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I. INTRODUCTION

In July 2014, the European Commission (the “Commission”) issued a White Paper² and a Staff Working Document³ confirming its intention to propose expanding the jurisdictional scope of the EU Merger Regulation⁴ (“EUMR”) to capture the acquisition of non-controlling minority shareholdings.⁵ This article considers two questions: (1) has the case for change been persuasively made; and (2) are the modalities of the Commission’s proposal appropriate?

II. THE EUMR

The EUMR has from the outset applied only to lasting changes of control. As a result, only minority shareholdings that confer control or “decisive influence”⁶ are currently subject to pre-closing, mandatory review under the EUMR. Determining whether a given minority shareholding confers “decisive influence” is fact-specific and depends on a range of considerations, including the governance rules of the company in question, the rights attached to the minority shareholding, the size of other shareholdings, and the likelihood that a given minority shareholding will represent a majority of votes cast at annual general meetings. Depending on the magnitude of the shareholding, the associated governance rights, and the composition of the remaining shareholder base, non-controlling minority shareholdings may confer “decisive influence,” even if they do not confer *de jure* control.⁷

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² COM(2014) 449, European Commission White Paper, Towards more effective EU merger control, July 9, 2014 (“White Paper”).

³ SWD(2014) 221, Commission Staff Working Document, “Towards more effective EU merger control” (July 9, 2014) (“Staff Working Document”). This document updated its 2013 predecessor, SWD(2013) 239, Commission 2013 Staff Working Document, “Towards more effective EU merger control” (June 25, 2013) (“2013 Staff Working Document”). References in this article to the Staff Working Document are to the 2014 version unless otherwise indicated.

⁴ Council Regulation No 139/2004 EC [2004] OJ L24/1 (the “EUMR”).

⁵ The Staff Working Documents refer to non-controlling minority shareholdings as “structural links.” The terms are used interchangeably in this article.

⁶ EUMR, Articles 3(1) and 3(2).

⁷ As a practical matter, shareholdings as low as 19 percent have been found to confer “decisive influence.” See, e.g., Case IV/M.258 *CCIE/GTE* Commission decision of September 25, 1992.

III. ARTICLES 101 AND 102

The EU Courts have confirmed the application of Articles 101 and 102 to the acquisition of non-controlling minority shareholdings and/or the exercise of rights attached to such shareholdings.

- As to Article 101, the Court of Justice held in *Philip Morris* that structural links resulting from agreements between companies may serve as an instrument for influencing the commercial conduct of either or both companies, so as to restrict or distort competition in the market(s) in which they carry on business in violation of Article 101.⁸ The Court recognized that such links may affect the incentives of an acquirer to compete with the target firm.⁹
- As to Article 102, the Court of Justice held, also in *Philip Morris*, that the creation of structural links could constitute an abuse of a dominant position provided “the shareholding in question results in effective control of the other company or at least in some influence on its commercial policy.”¹⁰ The Commission subsequently found in a case involving the acquisition by Gillette, the dominant producer of disposable razors, of a 22 percent share in a competitor, Wilkinson Sword, that Gillette had abused its dominant position by acquiring “some influence” over Wilkinson Sword and should therefore dispose of its equity stake.¹¹

The Staff Working Documents recognize that Articles 101 and/or 102 may apply to non-controlling minority shareholdings, but suggest that legal and practical difficulties limit their application, which presumably accounts for the paucity of cases in recent years.¹² As to Article 101, the Commission accepts that “structural links may fall under Article 101 TFEU,” but suggests that “it is unclear under which circumstances a structural link may constitute an ‘agreement’ having the object or effect of restricting competition within the meaning of Article 101 TFEU, in particular if the structural link is built up by the acquisition of a series of shares via the stock exchange.”¹³ As to Article 102, the 2013 Staff Working Document considers that it “would allow the Commission to deal with the competitive harm which may arise from structural links only in very narrow circumstances.”¹⁴ This is broadly correct, as Article 102 applies only to the abuse of a pre-existing dominant position.

⁸ Cases 142/85 and 156/84 *British American Tobacco Company Limited and R.J. Reynolds Industries Inc. v European Commission* [1987] ECR 4487 (“*Philip Morris*”), ¶¶37–38.

⁹ *Philip Morris, Id.* ¶¶50–51.

¹⁰ *Philip Morris, Id.* ¶65.

¹¹ Case No. IV/33.440 *Warner/Lambert/Gillette*, Commission decision of November 10, 1992 (1993 OJ L116/21).

¹² Following *Philip Morris*, the Commission opened a number of investigations (*see, e.g.*, Case No. IV/34.857 *BT/MCI*, Commission decision of July 27, 1994 (1994 OJ L223/36); and Case No. IV/34.410 *Olivetti/Digital*, Commission decision of November 11, 1994 (1994 OJ L309/24)). In recent years, however, the Commission has not sought to apply Articles 101 or 102 to structural links.

