# Possible Improvements of Controlling Acquisitions of Minority Shareholdings (Structural Links)

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# Summary

In June 2013 the Commission published its consultation paper *"Towards more effective EU merger control"* whereby the Commission was seeking to i) extend the scope of the EU merger control to the acquisition of non-controlling minority shareholdings and ii) reform the referral system. The paper proposed several options on how to successfully achieve the set objectives without creating undue burdens for businesses and opened up for a consultation period between June and September 2013 during which a considerable amount of stakeholders submitted their responses. Considering the tone of voice throughout the consultation paper it is fairly evident that the Commission is rather keen on introducing an additional toolkit providing it the possibility to intervene, investigate and, if appropriate, declare structural links compatible or incompatible within the ambit of the Merger Regulation. The key drive for its concerns lies, among many factors, in economic theory and practical examples including the heavily debated *Ryanair v Aer Lingus* case.

In January 2014 the New Implementing Merger Regulation entered into force containing amended provisions with regards to a new referral system but lacking the introduction of self-standing provisions controlling acquisitions of minority shareholdings. The reason hereof seems to lie in the fact that many of the respondents considered the extension as too far-reaching and disproportionate to the perceived problem. The Commission labelled the objectives of its proposal as creating a *"more effective and business-friendly Union"*, an objective that, most stakeholders find contradictory as it rather creates additional burdens, increasing expenses and leads to less legal certainty in the business environment.

This thesis aims to examine to what extent the proposed amendments would affect businesses if fully implemented by reviewing the underlying reasons for introducing a customized set of rules aiming at controlling creations of structural links. Accordingly, this paper will highlight the development of EU merger control, the current merger practice, the objectives and options of the proposal and the responses thereof as a step to fulfil the purpose of this thesis; namely exploring if merger regulation intervention conferring jurisdictional power for the Commission to intervene and reject acquisitions of (non –controlling) minority shareholdings will create undue burdens, increasing costs and lead to less legal certainty for businesses. This will be achieved by introducing a discussion of: *"what is to come-character"* and boil down to which system, if any, is the most beneficial for companies. By establishing this line of discussion, the author hopes that the thesis will serve as a basis for future research.

# Sammanfattning

I juni 2013 publicerade Kommissionen ett diskussionsunderlag (hädanefter ”förslaget”); *”Towards more effective EU merger Control”* genom vilket Kommissionen sökte att i) utöka tillämpningsområdet av europeisk kontroll av företagskoncentrationer till att också omfatta förvärv av icke kontrollerande minoritetsandelar samt ii) reformera förfarandet av hänskjutande av koncentrationer. Förslaget föreslår flera alternativ till hur man, enligt Kommissionen, framgångsrikt skall möta de bestämda målsättningarna utan att skapa orimliga bördor för företag och öppnade upp för en diskussionsperiod mellan juli och september 2013 under vilken en betydande mängd intressenter skickade in deras svaromål till förslaget. Med tanke på det tonfall som genomsyrar förslaget är det förhållandevis uppenbart att Kommissionen är angelägen om att införa ytterligare rättsliga instrument vilka ger dem möjligheten att ingripa, undersöka och, vid behov, förklara icke kontrollerande minoritetsförvärv förenliga eller oförenliga med EU-rätten. De viktigaste, bland många faktorer, till Kommissionens oro grundar sig i ekonomisk teori och praktiska exempel, däribland det kraftigt debatterade *Ryan Air v. Aer Lingus* fallet.

I januari 2014 trädde en ny koncentrationsförordning i kraft vilken innehöll ändrade bestämmelser rörande förfarandet av hänskjutningar av vissa koncentrationer men saknade fristående bestämmelser genom vilka Kommissionen ges exklusiv jurisdiktion att kontrollera vissa förvärv av minoritetsandelar. Anledning härom tycks ligga i det faktum att många av de inkommande svaromålen ansåg att de föreslagna förändringarna var alltför långtgående i förhållande till det presenterade problemet. Kommissionen redogjorde målen med förslaget som att *”skapa en mer effektiv och företagsvänlig Union”*, mål som enligt många av de berörda aktörerna motsäger sig själv eftersom de snarare utgör ytterligare bördor och kostnader samt leder till minskad rättssäkerhet för företag.

Denna uppsats syftar till att undersöka i vilken utsträckning de föreslagna ändringarna skulle påverka företagsklimatet om bestämmelser av förvärv av minoritetsandelar skulle införas i EU-rätten samt att undersöka de bakomliggande orsakerna till att införa ett sådant regelverk. Följaktligen avser denna uppsats att belysa utvecklingen av EU:s koncentrationskontroll, nuvarande koncentrationsutövning samt målen, alternativen och svaromålen till Kommissionens förslag som ett steg i att tillgodose syftet med denna uppsats, nämligen; att undersöka huruvida en reform av bestämmelserna i koncentrationsförordningen, vilka ger Kommissionen möjlighet att ingripa och refusera vissa förvärv av icke kontrollerande minoritetsandelar eventuellt kan ge upphov till orimliga bördor, ökade kostnader och/eller leda till mindre rättssäkerhet för berörda företag. Detta kommer att uppnås genom att föra en diskussion om ”*vad som komma skall”* och vill sedermera koncentreras till vilket alternativ, om något, är mest fördelaktigt för företagen. Genom att etablera en diskussion om vad framtiden har att bringa hoppas författaren att denna uppsats kommer att ligga till grund för framtida forskning.

# Preface

When I was first admitted to law studies in Lund, a former student and a true friend, likewise known as my older brother Karl, urged me to consider my studies as a round-the-clock job (at that very time I recall considering his advice somewhat cliché). However, being roughly 20 years of age I gladly nodded and all of a sudden I had my first exam. Luckily the exam turned out well and the beginning of another five years of studies was inevitable. Five years of joy to be more precise. Not only have I come to learn and find law studies, and all that it implies, very interesting, I have also had the privilege to connect with people that I nowadays am proud to call my beloved friends. Without them I would not be where I am today, writing my very last words of my Master thesis.

I am deeply grateful to my family, friends and fellow students in Lund and at the Faculty of Law. Without your endless encouragement and support I would never have finished this thesis. I would also like to specially thank, *Alexander Kloow*, my translator in times of blackouts, *Arvid Gilljam*, for providing me feedback on the thesis and of course my supervisor *Björn Lundqvist*, for his valuable opinions and inputs.

Last, but not least, I would like to sincerely thank *Henrik Norinder* for being a fantastic professor and source of inspiration throughout my studies as well as *Niklas Bergman* and *Ludvig Blomqvist* who introduced me to the practical line of law when I was pursuing an internship at their law firm in 2013.

Karl, thank you for giving me that advice in 2009 and ever since pushing me to perform to the best of my abilities. Without you doing so I would not be able to brag to you when receiving a good grade.

Lund, it has been a pleasure! It is with a sad heart I have to say goodbye, yet I am fully aware that the best is to come.

Lund, May 2014.

Nils Wijkmark

# Abbreviations

| | |
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| BWB | Bundeswettbewerbsbehörde |
| CC | UK Competition Commission |
| CJEU | Court of Justice of the European Union |
| ECSC | Treaty establishing the Coal and Steel Community |
| EEA | European Economic Area |
| EEC | Treaty establishing the European Economic Community |
| EGC | European General Court |
| EU | European Union |
| EUMR | European Union Merger Regulation |
| NCMS | Non-controlling Minority Shareholdings |
| NCA(s) | The National Competition Authorities |
| OFT | UK Office of Fair Trading |
| SIEC | Significant impediment to effective competition |
| TCA | The Competition Authority (Ireland) |
| TFEU | Treaty of the Functioning of the European Union |

# 1 Introduction

## 1.1 Background

*Prima facie*, combined forces between companies seem to merely bring benefits to the market economy. This notion of economic advantages and synergy effects stemming from mergers and acquisitions is in many cases correct, but what happens when such combined forces hinder other actors to enter the market? Even if merged or acquired companies may increase technical development, reduce costs and make companies work more efficient it could also distort the idea of a healthy competitive Union. In some cases, mergers and acquisitions by or between two or more undertakings could reduce competition by strengthening the dominant position and hence give rise to higher prices for consumers, reduce choices or create a less innovative market environment.[2]

At this very moment, there is an extensive on-going debate whether the Commission shall have the possibility to review and, if appropriate intervene in acquisitions of (non-controlling) minority shareholdings. This entails that diverse interests must be considered with precaution to safeguard the attractiveness of investing in the internal market. It is indeed, due to rapid globalisation, among one of the Union's most important tasks to create a market whereby companies, both within and outside the boundaries of the European Union, are enticed to invest. Therefore, safeguarding the attractiveness of the internal market is of vital importance in the context of positioning the Union as a future leading global market place, improving the growth and standard of the industry in the EU. One way to achieve this is by creating a legal framework that satisfies the Union's interests without posing undue burdens on companies.

The main objective of examining certain mergers and acquisitions is to prevent harmful effects on the competition that, instead of effectively contributing to a unified and well functioning internal market, may cause problems. Therefore, mergers and acquisitions going beyond national borders, constituting *"Community dimension",* may be subject for the Commission's review, whose drive is to ensure that a proposed merger or acquisition is suitable at a European level and under EU legislation.[3] Consequently, not all mergers and acquisitions are subject for review under current merger legislation. The Merger Regulation[4] (the single most important legal instrument of merger control) and its associated notices, guidelines and annexes only covers mergers and acquisitions with Community dimension that exceeds specific turnover threshold in terms of global and European sales.[5]

[2] http://ec.europa.eu/competition/mergers/overview_en.html, 2014-01-27.
[3] ibid.
[4] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings.
[5] http://ec.europa.eu/competition/mergers/overview_en.html, 2014-01-30.

Until quite recently and for a long time, the procedural course of action and the scope of the Merger Regulation has remained the same. As a result one can ask why such a dynamic area of business is governed by a rather static set of rules – giving rise to *"enforcement gaps"*?

Clearly, I was not the first person to identify an enforcement gap why the Commission, as late as in June 2013, released a staff working document titled; *"Towards more effective EU merger control"*[6] (hereinafter referred to as the *"consultation paper"),* introducing several options on how to plug a perceived gap relating to acquisitions of (non-controlling) minority shareholdings. The consultation paper aimed at bringing light upon and propose amendments to i) extending the scope of the EU Merger Regulation to the acquisition of non-controlling minority shareholdings and ii) reforming the referral system between the Commission and NCAs (the enforcement gaps). The former will be examined in this paper. The consultation paper was followed by a consultation period, ending in September 2013, during which various stakeholders had the opportunity to submit their responses on possible improvements of the Merger Regulation. In January 2014 a new implementing Merger Regulation entered into force containing amended provisions with regards to the simplification of the referral procedures but lacking provisions providing the Commission the power to intervene and investigate creations of structural links.

Due to the lack of self-standing provisions governing structural links in the final outcome, this thesis seeks to bring light upon and examine the possible impacts for businesses if the Commission were to introduce a system by which it would have the possibility to scrutinise, and if appropriate, reject certain acquisitions of (non-controlling) minority shareholdings.

*- "A Limited Reform – But with Significant Consequences"*[7]

## 1.2 Aim and purpose

Over the last years, the Commission and concerned stakeholders have heavily discussed the possible effects of implementing a revised Merger Regulation. As a product of the discussions the final outcome of the initial consultation paper is rather different from what was first proposed by the Commission.

The broad aim and purpose of this thesis is to provide a complete picture of the recent discussions with regards to the introduction of a new legal toolkit providing the Commission the power to control certain creations of structural links.

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[6] Commission Staff Working Document, "*Towards more effective EU merger control",* SWD(2013) 236 final.
[7] Steptoe & Johnson LLP, *"Upcoming reforms in EU merger Control"*, European Union, February 14 2013.

However, to give an exhaustive report of the broader aim is a desirable but unrealistic thought, given the scope of the paper. Therefore, this study will be limited to focus on when and if the acquisition of (non-controlling) minority shareholdings is to be implemented as a form of merger regulation intervention and if this will create a more business-friendly Union. This will be achieved by investigating how the introduction (if any) of a new merger control system will affect companies in terms of undue burdens, costs and legal certainty. Thus, this thesis aims to examine, the **possible** consequences for businesses. Introducing a discussion of: *"what is to come-character*" will, by its very nature, boil down to which system, if any, is the most beneficial for companies? By establishing this line of discussion, the author hopes that the thesis will serve as a basis for future research.

Accordingly, this thesis seeks to primarily address the following research question:

- *What will be the consequences in terms of undue burdens, costs and legal certainty for businesses if the Commission were to confer jurisdictional power to intervene, investigate and, if appropriate, reject an acquisition of (non-controlling) minority shareholdings?*
    - *Which system, if any, is the most beneficial for businesses?*

The specified research question will mainly be examined from a business point of view (so is the nature of the question), yet observe the diverse perspectives of the Commission and a selection of stakeholders.

## 1.3 Method and material

As a first source for performing the purpose of the paper, legal dogmatic method will be used. This method gives expression for sources of law such as legislation, doctrine and case law which together will work as a toolkit to describe the historical development, current legal framework ("*de lege lata*") and certain central concepts such as legal certainty, i.e. chapter two, four and to some extent chapter five. Since the thesis in itself will examine the implications of a EU regulation, construed in the light of Articles 101 and 102 of the TFEU[8], both primary- and secondary EU law and in particular official documents from the EU will work as a predominant source of material throughout the thesis.

Chapter three aims to describe the incentives and background of the consultation paper, the current practise and the proposed options/systems and the responses thereof. This will mainly be achieved by using a descriptive method stemming from various sources such as official documents, publications and responses but also credible online sources.

[8] Consolidated version of the Treaty on the Functioning of the European Union, Official Journal of the European Union C 83/47 of 30.3.2010.

The main reason for using a descriptive method based on official documentation rather than a traditional legal dogmatic method lies in the fact that the content of the chapter in itself describes an issue not yet discussed in neither law or doctrine nor case law and which consequences are yet to be seen.[9] The author is aware that the submitted responses originating from e.g. NCAs, law firms or companies may be biased. Thus, such responses will work as an indicator of the position taken by stakeholders rather than a statement of law.

Sub-headings titled "*chapter summary"* and chapter six will present results of the findings and consequently analyses thereof and will solely be based on what have previously been discussed with the exemptions of conclusions made by the author, thus a more analytic approach will be used.

In addition to the abovementioned methods and sources, a law and politics approach has been applied. The reason hereof is because the research questions "demand" such an approach to satisfy the purpose of the thesis as the law and politics perspective involves a broader analysis of the rationale behind the differences. Accordingly, such an approach will give the author greater possibilities to elaborate the conclusions and make tentative suggestions with regards to the research question.

Finally a law and economic perspective has been used as the purpose of the thesis is, inter alia, to examine whether the proposed merger reform will create a more business-friendly Union, in terms of both undue burdens and economic effects of the law. By doing so the author will be able to analyse the result from an economic point of view taking into consideration most companies' primary interest, profit.

Throughout the composition of this thesis evaluation of the sources used has been done continuously. In parts where legal dogmatic method is used this has not been an issue since such sources must be seen as independent and unbiased. However, when using information deriving from more uncertain sources (essentially in parts dealing with individual opinions) it has been deemed necessary to use a more critical approach.

## 1.4 Scope and delimitations

Several limitations need to be acknowledged to be able to provide a satisfactory conclusion to the specified question. European merger control is by definition a broad area covering various aspects of economic, political and legal nature. Hence, limitations have to be made in relation to the studied topic.

[9] Electronic answer from the Commission dated 2014-01-27: *"There are no court cases pending before the courts in which the procedures were based on the Amended Implementing Regulation. All cases being reviewed by our services, as of post 1 January 2014, should, in principle, be notified using the new forms – as the merger simplification package became applicable as of 1 January 2014".*

As a starting point this thesis will solely focus on the European Merger Regulation albeit references will be made to the Member States governance of mergers and acquisitions. However, such references will primarily work as explanatory comparisons and as a tool to be able to describe and/or exemplify whether domestic systems could be applicable also in the Commission's line of work.

The Merger Regulation contains a considerable amount of legal and regulatory provisions. Given the latest developments in the sector limitations with regards to the two proposed amendments seem reasonable. Thus, this thesis will solely focus on the possibility to extend the scope of the EU Merger Regulation to the acquisition of non-controlling minority shareholdings and consequently on segments[10] in the Merger Regulation that are associated to the proposed amendment. Having said that it is implied that e.g. fundamental aspects such as the rationale behind abusive dominant behaviour or exhaustive examination of Article 101 and 102 of the TFEU will fall outside the scope of this paper. That is, even if such behaviour or the implications of Articles 101 and/or 102 may be the justification for the Commission to initiate further investigation under the procedural rules.

Without ignoring the importance of considering the research question in an objective manner, the scope of this thesis will mainly examine the results from a business point of view. This means that the effectiveness and competitiveness of the Union will merely be scrutinised in terms of the attractiveness for businesses to e.g. invest within the internal market. Moreover, to meet the objective of studying the research question from a business point of view, it has been deemed necessary to limit the number of responses referred to in this paper. Each and every response referred to is therefore judiciously selected by the author (in the light of Annex B and C) and in a way that the author considers to be the best suitable to fulfil the purpose of the paper.

