquisitions would significantly impede effective competition. Statistics presented in [5.1] show that only about 9 per cent of all notified concentrations under the current EUMR would significantly impede effective competition. As mentioned in [3.1] the Commission's economic investigation shows that non-controlling minority shareholding acquisitions generally cause less concerns for effective competition than controlling acquisitions. Consequently, I believe that it is likely that less than 9 per cent of all non-controlling minority shareholdings that would be subject to the EUMR after reform would significantly impede effective competition. In my view, the statistics prove that the gap in the law is probably very narrow. For if very few non-controlling minority shareholding acquisitions would be problematic in practice, there is less need for reform.

6.2 Applicability of Current Law

The discussed in [4.1], *Ryanair/Aer Lingus* illustrates how the EUMR is insufficient for regulating non-controlling minority shareholding acquisitions. The Commission does not have authority to asses such acquisitions unless they relate to a transaction that achieves the threshold for controlling influence. Nonetheless, it is proven that non-controlling minority shareholdings are not completely outside the scope of the EUMR.

It is also proven that article 101 TFEU is applicable for non-controlling minority shareholdings under certain circumstances. The major limitation is that article 101 only applies to transaction agreements between independent undertakings. The legal investigation suggests that it would not be possible to apply article 101 in situations where a competing undertaking acquires shares in a competitor by third party shareholders. Consequently, I believe that article 101 could not be used in cases of hostile takeovers for example. In any case, the possibility to apply article 101 is clear from the *Philip Morris* judgement. Article 101 applies to non-controlling minority shareholdings that provide any ability to influence the commercial strategy of the target undertaking. In my view, article 101 could be thus be used to control some non-controlling minority shareholdings that are currently outside the scope of the EUMR. Therefore, article 101 narrows the gap in the law.

Likewise, article 102 TFEU is applicable to non-controlling minority shareholdings in some instances as discussed in [4.4]. It is evident from *Continental Can* that a non-controlling minority shareholding acquisition by

a dominant undertaking in a competitor may infringe article 102. In similarity to the assessment under article 101, the infringement assessment depends on whether the acquisition provides the ability to influence the commercial policy of the target undertaking. The main issue with the application of article 102 is that the acquirer needs to be dominant before the transaction. Otherwise, the transaction does not constitute abusive behaviour by a dominant undertaking. In [4.4] it was discussed that there may be further limitations of application. However, I believe that the assessment in *Gillette/Wilkinson Sword* shows that the requirement of dominance and influence over the commercial policy are the only requirements. Apparently, article 102 may be used in some situations where article 101 could not be applied. Consequently, the possible uses of article 102 further narrows the gap in the law.

In [4.2] I present some background that could explain why the Commission does not use articles 101 or 102 TFEU. Adopting the first merger regulation was a result of legal uncertainty as to the application of articles 101 and 102. However, my legal investigation shows that there should be little doubt as to the application of articles 101 and 102 TFEU now that the EUMR is in place. Therefore, legal uncertainties surrounding the articles does not provide a credible argument for extending the scope of merger control in my view.

6.3 Issues Related to the Control System

The examination of the current ex-ante control system in [5.1] reveals how comprehensive the legal process is. The requirement to notify the Commission is demanding in that it requires a lot of effort for the notifying parties to provide information to the Commission. Moreover, the suspension rule requires the parties to refrain from implementing the transaction until it has been cleared by the commission. Bundeskartellamt was the only of the studied consulted organisation that supports that the notification system should apply for structural links. According to Bundeskartellamt, that system is the only system that ensures effective merger control.[202] Arguably, the notification system should be retained to ensure that extending the scope of merger control structural links would effectively plug the gap in the law.

However, the discussion in [5.3] presents concerns about the demanding features of the notification system. Most consulted organisation believe that such a system would have significant negative effects on businesses. For example, the notification system would be costly and adversely affect economic growth. One may question if effective merger control is more

[202] See [5.3].

important than economic growth. From my investigation in [2.6] about the purpose to maintain effective competition, it is evident that overall effect on economic efficiency is decisive in EU merger control.

The self-assessment system is supported by most consulted organisations. For the self-assessment system imposes no obligation to submit a notification, nor would it be necessary to wait for clearance by the Commission to implement the transaction. Thus, the self-assessment system could have less negative effects for the business community. On the other hand, ex-post control may also be problematic in that it could be complicated and costly to divest already implemented shareholdings. Moreover, there could be legal uncertainty as to the legality of the transactions which would have negative effects as to the incentives to invest. The possibility of voluntary notification could provide greater legal certainty though. In my opinion, the self-assessment system could perhaps be motivated if it can be proved that it allows effective merger control. For it is important that any reform would remedy the gap in the law. Unfortunately, I have not found sufficient legal evidence that motivates any system considering the lacking source authority of the consulted organisations.

Concerns regarding negative aspects with merger control process systems could perhaps discourage reform. It comes down to assessing if the need for reform is so great that it would be proportionate despite the negative aspects of legal process.

6.4 Final Evaluation

In conclusion, the investigations in this thesis confirm that there is a gap in the law. However, the gap is very narrow. One of the reasons is that articles 101 and 102 are applicable for some non-controlling minority shareholding acquisitions. In addition, it is likely that only very few non-controlling minority shareholdings would merit scrutiny under a reformed EUMR. The reason is that the statistical and comparative studies suggest that the amount of non-controlling minority shareholding acquisitions between competitors is small. In addition, it is likely that only a very small portion of all structural links would significantly impede effective competition.

The limited material makes it impossible to determine exactly how to define structural links for effective remedy. Evidence in legal practice shows that non-controlling minority shareholdings constituting more than 25 per cent of the shares, or providing material influence could significantly impede effective competition. However, the evidence is very limited and it is unclear as how to formulate the conditions for significant influence.

The current system of mandatory prior notification would most likely be the most effective control system. All cases within the scope of merger control would be scrutinised by the Commission and the notification would provide useful data for assessment. It can neither be proved nor excluded that a self-assessment system could be effective, although the possibility for voluntary notification might increase effectiveness and decrease legal uncertainty. There is a lack of authoritative sources on the uses of alternative control systems for controlling non-controlling minority shareholdings in the EU. However, the study illustrates issues that control systems may cause on businesses, such as the costs and effort to provide materials for the Commission's assessment and decreased incentives to invest. The self-assessment may cause less such negative effects on businesses.

Since it is likely that only a small number of structural links would significantly impede effective competition, there is less need for legal reform. Moreover, the investigation in this thesis cannot prove exactly how the reform should be implemented for effective remedy, considering limited evidence for what acquisitions should qualify as structural links. Concerns as to negative aspects of the merger control process systems makes it necessary to consider the proportionality of reform. I have not been able to find sufficient evidence to support that legal reform would be effective and proportional. Therefore, I do not believe that reform can be encouraged from the legal perspective. On the other hand, my thesis does not prove that reform is discouraged neither. Further studies are required as to the amount of non-controlling minority shareholdings that would significantly impede effective competition, how reform could be effectively implemented and the magnitude of the negative effects on the business community from the chosen merger control process system.

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