¹³ White Paper, *supra* note 2, ¶40; 2013 Staff Working Document, *supra* note 3 p. 6; and Staff Working Document, ¶62.

¹⁴ White Paper, *Id.* ¶40; and 2013 Staff Working Document, *Id.* p. 6.

Notwithstanding their putative limitations,¹⁵ Articles 101 and 102 represent an established legal basis that could be used to challenge structural links in situations where one party has a dominant position and/or there is evidence of an anticompetitive agreement or concerted practice. The situation is therefore different from that addressed by the last major reform of the EUMR, when the substantive test was expanded to permit the Commission to challenge concentrations that gave rise to unilateral effects, but fell short of single firm or collective dominance and would not therefore have been caught by the dominance test in the original form of EUMR adopted in 1989. Such transactions risked escaping review altogether and, since the recasting of the substantive test in 2004, the Commission has challenged a number of concentrations that could not readily have been pursued under the dominance test, including *UPS/TNT*, a 4-to-3 merger that was prohibited in 2013.¹⁶ By contrast, Articles 101 and 102, together with national merger control rules that apply to non-controlling minority shareholdings, ensure that anticompetitive effects rising from most (even if not all) structural links may today be potentially subject to antitrust review in the European Union.

IV. THEORIES OF HARM

There are five principal theories of harm concerning the acquisition of non-controlling minority shareholdings. Upon examination, however, it will only rarely be possible to predict to the requisite evidentiary standard that the acquisition of such shareholdings will significantly lessen effective competition. This is in part because, as explained further below, several of these theories of harm are based on predictions about future conduct that are ill-suited to *ex ante* merger control.

The first theory is based on unilateral effects in the form of reduced incentives to compete—a minority shareholder may have less incentive to compete with the target firm if it believes it will benefit from the target's improved performance.¹⁷ In practice, however, the acquirer of a minority shareholding will have strong incentives to compete with the target firm as it gains all the profits from its own business, but only a share of the target firm's profits.

The acquirer may therefore be expected to compete less vigorously with the target firm only where: (a) it is able to predict the relationship between demand and price; (b) it is confident that, by raising prices for its own products, it will benefit the target firm and not instead divert sales to rivals (or encourage new entry); (c) it is able to predict the extent to which it will recoup revenues lost through lower sales of its own products; and (d) it is confident that the benefit it secures by increasing the target firm's sales will outweigh the profits it would otherwise have secured itself. These conditions will be met only in exceptional circumstances. More usually, the diversion ratio will be unknown, the information available to the acquirer of the minority

¹⁵ See, e.g., A. Ezrachi & D. Gilo, *EC Competition Law and the Regulation of Passive Investments Among Competitors*, 26(2) OXFORD J. LEG. STUDIES 338–344 (2006).

¹⁶ Case COMP/M.6570 *UPS/TNT Express*, Commission decision of January 30, 2013 (not yet published).

¹⁷ 2013 Staff Working Document, *supra* note 3, Annex I, ¶4; and Staff Working Document, ¶50.

shareholding will be incomplete and unreliable, and the impact on both companies' revenues and profits will be uncertain and unpredictable.¹⁸

The General Court considered, but rejected, a variant of this theory in connection with Aer Lingus' appeal of the Commission's determination that it lacked jurisdiction over Ryanair's minority shareholding in Aer Lingus. Aer Lingus had contended that "a minority shareholding in a competitor undertaking in a duopoly inherently distorts competition because the company with such a shareholding has less incentive to compete with a company in whose profitability it is interested."¹⁹ The Court excluded this "theoretical argument" on the facts: competition had actually increased between Ryanair and Aer Lingus following Ryanair's acquisition of its minority shareholding.²⁰ The Court therefore determined that the "bounds of the powers invested in the Commission" under the EUMR:

would be exceeded if it were accepted that the Commission may order the divestment of a minority shareholding on the sole ground that it represents a theoretical economic risk when there is a duopoly, or a disadvantage for the attractiveness of the shares of one of the undertakings making up that duopoly.²¹

Notwithstanding the General Court's findings in *Aer Lingus*, together with the reasons outlined above as to why the conditions required to support this theory of harm may seldom arise in practice, this first theory nevertheless represents the strongest case for the existence of a "gap" in the existing legal framework, as unilateral effects of the kind envisaged could not readily be caught by Articles 101 or 102 and this theory of harm does not require any prediction to be made as to future conduct.