Moreover the author finds it essential to reflect the allocation of jurisdictional competence between the Commission and the Member States, as this will create an opportunity to assess whether the studied question is beneficial or detrimental for companies involved in a proposed merger or acquisition. The reason behind this approach is because an important element of a potential merger or acquisition may depend on, who is the responsible authority and what is that authority's competence, the notion of legal certainty, i.e. chapter five.

[10] E.g. Articles 4(4) and 4(5), 9 and 22 of the 139/2004 Merger Regulation, covering the pre- and post notification system and associated thresholds.

Furthermore, it is worth mentioning the existence of different businesses. Whilst some are focusing on profit others are non-profitable (pro bono) companies, some are small whilst others are bigger and so on. This thesis will only consider companies that have a profitable interest and that is of such considerable size[11] that a potential merger or acquisition might fall under EU legislation. It is *per se* deemed unnecessary for the purpose of this thesis to examine companies that are solely dependent on national legislation since the study will exclusively investigate the European legal framework on a Union level. However, as a consequence of the fairly extensive harmonisation process of merger control during the last decades the information provided in this paper will be valuable for the reader also on a national level as domestic legislation is construed in the light of EU law and thus, to some degree comparable.

Lastly, and even if the Commission from time to time stresses the disparities between horizontal and vertical concentrations and creations of joint ventures, those concepts will merely be mentioned but not further explained as the author trusts that the beneficiaries of this paper are aware of the differences. Likewise, the basis of how to calculate thresholds (for Community dimension) and apply the SIEC test (substantive appraisal) will fall outside the scope as the complexity of these concepts would be overwhelming for the purpose of this paper. That same goes for the Zephyr Database which is merely mentioned without further explanation.

## 1.5 Disposition

This thesis has been divided into six chapters. Following this introductory chapter in which the background and various explanatory and technical aspects have been covered, the second chapter will give the reader a historic overview of the development of EU merger control as a step to further understand the underlying reasons why the Commission has opted for introducing a new Merger Regulation that cater the globalisation and current business environment.

Chapter three will form the most substantive part of this paper, describing the consultation paper from several angles starting with a brief background and introduction which will provide the reader with a rigid starting point to understand the sequent sub headings. Following this introduction, the current practise, main objectives and proposed options will be discussed. The reader should be aware that the proposal will be examined in terms of, what was desired by the Commission and what was later adopted by the Commission as the final outcome did not take into consideration the acquisition of minority shareholdings. Lastly, chapter three will bring light upon a selection of responses from stakeholders as a step to provide the reader with independent opinions in regards to what the Commission desired to adopt in the first place.

[11] Companies close to, or above the set thresholds in the Merger Regulation.

The desired result of presenting stakeholders responses is to give a clear idea why certain measures are not being implemented at this stage and consequently serve as the base for the forthcoming chapters which will further discuss certain impacts for businesses.

Chapter four will provide the reader with an in-depth analysis of the Commission's decision, the EGC ruling and the OFT and CC judgement in the *Ryanair v Aer Lingus* case. This case has been heavily debated and is of utter importance for the discussion of the notion of reviewing acquisitions of (non-controlling) minority shareholdings. Consequently the analysis in chapter four will provide a hands on exemplification of what has been discussed in chapter three providing the reader further understanding of how problematic the studied topic could be in reality.

Chapter five and the last chapter which are of a more descriptive character will discuss a selection of important consequences and concepts for concerned undertakings. The author will mainly discuss the concept of legal certainty and possible undue burdens for companies covered by the proposed reform. This discussion will lead the reader to the final chapter in which final concluding remarks will be presented and summarized. In this section the author aims to provide a final understanding and guidance on whether the proposed amendments could create a more business-friendly Union but also discuss and analyse why the majority of the responding stakeholders rejected the proposed amendments. A desirable outcome is also to provide recommendations and, if possible, give an idea of what is to come.

## 1.6 Terminology

As this thesis aims to examine certain developments of the EU merger control it is vital to be comfortable with important terms and concepts as they change over time.

For the purposes of this thesis the author will use the terms *"non-controlling minority shareholdings"* or "*minority shareholdings"* and *"structural links"* interchangeably. The definition of these terms are to be understood as defined in paragraph 19 of the Commission's consultation paper Annex I[12]. Similarly, the use of the terms concentration(s), merger(s) and acquisition(s) are regularly recurring throughout the paper. These terms are to be understood as defined under Article 3 of the EUMR.

[12] Para. 19, Annex I, *"Economic Literature on Non-Controlling Minority Shareholdings ("Structural links")"*, to the Commission Staff Working Document, *"Towards more effective EU merger control",* SWD (2013) 239 final, Part 2/3.

Furthermore, in December 2009 the TFEU entered into force and as a consequence the numbering of articles was amended. Therefore, e.g. doctrine and case law published prior to 2009 uses Articles 81 and 82. In this paper, references will continuously be made to the new Articles 101 and 102.

Moreover, this thesis will make references to the *"European market"* which is often labelled as the *"single market"*, *"internal market"* or, formerly, the *"common market"*. In this paper the meaning will be the same and defined as:

> *"The internal market of the European Union is a single market in which the free movement of goods, services, capital and persons is ensured and in which European citizens are free to live, work, study and do business."*[13]

Lastly, when references are made to the "Merger Regulation" the author means the "*Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings."* References made to the "Implementing regulation" means the "*Commission Regulation (EC) No.802/2004 implementing Council Regulation (EC) No. 139/2004",* and references made to the "New Implementing Regulation" or the "New Implementing Merger Regulation" the author means the *"Commission Implementing Regulation (EU) No 1269/2013 of 5 December 2013 amending Regulation (EC) No 802/2004 implementing Council Regulation (EC)".* The new implementing regulation may also be referred to as the "*simplification package*", or *"merger reform"*. Noteworthy to mention is also that references will be made to the 1989 Merger Regulation[14], however, when this is the case it will clearly be explained by the context.

[13] http://europa.eu/legislation_summaries/internal_market/index_en.htm, 2014-02-06.
[14] Regulation 4064/89 on the control of concentrations between undertakings, OJ L 395.

# 2 Important concepts and development of EU merger control

## 2.1 Introduction

Due to the rapid pace of development, European merger control is one of the most complex areas of competition law. As a consequence the legislation and its accompanying guidelines are fairly frequently updated in one way or another and as a result, companies need to keep up with the current legal framework to make sure that actions taken are compatible with EU law.

The strengthening of a position of dominance in terms of *"internal growth"*[15] is not prohibited under EU law as it is merely an outcome of a company's own commercial effectiveness and should therefore not be punished. However, if the position of dominance is strengthened as a result of *"external growth"*, that could be, the creation of concentrations of previously independent companies, certain competition issues may occur.[16] This is of course only true for concentrations that may distort, or in any other way significantly harm or impede the competition within the Union.[17] Hence, the starting point for the legislator should lie in the notion that concentrations could generate efficiencies that contribute to a dynamic economy by e.g. strengthening and distinguishing the internal market rather than harming it.[18] Nonetheless, and by contrast with internal growth, external growth, as an outcome of the creation of a concentration, may give rise to a *"bundle of companies"* that in turn could benefit from and take control over the economic capacities already existing in the market. Once such concentrations are realised there is a potential risk that e.g. the post-merger prices and/or the incitement to innovate is taking the rap as a result of that particular merger or acquisition. For this reason, external growth by and between companies could potentially damage the competition and thus be subject for review under the European merger control laws.[19]

[15] E.g. the achievement of technological advantage, growth of financial assets or strategic advantages through distribution networks.
[16] M. Rosenthal & S. Thomas, *"European Merger Control",* C.H Beck, Hart Publishing, 2010, p. 1 f.
[17] The precise definition in Article 2(3) EUMR states: "[concentrations] /.../ *would significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position"*
[18] M. Rosenthal & S. Thomas, *"European Merger Control",* C.H Beck, Hart Publishing, 2010, p. 2.
[19] Ibid.

Due to the perception that certain mergers may affect the competitive environment to such a degree and in such direction that it might damage the effectiveness of the Union there is a substantive legal framework governing the issue. Conversely, this has not always been the case, thus a basic knowledge about the development of EU merger control is desirable to provide greater understanding of the recent developments and in particular whether the same set of notification rules shall apply also for structural links (primary to maintain the same high level of legal certainty).

## 2.2 Important legal instruments

The first preventive provision[20] on control of mergers and acquisitions arose under the 1952 Treaty establishing the Coal and Steel Community[21] (hereinafter referred to as the ECSC Treaty). The ECSC Treaty provided a provision dealing with the control of concentrations. The provision was, admittedly limited to concentrations affecting the coal and steel sector but was nonetheless a first step towards recognising the complexity of mergers and acquisitions that could affect the competition on the internal market. Not long after the ECSC was established the 1958 Treaty establishing the European Economic Community (hereinafter referred to as the EEC Treaty) entered into force[22]. At this time, the notion of controlling concentrations was indeed recognised and heavily discussed. Paradoxically the "new" EEC Treaty did not include any additional or supplementary provision (save for Articles 101 and 102 TFEU, see below) dealing explicitly with the control of concentrations.[23] However, after the implementation of the EEC Treaty it became clear that the omission of provisions dealing with mergers and acquisitions, outside the scope of the coal and steel sector, could be problematic. Therefore the CJEU confirmed in its famous *Continental Can*[24] and *British-American Tobacco*[25] cases that Articles 101 and 102 of the TFEU should also apply to certain concentrations.[26]

[20] See Article 66(1) of the ECSC stating: *"Any transaction shall require the prior authorisation of the High Authority /.../ if it has in itself the direct or indirect effect of brining about within the territories referred /.../ a concentration between undertakings /.../ whether it is effected by merger, acquisition of shares or parts of the undertaking or assets, loan, contract or any other means of control."*.

[21] Treaty establishing the European Coal and Steel Community and Annexes I-III, Paris, 18 April 1951.

[22] Treaty establishing the European Economic Community or The Treaty of Rome, 25 March 1957.

[23] M. Rosenthal & S. Thomas, *"European Merger Control",* C.H Beck, Hart Publishing, 2010, p. 3.

[24] Case 6-72 *Continental Can v. Commission* [1973] E.C.R. 215.

[25] Joined Cases 142 and 156/84 *British-American Tobacco & R.J. Reynolds v. Commission* [1987] E.C.R 4487.

[26] M. Rosenthal & S. Thomas, *"European Merger Control",* C.H Beck, Hart Publishing, 2010, p. 3.

Shortly after the CJEU judgment in *Continental Can* and *British-American Tobacco* it became, once again, evident that Articles 101 and 102 of the TFEU were insufficient to effectively control the internal market in which concentrations where more and more frequently occurring. Therefore a special regime was established to address the complications that concentrative transactions may cause to the competitive environment. Accordingly, in 1989 a special regulation[27] entered into force aiming to provide a uniform legal framework for the assessment of concentrations.[28] The regulation was later replaced by the new version of the Merger Regulation[29], entering into force May 1, 2004 which was, later in 2004, amended by the Implementing Regulation[30] which, in turn was amended and implemented as late as of January 1, 2014 by the New Implementing Merger Regulation[31]. Consequently, the New Implementing Merger Regulation comprises amended versions of the Implementing Regulation and its accompanying notification and referral annexes, *"Form CO"* (for standard merger notifications), *"Short Form CO"* (for simplified merger notifications) and *"Form RS"* (for referral requests).[32]

## 2.3 Central terminologies in the 139/2004 Merger Regulation

### 2.3.1 Scope

In accordance with recital 9 of the EUMR the scope of application of the Merger Regulation is defined according to the geographical area of the activity of the undertakings concerned and is limited to those concentrations that exceeds certain quantitative thresholds as defined by the Community dimension in Articles 1(2)[33] and 1(3) [34] of the EUMR.

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[27] Regulation 4064/89 on the control of concentrations between undertakings, OJ L 395, 3. 12. 1989.

[28] M. Rosenthal & S. Thomas, *"European Merger Control",* C.H Beck, Hart Publishing, 2010, p. 3 f.

[29] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings.

[30] Commission Regulation (EC) No.802/2004 implementing Council Regulation (EC) No. 139/2004 (The "Implementing Regulation").

[31] Commission Implementing Regulation (EU) No 1269/2013 of 5 December 2013 amending Regulation (EC) No 802/2004 implementing Council Regulation (EC).

[32] http://www.lexology.com/library/detail.aspx?g=d6737485-87fe-414c-9feb-bc75fb56d2d3, 2014-02-07.

[33] Article 1(2), EUMR*: "A concentration has Community dimension where: a) the combined aggregated world-wide turnover of all the undertakings concerned is more than €500 million and b) the aggregated Community-wide turnover of each of at least two of the undertakings concerned is more than €250 million, unless each of the undertakings concerned achieves more than two-thirds o fits aggregate Community-wide turnover within one and the same Member State."*.

[34] Article 1(3), EUMR: *"A concentration that does not meet the thresholds laid down in paragraph 2* [see footnote 36] *has a Community dimension where: (a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2 500 million; (b) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million; (c) in each of at least three*

Put simply, Articles 1(2) and 1(3) can be described as the *"primary turnover thresholds"* and the *"alternative turnover thresholds"*. If a transaction does not meet the primary thresholds, the test in Article 1(3) is applied. If the transaction does not fall under, neither the primary threshold nor the alternative threshold, the transaction is recognised as not having Community dimension and thus, it is for the Member States to review the proposed merger (if subject for review under national legislation). Hence, Article 1(3) catches concentrations that do not per se have a Community dimension but, nevertheless, may affect cross-border activities and as a consequence thereof need to be notified to multiple NCAs.[35] As a result of the structure of Article 1(3), one can argue that its legal content triggers both advantages and disadvantages for companies. Advantages in the sense that it spares companies from notifying multiple NCAs, disadvantages in the sense that it provides the Commission the ability to review the concentration and, if considered necessary, start an investigation or declare incompatible with EU law, both alternatives very burdensome for concerned undertakings.

### 2.3.2 The general principle: *"One-Stop Shop"*

It is undesirable that the same merger may be subject to investigation under different regimes.[36] Therefore, the Commission has exclusive jurisdiction under Articles 21(2) and 21(3) on reviewing all possible (major) concentrations that is active on a cross-border level and which holds a Community dimension. If the criteria are met, at least *prima facie*, the Member States will not be able to apply their own national competition laws. However, depending on the specific situation at hand, the division of jurisdictional competence might fluctuate. Therefore it is of vital importance for companies, and for the sake of *"legal certainty"*, to be comfortable with the so-called *"one-stop shop"* principle[37].

According to the scheme of referrals the allocation of jurisdictional competence between the Commission and the Member States is somewhat modified as provided for in Articles 4(4) and (5) and Article 9 and Article 22 of the EUMR[38] and further clarified in the Commission's Notice of 2005[39] (hereinafter referred to as the 2005 Notice).

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*Member States included for the purpose of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million; and (d) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State."*.

[35] M. Rosenthal & S. Thomas, *"European Merger Control",* C.H Beck, Hart Publishing, 2010, p. 54 f.

[36] P. Craig & G. De Burca, "Eu Law – text, cases and materials", 5ed., Oxford University Press, 2011, p. 1052.

[37] See further recital 8, EUMR: the so-called *"one-stop shop"* principle.

[38] M. Rosenthal & S. Thomas, *"European Merger Control",* C.H Beck, Hart Publishing, 2010, p. 8 f.

[39] COM Notice on Case-Referral in Respect of Concentrations [2005], OJ C56/2.

The single most important principle in the 2005 Notice seems to be the rationale underlying the case referral system, defining the Articles as a derogation from the general rules which is defined by the application of the turnover criteria and determined exclusively by reference based upon objectively determinable turnover thresholds.[40] This distinction is particularly important by way of providing sufficient legal certainty for companies. The idea of tolerating certain mergers or acquisitions to be exempted, or rather reattributed to the Member States stem from the principle of subsidiarity and/or suitability. Thus, depending on the specific circumstances, the system offers undertakings the possibility and (hopefully) certainty, at an early stage to scrutinise where the ultimate jurisdiction lies.[41] The articles governing the possibility for the Commission to reattribute cases to Member States and vice versa will be further discussed below.

### 2.3.3 Pre-notification reallocation of jurisdiction: Article 4(4) and Article 4(5)

In the 2004 merger reform, Article 4(4) and 4(5) was introduced.[42] The articles provide concerned parties to a transaction the possibility to, prior to the notification of a concentration, inform the Commission by reasoned submission, that the concentration may significantly affect competition in a market within a Member State that has all the characteristics of a distinct market and hence, should be examined in whole or in part, by that particular Member State. It is for the Commission to transmit this submission to all other Member States which in turn may agree or disagree to the proposed concentration. If no Member State disagrees, the Commission may grant the Member State the possibility to address national competition law and subsequently rule upon the proposed merger or acquisition. In principle and according to the 2005 Notice, the jurisdiction should only be reattributed to a NCA in circumstances where the latter is more appropriate for dealing with the proposed merger or acquisition, taking into consideration the competent authority's tools and expertise.[43] Having this in mind, it is therefore important for companies to clearly justify why the NCA should have the competence to review the concentration by providing well thought-through arguments and detailed information of the affected market(s). In such case, the undertakings desire to make use of the derogations set forth in Article 4(4) it is of course vital for the companies to consider the balance between the possible beneficial effects of requesting the proposed merger or acquisition to be reviewed under national merger regime *vis-á-vis* the potential burdens and additional costs and time consumption such request may pose.