The second theory of harm concerns the possibility that the acquirer of a minority shareholding will have the ability and incentive to influence the strategic direction of the target firm. In practice, the rights attached to a minority shareholding will (absent specific veto rights) only rarely confer influence over strategic decisions. Where they do, other shareholders, that by definition together exercise control, will presumably have strong incentives to veto any policy that favor the acquirer of the minority shareholding at the expense of the target firm (or that could damage the target firm).²²

Practical application of this theory also requires an agency to predict how the acquirer of a minority shareholding is likely to vote its shares, how the remainder of the shareholders are likely to vote their shares, and to determine to the requisite standard of proof that competition would be significantly reduced. As the Court has found in respect of conglomerate effects,²³ the

¹⁸ See, e.g., OECD Policy Roundtable, pp. 36–38 which identifies "real-world" factors that may in practice render unlikely the possibility of anticompetitive effects. See too F. E. González-Díaz, *Minority Shareholdings and Creeping Acquisitions: The European Union Approach*, FORDHAM COMP. L. INST. 423 (B. E. Hawk, ed. 2012).

¹⁹ Case T-411/07 *Aer Lingus Group plc v Commission* [2010] ECR II-03691 ("*Aer Lingus*") ¶74.

²⁰ *Aer Lingus*, *Id.* ¶74.

²¹ *Aer Lingus*, *Id.* ¶76.

²² See D. O'Brien & S. Salop, *Competitive Effects on Partial Ownership: Financial Interest and Corporate Control*, 67 ANTITRUST J. 559-614, p. 581 (2000).

²³ Court of Justice has held that the quality of evidence produced by the Commission is "particularly important" as the "chains of cause and effect [may be] dimly discernible, uncertain, and difficult to establish." Case C-12/03 P *Commission v. Tetra Laval* [2005] ECR I-978 ("*Tetra Laval*"), ¶44 (speculative theories as to future

Commission cannot safely make reliable predictions about future conduct. More typically, hypothesized conduct of this kind will emerge only over time, rendering *ex ante* review difficult or ineffective and suggesting that Articles 101 or 102 may be more effective legal instruments.

The third theory is premised on the notion that a non-controlling minority shareholding may increase the risk of tacit collusion.²⁴ Although it is widely accepted that structural links may be relevant to determining whether coordinated effects are likely,²⁵ such links represent only one element among many considered in coordinated effects cases,²⁶ are less important to determining whether tacit collusion is feasible than the criteria identified by the Court in *Airtours*²⁷ and set out in the Horizontal Merger Guidelines,²⁸ and typically increase the risk of coordinated effects only where they involve or lead to the exchange of confidential information. Not only is it difficult to predict *ex ante* that confidential information will be communicated, but any exchange of such information between competitors may be subject to Article 101, rendering review under the EUMR unnecessary.

As to the fourth theory, that a minority shareholder may be in a position to induce the target firm to discriminate against rivals so as to favor the minority shareholder,²⁹ vertical relationships have only exceptionally led to Commission intervention in recent years, and are most unlikely to raise concerns in the case of non-controlling minority shareholdings. Although the Commission has in the past required the sale of a minority shareholding to address a concern of this kind, that case involved the acquisition of “decisive influence.”³⁰ It is unlikely that the Commission would be able to substantiate a vertical concern of this kind other than in exceptional cases. Correspondingly, where a minority shareholding involves firms in a vertical relationship, there may be efficiencies, including a reduction in the level of double marginalization.³¹

Finally, it has been suggested that the acquisition of non-controlling minority shareholdings may deter market entry, including by hindering third-party access to the equity of the target.³² In practice, this situation may arise only rarely given the possibility under many national laws for takeover bids to be structured in such a way as to allow minority shareholders to be “squeezed out.” In any event, it will generally be difficult to prove to the requisite

conduct must be based on “sufficiently convincing evidence” and any “analysis of the future position must ... be particularly plausible”). See Case T-5/02 *Tetra Laval v. Commission* [2002] ECR II-4381, ¶162.

²⁴ White Paper, *supra* note 2, ¶35; 2013 Staff Working Document, *supra* note 3, Annex I, ¶8; and Staff Working Document, ¶58.

²⁵ See Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the control of concentrations between undertakings (“Horizontal Merger Guidelines”), (2004/C 31/03), ¶48 (“structural links such as cross-shareholding or participation in joint ventures may also help in aligning incentives among the coordinating firms”).

²⁶ See Joined Cases C-68/94 and C-30/95 *France and Others v. Commission* [1998] ECR I-1375, ¶221; Case T-102/96 *Gencor v. Commission* [1999] ECR II 753, ¶¶273 and 275–76; and Horizontal Merger Guidelines, *Id.*, ¶48.

²⁷ Case T-342/99 *Airtours plc v. Commission* [2002] ECR II-2585 (“*Airtours*”), ¶62.

²⁸ Horizontal Merger Guidelines, *supra* note 25, ¶41.

²⁹ Staff Working Document, *supra* note 3, ¶60; and 2013 Staff Working Document, Annex I, ¶11.

³⁰ See Case COMP/M.5406 *IPIC/MAN Ferrostaal*, Commission decision of March 13, 2009, ¶36.

³¹ 2013 Staff Working Document, *supra* note 3, Annex I, ¶82.