[40] Para. 3 and 7, Commission Notice on Case-Referral in Respect of Concentrations [2005], OJ C56/2.
[41] COM. Notice on Case-Referral in Respect of Concentrations [2005], OJ C56/2, p. 1 f.
[42] https://www.slaughterandmay.com/media/64572/the-eu-merger-regulation.pdf, 2014-02-17.
[43] COM. Notice on Case-Referral in Respect of Concentrations [2005], OJ C56/2, p. 9.

As a counterpart to the provisions set forth in Article 4(4), Article 4(5) allowing undertakings to make use of a mechanism that advocate the possibility for companies to be reviewed by the Commission rather than a Member State. The main aim of the provision is to provide an alternative option for companies to be reviewed by the Commission as long as the following criteria's are met: the parties to the transaction i) constitutes a concentration within the meaning of Article 3 ii) do not have Community dimension as defined by Article 1 iii) are subject for review under national competition laws of at least three Member States. The submission by a concentration to be reviewed by the Commission can be made before any NCA and as long as no other Member State disagree. If no Member State disagrees, the proposed concentration shall be deemed to have Community dimension and consequently be subject for review by the Commission. If so is the case, no Member States may apply its national law to the concentration.[44] Making use of this mechanism may decrease the burdens for companies functioning on a cross-border level planning to merge or acquire, as the Commission's decision to declare (assumption) the concentration compatible with EU law will be fully effective throughout the Union.

### 2.3.4 Post-notification reallocation of jurisdiction: Article 9 and 22

When the Merger Regulation was drafted in the late 1980s the Member States, and in particular Germany, was concerned that a number of mergers and acquisitions may not be harmful from a EU perspective, even if holding Community dimension, but could still be detrimental at national level. Accordingly, Article 9 of the EUMR, known as the *"German clause"*, was adopted to provide the Member States the possibility to request that a concentration notified to the Commission ought to be reattributed to the competent NCA, proviso that the conditions set out in Article 9(2)[45] are met.[46] Even if Article 9(3) states that it is for the Commission to decide whether the proposed merger or acquisition threatens to affect a distinct (national) market it is a clear statement that the jurisdictional competence may transfer as a result of the characteristics of a certain concentration. Initially, the Commission rejected most cases where Article 9 was used.
However, after the *Streetley plc v Tarmac* case[47] in 1992 in which the Commission accepted the use of Article 9 by request of the United Kingdom, the provision have been used to a greater extent.[48]

[44] P. Craig & G. De Burca, "Eu Law – text, cases and materials", 5ed., Oxford University Press, 2011, p. 1054.
[45] Article 9(2) set the following conditions: [when a concentration] /.../ (a) threatens to affect significantly competition in a market within that Member State which presents all the characteristics of a distinct market or (b) affects competition in a market within that Member State which presents all the characteristics of a distinct market and does not constitute a substantial part of the internal market.
[46] P. Craig & G. De Burca, "Eu Law – text, cases and materials", 5ed., Oxford University Press, 2011, p. 1053.
[47] Case IV/M180 *Streetley plc v Tarmac* [1992] 4 CMLR 343.

Equally, other (smaller) Member States, and in particular the Netherlands, argued that mergers and acquisitions which do not hold Community dimension shall still be able to be referred to the Commission from the Member States. The reason hereof lies in the fact that some Member States, especially in 1989, lacked their own merger control schemes and could therefore not examine the potential concentration in a satisfying way.[49] As a consequence, Article 22, know as the "*Dutch clause*", was introduced to provide NCAs, a Member State or joint States, the possibility to refer concentrations as defined in Article 3, not holding Community dimension within the meaning of Article 1 to be investigated by the Commission where it affects trade between Member States and threaten to significantly affect competition within the territory of the Member State or States making the request. It is for the Commission to decide whether a concentration meet the criteria's set out in Article 22(3) and also to decide whether to take action or not.[50] Whilst the use of Article 9 has increased in importance over the years, Article 22 is nowadays rarely used as a result that most Member States now have their own merger control regime. However, both played a central role in the discussions which led to the 2004 Merger Regulation and still plays an important role in the notion of allocation of jurisdictional competence between the Commission and the Member States and thus, affect legal certainty and actions taken by companies, let it be the realisation of full mergers or the creation of structural links, the referral system is of vital importance.[51]

## 2.4 Chapter summary

It goes without saying that the EU merger control has considerably developed since the establishment of the Coal and Steel Community, predominantly, as a result of the rapid globalisation. It is noteworthy to say that, even as early as in 1952, the Community "realised" the importance of controlling mergers and acquisitions as the creation of a concentration may impede competition. However, it was not until as late as in 1989 that a special regime was established to directly address situations of concentrative transactions that could be harmful for the internal market. The establishment later led to the creation of the 1989 Merger Regulation. The 1989 Merger Regulation introduced special provisions aiming at controlling jurisdictional matters under certain circumstances. As years went by, the Commission identified its "first" enforcement gap which subsequently led to the 2004 Merger Regulation. By introducing additional provisions of jurisdictional nature the Commissions manage to plug this gap. Now, ten years later, the Commission has identified its "second" enforcement gap – (non-controlling) minority shareholdings.

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[48] A complete list of "Article 9" full referral cases can be found here: http://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp_result, 2014-02-18.

[49] M.P. Broberg, *"The European Commission's Jurisdiction to Scrutinise Mergers",* 2nd ed., Kluwer Law International, 2003, p. 8 f.

[50] P. Craig & G. De Burca, "Eu Law – text, cases and materials", 5ed., Oxford University Press, 2011, p. 1054.

[51] M.P. Broberg, *"The European Commission's Jurisdiction to Scrutinise Mergers",* 2nd ed., Kluwer Law International, 2003, p. 10.

As is fairly evident from all the abovementioned it is only under rather specific circumstances that reattribution of jurisdictional competence occurs. The derogations from the general one-stop shop principle, which provides the Commission the sole jurisdictional competence of reviewing all concentrations by definition of Article 3, seems to merely provide the Member States and/or undertakings theoretical possibilities to refer potential concentrations, but which in reality rarely happens. Looking at Slaughter and May's publication on *"The EU Merger Regulation – An overview of the European merger control rules"* from March 2012, support this impression:

> The total number of notifications to the Commission from 1990 – 2011 is 4857. Out of those, 245 (or roughly 5%) of the referrals is made from the Member States/NCAs or undertakings to the Commission of which 217 (or roughly 4,5% of the 5%) under the pre-notification provision in Article 4(5) whilst 144 (or roughly 3%) of the referrals are made from the Commission to the Member States of which the pre-notification provision under Article 4(4) seems to be the most frequently occurring since its introduction in 2004.[52]

Bearing in mind that the Commission is given the sole jurisdictional competence to review major concentrations and that the case referral system is not very frequently used, it is indeed interesting that the consultation paper is labelled as creating a more business-friendly Union, yet introducing new systems providing the Commission additional power to also review acquisitions of non-controlling minority shareholdings. Even if the options provided for in the consultation paper did not became reality when the New Implementing Merger Regulation was adopted in 2014, one can argue that the proposed options establishes a clear-cut message of the Commission's ambition to create a legal toolkit whereby it will "benefit" from additional power, providing it the possibility to review creations of structural links where the change of control may be considerably less than 50%[53].

[52] https://www.slaughterandmay.com/media/64572/the-eu-merger-regulation.pdf, annex 2 p. 38, 2014-02-18.

[53] The reader should note that there is no fixed percentage in law of what is considered to be "control" or "joint control". Thus, the control of a concentration needs to be assessed on a case-by-case basis in which less than 50% have been considered to constitute a concentration within the meaning of the Merger Regulation, the notion of *"decisive influence"*. See chapter 3.2.1 for more information.

# 3 "Towards a more effective EU merger control"

## 3.1 Introduction and background

On 20 June 2013, the Commission published its consultation paper *"Towards more effective EU merger control"* which primary objectives was to assess the possibilities of:

- **extending the scope** of the EU Merger Regulation **to the acquisition of non-controlling minority shareholdings**. The paper propose several options to achieve effective control of non-controlling minority shareholdings and /…/;

- **reforming the referral system** between the Commission and national competition authorities, making it more business-friendly by streamlining and shortening procedures but without fundamentally changing the system's basic features.[54]

The consultation period closed on 12 September 2013.

In its consultation paper, the Commission stress the importance of regularly reviewing and improving the merger system to meet the evolving practice and enhances that: "*nearly 10 years after the most recent reform,*[55] *is an appropriate time to reflect the possibility of improvements due to the rapid pace of business development and globalisation*."[56] According to the *"International Comparative Legal Guide to: Merger Control 2014"*; the previous major reform[57] primarily focused on plugging a perceived enforcement gap triggered by the existing set of rules which governed the Commission's possibility of reviewing mergers but was limited to the creation of strengthening a dominant position. Now, 10 years later, it seems that the Commission has identified another enforcement gap directly relating to the possibility of reviewing minority shareholdings. The main concern is that certain business formations escapes prior review by the Commission under the current Merger Regulation.

[54] http://ec.europa.eu/competition/consultations/2013_merger_control/index_en.html, 2014-02-10.
[55] The Merger Regulation was first adopted as Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ L 395, 30.12.1989, p. 1). Council Regulation (EEC) No 4064/89 was later amended by Council Regulation (EC) No 1310/97 of 30 June 1997 (OJ L 180, 9.7.1997, p. 1). The re-casting of the Merger Regulation in 2004 led to the adoption of Council Regulation (EC) No 139/2004, the current Merger Regulation.
[56] Commission Working Staff Document, "*Towards more effective EU merger control",* SWD (2013) 236 final, p. 3.
[57] See further under 2.4.

Heretofore, the Commission's powers has been limited to the acquisition of control in a company, which implies that the Commission can only review the acquisition of a company's shares if the acquirer confers *de facto* control of the target company. After recent events (see e.g. *"Ryanair v Air Lingus"* below), the Commission has established that certain situations require an effective set of tools to prevent anti-competitive behaviour which do not *per se* give expression of acquiring joint or sole control. [58]

Whilst the Commission appears to perceive the new reform primarily as a tool to create a more business-friendly, effective and competitive Union, others consider the proposal, and in particular the possibility to extend the scope to acquisitions of NCMS, merely as an instrument providing the Commission additional power to intervene in pure business transactions which consequently counteract the Commission's own intentions.

This chapter will further discuss the Commission's consultation paper and associated questions[59], the concerns and rationale behind the enforcement gap, i.e. the review of structural links and the responses and consequences thereof, as a step to create greater understanding of the proposal and the views taken among stakeholders.

## 3.2 The control for the acquisition of non-controlling minority shareholdings

According to section II of the Commission's consultation paper, effective competition policy need appropriate means to warrant a healthy and effective internal market. Accordingly, the Commission has identified, what they consider to constitute an enforcement gap or absence of provisions aiming at preventing anti-competitive effects stemming from an undertaking's intent to acquire minority shareholdings in another establishment. As a solution, the Commission has recognised a number of options which provides it the necessary legal toolkit to intervene in what it deems to be *"problematic cases"* of structural links and in particular those that strike between competitors.[60]

### 3.2.1 Notion of "control" and current EU practice

Before examining the objectives and options of the proposal one should bear in mind that the Commission, during the last decades, has adopted an expansive view of the scope of the concept *"control"* by which it asserts that control could also cover the acquiring of minority shareholdings.

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[58] F. Depoortere & G. Motta, *" International Comparative Legal Guide to: Merger Control 2014"*, 10th ed., Global Legal Group, Chapter 2.
[59] See Annex A.
[60] Commission Working Staff Document, "*Towards more effective EU merger control",* SWD (2013) 236 final, p. 3.

This conception is instructively exemplified in the *"International Comparative Legal Guide to: Merger Control 2014"* in which the authors states that:

> *"A firm owning less than 50% of the voting securities of Company A could still be considered to have or obtain control, for example, if it has the power to nominate the majority of Company A's Board of Directors, if de facto the minority stake would represent a stable majority at Company A's shareholders' meetings because of the fragmented nature of the remainder of the shareholdings or if Company A's by laws or any contractual arrangements would give the minority shareholder a decisive influence over Company A, i.e., by giving the minority shareholder the power to decide on or veto strategic commercial decisions relating to Company A."*[61]

This is indeed an interesting perception of the concept of control, as it appears that the Commission creates a wider discretionary interpretation than what seems to be the legislator's intent from the beginning. This positioning was confirmed in the *Arjomari-Prioux v WTA*[62] case from 1990.

In *Arjomari-Prioux v WTA*, Arjomari was found to be able to exercise decisive influence on WTA with "only" a 39% stake where the reminder of the WTA's shares were widely dispersed, held by about 107 000 other shareholders, non of them whom owned more than 4%, with only three shareholders holding over 3% of the issued share capital. Under the specific circumstances, Arjomari was considered to acquire control of the undertaking within the meaning of Article 3 of the 1989 Merger Regulation and consequently the transaction was considered to constitute a concentration. Even if the concentration in the end was declared compatible with the internal market (it did not have Community dimension), the Commission clearly pointed out that acquiring minority shareholdings may, under certain circumstances, be enough to constitute a *de facto* concentration and hence the Commission shall have jurisdictional competence to intervene. Recently, a to some extent similar situation has been pending before the Commission and the EGC in the *Ryanair v Aer Lingus* case[63] which is, among other sources, cited in the Commission's consultation paper as a key driver for creating a customised set of rules for the notification of NCMS.[64]

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[61] F. Depoortere & G. Motta, *" International Comparative Legal Guide to: Merger Control 2014"*, 10th ed., Global Legal Group, Chapter 2, I.A., para 3.
[62] Case IV/M.0025, Arjomari-Prioux SA / Wiggins Teape Appleton plc.
[63] Case T-411/07 Aer Lingus v Commission [2010] ECR II-3691.
[64] http://ec.europa.eu/competition/consultations/2013_merger_control/cadwalader_en.pdf, p. 3, 2014-02-12.

Correctly gasping the definition of control is essential as altering the Merger Regulation to further cover structural links necessitates a rethinking of the perception of the traditional notion of control. Vital information pertaining to the concept of control is to be found in the Commission's Consolidated Jurisdictional Notice[65] (hereinafter referred to as the *"Jurisdictional Notice"*), which is construed on the definitions embedded in the Merger Regulation.[66] Article 3(2) of the EUMR provides a non-exhaustive list of means establishing control, namely by rights, contracts or any other means and is further explained in Article 16 of the Jurisdictional Notice which provides that a concentration may occur on a *de jure* or *de facto* basis and may take the form of sole or joint control, and extend to the whole or parts of one or more undertakings. For a transaction to fall under the current merger practice one or the other party should confer the possibility of exercising decisive influence over the behaviour in the other undertaking. According to Article 16 of the Jurisdictional Notice it is however not necessary to show that decisive influence is or will be actually exercised.[67] Accordingly, the notion of decisive influence as an essential feature of control does not necessarily entail obtaining sole or joint control but is rather interpreted in terms of attaining positive rights such as the operational control of the target company.[68]

That same notion of the concept of control may apply on the acquisition of (non-controlling) minority shareholdings. For example Article 57 of the Jurisdictional Notice provides that:

> *"Even in the case of a minority shareholding, sole control may occur on a legal basis in situations where specific rights are attached to this shareholding. These may be preferential shares to which special rights are attached enabling the minority shareholder to determine the strategic commercial behaviour of the target company, such as the power to appoint more than half of the members of the supervisory board or the administrative board. Sole control can also be exercised by a minority shareholder who has the right to manage the activities of the company and to determine its business policy on the basis of the organisational structure /.../"*

The same goes for negative rights (of control) which is provided for under Article 56 of the Jurisdictional Notice and aiming at situations whereby a party to a transaction acquiring minority shareholdings, providing them the possibility of vetoing or blocking important business strategy decisions (deadlock situations), may be covered under the current merger regime.

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[65] Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, 2008/C 95/01.

[66] C. S. Rusu, *"Eu Merger Control and Acquisitions of (Non-Controlling) Minority Shareholdings – The State of Play",* CLaSF WP Series No. 10, February 2014, p. 2f.

[67] See e.g. Case IV/M.330 *"McCormick/CPC/Rabobak/Ostmann* where the Commission concluded that the concentration threatens to create a dominant position as a result of which competition would be significantly impeded on a distinct German market even if the parties did not actually showed the existence of decisive influence.

[68] C. S. Rusu, *"Eu Merger Control and Acquisitions of (Non-Controlling) Minority Shareholdings – The State of Play",* CLaSF WP Series No. 10, February 2014, p. 3f.