³² *Id.* ¶15.

evidentiary standard that, at the time a non-controlling minority shareholding is acquired, another bid is probable, likely to succeed, and likely to strengthen competition. Demonstrating that competition may be significantly harmed because a non-controlling minority shareholding impedes a takeover bid will therefore be difficult to predict *ex ante* other than in highly exceptional circumstances.

In short, non-controlling minority shareholdings will only rarely raise competition concerns. In particular, it will only exceptionally be possible for an agency to predict anticompetitive harm to the requisite legal standard at the time a minority shareholding is acquired. The “gap” in the EUMR’s jurisdictional ambit is therefore slender. As a result, any expansion of the EUMR should be narrowly framed to avoid imposing unnecessary or disproportionate costs.

V. THE 2001 GREEN PAPER

In 2001, the Commission considered expanding the jurisdictional scope of the EUMR to capture non-controlling minority shareholdings.³³ It recognized at the time that such shareholdings may have a structural impact, but identified difficulties in defining the types of transactions that would be subject to mandatory notification.³⁴ Following a consultation process, the Commission decided against amending the EUMR, noting that “only a limited number of [acquisitions of minority shareholdings] would be liable to raise competition concerns that could not be satisfactorily addressed under Articles [101] and [102 TFEU].”³⁵

Various considerations counseled against expanding the EUMR at that time, including (i) difficulties associated with defining the types of transactions that would be subject to EU jurisdiction, (ii) policy arguments concerning the sufficiency of evidence about the competitive effects of non-controlling minority shareholdings, (iii) existing possibilities open to the Commission to examine structural links under Articles 101 and 102, (iv) concern about “unnecessarily burdening the European Commission’s service and the parties involved in these types of transactions, which in most cases are pro-competitive or competitively neutral,”³⁶ and (v) the existence of national merger control laws in Germany and the United Kingdom that were sufficiently broad to capture non-controlling minority shareholdings. In this author’s view, these considerations remain equally valid today.

VI. THE RYANAIR/AER LINGUS CASE

The Commission’s proposal to expand the EUMR’s jurisdictional scope has its origins in a long-running dispute between two Irish airlines, Ryanair and Aer Lingus, that arose out of Ryanair’s minority shareholding in Aer Lingus. In 2007, the Commission prohibited Ryanair’s

³³ *Commission Green Paper, “Review of Council Regulations (EEC) No 4064/89,” December 11, 2001 (“Green Paper”).*

³⁴ *Id.* ¶109 (“[I]t appears doubtful whether an appropriate definition could be established capable of identifying those instances where minority shareholdings and interlocking directorships would warrant such treatment [i.e., the *ex ante* control of the EUMR]”).

³⁵ *Id.* ¶109.

³⁶ OECD Policy Roundtable Concerning Minority Shareholdings (2008), Paper DAF/COMP(2008)30 (“OECD Policy Roundtable”), p. 40.

acquisition of Aer Lingus.³⁷ Following that decision, Aer Lingus asked the Commission to order Ryanair to divest a 29 percent minority shareholding acquired by Ryanair in anticipation of a full bid for Aer Lingus. The Commission determined that, because Ryanair had not acquired control over Aer Lingus, it could not order the divestment of Ryanair's minority shareholding. On appeal, the General Court upheld the Commission's determination that it lacked jurisdiction under the EUMR to order the divestiture of a non-controlling minority shareholding, finding that:

the concept of [a] concentration cannot be extended to cases in which control has not been obtained and the shareholding at issue does not, as such, confer the power of exercising decisive influence on the other undertaking, but forms part, in a broader sense, of a notified concentration examined by the Commission and declared incompatible with the common market following that examination, without there having been any change of control.³⁸

The position under the EUMR may be contrasted with that in certain other jurisdictions, including Germany,³⁹ the United Kingdom,⁴⁰ and the United States,⁴¹ where the applicable merger control laws apply to the acquisition of non-controlling minority shareholdings. Between 10 and 15 percent of transactions challenged by the German Federal Cartel Office have involved non-controlling minority shareholdings.⁴² By contrast, the U.S. agencies have only rarely challenged transactions involving the acquisition of non-controlling minority shareholdings.⁴³ In the United Kingdom (which has a voluntary regime), the incidence of such shareholdings being

³⁷ Case COMP/M.4439 *Ryanair/Aer Lingus*, Commission decision of June 27, 2007.

³⁸ Case T-411/07 *Aer Lingus Group plc v. Commission* [2010] ECR II-03691 ("*Aer Lingus*"), ¶65.

³⁹ German merger control law applies to acquisitions of at least 25 percent of the shares (capital or voting rights) in another undertaking (§ 37 (1) No. 3 lit. b Act against Restraints of Competition ("ARC")), and other transactions enabling one or several undertakings to directly or indirectly exercise a "competitively significant influence" on another undertaking (§ 37 (1) No. 4 ARC). The German courts have clarified that, in the case of shareholdings below 25 percent, there must be "plus factors" that put the acquirer of the minority shareholding in a similar position as a 25 percent shareholder.

⁴⁰ U.K. merger control rules apply to acquisitions that confer "material influence." "Material influence" is "presumptively" assumed to exist for shareholdings of 25 percent or more (because such shareholdings "generally enable the holder to block special resolutions"). The U.K. agencies may also examine "any case where there is a shareholding of 15 percent or more in order to see whether the holder might be able materially to influence the company's policy." Material influence may exceptionally extend to shareholdings of less than 15 percent, but in practice such acquisitions are likely to be examined only "where they concern one business taking a stake in a direct competitor." See Enterprise Act 2002, s 26(3), and OFT, *Mergers: Jurisdictional and Procedural Guidance*, June 2009, ss 3.19-3.20.

⁴¹ Clayton Antitrust Act 1914, s 7, prohibits acquisitions of "the whole or any part" of a corporation's stock or assets if "the effect of such an acquisition may be substantially to lessen competition." The U.S. Supreme Court has found violations in acquisitions involving shareholdings as low as 20 percent.

⁴² See J. P. Schmidt, *Germany: Merger control analysis of minority shareholdings—A model for the EU?* 2 COMPETITION L.J., 208 (2013), who estimates that, between 1990 and 2010, acquisitions of non-controlling minority shareholdings represented around 10 percent of all notified transactions in Germany.

⁴³ See F. E. Gonzalez-Diaz, *Minority shareholdings and creeping acquisitions: the European Union approach*, FORDHAM COMP. L. INST. 423 (B. E. Hawk, ed. 2012), who estimates that, of the 15,000 transactions notified to the U.S. antitrust agencies between 2001 and 2010, fewer than 10 involved partial ownership concerns; and see too 2013 Staff Working Document, *supra* note 3, Annex II, ¶75-90.

challenged has been low,⁴⁴ although two of the most prominent recent U.K. merger decisions, *BSkyB/ITV*⁴⁵ and *Ryanair/Aer Lingus*,⁴⁶ involved minority shareholdings that the U.K. Competition Commission ordered should be partially divested.

VII. THE EUROPEAN COMMISSION'S PROPOSAL

In March 2011, then-Commissioner Almunia disclosed that the Commission was considering a proposal to expand the EUMR to cover non-controlling minority shareholdings.⁴⁷ In October 2011, the Commission announced a study to examine the case for reform⁴⁸ and, in June 2013, the Commission published a Staff Working Document, soliciting comments on either a mandatory “notification” system or a “selective” system where the Commission would have the possibility to assert jurisdiction over “problematic” cases.⁴⁹ In July 2014, following a consultative process that was largely critical of the Commission’s proposed expansion of the EUMR,⁵⁰ the Commission published a White Paper advancing specific proposals for a “targeted” mandatory notification system.⁵¹

A. Has the Case for Change Been Persuasively Made?

The 2013 Staff Working Document identified “at least” 53 merger cases in which structural links were relevant for its competitive assessment, out of which 20 “led to or strengthened competition problems.”⁵² Upon examination, however, these 20 cases, which represent less than 0.5 percent of the 6,000 concentrations notified since 1990, do not represent a compelling case for change.

⁴⁴ Of the approximately 400 transactions investigated in the United Kingdom since 2008, fewer than 10 have involved non-controlling minority shareholdings, of which the majority involved situations where the shareholdings in question conferred a right to board representation.

⁴⁵ *British Sky Broadcasting Group PLC/ITV PLC*, Competition Commission Final Report (December 14, 2007) (“*BSkyB/ITV*”).

⁴⁶ *Ryanair Holdings plc and Aer Lingus Group Plc*, Competition Commission Final Report (August 28, 2013). Confirmed on appeal by the Competition Appeal Tribunal (*1219/4/8/13 Ryanair Holdings PLC v Competition and Markets Authority* [2014] CAT 3). Confirmed on appeal by the Competition Appeal Tribunal (*1219/4/8/13 Ryanair Holdings PLC v Competition and Markets Authority* [2014] CAT 3).

⁴⁷ J. Almunia, “EU Merger Control has Come of Age, Merger Regulation in the EU after 20 Years,” co-presented by the IBA Antitrust Committee and the European Commission, Brussels, March 10, 2011, (Commission Press Release SPEECH/11/166).

⁴⁸ See Provision of Data on the Importance of Minority Shareholdings in the EU, Invitation to Tender, October 27, 2011 (COMP/2011/029).

⁴⁹ 2013 Staff Working Document, *supra* note 3, p. 6. Two possible “selective” systems were identified: (1) a “self-assessment” system in which companies would be under no obligation to file a notification, but the Commission would reserve the right to investigate; and (2) a “transparency” system that would require companies to file a short information notice in situations involving a “*prima facie* problematic structural link.” *Id.*, pp. 8–9.