Minority shareholdings may also be deemed to have sole control on a *de facto* basis. This is the case where the shareholder is highly likely to achieve a majority at the shareholders' meetings, given the level of its shareholding and the evidence resulting from the presence of shareholders in the shareholders' meetings in previous years[69] (dispersed nature of the remaining shareholdings).[70]

Keeping in mind the above information it is easy to see that control may be exercised even where the acquiring party obtain less than 50% of the target undertaking. In other words, there is no prescribed minimum stated in law what constitutes control but is rather a question for the Commission to assess on a case-by-case basis the significance of decisive influence.

As things stands under current EU merger practice the Commission does not have the possibility to investigate the creation of structural links unless the acquiring party have decisive influence attached to the proposed transaction that goes beyond what would normally be expected, i.e. the minority shareholder is able to determine the strategic commercial practice of the target company.[71] According to the Commission, the existence of concentrative (minority shareholdings) transactions that do not fall within the ambit of the current set of merger rules could however, still raise competitive concerns. Thus, it seems that the Commission deems the current legal framework to be obsolete in relation to the present European business environment. As will be discussed below, the Commission does have, in addition to what have been clarified above, additional legal tools to tackle minority shareholdings, namely Article 101 and 102 of TFEU.

Summing up, one can argue that the existing legal toolkit is sufficient given the rather low number of cases not caught by it. However, this is not the Commission's point of view.

### 3.2.2 Objectives of the Commission's options of controlling NCMS

From the Commission's point of view, harm to competition and consumers can occur, not only from acquiring control, but also from the creation of structural links. Even if the Commission stresses that the impacts of anti-competitive behaviour, as a consequence of the creation of structural links, is likely to be less pronounced than *de facto* acquisition of control, such behaviour might still lead to impediment to effective competition in terms of e.g. less innovation, less growth and higher prices for consumers.

[69] Article 59 of the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, 2008/C 95/01. See also Case IV/M.343 *"Société Générale de Belgiqu v. Générale de Banque.*

[70] C. S. Rusu, *"Eu Merger Control and Acquisitions of (Non-Controlling) Minority Shareholdings – The State of Play",* CLaSF WP Series No. 10, February 2014, p. 4.

[71] Ibid. p. 5.

The Commission underpins its objectives by two main sources based on Annex I[72] (economic theory) and on the basis of examples, Annex II[73] (e.g. examples from the Zephyr Database[74] on transactions resulting in change of ownership in listed companies and case law) as a step to demonstrate the practical impact the acquiring of minority shareholdings may pose on the internal market.[75]

The Commission's single most important argument to underpin the necessity and the degree of seriousness the lack of self-standing provisions governing structural links may cause seems to stem from economic theory (combined with the *Ryanair v Aer Lingus* case). According to Annex I, the economic effects of acquiring minority shareholdings depends on the underlying reasons for the particular transaction. Such reasons could in turn be divided into two types of elements, namely: i) the financial interest flowing from an acquisition and ii) the corporate rights conferred by an acquisition. The financial interest refers to the acquirer's entitlement to shares in the target company whilst the corporate rights refer to the acquirer's right to influence competitive decisions such as price, output and product selection. The elements could create incentives for companies acquiring financial interests in a competing target company to compete less aggressively by e.g. increase its own prices whilst an acquisition of significant influence, by means of corporate rights, may create incentives for the acquirer to raise the target company's prices. According to the economic literature there are certain scenarios, encompassing the acquisition of control and decisive influence, that escapes the current EU merger control even if the holder of NCMS may still be able to exercise material influence over the target company which potentially may give rise to anti-competitive effects.[76] Similar conclusions, based on advanced economic theory, where drawn in the 2009 OECD report on minority shareholdings and interlocking directorates.[77] The report contains an exhaustive analysis of possible anti-competitive effects that might be triggered by creation of structural links (from a competition law perspective). In paragraph 47 of the consultation paper, the Commission quotes the OECD report to underpin the necessity of improving current EU merger control.

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[72] Annex I, *"Economic Literature on Non-Controlling Minority Shareholdings ("Structural links")"*, to the Commission Staff Working Document, *"Towards more effective EU merger control",* SWD (2013) 239 final, Part 2/3.

[73] Annex II, *"Non-controlling minority shareholdings and EU merger control",* to the Commission Staff Working Document, "*Towards more effective EU merger Control",* SWD (2013) 239 final, Part 3/3.

[74] See para. 91-105, Annex II, *"Non-controlling minority shareholdings and EU merger control",* to the Commission Staff Working Document, "*Towards more effective EU merger Control"*.

[75] Commission Working Staff Document, "*Towards more effective EU merger control",* SWD (2013) 236 final, p. 4.

[76] Annex II, *"Non-controlling minority shareholdings and EU merger control",* to the Commission Staff Working Document, "*Towards more effective EU merger Control",* SWD (2013) 239 final, Part 3/3, p.3.

[77] OECD, *"Antitrust issues involving minority shareholdings and interlocking directorates",* DAF/COMP(2008) 30, 2009. Available at: http://www.oecd.org/daf/competition/mergers/41774055.pdf .

It could be reasonably contended that, by falling back on the OECD report, the Commission is seeking to present an idea of global acceptance of the existence of the phenomenon as a way to further support its position.

Considering the Commission's rather convincing position towards introducing an additional set of rules, it is noteworthy to stress that the Commission, under current merger legislation, already has the possibility to scrutinise structural links under most circumstances (see above under 3.2.1). Although such scrutiny is limited (the Commission is only allowed to review pre-existing structural links) it has occurred in a significant amount of cases[78]. The reason behind the limitation seems to lie in the notion that the creation of a structural link, which neither itself change the control in another company nor is likely to impede competition. However, where a company, previous to a transaction, already holds possession of minority shareholdings in its competitor(s) and/or other companies and where such minority shareholdings is frequently offered to divest as a step to remedy competition concerns there is no legal toolkit available for the Commission to intervene.[79] The same applies where NCMS has been acquired after examination made by the Commission. Therefore, when a subsequent acquisition of minority shareholdings does not constitute an acquisition of control the Commission is not empowered to interfere. This is so, even if the competition concerns would have been exactly the same as if the Commission were to review pre-existing minority stakes, a situation that the Commission consider to be rather unsatisfactory.[80]

To this date, there are three Member States that, in its domestic merger regimes addresses structural links, namely: Austria, Germany and the United Kingdom. The Commission demonstrate the need of expanding the scope of the Merger Regulation by highlighting several cases that have been pending before the German Bundeskartellamt (The Federal Cartel Office in Germany).[81] The cases concerns inter alia the energy sector in which the acquisition of minority shareholdings in local and municipal electricity suppliers by companies in the upstream market was either prohibited or conditionally cleared as they were considered to significantly harm the competition in Germany.[82]

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[78] See e.g. Case COMP/M.3653 – Siemens/VA Tech, in which Siemens had a minority stake in SMS Demang and the Commission found horizontal concerns even if Siemens had already announced an option to sell its stake in SMS Demang but which was delayed due to a litigation process. Therefore, the Commission found that Siemens, via its minority shareholdings, would still have influence on the competitive conduct. The Commission approved the merger flowing a commitment by Siemens to transfer its shares in SMS Demang as soon as possible.

[79] Annex II, *"Non-controlling minority shareholdings and EU merger control",* to the Commission Staff Working Document, "*Towards more effective EU merger Control",* SWD (2013) 239 final, Part 3/3, p. 4.

[80] Commission Working Staff Document, "*Towards more effective EU merger control",* SWD (2013) 236 final, p. 5.

[81] See e.g. cases B8-107/02 EWE, E.DIS/Stadtwerke Eberswalde, B8-27/04 Mainova/Aschaffenburger Versorgungs AG, B8 – 96/08 EnBW / EWE.

[82] Commission Working Staff Document, "*Towards more effective EU merger control",* SWD (2013) 236 final, p. 5 f.

Whilst the Commission makes use of jurisdictional issues by highlighting domestic concentration control systems (read Austria, Germany and UK) as a step to advocate the necessity of self-standing provisions, others argue that the lack of self-standing provisions may also undermine the objective of harmonised rule-making as certain minority shareholding transactions may be subject for undesirable and unfair scrutiny under a certain regime, e.g. the United Kingdom who uses a "material influence" test rather than the stricter European "decisive influence" test.[83] The position taken by Commission officials *Joaquin Almunia* and *Nadia Calvino* at the Global Competition Review's Conference in Brussels in September 2010 underpins that the Commission supports the idea of greater harmonisation of (domestic) merger regimes as it would avoid situations where substantive and procedural rules between different domestic systems could lead to dissimilar outcomes and thus provide greater legal certainty while decreasing burdens and costs for undertakings active on a cross-border level.[84] The objective of introducing harmonised merger provisions to provide greater legal certainty while decreasing burdens and costs for companies is indeed interesting as most of the respondents consider the proposal to bring the opposite to the table.

Moreover, the Commission emphasises that the possibility to tackle minority shareholdings under Article 101 (agreements restricting competition) and Article 102 (abuse of dominance) of the TFEU is rather limited. Although the CJEU expanded the applicability of Article 101 in *British-American Tobacco v Commission*, it is still unclear whether the acquisition of NCMS may constitute an "agreement" within the meaning of the Article 101[85] and especially in situations where shares are built up in an undertaking based on the acquisition of shares traded freely on stock exchange.[86] The Commission further stress that the use of Article 102 would only be applicable under very narrow circumstances as the acquirer of the minority shareholdings, at the time of the acquisition, has to hold a dominant position which *per se* exclude the creation of structural links by non-dominant companies from the scope of Article 102.[87]

[83] C. Riis-Madsen, et.al, *"Reform of the EU Merger Regulation: Looking out for the Minority"*, CPI Antitrust Chronicle, January 2012, p. 3.
[84] . S. Rusu, *"Eu Merger Control and Acquisitions of (Non-Controlling) Minority Shareholdings – The State of Play",* CLaSF WP Series No. 10, February 2014, p. 6.
[85] Commission Working Staff Document, "*Towards more effective EU merger control",* SWD (2013) 236 final, p. 6.
[86] Irish Competition Authority, *"Submission to the European Commision Public Consultation: Towards more effective EU merger control",* S/13/04, p. 3.
[87] http://www.lexology.com/library/detail.aspx?g=f0954d15-52ef-458d-9d0b9e783c83e17d, 2014-02-19.

One can quite easily argue that the EU competition law system is not short of tools that may be used when dealing with structural links, yet the Commission, or to be more precise, Commissioner Almunia state that the existing provisions in the Merger Regulation and the scope of Article 101 and 102 is not covering all situations of structural links or is to narrow in the specific context.[88] This same view is also reiterated in the consultation paper (including its annexes). Consequently, the Commission appears to call for an "update" of the current Merger Regulation by introducing self-standing provisions that would directly provides it the possibility to intervene in what it considers to be problematic cases of structural links.[89] According to the Commission, such update would extend the Merger Regulation to not only include concentrations defined as: *"acquisition of control of another company"*, but also the *"acquisition of minority shareholdings"*. Against this background, and as a result of satisfying the set objectives of the consultation paper, the Commission has proposed several options of how to deal with the issue.

### 3.2.3 Option 1: *"The notification system"* (ex-ante review)

According to Article 2(2) and (3) of the Merger Regulation, the Commission must make a prospective appraisal of a concentration's compatibility with the EUMR and on whether the proposed merger would; *"significantly impede effective competition, in the internal market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position"*.[90] This appraisal is primary achieved by a "substantive test"[91], commonly referred to as the SIEC test.

According to the Commission's consultation paper, and as long as the substantive test is applied in the same manner as if the (ex-ante) notified merger or acquisition were to assess a concentration holding Community dimension as defined in Article 3, a first option of reviewing minority shareholdings could simply be to extend the current regulation to also cover ex-ante merger control to structural links. Thus, this implies that *"all relevant"* structural links would have to be notified to the Commission in advance and subsequently be declared compatible or incompatible with the Merger Regulation by the Commission, the idea of *"the notification system"*.[92]

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[88] Joaquin Almunia, SPEECH/12/773. Available at: http://europa.eu/rapid/press-release_SPEECH-12-773_en.htm.

[89] C. S. Rusu, *"Eu Merger Control and Acquisitions of (Non-Controlling) Minority Shareholdings – The State of Play"*, CLaSF WP Series No. 10, February 2014, p. 9.

[90] Article 2(2) and(3) of the Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings.

[91] The rationale behind this method is explained in recital 25 of the EUMR and will not be further explained in this paper.

[92] Commission Working Staff Document, "*Towards more effective EU merger control"*, SWD (2013) 236 final, p. 7.

The Commission does not define the concept of all relevant structural links any further but just imply that such structural links would fall under the scope of providing limited information similar to what is the case under the "Short Form CO" (see 2.2 above).[93]

### 3.2.4 Option 2: "Self-assessment system" or "Transparency system" (discretionary review)

The Commission's second option aims at providing the Commission the discretion to select cases of structural links to investigate. Such system could, according to the consultation paper either be achieved by a *"self-assessment system",* where the obligation to notify an acquisition of NCMS would not be mandatory for the undertakings and so the concerned parties would be allowed to proceed with their transaction, but the Commission would have the option to *ex-offico* open an investigation if considered appropriate. Under such system the Commission would have to rely on its own market intelligence or by complaints to become aware of a possible creation of a structural link that may impede the competition on the internal market.[94]

As an alternative to the self-assessment system, the Commission has introduced a *"transparency system"* by which parties involved in the creation of structural links ensure that the transaction do not take place without notifying the Commission hereof. As it is fairly unlikely that an acquisition of NCMS would significantly impede effective competition, the Commission emphasises that the concerned parties would merely be obliged to file a short information notice.[95] In order to create awareness of the transaction (transparency) the Commission would have the obligation to publish the information for any third party and Member State comments. The Commission could then investigate, if appropriate and desirable.[96]

In addition to both the self-assessment system and the transparency system, the Commission opens up for discussion of the possibility for undertakings to make voluntarily notifications as well as the possibility to tie the systems with so-called *"safe harbours",* standstill obligations and certain time limits (see comments about this below).

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[93] F. Depoortere & G. Motta, *" International Comparative Legal Guide to: Merger Control 2014"*, 10th ed., Global Legal Group, Chapter 2, I.A., para 9.

[94] Commission Working Staff Document, "*Towards more effective EU merger control",* SWD (2013) 236 final, p. 7

[95] Containing e.g. information about the parties and the transaction and limited information on the sector or markets concerned.

[96] Commission Working Staff Document, "*Towards more effective EU merger control",* SWD (2013) 236 final, p. 7

Lastly the Commission highlights that both systems under the second option could be subject for the substantive test (as "full" mergers) and equally fall under the Commission's jurisdiction only if the concerned parties exceeds the turnover thresholds as set in Article 1 of the EUMR. [97] By accepting such approach, the already established provisions would contribute to ensure legal certainty (see further below).

### 3.2.5 The notion of "problematic cases" of structural links

In the Commission's consultation paper, the term *"problematic cases"* is frequently recurring without being further defined. Nor is it defined in the EUMR and its accompanying documents. Although, one can argue that the term does not need further explanation as the Commission acknowledge that:

> *"However, as the number of cases creating problematic structural links seems to be rather limited, it may be doubted whether it is necessary to apply all the procedural rules of the current merger regulation to structural links, in particular the mandatory ex-ante notification system, or whether procedural rules can be devised so that the Commission is able to select the problematic cases only."*[98]

One can interpret the above as it is solely for the Commission to assess whether structural links creates problematic cases on a case-by-case basis. However, and since this is not the only option, it seems rather decisive to also have an idea of how the term may be perceived by others.

As there is no legal definition (at least not when it comes to structural links) one cannot be exactly sure what the Commission means when using the term. However, the Bundeskartellamt explains the concept in a rather instructive way by which it means that problematic cases are those that significantly impedes effective competition and in particular if the merger or acquisition is expected to create or strengthen a dominant position. However, such cases would most probably fall under current Merger Regulation or Article 102, TFEU and so the definition needs further investigation.[99] Hence, companies that significantly impede effective competition might just be those that gain a scope of action to such a degree that there is no longer sufficient control of the competition. Accordingly they would have the possibility to e.g. increase their price or lower the quality of their products or services without risking losing their consumers or clients[100] or confer the right to board representation or veto right. Such actions may not *per se* be abuse of dominant position but can also be the result of acquiring decisive control in a competitor or other company without acquiring a majority post.

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[97] ibid.
[98] Commission Working Staff Document, "*Towards more effective EU merger control",* SWD (2013) 236 final, p. 6.
[99] http://www.bundeskartellamt.de/EN/Mergercontrol/, 2014-02-20.
[100] ibid.