⁵⁰ SWD(2014) 217, Commission Staff Working Document, Impact Assessment “Towards more effective EU merger control” (July 9, 2014) (“Impact Assessment”) ¶78 (“During the public consultation, respondents across all groups of stakeholders, expressed concerns that the proposed reform would greatly increase the administrative burden which they face, and that this would be disproportionate given the low number of problematic acquisitions of minority shareholdings”).

⁵¹ *Id.* ¶¶94–98.

⁵² 2013 Staff Working Document, *supra* note 3, Annex II, ¶12.

- Three of the cases cited involved minority shareholdings that were extremely small (less than 10 percent) and should not therefore be subject to merger review on any basis.⁵³
- In a further three of the cases cited, the Commission found (or came close to finding) that the minority shareholding in question conferred control or “decisive influence.”⁵⁴ Acquisitions conferring control would presumably have been reportable in their own right under EU or national merger control rules.
- In six of the cases cited, the minority shareholdings under review raised concerns about the exchange of confidential information and the coordination of commercial policies,⁵⁵ which could presumably have been dealt with under Article 101. Article 101 could also potentially have been applied in those cases where the concern identified related to networks of controlling and non-controlling shareholdings in concentrated markets.⁵⁶
- Virtually all of the 20 cases concerned pre-existing structural links that were addressed in the context of the Commission’s review of reportable concentrations. These are not therefore examples of non-controlling minority shareholdings that escaped antitrust scrutiny. The Staff Working Document observes that, had these minority shareholdings been acquired after the concentrations in question had been approved, the Commission might have lacked jurisdiction to review them under the EUMR. This is possible. However, national merger control rules might have applied and/or the Commission might have been in a position to invoke Articles 101 and/or 102.

The 2013 Staff Working Document acknowledged that “there is currently only limited empirical literature on the effects of structural links,”⁵⁷ but presented little evidence that any of the 91 transactions it considered to “potentially merit competition scrutiny”⁵⁸ have, in fact, caused competitive harm. Accordingly, even if one accepts the theoretical existence of a “gap” in the EUMR’s scope of application, there is little evidence of non-controlling minority shareholdings being associated with anticompetitive harm in the European Union today.

⁵³ See Case COMP/M.1940 *Framatome/Siemens/Cogéma/JV*, Commission decision of December 6, 2000 (9.3 percent shareholding); Case COMP/M.4150 *Abbott/Guidant*, Commission decision of April 11, 2006 (4 percent shareholding); and Case COMP/M.5096 *RCA/MAV Cargo*, Commission decision of November 25, 2008 (5.7 percent shareholding).

⁵⁴ See Case COMP/M.833 *Coca-Cola Company/Carlsberg A/S*, Commission decision of September 11, 1997, ¶62; Case COMP/M.1453 *AXA/GRE*, Commission decision of August 4, 1999, ¶24; and Case COMP/M.5406 *IPIC/MAN Ferrostaal AG*, Commission decision of March 13, 2009, ¶36.

⁵⁵ See Case COMP/M.1080 *Thyssen/Krupp*, Commission decision of July 2, 1998, ¶33; Case COMP/M.1673 *VEBA/VIAG*, Commission decision of June 13, 2000, ¶106; Case COMP/M.2567 *Nordbanken/Postgirot*, Commission decision of November 8, 2001, ¶55; Case COMP/M.3653 *Siemens/VA Tech*, Commission decision of July 13, 2005, ¶222; Case COMP/M.4150 *Abbott/Guidant*, Commission decision of April 11, 2006, ¶57; and Case COMP/M.4153 *Toshiba/Westinghouse*, Commission decision of September 19, 2006, ¶92.

⁵⁶ See Case COMP/M.1383 *Exxon/Mobil*, Commission decision of September 29, 1999, Annex II; and Case COMP/M.167 *VEBA/VIAG*, Commission decision of June 13, 2000, ¶4.

⁵⁷ 2013 Staff Working Document, *supra* note 3, Annex I, ¶23.

⁵⁸ 2013 Staff Working Document, *Id.*, ¶97. Of these 91 transactions, “43 [...] were likely to have an EU dimension and fall under the Merger Regulation if the latter were to cover structural links.”

B. Are the Modalities of the Commission's Proposal Practicable and Proportionate?

The Commission's proposal has three main objectives: (a) to "capture the potentially anti-competitive acquisitions of non-controlling minority shareholdings;" (b) to "avoid unnecessary and disproportionate administrative burdens on companies;" and (c) to "fit with the merger control regimes currently in place at both the EU and national level."⁵⁹ The Commission estimates, optimistically perhaps, that its proposal would entail "light and tailor-made review"⁶⁰ and would apply to only 20-30 transactions a year, corresponding to around 7-10 percent of merger cases currently examined annually by the Commission.⁶¹