Whether such a situation may occur as a result of the creation of structural links would most probably need to be assessed on a case-by-case basis by the Commission (or else) who then would have to apply the same set of rules as if the situation were to cover a full merger. If adopting this approach one can elevate the understanding of the rationale behind the concept that only creations of structural links that equals full mergers shall be considered problematic and consequently be subject for the substantive test and if appropriate, investigated by the Commission.[101]

## 3.3 Selection of responses from the consultation period

As mentioned above the New Implementing Merger Regulation[102] does not include the proposed merger control for structural links. The reason hereof seems to lie in the fact that many of the respondents[103] opposed the proposal as they considered it to rather create disadvantages than advantages, in particular with respect to the notion of legal certainty, undue burdens and increasing costs that the proposal might procure but also as they consider the Commission's existing legal toolkit sufficient. In the forthcoming a selection of responses will be highlighted.

### 3.3.1 National competition authorities

Before examining a selection of responses from NCAs it is indeed noteworthy to stress that out of six submissions, three are from Member States (Austria, Germany and the United Kingdom), all holding national merger legislation governing the creation of structural links, whereas one is from Norway (who is not part of the EU but part of the EEA[104]), yet having national legislation covering the issue. The remainder are from Ireland and Poland respectively, both Member States that does not have national merger legislation governing this area. Hence, to be able to give an objective view of the submitted responses, this section will bring light upon the responses from Austria (whose national legislation[105] governs structural links) and Ireland (whose national legislation[106] do not governs structural links). This sub-heading should be read in the light of Annex A, and in particular question 1.

[101] See last paragraph in 3.2.4 above.
[102] Commission Implementing Regulation (EU) No 1269/2013 of 5 December 2013 amending Regulation (EC) No 802/2004 implementing Council Regulation (EC).
[103] All responses are available at the Commission's website: http://ec.europa.eu/competition/consultations/2013_merger_control/index_en.html.
[104] European Economic Area.
[105] E.g. the Cartel Act 2005 (Kartellgesetz) and Competition Act (Wettbewerbsgesetz).
[106] Number 14 of 2002, Competition Act 2002.

#### 3.3.1.1 Austria

According to the Bundeswettbewerbsbehörde[107] (hereinafter referred to as *"BWB"*) the current Merger Regulation establish a clear delineation between the jurisdictional competence between, on the one hand the Commission and on the other the NCAs based on turnover thresholds (one-stop shop principle), which in turn safeguards legal certainty and creates a clear distinction between the Commission's and NCAs jurisdictional competence. As the BWB consider "certainty" and "distinction" well incorporated within EU and an important element in the European merger control, it explicitly favours a notification system by which it recognises that the Commission will have exclusive jurisdiction to scrutinise all structural links with Community dimension under current merger legislation and under the same conditions as if it was a full merger. This would result in safeguarding the clear distinction of the respective jurisdictions and would maintain the one-stop shop principle intact as well as avoid situations whereby the same structural link could be subject for review by both the Commission and NCAs.[108]

Moreover, the BWB stresses the necessity for Member States to have sufficient information to be able to decide upon referral requests if the Commission were to introduce any of the selective systems. This is especially so, if the selective systems were to include voluntary notification as the Member States would have to have the capacity to assess whether such notification shall be referred or not. According to BWB both situations could be detriment or at least burdensome for smaller authorities, which do not, by its very structure, have the capacity to meet such requests and handle such amount of information.[109] Accordingly, both the self-assessment system and the transparency system may pose overwhelming burdens for smaller authorities and is therefore excessive to its objectives.

It seems rather clear that the BWB consider the notification system to be a suitable solution to meet the set objectives as the system would not create any great changes to the current referral system but would merely provide the Commission the possibility to investigate acquisitions of NCMS of very specific nature, meeting the same criteria's as other mergers and acquisitions.[110] The rationale behind its fairly positive attitude towards the proposal could be motivated by the very reason that Austria already make use of a similar system and therefore, the impacts of the notification system would not be very significant.

[107] The Austrian Federal Competition Authority.
[108] Dr. T. Thanner, *"Public consultation: Towards more effective EU merger control HT.3053",* p. 2.
[109] Ibid. p. 2 f.
[110] Ibid.

### 3.3.1.2 Ireland

If the Austrian submission was rather concise taking a clear standpoint, Ireland's can be considered the opposite. Their nine pages submission addresses only the issue of structural links in which the Irish Competition Authority (hereinafter referred to as the *"TCA"*) not only provides answers to the raised questions[111], but also introduces an alternative proposal.

Contrary to Austria's merger control system, the TCA set forth in its submission that the Irish merger regime as set out in Part 3 of the Competition Act 2002[112] (as amended in 2012) constitutes a mandatory obligation for notification of proposed mergers or acquisitions exceeding certain thresholds (as defined in law) with the additional possibility for parties involved to notify on a voluntary basis if below the thresholds. However, and contrary to the Austrian legal framework, the trigger for notification is solely based on change of control, either by transfer or acquisition.[113] As a consequence, the TCA does not have the authority or mandate to address a review or investigation with reference to structural links. Thus, the Irish regime only applies if either of the parties acquires decisive influence or sole control in the other party (similar to the Merger Regulation).[114]

As a starting point the TCA generally welcomes the proposal as outlined in the consultation paper and do indeed agree that there is an enforcement gap by which the control of minority shareholdings is not subject for review even if the creation of structural links may harm the competition. Nonetheless, the TCA identifies two issues, namely:

- *Can structural links significantly impede competition?*
- *Should the Commission be able to address them with the new option?*

According to the TCA there is a universally accepted notion that partial ownership short of control can impede the competition. The assertion is substantiated by examples of legal systems[115] that has already recognised that partial acquisition can substantially lessen competition.[116]

With regards to its second concern, the TCA emphasises that it is possible to pursue the creation of structural links by using Article 101 or Article 102 of the TFEU but enhances that such approach would be consistent with difficulties. Nor does Member States (as only three appears to regulate the issue) have sufficient means to effectively challenge acquisitions of NCMS

[111] See Annex A.
[112] Number 14 of 2002, Competition Act 2002.
[113] Section 16 of the Comepeption Act 2002.
[114] Irish Competition Authority, *"Submission to the European Commision Public Consultation: Towards more effective EU merger control",* S/13/04, p. 2.
[115] E.g. Austria, Germany, the UK (within EU) and Canada, Japan and the U.S. (outside EU).
[116] Irish Competition Authority, *"Submission to the European Commision Public Consultation: Towards more effective EU merger control",* S/13/04, p. 3.

and, even if the Member States decides to revise its national legislation it seems more likely that the creation of problematic structural links would affect cross-border transaction and thus be within the jurisdiction of the Commission. Accordingly the TCA seems to consider that the Commission should be able to address NCMS as long as this is executed in a proportionate and balanced manner while minimising the regulatory burden on companies and satisfying the need of certainty and transparency.[117]

The TCA stress that the transparency system is the most suitable to meet the set objectives as the notification system, even if the notifiable criterion were to be low, e.g. 10% or more demanding, e.g. 30% would, in the former presumably result in a very large number of notifications that are not problematic (and therefore be burdensome) whilst the latter seems likely to create a system by which concerned undertakings may try to escape the Commission's review by actively counteracting the purpose which in turn could result in less legal certainty. As a consequence, such system would unlikely strike the right balance between burden and benefit.[118]

Likewise the TCA does not favours the self-assessment system as it considers that such system would merely create difficult administrative issues that solely relies on the Commission's market intelligence or third party complaints. Accordingly, there is a risk that the Commission's market intelligence will result in reviewing only high profile and/or hostile transactions which do not correlate to the actual competition concerns on the market as other structural links could also be subject for review. Therefore, and in conclusion the TCA favours the transparency system, as this system would balance the need for information without significantly increasing the regulatory burden on undertakings.[119]

In addition to the proposed systems the TCA introduces an alternative option[120] which is a compromise between a pure mandatory system and a voluntary system and that has similarities with the self-assessment system. According to the TCA, this system would provide the Commission sufficient tools to challenge the acquisition of NCMS either by requiring parties to a problematic transaction to notify or by relying on voluntary notifications. The system would work effectively as long as the Commission is obliged to keep track of and gather information about structural links, not overly rely on media reports and/or reports from third parties. Furthermore, for the system to work the TCA stresses that it would be necessary for the Commission to identify all possible cases which would be covered by the mandatory requirement (even if such number would be relatively small). Such mandatory requirements could consist of e.g. a set percentage of shareholdings and/or by the conferring rights such as board membership or veto right over strategic decisions.

[117] Ibid.
[118] Ibid., p. 4.
[119] Ibid.
[120] The TCA refer this option as the "self-assessment plus" system.

In conclusion the TCA emphasises that this system will most probably offer a healthy balance between, on the one hand the possibility to challenge problematic cases and, on the other provide legal certainty for undertakings under the voluntary option and consequently strike the right balance between burden and benefit.[121]

As for question four to nine (see annex A), the TCA agrees with most of what is identified in the consultation paper but highlights the difficulty to establish the right level of information that an acquirer should be obliged to provide. It should not be too burdensome for undertakings, nor should it be as extensive as the current CO form.[122] It also stresses that it is essential to create a system by which the level of legal certainty remains high.[123]

As a concluding remark one can argue that, even if the TCA does have the possibility to review creations of structural links whereby one of the transactional parties confers a decisive influence over the other, they *pari passu* seems to support the general directions taken by the Commission. The rationale behind Austria favouring the notification system probably lies in the reality that they practice a system similar whilst Ireland lacks such system in its regulatory framework. What is certain is that all Member States submitting their responses appear to welcome the proposal in one way or another, sharing the Commission's view, that acquisitions of minority shareholdings may give rise to anti-competitive behaviour. However, other organisations such as law firms and companies seem to disagree.

### 3.3.2 Law firms

Out of 21 responses from well-established law firms, only three seem to consider it directly appropriate to complement the Commission's toolkit, which enables it to investigate creations of structural links under the Merger Regulation.[124] This is indeed an interesting contrast as all the NCAs welcomed the proposal (to a greater or lesser extent). It is of course desirable to give a comprehensive review of all responses, however that is not feasible given the scope of the paper. Therefore this section will introduce the opinions of *Baker & McKenzie* and *Vinge*. The reason hereof is because their responses are predominantly focusing on the impacts for businesses and will therefore instructively mirror the purpose of the research question. This sub-heading should be read in the light of Annex B.

[121] Irish Competition Authority, *"Submission to the European Commision Public Consultation: Towards more effective EU merger control",* S/13/04, p. 6.
[122] Comparable with the BWB's argumentation (see above under 3.3.1.1).
[123] Ibid. p. 6 f.
[124] See Annex B.

As a starting point it is noteworthy to say that most responding law firms shared the same view with regards to:

- The self-assessment system is best suitable as it is the less burdensome for undertakings,
- A limitation period is essential to ensure legal certainty for undertakings,
- The importance of safeguarding the internal market and not create an unattractive market for investors,
- The importance of clear definition of "safe harbours" and "time limits",
- Most law firms recognise that there is an enforcement gap, but highlights the very narrow practice of structural links.[125]

#### 3.3.2.1 Baker & McKenzie

Baker & McKenzie (hereinafter referred to as *"McKenzie"*) recognises in its response[126] that, it is only under very limited circumstances that the creation of structural links may give rise to competition issues. Thus, it considers a wholesale legislative reform to address such limited numbers of cases is a highly disproportionate burden for European as well as international companies doing business within the internal market and that the proposal published by the Commission may potentially create legal uncertainty for businesses. Even if the economic theories as outlined in Annex I of the consultation paper are well underlined, McKenzie argues that the consultation paper features insufficient hard evidence that myriad forms of structural links exists within the Union that could result in significant anti-competitive effects justifying a legislative reform.[127]

As is also mentioned by the author under 2.4, McKenzie seems to share the notion that the proposal appears to fly directly in the face of its intention as it is labelled:

> "*The proposal aims to make EU merger control even more* ***business-friendly*** *by cutting red tape and streamlining procedures. This initiative is part of the Commission's overall effort to make administrative procedures less burdensome for business, thereby stimulating growth and making Europe more competitive.*"[128]

McKenzie underlines that the creation of a system whereby NCMS could be subject for investigation by the Commission are likely to impact the health of the European economy as there is a perceived risk that financial investments, by way of minority shareholdings, will be less commercially attractive and so the consultation paper is rather disadvantageous than business-friendly for companies.[129]

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[125] According to the consultation paper only 20 out of approximately 5300 cases would be subject for review.
[126] Baker & McKenzie, *"Response to the European Commission's consultation on the EU Merger Regulation in respect of structural links and the referral of merger cases"*.
[127] Ibid. p. 1.
[128] http://europa.eu/rapid/press-release_IP-13-288_en.htm, 2014-02-27.
[129] Baker & McKenzie, *"Response to the European Commission's consultation on the EU Merger Regulation in respect of structural links and the referral of merger cases"*, p. 1 f.

Furthermore McKenzie argues that the Commission, under its current merger control toolkit, does indeed have the necessary tools to address problematic cases of structural links by several legal means. As is clearly set out in paragraphs 56-60 of the Jurisdictional Notice, McKenzie notes that, structural links that confer control to one or the other party, *de jure* or *de facto,* is caught by the notice. The same applies also for pre-existing structural links as described under 3.2.1 and 3.2.2. As a last resort and if the creation of structural links is not caught by the Merger Regulation, the Commission has the possibility to take action by relying on Articles 101 or 102, TFEU.[130]

Taking into account the abovementioned, McKenzie considers that the proposal in respect of structural links should be dropped in its entirety, as it would be detrimental for affected undertakings and lessen the incentives to invest in the internal market.

#### 3.3.2.2 Vinge

Vinge does indeed seem sceptical of the new merger reform. In its response it considers the proposed changes as unnecessary, too far-reaching and disproportionate to the perceived problem, stating that the Commission's existing antitrust tools are sufficient. Vinge further stresses, as the Commission also notices, that the numbers of cases creating problematical structural links are rather few. Introducing a general notification requirement would therefore be *"disproportionately burdensome"*. Although Vinge notices that the Commission is proposing to introduce a system tied to the one-stop shop principle, it does also stresses that most Member States do not even review structural links under their national merger control regime which in itself underpins that Member States do not perceive the situation as problematic as the Commission.[131]

Similar to McKenzie, Vinge further highlights that the review of structural links would not help EU to become more business-friendly as it would create less incentives for businesses to invest in the internal market. Even if the Commission were to introduce a Short Form (simplified procedures) this would still end up being both costly and time consuming for the notifying companies, not taking into consideration the effective use of companies' resources. Lastly Vinge emphasises that the objective of the consultation paper, i.e. to create a more business-friendly union, under both the on-going merger reform and the modernisation of the EU antitrust rules in 2004 is contradictory as it will merely provide the Commission additional power to investigate companies and thus, not create a more business-friendly environment.[132]

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[130] Ibid. p.3 f.
[131] Vinge, *"Response of Advokatfirman Vinge to the European Commission's public consultation on a proposal towards more effective EU merger control",* 11 September 2013, p. 1.
[132] ibid. p. 1 f.

### 3.3.3 Companies

Under the consultation period, six companies, all of them having an annual turnover exceeding the thresholds for Community dimension, submitted their responses. It is noteworthy to stress that, out of six submissions, three originates from airline companies, one in favour (Aer Lingus), one partially in favour (Air France) and one firmly against (Ryanair) the proposal. It is fair to argue that the reason hereof is because of the extensive judgements in the *Ryanair v Aer Lingus* case. The remainder are from other globally leading companies whom are all, to a greater or lesser extent, against the modifications. Therefore, to be able to give a comprehensive idea of the businesses standpoint, this section will highlight the responses from Air France (semi-pro - under certain circumstances) and Orange[133], an industrial investor (contra). Both Ryanair and Aer Lingus will be exhaustively discussed under chapter 4 and so most of the responded companies will be considered in one way or another. This sub-heading should be read in the light of Annex C.

#### 3.3.3.1 Air France

Société Air France (hereinafter referred to as *"Air France"*) welcomes the Commission's initiative to further investigate the identified enforcement gap but only when certain criteria's are met, namely:

1. *"The acquisition of a minority stake does raise **serious** competition concerns;*
2. *Anti-trust law is hardly applicable to the operation given the absence of agreements entered into between the two companies*
3. *Ex-ante control by members states and ex-post review through articles 101 and 102 TFEU is not efficient nor applicable regarding a specific transaction"*[134]

As is evident from the criteria's only in very limited circumstances will the acquisition of NCMS be subject for the Commission's review under Air France's submission. Air France firmly points out that a systematic and mandatory review of minority shareholdings would not be relevant and that the result thereof could constitute an impediment for companies to simply invest in the internal market even if the investment as such would not give rise to any competition issues.

[133] Everything Everywhere Limited ("EE") is the UK's largest mobile communications provider with nearly 26.8 million customers and mobile subscriber market share of 33%. The EE, which operates exclusively in the UK, runs three of Britain's most famous brands – EE (newly established in 2012), Orange and T-Mobile. The EE revenue for the year 2012 was £6.7 billion. Information from *"Everything Everywhere Limited* (Comp. no. 2382161) *Annual Report Group and Company Financial Statements Year ended 31 December 2012",* 2014-03-03.

[134] Société Air France's submission, "*European Commission – Consultation on the EU Merger Regime Acquisition of non-controlling minority shareholdings "structural links", 12/09/2013, MM/OD.UA,* p. 1.

If the Commission, even so, decides to add a new tool in order to scrutinise structural links, Air France favours the self-assessment system combined with the possibility for companies to voluntarily notify a proposed merger or acquisition as it considers this solution to be the most manageable for companies to comply with. Air France further points out that it is for the Commission to decide whether to continue on the set path, stating that the system, as it is construed today, may not be deemed appropriate for all NCMS but that Merger Regulation intervention could nevertheless be an appropriate legal ground for implementing such system. This is so only if the structure of the market would significantly change by consequence of creations of structural links and where Article 101, TFEU and/or ex-ante review is not possible.[135]

Even if Air France partially welcomes the consultation paper it seems to take the view that it is only in very limited cases a new legal toolkit would be applicable and that the options presented need further explanation before implementation as they are not sufficiently underpinned. A similar view is emphasised by Orange although having more far-reaching doubts. Orange introduces four arguments against the proposal in its submission.

#### 3.3.3.2 Orange

Firstly Orange seems to consider, as many of the law firms, that the existing regulatory framework already covers most, if not all, situations of structural links, stating that the cases cited in the consultation paper, and in particular in Annex II, does not constitute a justified ground for the proposed changes.[136]

Secondly Orange stresses that the changes as such would be disproportionate as the cost, burden and realisation of crucial transactions for businesses would outweigh the benefits of a new system.[137]

As a third argument Orange highlights that the proposed amendments would be contrary to its aims, inter alia because it would go against the principle set out in Article 103 (2)(b) of the TFEU *"The regulations or directives referred to in paragraph 1 [Articles 101 and 102] shall be designed in particular: /.../ to simplify administration to the greatest possible extent"*. Accordingly, EU competition law should foster competition rather than hamper it; something Orange deems the proposal to do. [138]

Lastly, Orange emphasises the importance of protecting the internal market, taking the view that raising procedural obstacles for transactions may discourage the incentives to invest in up-coming businesses or at least make

[135] Ibid., p. 1-2.
[136] Orange, *"Orange reply to the consultation "Towards more effective EU merger control"*, September 2013, p. 1.
[137] Ibid. p. 1 f.
[138] Ibid. p. 2.

investors to choose fund companies outside the geographical area of EU where they are subject for less procedural obstacles.[139]

In conclusion, Orange, as well as many of the other responding companies (and law firms), argues that the additional burdens that the proposal will pose on companies in relation to the very few identified problematic cases are disproportionate to the perceived problem.

## 3.4 Chapter summary

This chapter has examined the current EU merger practice, the Commission's consultation paper and its primary objectives and a selection of responses stemming from the consultation period. Whilst the Commission seems rather enthusiastic to plug the enforcement gap, the majority of the respondents have the opposite opinion. What one can claim is that most NCAs seem to welcome the initiative. The reason hereof might lie in the fact that most of the responding NCAs already make use of a similar national legal system or has recently been involved in situations where the absence of *lex specialis* have caused some uncertainty (Ireland). It would indeed be more interesting if Member States lacking national merger regimes governing the issue had submitted their opinions. Unfortunately this is not the case. It could be reasonably contended that this is because most Member States passively share the Commission's position.

As is evident from Annex B, most law firms consider Merger Regulation intervention unnecessary as it would merely create uncertainty, be disproportionate to the perceived problem and create less incentive for businesses to invest in the internal market. That same view goes for most of the responding companies, where only Aer Lingus favour the proposal without further revision whilst the rest consider the control of NCMS unnecessary in part or in whole.

Even if there has been different perceptions throughout the consultation period, the Commission decided (as for now) in December 2013 to only implement the new "simplification package"[140], and as the Commission's Vice President, *Joaquín Almunia* said in its official speech:

> *"**The Merger simplification package shows that we are listening to our stakeholders**. It is the most comprehensive reform of our merger procedures to date and will make them much simpler. This will reduce the administrative burden and cost for business at a time when it needs it most."*[141]

[139] Ibid.
[140] Reforming the referral system between the Commission and national competition authorities, making it more business-friendly by streamlining and shortening procedures but without fundamentally changing the system's basic features.
[141] European Commission, Press Release, *"Mergers: Commission cuts red tape for businesses",* Brussels, 5 December 2013, IP/13/2014.

Although structural links was left outside the new merger reform, the author firmly believe that the consultation paper will constitute the basis for further discussion on how to design a system that satisfies a majority of concerned stakeholders, yet provide the Commission the possibility to intervene. This conviction will be further discussed below (see chapter 6).

# 4 Ryanair v Aer Lingus

## 4.1 Introduction

The first type of limitation in the Commission's power to intervene became apparent in the *Ryanair v Aer Lingus* decision[142] and the following litigation at the General Court.[143] The first case took place in 2006 and concerned the proposed acquisition of Aer Lingus by Ryanair, which was later prohibited by the Commission as it would significantly harm the competition. After the prohibition, Ryanair made several acquisitions in Aer Lingus, which eventually led to stake holdings of roughly 29,8%. In 2010 the EGC confirmed that the Commission could not act against the minority shareholdings under the Merger Regulation and the case was later in 2010 under investigation by the UK Office of Fair Trading (hereinafter referred to as the *"OFT"*) and under UK law, which – unlike the Merger Regulation governs acquisitions of NCMS. As late as in June 2012, the OFT referred the issue to the Competition Commission (hereinafter referred to as the *"CC*") for further investigation. The case was finally judged upon in August 2013.[144] Below, and in the light of the aforementioned decisions/rulings (collectively referred to as the *Ryanair v Aer Lingus* case), the impacts on EU merger control will be discussed.

### 4.1.1 Background

The *Ryanair v Aer Lingus* case is remarkable in many aspects. Not only are the findings of vital importance for the proposed changes of the European merger control, its length, accurate examination and information collected is significant.[145] Having this in mind, only a brief introduction of the background, based on the CC's published report on *"the acquisition by Ryanair of a minority shareholding in Aer Lingus"* [146] will be discussed.

Ryanair, founded in Ireland in 1985, is the leading low-cost/low-fare passenger aircraft carrier in Europe serving approximately 1 500 routes in 28 countries across Europe with an annual turnover, in March 2013, of €4,884 million. As for 2013 Ryanair operated 12 routes from Ireland to airports in Great Britain.[147]

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[142] Commission Decision, COMP/M.4439 Ryanair/Aer Lingus
[143] Judgment of the General Court in case T-411/07 Aer Lingus v Commission [2010] ECR II-3691 and case T-342/07 Ryanair Holdings plc v Commission [2010] ECR II-000.
[144] Annex II, *"Non-controlling minority shareholdings and EU merger control",* to the Commission Staff Working Document, "*Towards more effective EU merger Control",* SWD (2013) 239 final, Part 3/3, p. 4 f.
[145] E.g. the Commission decision M 4439 consist of 514 pages (non-confidential version) and the EGC ruling of 122 detailed and carefully thought through pages.
[146] Competition Commission, *Ryanair Holdings plc and Aer Lingus Group plc – A report on the completed acquisition by Ryanair Holdings plc of a minority shareholding in Aer Lingus Group plc,* 28 August 2013, website: www.competition-commission.org.uk.
[147] Ibid., Para. 2.

Aer Lingus was founded by the Irish Government in 1936 and provides passenger aircraft routes between mainly Ireland and the UK, but also (through e.g. franchise agreements) to continental Europe and the USA. In 2006 the Irish Government held a 25,1 per cent of the shares and the annual turnover, in the year ended in December 2012, amounted for €1 393 million. As for 2013 Aer Lingus operated 4 routes from Ireland to airports in Great Britain.[148]

In October 2006 Aer Lingus' shares were admitted to the Irish and London stock exchange ("privatised") and only a few days after its introduction Ryanair acquired a shareholding of 19,1 per cent. This pattern continued and in July 2008 Ryanair had acquired its current level of shareholding which amounts to 29,82 per cent at a cost of €407,2 million. According to Ryanair, the rationale behind acquiring shares in Aer Lingus was to acquire the company in whole and not to influence their competitive behaviour, a line of argumentation that Aer Lingus disagreed with. Since 2006 Ryanair has launched several public offers for Aer Lingus.[149]

### 4.1.2 Judgement

The first public offer was prohibited by the Commission on 27 June 2007 and subsequently appealed by Ryanair to the EGC who followed the Commission's line of argumentation. The Commission found that the proposed acquisition would lead to overlaps on more than 30 routes[150] from/to Ireland and that Ryanair's market share would be significantly high which in turn could affect the consumers in terms of increased prices and reduction of choice. Ryanair submitted a number of commitment proposals, all rejected by the Commission as it considered the proposal to not identify the actual competition concerns.[151] Moreover the Commission found that, in contrast to other airline merger cases, the combined representation of airlines would be concentrated to one single airport (Dublin) accounting for about 80% of all scheduled European traffic from and to Dublin.[152]

In November 2007 Ryanair appealed the Commission's decision to the EGC, claiming (in five different pleas) that the Commission had manifestly erred throughout the decision. The findings of the EGC is indeed noticeable as the level of detail is large, addressing most of Ryanair's argument even where it would not have been necessary for the outcome of the ruling (something you rarely see in their judgements) taking into consideration complex technical and economic data in its assessment yet focusing closely on verifying whether the Commission had established all the necessary facts.

[148] Ibid., Para. 3.
[149] Ibid., Para. 4.
[150] Commission Decision, COMP/M.4439 Ryanair/Aer Lingus, para. 571.
[151] O. Koch, *"Yes, we can (prohibit) – The Ryanair/Aer Lingus merger before the Court",* Competition Policy Newsletter, Number 3, 2010, p. 41.
[152] Commission Decision, COMP/M.4439 Ryanair/Aer Lingus, para. 59.

The outcome of the decision was all in favour of the Commission, rejecting all five pleas from Ryanair, following the Commission in all of its 40 sub-pleas.[153]

The second public offer took place in 2008, but was later abandoned by Ryanair as the Irish Government made clear that it would not support the bid. However, and of greater importance for the acquisition of NCMS, Aer Lingus requested the Commission, during Ryanair's first public offer in 2006, to order Ryanair to divest itself of the minority shareholding and prohibit the concentration pursuant to Article 8(4)[154] of the EUMR. The Commission however, ruled that the minority shareholding did not constitute a concentration within the meaning of the EUMR and, as a consequence it did not have the power to divesture Ryanair's minority shareholdings.[155]

The decision was appealed by Aer Lingus to the EGC who had to rule upon the issue of "*treatment of non-controlling minority shareholdings"*, a blurry area of EU merger law (and the core purpose of this thesis).[156] In its appeal, Aer Lingus pointed out that not ordering Ryanair to divest its entire minority shareholding would significantly impede competition and that the Commission, in the famous *Tetra Laval/Sidel* case[157] had ordered the remaining shareholdings to be divested after declaring a concentration incompatible with the internal market. The EGC followed the Commission's line of argumentation, stating that the Commission could not order Ryanair to divest its NCMS under current Merger Regulation as:

> *"/.../ the concept of concentration cannot be extended to cases in which control has not been obtained and the shareholding /.../ does not confer the power of exercising decisive influence on the other undertaking, but forms part /.../ of a notified concentration /.../ declared incompatible with the common market /.../ without there having been any change of control"*[158]

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[153] O. Koch, *"Yes, we can (prohibit) – The Ryanair/Aer Lingus merger before the Court",* Competition Policy Newsletter, Number 3, 2010, p. 42.

[154] Article 8 of the EUMR lay down the premises for when the Commission have the power to decide whether a concentration may be compatible or incompatible with EU law.

[155] Competition Commission, *Ryanair Holdings plc and Aer Lingus Group plc – A report on the completed acquisition by Ryanair Holdings plc of a minority shareholding in Aer Lingus Group plc,* 28 August 2013, p. 3.

[156] The reader should have in mind chapter three and in particular sub-heading 3.2.1 "Current EU practice" and the responses from the law firms who consider the existing toolkit sufficient.

[157] See e.g. COMP/M.2416 – *"Tetra Laval/Sidel"* whereby the Commission (para. 97) said that: "*In the light of the fact that the concentration between Sidel and Tetra, which was declared incompatible with the common market and the functioning of the EEA Agreement on 30 October 2001, has already been implemented and in the light of the reasons set out above, it is concluded that it is necessary to order Tetra to separate itself from Sidel by divesting its shareholding in Sidel and to take additional appropriate measures in order to restore conditions of effective competition pursuant to Article 8(4) [of Council Regulation (EEC) No 4064/89]"* (former Merger Regulation).

[158] Case T-411/07 *Aer Lingus v Commission* [2010] ECR II-3691, Para. 65.

The EGC further stressed that the Commission was right to interpret that Ryanair's acquisition of a minority share can neither be regarded as "full" nor as "partial" implementation of a concentration pursuant to Article 8(4) and that the Commission, as a result, lacks the competence to order Ryanair to divest its minority shares.[159] By emphasising such point of view, the *Tetra Laval/Sidel* merger (see footnote 144) *per se* gave rise to another situation as the transaction between the parties "had already been notified and implemented" and is not, as in the present case merely "proposed" and not *de facto* implemented.[160]

Furthermore, Aer Lingus claimed that the acquisition of minority shareholdings constitutes a *de facto* control of the company as Ryanair had, according to Aer Lingus, the possibility to block important decisions and get access to confidential strategic plans and business secrets. However, this claim was also rejected by the EGC on several bases. Firstly, the EGC stated that it is not for the Merger Regulation to protect companies from commercial disputes or to remove uncertainty of important decision since such claims are rather for the competent national courts or authorities to decide upon. Secondly, the evidence put forward by Aer Lingus was not convincing enough to give the Commission the competence to make use of Article 8(4) as Aer Lingus could not prove that it was possible for Ryanair to exercise decisive influence over the company. This is e.g. shown by the fact that Ryanair requisitioned two extraordinary general meetings, both rejected by the board of directors, who instead implemented the planned decisions in spite of Ryanair's opposition. Accordingly, this event directly illustrates, contrary to the applicant's claim, that Ryanair was not in a position to impose its will.[161]

[159] Point 12 of the Commission Decision C (2007) 4600 of 11 October 2007 explains the issue in an instructive way: *"The suggested interpretation [by Aer Lingus] of the acquisition of the minority shareholding as a "partial implementation" covered by Article 8(4) of the Merger Regulation is difficult to reconcile with the wording of that provision, which clearly refers to a concentration that "has already been implemented". As the decisive element of a concentration under the Merger Regulation – the acquisition of control – is missing, there is no concentration which "has already been implemented" and the parties thus cannot be required to "dissolve the concentration". The Commission's competence is limited to situations in which the acquirer has control over the target. The purpose of decisions under Article 8(4) of the Merger Regulation is to address the negative effects on competition that are likely to result from the implementation of a concentration as defined in Article 3 of the Merger Regulation. In the present case, such negative effects cannot occur, since Ryanair has not acquired, and may not acquire, control of Aer Lingus by way of the proposed concentration."*.

[160] O. Koch, *"Yes, we can (prohibit) – The Ryanair/Aer Lingus merger before the Court"*, Competition Policy Newsletter, Number 3, 2010, p. 45.

[161] Case T-411/07 *Aer Lingus v Commission* [2010] ECR II-3691, Para. 68-72.

On 24 July 2012, Ryanair notified the Commission of their third intent to acquire Aer Lingus. Their request was, in February 2013, once again prohibited. [162] According to Commission Vice President Joaquín Almunda:

> *"The Commission's decision protects more than 11 million Irish and European passengers who travel each year to and from Dublin, Cork, Knock and Shannon. For them, the acquisition of Aer Lingus by Ryanair would have most likely led to higher fares. During the procedure, Ryanair had many opportunities to offer remedies and to improve them. However, those proposals were simply inadequate to solve the very serious competition problems which this acquisition would have created on no less than 46 routes."*[163]

Ryanair, in turn, appealed this decision to the EGC on 8 May 2013, a case which is still pending before the court.

Meanwhile, and after Aer Lingus request to the Commission to order Ryanair to divest its minority shareholdings, Aer Lingus brought the issue before the UK national authorities and on 15 June 2012 the OFT referred its inquiry to the CC for an investigation and report. The CC started its investigation in March 2013 and on 28 August 2013 the CC published its 99 pages long report regarding the divesture of Ryanair's minority shareholdings.[164]

During the investigation and according to the report, the CC mainly investigated whether Ryanair's shareholdings might:

a) *"affect Aer Lingus's ability to participate in a combination with another airline;*
b) *hamper Aer Lingus's ability to issue shares to raise capital;*
c) *influence Aer Lingus's ability to manage effectively its portfolio of slots at London Heathrow;*
d) *influence Aer Lingus's commercial policy and strategy by giving Ryanair the deciding vote in an ordinary resolution; and*
e) *allow Ryanair to raise Aer Lingu's management costs or impede its management from concentrating on Aer Lingu's commercial policy and strategy."*[165]

[162] Competition Commission, *Ryanair Holdings plc and Aer Lingus Group plc – A report on the completed acquisition by Ryanair Holdings plc of a minority shareholding in Aer Lingus Group plc,* 28 August 2013, p. 3, Para. 5.
[163] Press Release, European Commission, *"Mergers: Commission Prohibits Ryanair's proposed takeover of Aer Lingus",* Brussels, 27 February 2013, IP/13/167.
[164] http://www.competition-commission.org.uk/media-centre/latest-news/2013/Aug/cc-requires-ryanair-to-sell-shareholding, 2014-03-06.
[165] Competition Commission, *Ryanair Holdings plc and Aer Lingus Group plc – A report on the completed acquisition by Ryanair Holdings plc of a minority shareholding in Aer Lingus Group plc,* 28 August 2013, p. 5, Para. 13.