In designing a new system, the Commission had various options, including whether to propose a mandatory or a voluntary system and whether to establish jurisdiction on the basis of "bright line" rules (e.g., a simple shareholding threshold) or more complex criteria. As explained below, the proposal advanced in the White Paper represents among the more complex and burdensome of the various possible options available to the Commission: It envisages a mandatory system (albeit one in which the Commission would "target" its resources on problematic transactions) that would be applicable to shareholdings as low as 5 percent and would establish jurisdiction by reference to various fact-specific criteria. The principal elements of the Commission's proposal are summarized below:

- The acquisition of non-controlling minority shareholdings would be subject to mandatory notification where they create "competitively significant links." This concept has two elements: (a) the determination of whether the companies in question operate in horizontally or vertically related markets, and (b) the assessment of whether the acquired structural link is "significant."⁶²
- EUMR jurisdiction would arise automatically in respect of the acquisition of shareholdings above 20 percent.⁶³ In respect of shareholdings between 5 and 20 percent, jurisdiction would be found in the event of "additional elements." Three examples of "additional elements" are given: (a) where a shareholding confers a *de facto* blocking minority, (b) where a shareholding confers a right to representation on a target's board, and (c) where a shareholding confers rights of access to commercially sensitive information.⁶⁴
- Notification would be mandatory. Companies would be required to submit a short notice following which there would be a 15-day standstill provision during which time the acquired shareholding could not be voted and the Commission could decide whether to

⁵⁹ Staff Working Document, *supra* note 3, ¶¶67-70; and White Paper, *supra* note 2, ¶62. See too C. E. Mosso, Acting Deputy Director-General for Mergers, DG COMP, "EU Merger Control: The Big Picture," speech delivered at the Sixth Annual GCR Conference, Brussels, November 12, 2014, p. 8, available at http://ec.europa.eu/competition/speeches/text/sp2014_06_en.pdf.

⁶⁰ Commission Press Release IP/14/801 of July 9, 2014.

⁶¹ Staff Working Document, *supra* note 3, ¶85; and Impact Assessment, *supra* note 50, ¶46.

⁶² White Paper, *supra* note 2, ¶¶46-47; and Staff Working Document, *supra* note 3, ¶¶78 and 89.

⁶³ White Paper, *Id.* ¶47; and Staff Working Document, *Id.* ¶89.

⁶⁴ White Paper, *Id.* ¶47; and Staff Working Document, *Id.* ¶92.

investigate, national agencies could consider a referral request, and potential complainants could decide whether to come forward.⁶⁵ If the Commission decided to open an investigation, the normal review periods would apply.⁶⁶ If it decided not to investigate, the Commission would nevertheless retain the possibility to open an investigation for up to 4-6 months.⁶⁷

Any proposal to extend the ambit of the EUMR necessarily involves balancing potential benefits against likely costs. This calculus is in part a function of the modalities of the system adopted by the European Union: the clearer the jurisdictional thresholds, the easier they are to apply, and the more targeted their scope of application, the stronger the case for reform. The Commission's proposal is unsatisfactory because, notwithstanding the slender "gap" in the EUMR's current scope of application, the White Paper envisages a complex, cumbersome, and uncertain process that is inconsistent with the "bright line" jurisdictional thresholds that have served the EUMR well from the outset. Four principal observations may be made:

First, the Commission has, for the first time since the EUMR's adoption, proposed a jurisdictional test that is based on substantive criteria, namely the determination of whether there are "competitively significant links." The Commission's proposals would add a level of complexity that would make it difficult for many companies to comply with their obligations under the EUMR. Individual cases might well require lengthy pre-notification discussions on market definition and the extent of competitive overlap necessary to satisfy the test, resulting in delay and uncertainty.

Experience over the past 25 years shows that a wide array of definitional and other issues have arisen concerning the interpretation of the application of the existing revenue-based jurisdictional thresholds. Given the complexity of the proposed new thresholds, it would take time and effort to develop practicable rules. At a minimum, detailed guidance would be required as to the circumstances in which a competitive relationship would be sufficiently "significant" to establish EUMR jurisdiction.

Second, leaving aside the question of whether acquisitions of 5 percent shareholdings should be subject to *ex ante* merger control review, the 5-20 percent plus "additional factors" test proposed by the Commission would be difficult to apply and, therefore, problematic. The "additional factors" test seems to be modeled on the "competitively significant influence" test found in Chapter VII of the German Act Against Restraints of Competition. It is widely acknowledged that this feature of German law has led to confusion and an absence of legal certainty that has taken many years to address, and is even today not free of controversy.

Particularly difficult issues may be anticipated in respect of the proposal that shareholdings less than 20 percent be subject to review where they confer a "*de facto*" blocking minority, as it can in practice be difficult to determine whether a given minority shareholding is capable of conferring such powers. While there may be situations where this determination can be made easily (*e.g.*, where there are only a few large shareholders), in many cases it will not be

⁶⁵ White Paper, *Id.* ¶43; and Staff Working Document, *Id.* ¶¶105-107.

⁶⁶ White Paper, *Id.* ¶51; and Staff Working Document, *Id.* ¶109.