After extensive and careful examination of the specific situation, the CC found that Ryanair's minority shareholdings in Aer Lingus was likely to affect its commercial policy and strategy as Ryanair may impede or prevent Aer Lingus from being acquired by, or merging with another airline. In a time when the importance of scale to airlines and consolidation of the industry is evident, the possibility for Ryanair to impede or prevent important commercial strategies would consequently be harmful for the competition. Also, and contrary to the EGC, the CC formed the view that Ryanair was likely to affect Aer Lingus commercial policy and strategy by blocking special resolutions, restricting Aer Lingus' ability to issue shares and raise capital and to limit Aer Lingus' ability to manage effectively its portfolio of Heathrow slots. This all together would, according to Simon Polito, CC Deputy Chairman and Chairman of the Ryanair/Aer Lingus Inquiry Group, result in a: "*substantial lessening of competition between the airlines".*[166]

In conclusion the CC required Ryanair to reduce its shareholdings in Aer Lingus to 5 per cent of issued ordinary shares and established that the divesture should be accompanied by obligation on Ryanair not to seek or accept board representation or acquire further shares in Aer Lingus as long as clearance would not be given for the concentration under the EUMR.[167]

Ryanair announced on 28 August 2013 (the very same day as the CC published its report) that it plans to appeal the decision. Whether Ryanair will succeed or not is for the UK national Courts to decide.[168]

### 4.1.3 Analysis

The *Ryanair v Aer Lingus* saga is indeed remarkable and interesting in many aspects. Not only does it provide important clarifications as to the interpretation of Article 3 and Article 8(4) of the EUMR, it also shows how EU and Member States uses different legal tools to address the same issue. Whilst the Commission and EGC stress the importance of having *"decisive influence"* over the target company, UK envisages a *"material influence criterion"* which, accordingly seems to be satisfied by less control than "decisive influence".[169] Even if the Commission's consultation paper was published before the final ruling by the CC, the outcome of the *Ryanair v Aer Lingus* case provides clearer understanding of why the Commission sympathises a merger reform aiming at providing it the necessary legal toolkit to address situations like the case at hand. Consequently, if the Commission were to be able to use a more material approach (like the UK), cases similar to *Ryanair v Aer Lingus* would be subject for EU remedies.

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[166] http://www.competition-commission.org.uk/media-centre/latest-news/2013/Aug/cc-requires-ryanair-to-sell-shareholding, 2014-03-06.
[167] Competition Commission, *Ryanair Holdings plc and Aer Lingus Group plc – A report on the completed acquisition by Ryanair Holdings plc of a minority shareholding in Aer Lingus Group plc,* 28 August 2013, p. 99, Para. 8.127.
[168] UK is one of only three Member States that have statutory powers to review NCMS.
[169] For similar reasoning visit: http://www.cliffordchance.com/content/dam/cliffordchance/PDF/Ryanair_Aer_Lingus_article.pdf, 2014-03-06.

Another interesting conclusion to be drawn is the EGC's clear distinction of the notion "*change in control*". The EGC makes it quite clear that any form of minority shareholdings is excluded under the EUMR unless the acquisition confers *de facto* control. This is so even if recital (20)[170] of the EUMR seems to give the Commission and/or EU Courts rather broad discretion of interpretation.[171]

As stated above in section 3.2.2, the Commission may only take pre-existing minority shareholdings into account under current Merger Regulation. This prerequisite, vis-á-vis the underlying reasoning in the *Ryanair v Aer Lingus* case together with economic theory appears to be the most important rationale behind the proposal. Taking the consultation paper and the responses thereof into account, as well as the current EU merger practice and the case at hand provides a solid basis to support the purpose of this paper. In forthcoming sections, the legal and economic aspects followed by concluding remarks will be highlighted.

[170] It is expedient to define the concept of concentration in such a manner as to cover operations bringing about a lasting change in the control of the undertakings concerned and therefore in the structure of the market. /…/ It is moreover appropriate to treat as a single concentration transactions that are closely connected in that they are linked by condition or take the form of a series of transactions in securities taking place within a reasonably short period of time.

[171] O. Koch, *"Yes, we can (prohibit) – The Ryanair/Aer Lingus merger before the Court",* Competition Policy Newsletter, Number 3, 2010, p. 45.

# 5 Impact on businesses – disproportionate?

## 5.1 Introduction

After reviewing a great amount of documentation, taking into consideration the consultation paper itself, most of the responses as well as doctrine and case law it is with certainty the author can argue that the extension of the scope of the merger control to acquisitions of NCMS have not met its initial aim as a result of poor design of certain essential elements in the proposal. Those elements will be studied under this section. As the Commission clearly states: "*the paper proposes several options to achieve a regulatory framework without creating an undue burden for businesses"*, a notion not shared with the majority of the stakeholders. Whilst some seem to consider the existing toolkit sufficient (see 3.3 above), others emphasise that the balance between additional burdens, increasing costs and legal certainty in relation to the potential positive effects is not sufficiently underpinned or unnecessary in whole[172]. The rationale behind the contradictions towards the Commission's proposal is to a great extent similar and most arguments are somewhat linked. The concerns and impacts will be discussed in this chapter and should be read in the light of Annex A, and in particular questions 3b, 7 and 8, Annex B and Annex C combined.

## 5.2 Undue burdens

The Commission clearly points out that the administrative burden and possible increasing transaction costs on parties to a transaction shall be taken into consideration when considering the basis of discussion in the consultation paper.[173] It is evident from most of the submitted responses that the benefits of an extension of the EUMR are unlikely to outweigh the additional costs, administrative burdens and increasing time consumption that such extension would pose on businesses, especially considering the low level of risk an acquisition of NCMS may cause to the competitive environment.[174]

[172] See e.g. Baker & McKenzie, F. Carlin, G.B. Bushell,*" The Devil in the Detail: European Merger Regulation Reforms Increase Burden for Merger Parties",* December 2013, http://bakerxchange.com/, 2014-03-10.
[173] See inter alia question 3b. and 8 in Annex A.
[174] Linklaters LLP, *"Response to the Commission's Consultation on possible improvements to the EUMR",* 20 September 2013, p. 1.

Whilst most respondents only consider the additional burdens the proposal may pose on businesses others also advocate the impacts on the Union as a step to underpin their line of argumentation. According to, inter alia, *Canon Europe*; the extension of the rules is liable to, not only generate extra costs on businesses but also on the EU budget if the systems are not revised and construed in a satisfying way with clear definitions.[175]

Considering burdens posed on businesses is inherently dependent on which option one desires since the mechanisms behind the systems' differ. According to *Gavin Bushell*, partner in the European & Competition Law Practice Group in Brussels at Baker & McKenzie, "the notification system", as it is construed today, imposes a considerable burden on the notifying parties in terms of timing and legal and economic costs. If this system were likewise to cover the acquisition of minority shareholdings the incentive for both European and international companies to invest (within the internal market) would inevitably result in investors opting out as a result of additional costs and burdens and thus be highly disproportionate in relation to the anti-competitive problems identified by the Commission. Furthermore, Bushell stresses that, even if both the "self-assessment system" and the "transparency system" appears to involve lesser administrative burden for companies, such systems would impose a greater legal uncertainty for businesses (see about legal certainty below) which would result in greater business costs by reason of of additional evaluation of a potential investment.[176]

The majority of the responded stakeholders seem to share Bushell's notion that the notification system is too far-reaching and disproportionate to the perceived problem and that the other systems would entail a degree of risk and uncertainty as the Commission would have the possibility to intervene after the completion of a transaction.[177] As a conclusion, one can argue that the notification system enjoys the clear advantage of providing legal certainty, yet create additional burdens for companies and thus contradict the objective of the proposal whilst the self-assessment system and the transparency system would impose greater uncertainty for companies but less burdens (in relation to the notification system). Due to the Commission's quite poor examination of the different options, the overall opinion seems to be that additional revision of the systems needs to be executed before stakeholders are able to establish a precise assessment on burdens and costs associated with a certain system and before accepting a potential new legal framework to plug the enforcement gap.

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[175] Canon Europe, *"European Commission Consultation Reference: HT. 3053 – Towards more effective EU merger control",* p. 1.
[176] G. Bushell, *"Minority Report? The EC's Public Consultation on minority shareholdings",* Baker & Mckenzie, Belgium, 2013, available on: http://kluwercompetitionlawblog.com/2013/08/08/minority-report- the-ecs-public-consultation-on-minority-shareholdings/ .
[177] Vinge, *"Response of Advokatfirman Vinge to the European Commission's public consultation on a proposal towards more effective EU merger control",* 11 September 2013, p. 2.

## 5.3 Legal certainty

### 5.3.1 Introduction

The principle of legal certainty is extensively discussed in legal literature and can be defined in several ways. According to Elina Paunio[178], the concept of legal certainty can be theoretically divided into i) formal and ii) substantial legal certainty. The first issue underpins that law and adjudication must be predicable in terms of e.g. clarity, stability and intelligibility so that concerned parties (in this case undertakings) can calculate, with a certain degree of accuracy, the legal outcome and its consequences of a specific action. Substantial legal certainty rather underpins that predictability is not sufficient in itself, but must also be accepted by the legal community in question (acceptability of judicial decision-making). Combined, these two theories establish a fundamental principle of EU law aimed at creating a possibility for those addressed to know the law in order to plan their actions in accordance with it.[179]

The principle of legal certainty is frequently recurring in the merger control discussion and has shown to be of crucial importance also in the discussion of introducing a toolkit controlling structural links under EU law. According to the discussion set out in the consultation paper a number of parameters, with regards to legal certainty, read in the light of the proposed options, need to be considered, namely:

a) the scope and substance of the Commission's power to examine structural links;
b) the relationship between the Commission and NCAs, and
c) procedural issues[180]

### 5.3.2 The scope and substance of the Commission's power to examine structural links

A clear definition of what, and under which circumstances, the creation of structural links constitutes a problematic case is not apparent in the consultation paper (see also 3.2.5). As a consequence the Commission opens up for a discussion by which it seeks to determine which acquisitions of minority shareholdings should qualify as "structural links" and thus be subject for the Commission's scrutiny.

[178] Elina holds a Doctor of Laws degree in European law and a Master of Arts degree in French philology and Translation studies. Her research focuses on theoretical aspects of EU law and the legal reasoning of the European Court of Justice.
[179] E. Paunio, *"Legal Certainty in Multilingual EU law Language, Discourse and Reasoning at the European Court of Justice",* Fasnham: Ashgate Publishing Ltd., 2013, p. 51.
[180] Commission Working Staff Document, "*Towards more effective EU merger control",* SWD (2013) 236 final, p. 8.

The discussion is based on the notion of *"safe harbours"* which entails that some structural links could fall outside the scope of the Commission's scrutiny provided that certain prerequisites are met. The Commission gives examples of jurisdictions that already review acquisitions of minority shareholdings that are defined by safe harbours. The United States, which emphasises safe harbours based on, a given level of shareholding, e.g. 10% or by the absence of special shareholder rights such as veto right or board representation. Germany, which emphasises a more substantive criterion of *"competitively significant"* control and the United Kingdom, which rather emphasises a principle of *"material influence"*.[181]

Whichever system preferred, one can argue that is has one important mechanism in common, namely to what degree it provides legal certainty. Providing a clear definition of safe harbours, which meet the formal criterion of legal certainty, would in itself provide companies with a sufficient toolkit to examine whether their action is subject for scrutiny or not whilst a more imprecise definition would need e.g. guidelines to provide companies with the same degree of certainty. The discussion in regards to legal certainty and in the light of the responses seems to aim at making sure that the definition of safe harbours are precise, in particular if the Commission were to implement the self-assessment system or the transparency system by which they will have discretionary power to select cases of structural links that are *prima facie* most likely to give raise to competition concerns.[182]

The opinions on how to appropriately define "structural links" and what would constitute appropriate "safe harbours" varies among the respondents. Aer Lingus, as only replying company, consider no need for safe harbours and defines structural links to cover shareholdings less than 20%.[183] Contrary, most other respondents consider this issue with caution, emphasising the importance of further revision and clear definitions to protect the fundamental principle of legal certainty. Taking into consideration both law firms and companies, the question regarding the Commission's power to examine structural links[184] seems to be the most fundamental question underlying the proposal.[185] Even if the submissions vary in details, as to the level of shareholdings forming a safe harbour or whether a substantive or material influence shall be used, the conclusions are clearly the same; the concept of structural links needs to be very precise and carefully defined before considering implementing a new merger reform.

[181] Ibid.
[182] Commission Working Staff Document, "*Towards more effective EU merger control",* SWD (2013) 236 final, p. 8.
[183] Aer Lingus Response, *"Towards more effective EU merger control",* p.7 f.
[184] See question 7 in Annex A.
[185] See e.g. Allen & Overly LLP, *"Response to European Commission public consultation – Towards more effective EU merger control",* 12 September 2013, p. 6.

### 5.3.3 The relationship between the Commission and NCAs

As is demonstrated in the *Ryanair v Aer Lingus* case, the relationship between the Commission and the NCAs may give rise to uncertainty for businesses. The fact that two parallel investigations of the same issue resulted in unequal outcome runs counter to the one-stop shop principle causing unnecessary uncertainty for companies involved.[186] The delineation between the Commission's and the NCAs competence is of vital importance in the creation of a system which *per se* would confer jurisdictional power to the Commission as a step to provide companies with accurate and sufficient information as regards legal certainty. Accordingly the Commission opens up for a discussion whether the same rules as those under the current Merger Regulation, which provides for a clear distinction based on the Community dimension criterion should apply also for structural links. By accepting such approach, the one-stop shop principle would stay intact and the existing case referral system under Articles 4(4), 4(5), 9 and 22 of the EUMR would be applicable also for structural links. Structural links would thus be treated in the same manner as full mergers, irrespectively of the differences in design.[187]

According to the majority of the responses a system based on current EUMR seems to be welcome as it would warrant legal certainty without creating undue burdens for businesses. This is so because the current system is well established throughout the Union and in respective Member State and hence the delineation between authorities will be safeguarded. Thus, creating an entirely new set of rules, not based on current provisions, seems inconceivable for virtually all responding stakeholders.

### 5.3.4 Procedural issues

The third subject for discussion closely linked to legal certainty concerns essential elements of procedural issues and in particular the creation of a voluntary notification system. Understandably this issue must be read in the light of the proposed options, i.e. the notification system, self-assessment system or transparency system as the mechanism behind the systems varies. Especially under the self-assessment system and transparency system the matter of voluntary notification is evident. Providing parties to a concentrative transaction the option to notify an intended acquisition of minority shareholdings on a voluntary basis would by definition create certainty and simultaneously provide the Commission the possibility to, depending on the nature of the transaction, investigate if considered appropriate.

[186] A. Usova, *"EU Merger Regulation Reform: Capturing Minority Acquisitions",* The Ukrainin Journal of Business Law, July-August, 2013, p. 40-42.
[187] Ibid. p. 9.

However, a system solely based on voluntary notification would not, by its very nature, exhaustively cover all situations of problematic structural links but would rather work as a supplement to one of the "main options". Therefore, to be able to meet the objectives of the consultation paper it would not be sufficient to lean back on a system whereby it would be exclusively for the concerned parties to notify as such system would merely provide legal certainty in one direction and thus counteract the intention of the proposal.[188]

Moreover, the Commission examines various solutions on how to address a voluntary notification system in a way feasible for the majority of stakeholders while still holding the option to intervene *ex-post* in cases of structural links where concentrations can be realised before obtaining a clearance decision but could still be subject for investigation at a later stage. Likewise, the Commission opens up for discussion in regards to introducing a standstill obligation whereby parties to a transaction, not yet implemented, could be notified voluntarily and, if deemed necessary trigger a standstill obligation (similar to the system used in the United Kingdom).[189] The reaction of most stakeholders seems to be that *ex-post* intervention is directly harmful for legal certainty as it would be hard for undertakings, with adequate certainty, to know if to proceed their plan of action or not, especially if the set of rules are not accompanied with clear guidelines. That same view goes for introducing a standstill obligation, as acquiring a minority shareholding is merely a way to get access to assets or technical information and should therefore not be "punished" in the same way as a full acquisition.

Finally, the Commission asks whether a time limit should apply to open an investigation on structural links. Most respondents deem a time limit vital to ensure legal certainty and emphasise that such time limit should be as short as possible, yet provide the Commission enough time to intervene from the time the information of an acquisition exists in the public domain. Accordingly a time limit between two to four months seems reasonable given most of the answers. Many respondents base their argumentation in the UK merger regime which employs a four months time limit (which has shown to work well for a number of years) but stress, at the same time that, given the limited number of "problematic cases", it could be even shorter. In any circumstance, a clear definition of when the time limit is triggered and how long the Commission will have the possibility to intervene is essential to safeguard legal certainty.[190]

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[188] Commission Working Staff Document, "*Towards more effective EU merger control",* SWD (2013) 236 final, p.10.
[189] Ibid.
[190] See e.g. Freshfields Bruckhaus Deringer, *"Response to the European Commission's public consultation of 20 June 2013 – Towards a more effective merger control – Submission of 12 September 2013,* p. 8 and Allen & Overly LLP, *"Response to European Commission public consultation – Towards more effective EU merger control",* 12 September 2013, p. 7.

Considering most responses submitted by stakeholders, implementing either of the systems, without further revision, would lead to increased uncertainty and unpredictability. To mitigate this shortcoming the Commission needs to further elaborate a suitable system that provides a clear balance between power and certainty.[191] Summing up, to provide adequate legal certainty the Commission seems to be required to introduce a system providing companies the possibility to voluntary notify, accompanied with detailed guidelines, clearly explaining under what circumstances and during which time period the Commission considers *ex-post* intervention appropriate alongside a clear motivation for introducing a standstill obligation. [192]

## 5.4 Chapter summary

Considering the Commission's tone of voice throughout the consultation paper the necessity of plug the enforcement gap is of utter importance. The Merger Regulation is, according to the Commission, not sufficient to systematically prevent anti-competitive effects stemming from structural links and thus its current toolkit does not have the appropriate means to tackle "all sources" of harm to competition and consumers.[193] Even if the Commission, by establishing Annex I[194] and Annex II[195] of the consultation paper, aims on providing practical information of potential anti-competitive effects based on both economic theory and on the basis of examples the final outcome is not sufficient for anxious stakeholders who also make this rather clear in their responses.

Nevertheless, by examining the responses carefully one can argue for, and establish a trend towards, which most of the respondents, seems to be willing to proceed. Accordingly, stakeholders do not seem to reject the proposal in whole, but rather illuminate the importance of clear and proper definitions to ensure that burdens and legal certainty for undertakings is safeguarded and accounted for.[196] As a result it is evident to say that the Commission had the possibility to go further, but failed in doing so as it did not introduce a system by which the definition of central concepts where sufficiently underpinned.

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[191] A. Usova, *"EU Merger Regulation Reform: Capturing Minority Acquisitions",* The Ukrainin Journal of Business Law, July-August, 2013, p. 40-42.
[192] See e.g. Orange, *"Orange reply to the consultation "Towards more effective EU merger control"*, September 2013, p. 3. or Philips, *"Response of Koninklijke Philips N.V. to Consultation on possible improvement of the Merger Regulation – "Towards more effective merger control",* 12 September 2013, ref. no: HT.3053, p. 10.
[193] Commission Working Staff Document, "*Towards more effective EU merger control",* SWD (2013) 236 final, p.3.
[194] Available on: http://ec.europa.eu/competition/consultations/2013_merger_control/consultation_annex1_en.pdf.
[195] Available on: http://ec.europa.eu/competition/consultations/2013_merger_control/consultation_annex2_en.pdf.
[196] This is a consolidated view recognised by the author. Whilst some respondents seem to reject the proposal in whole, others advocate further discussions.

The possible effects of the proposal will be further elaborated in the forthcoming and final section in which the author will establish concluding remarks, possible outcomes for future discussions and an alternative solution, taking into consideration all the abovementioned as a step to create guidance on whether, and possibly when, the Commission will have the possibility to address certain structural links.

# 6 Concluding remarks

## 6.1 Introduction

As portrayed above and according to both the Commission and concerned stakeholders, anti-competitive effects may arise in connection with minority shareholdings (let so be to a greater or lesser extent). Consequently, one can claim that there is an enforcement gap as identified by the Commission. Nonetheless, an important question inevitably follows: is merger regulation intervention proportionate to its aim, i.e. to create a more business-friendly Union without posing undue burdens and/or less legal certainty on undertakings?

According to Russo[197], the answer appears to depend on whether minority shareholdings participation in companies' equity capital is analysed from: i) *the classic perspective of protection* or ii) *the undue anti-competitive advantage approach*. On the one hand, protecting minority shareholders' rights are of utter importance for the development of everyday (Union) economic life. This approach is evident, not least by the development of European company law instruments, by which one can grasp that minority shareholdings should be protected against e.g. possible mismanagement, change of company structure and/or objectives or exclusion from strategic decision-making, the notion of *"dictatorship of the majority"*. On the other hand and on the opposite, minority shareholdings may instead lead to hardly detectable competitive advantages (where minority shareholders exploit their position), which in turn could give rise to unfair practice by one or more undertakings. In any case, one can quite easily argue that the line between the two is very thin and as a consequence, the reader needs to acknowledge the existence of the two perspectives.[198] By accepting the existence of an enforcement gap and the very thin line between protecting minority shareholdings vis-à-vis unfair competitive advantages the purpose of the thesis can be further elaborated.

Now, considering all the abovementioned, the author firmly believes that there is no right or wrong answer for satisfying the purpose of this thesis, but rather considers it a question of *"the proposal's suitability in relation to its objectives"*. Therefore the analysis will mainly focus on "looking forward" – what is to come – and how will this affect businesses.

[197] PhD, University of Amsterdam - Amsterdam Centre for Law & Economics (ACLE).
[198] F. Russo, *"Abuse of Protected Position? Minority Shareholdings and Restriction of Markets Competitiveness in the European Union",* World Competition, Vol. 29(4), 2006, p. 608 ff.

## 6.2 What is to come?

Insufficient clarity, lack of balance, poor design, reduced legal certainty; the list of arguments against the Commission's proposal goes on. Nonetheless the discussion does not seem to be over just yet, rather the opposite. Regardless of the mechanism and the composition behind a certain system - providing the Commission the authority to intervene in acquisitions of NCMS - it is fairly easy to say that the signals stemming from the Commission's stance, either via Commissioner Almunia, other Commission officials or, first and foremost the consultation paper itself is a clear-cut acknowledgment of the existence of an enforcement gap in current Merger Regulation which needs to be dealt with[199].

It should be remembered, when the Commission published its consultation paper, it labelled it:

> "*The proposal aims to make EU merger control even more business-friendly by cutting red tape and streamlining procedures"*

Given the compilation of material in this thesis it is fair to say that even future proposals may fail to live up to this "lofty" ideal as the measures proposed are likely to place significant burdens on companies along with reducing legal certainty if the Merger Regulation is not altered in consideration of already established procedures. The reasons for companies to invest in minority shareholdings are many, among others to gain access to specific assets and/or new technologies or receive additional financial resources, without, having that said, confer control in the target company. As Rusu properly points out, the various possibilities of substantive amendments of the Merger Regulation to also govern minority shareholdings without capturing "wrong" structural links are many.[200] A first and fairly easy solution could simply be to relax the thresholds of "decisive influence". However, such modification would in turn impose a change of definition of the term "concentration" and as a consequence force companies to become comfortable with a new definition that could lessen legal certainty. As been described above, most law firms and companies consider plugging the enforcement gap rather unnecessary. However, if the Commission decides to do so the most essential component lies in clear definitions of central concepts (e.g. "structural links, "safe harbours" "problematic cases" etc.), without altering current definitions in order to avoid undue burdens for concerned undertakings.

[199] C. S. Rusu, *"Eu Merger Control and Acquisitions of (Non-Controlling) Minority Shareholdings – The State of Play",* CLaSF WP Series No. 10, February 2014, p. 31.
[200] Ibid.

A second solution could be to learn from Member States (and other States for that matter), including but not limited to, the UK which emphasises a "material influence" approach or Germany which advocates the idea of "competitively significant influence". Yet again, such approach would most probably pose burdens on both companies and Member States not familiar with the particular system. All things considered, it seems that everything boils down to: - how exactly should the Commission define structural links in a way that suit companies without posing undue burdens and minimise the likelihood of reducing well-established procedures?

The substantive alterations presented in the consultation paper do indeed call for further practical guidance on how either of the suggested systems and its ancillary concepts should be defined and should thus, not be overlooked. The *ex-ante* methods of control, i.e. the notification system and the (selective) transparency system both have upsides and downsides for businesses. The former would widely extend the scope of the Merger Regulations which entails that it would capture structural links that might not be problematic and therefore be costly and time consuming for both the Commission and businesses, then again it would provide legal certainty as it would be construed on already established principles. The latter would provide the Commission with excessive discretionary power as it would be authorised to identify, by its own means, what it consider to be, *prima facie* structural links that might raise competition concerns. Such system could reduce burdens for companies since they would merely be obliged to file a short form. However, if the Commission opts, by reason of e.g. third parties, to investigate it might both be costly and reduce legal certainty for companies. Although the *ex-post* method of control or the self-assessment system will not entail a prior-notification obligation for undertakings and no standstill obligation to comply with, the Commission would yet again be provided a great deal of discretion. Nevertheless, this system seems to be the most reasonable for companies as it would be based on an undertaking's internal decision to file a notification by reference of e.g. uncertainty whether the merger may fall within the ambit of the Merger Regulation or not. However, the downside would be the potential decrease in legal certainty and lawyers' costs for assessing whether the acquisition is covered by EU merger legislation or not.

All the above observations do have their reasons to support and reasons to oppose. Although introducing self-standing provisions covering acquisitions of NCMS are likely to plug the enforcement gap I believe that further revision is of vital importance to satisfy the *"objective to make EU merger control even more business-friendly"*. Providing a system whereby the Commission will have the possibility to scrutinise structural links without posing undue burdens or less legal certainty on businesses needs to be done gradually, one step at a time, not by introducing an entire new set of rules for companies to comply with. As has been emphasised above, the consultation period started in 2013 is an important statement by the Commission which somewhat demonstrates in which direction it are likely to proceed. However, that being said, it is necessarily not the right way to proceed.

Nonetheless, the conclusion can be drawn that the Commission is likely to, in some way or another, let it be by following the set path in the consultation paper or by further experiment via a White Paper, thereby continuing its struggle to acquire jurisdictional competence in regards to structural links.[201]

Summing up, I believe that we will see an amended set of rules within quite a near future. If only considering the proposed systems in the light of the responding law firms and companies, it appears that the majority favours a self-assessment system alongside the possibility to notify on a voluntary basis accompanied with well-defined safe harbours, time limits and clear guidelines. Furthermore it seems desirable, to the greatest extent possible, to safeguard legal certainty by maintaining high thresholds (20% or above) and apply the same substantive tests, one-stop principle and referral system as is done today.

Considering the above observations I would finally like to introduce an alternative system, similar to that Ireland proposed in its response but with one additional element. It could be describes as a *"notification-self-assessment"* system. Although the wording of this system is contrary to the meaning of the Commission's definition of the systems respectively, it seems that most companies would like to keep and safeguard the current referral and notification systems to warrant legal certainty (as proposed under the notification system) but not go as far as simply extending the scope of current Merger Regulation to also cover (non-controlling) minority shareholdings. This is where the self-assessment system comes into play as it would provide companies, by their own means, to notify a minority shareholding acquisition if they are uncertain of its nature and compatibility with EU law. If companies were to make use of current procedures and yet have the possibility to voluntarily notify a merger or acquisition this would minimise both the burdens and costs to such an extent that it would not be mandatory for companies to notify if they are certain that the acquisition would not fall within the ambit of EU law, yet provide them the possibility to warrant legal certainty. This would of course only work as long as central concepts are well defined which is for the Commission to work out before introducing a new legal toolkit that companies may consider acceptable. All in all this specific area of merger control is of complex nature as it entails that diverse interests and needs must be considered with precaution before being realised. I truly hope that this thesis will help to create greater understanding of the complexity between the desire to implement a system providing the Commission the possibility to intervene in certain cases of structural links and the desire to create a more business-friendly union that safeguards the attractiveness of the internal market and is looking forward to see what the future will bring.

[201] Electronic answer from the Commission dated 2014-03-25: *"We shall be publishing a White paper before the summer"*.

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# Annex A

**Questions on structural links:**

*"**1**. In your view would it be appropriate to complement the Commission's toolkit to enable it to investigate the creation of structural links under the Merger Regulation?*

***2.** Do you agree that the substantive test of the Merger Regulation is an appropriate test to assess whether a structural link would lead to competitive harm?*

***3**. Which of the three basic systems set out above do you consider the most appropriate way to deal with the competition issues related to structural links? Please take into account the following considerations:*

*a) the need for the Commission, Member States and third parties to be informed about potentially anti-competitive transactions,*

*b) the administrative burden on the parties to a transaction,*

*c) the potential harm to competition resulting from structural links, both in terms of the number of potentially problematic cases and the impact of each potentially harmful transaction on competition;*

*d) the relative ease to remove a structural link as opposed to the difficulties to separate two businesses after the implementation of full merger;*

*e) the likelihood that anti-competitive effects resulting from an already implemented structural link can be eliminated at a later stage.*

***4**. In order to specify the information to be provided under the transparency system:*

*a) What information do you consider necessary to enable the Commission and Member States to assess whether a case merits further investigation or to enable a third party to make a complaint (e.g. information describing the parties, their turnover, the transaction, the economic sectors and/or markets concerned)?*

*b) What type of information which could be used by the Commission for the purpose of the transparency system is readily available in undertakings, e.g. because of filing requirements under securities laws in case of publicly listed companies? What type of information could be easily gathered?*

***5.*** *For the acquirer of a structural link, please estimate the cost of filing for a full notification (under the selective system in case the Commission decides to investigate a case, or under the notification system). Please indicate whether the costs of a provision of information under the transparency system would be considerably less if the information required were limited to the parties, their turnover, the transaction and the economic sectors concerned.*

***6.*** *Do you consider the turnover thresholds of the Merger Regulation, combined with the possibility of case referrals from Member States to the Commission and vice versa, an appropriate and clear instrument to delineate the competences of the Member States and the Commission?*

***7.*** *Regarding the Commission's powers to examine structural links, in your view, what would be an appropriate definition of a structural link and what would constitute appropriate safe harbours?*

***8.*** *In a self-assessment or a transparency system, would it be beneficial to give the possibility to voluntarily notify a structural link to the Commission? In answering please take into account the aspects of legal certainty, increased transaction costs, possible stand-still obligation as a consequence of the notification, etc.*

***9.*** *Should the Commission be subject to a limitation period (maximum time period) after which it can no longer investigate/intervene against a structural link transaction, which has already been completed? If so, what would you consider an appropriate time period for beginning a Commission investigation? And should the length of the time period depend on whether the Commission had been informed by a voluntary notification?"*[202]

[202] Commission Staff Working Document, *Towards more effective EU merger control,* SWD (2013) 236 final, p. 11 f.

# Annex B

| Responder | Not sufficient clarity/evidence | Existing toolkit works (Art. 101 & 102) | Additional cost, burden and uncertainty | Balance of burden and benefit/disproportionality | Scope of jurisdiction | Welcomes an extension |
|---|---|---|---|---|---|---|
| Allen & Overy LLP | X | | | | | |
| Ashurst | | X | X | | | |
| **Baker & McKenzie** | X | X | X | X | | |
| Berwin Leighton Paisner LLP | | X | | X | X | |
| Cadwalader, Wickersham & Taft LLP | | | | | | X |
| Cleary Gottlieb Steen & Hamilton LLP | | X | | X | | |
| Clifford Chance | X | X | | | | |
| CMS | | | X | | | X |
| Dickson Minto W.S. | X | | | | | |
| Freshfields Bruckhaus Deringer LLP | | | X | X | X | |
| Herbert Smith Freehills LLP | | X | X | X | | |
| Hogan Lovells LLP | | X | | | | |
| Linklaters LLP | | X | X | X | | |
| Mayer Brown LLP | | X | | | X | |
| NautaDutilh N.V. | | X | X | X | | |
| Pinsent Masons LLP | X | X | | | | |
| Shearman & Sterling LLP | | X | X | X | | |
| Simmons & Simmons LLP | X | | | | X | |
| SJ Berwin LLP | X | X | | | | |
| Van Bael & Bellis LLP | | | | | | X |
| **Vinge** | X | X | X | X | | |
| **Total:** | 7/21 | **14/21** | **9/21** | **9/21** | 4/21 | 3/21 |

# Annex C

| Responder | Not sufficient clarity/evidence | Existing toolkit works (Art. 101 & 102) | Additional cost, burden and uncertainty | Balance of burden and benefit/disproportionality | Partly welcomes an extension | Welcomes an extension |
|---|---|---|---|---|---|---|
| Aer Lingus | | | | | | X |
| **Air France** | X | | | | X | |
| Canon Europé | | X | X | | | |
| **Orange** | | X | X | X | | |
| Philips International B.V. | X | | | | | |
| Ryanair | | X | X | X | | |
| **Total:** | 2/6 | **3/6** | **3/6** | 2/6 | 1/6 | 1/6 |