⁶⁷ White Paper, *Id.* ¶51; and Staff Working Document, *Id.* ¶102.

straightforward.⁶⁸ Any system that required investors (for purposes of determining jurisdiction) to make similar types of assessments across the European Union could raise complex legal and factual issues under a wide range of national corporate governance rules.

Third, the procedural aspects of the Commission's proposal are heavy-handed. The White Paper envisages a 15-day waiting period, in part to avoid undermining the suspensory effect of various national rules to which transactions might be subject should the Commission decline to investigate. Since minority shareholdings do not involve the integration of competing businesses, their acquisition can, in most cases, be unwound without undue difficulty. Further, the Commission recognizes that, therefore, largely most such shareholdings do not raise concerns. A stand-still requirement is unnecessary. The envisaged 4-6 month limitation period during which the Commission could review any completed acquisitions is similarly unnecessary and unduly long.

Finally, although the White Paper is silent on the topic, the implication of the Commission's proposal is that fines could be imposed for failure to notify reportable transactions. Given the issues that may in practice arise from interpreting and applying the proposed thresholds, this risks creating an unacceptable level of exposure, particularly given (i) the Commission's recognition that non-controlling minority shareholdings are less likely to raise concern than full mergers, (ii) its stated preference for a "light" system, and (iii) the possibilities that exist for unwinding such transactions relatively easily.

In short, the system proposed for reviewing the acquisition of non-controlling minority shareholdings does not meet the Commission's stated objective of minimizing the regulatory burden. This consideration is particularly important given the rare circumstances in which non-controlling minority shareholdings may be expected to raise antitrust concerns and the narrow "gap" in the existing legal framework given the scope for applying Articles 101 or 102. Accordingly, should the Commission maintain its determination to expand the EUMR's ambit, a voluntary system of the kind preferred by former Commissioner Almunia in 2012⁶⁹ and favored by the U.K. and other competition agencies would be better.⁷⁰ In addition, the applicable thresholds should be clear, predictable, and based on objective, readily ascertainable criteria.⁷¹

⁶⁸ In *BSkyB/ITV* and *Ryanair/Aer Lingus*, for example, the U.K. Competition Commission conducted detailed inquiries in an effort to predict voting turnout, future voting patterns, and the types of decisions that could confer "material influence" under U.K. law. *BSkyB/ITV*, ¶¶3.45-3.55 and 6.25-6.38; and *Ryanair/Aer Lingus*, ¶¶4.16-4.27.

⁶⁹ J. Almunia, "Merger Review: Past Evolution and Future Prospects," November 2, 2012 (Commission Press Release SPEECH/12/773) ("My preliminary preference would be to go for a selective system and identify the cases which *prima facie* can raise competition problems rather than creating a system in which significant minority shareholdings would have to be notified in all instances").

⁷⁰ See response to 2013 Staff Working Document submitted by U.K. OFT and Competition Commission, "U.K. competition authorities' response to DG COMP's Consultation on Reform of the EUMR," of September 20, 2013, pp. 2-3 ("the U.K. competition authorities favour a voluntary notification system for structural links, allowing parties to self-assess ... the U.K. competition authorities consider it is very important to implement the new system in such a way that it catches only the relatively few, yet problematic, cases. Any consideration of a mandatory pre-notification requirement should balance the need to be more active and thorough in conducting analysis of the impact of transactions on competition against the administrative and financial burden on the parties").

⁷¹ See, e.g., A. Bardong, *Head of Merger Control Policy at the Bundeskartellamt, 'The German Experience,'* in *Merger control and minority shareholdings: Time for a change?* 3 CONCURRENCES 14-41 (D. Bosco et. al. eds.2011).

VIII. REMEDIES

The Commission's general preference has been for structural commitments, in particular divestitures that do not require medium- or long-term monitoring.⁷² However, unlike acquisitions of control, where by definition the acquirer secures control of the target firm thereby eliminating competition between them, the principal theories of harm applied to non-controlling minority shareholdings are often based on predictions as to the future conduct. In this respect, the Commission has recognized that "competition concerns are more likely to be serious when a minority shareholding grants some degree of influence over the target firm's decisions"⁷³ or gives the non-controlling minority shareholder access to commercially sensitive information.⁷⁴ In such circumstances, behavioral remedies may well be sufficient, as "competition concerns arising from minority shareholdings can be alleviated not only by full divestiture, but also by non-structural remedies regarding voting rights and access to information."⁷⁵

By way of example, where the theory of harm is that the acquirer of a non-controlling minority shareholding may have the ability and incentive to influence the target firm so as to lessen effective competition, any remedy that limited the acquirer's influence, including by limiting its corporate governance rights, could well remove the competitive concerns. Likewise, where the theory of harm is that the acquirer of a non-controlling minority shareholding may secure access to confidential information as a result of its shareholding, an undertaking not to seek or obtain such information should be sufficient. Similarly, where the theory of harm is that the acquirer of a non-controlling minority shareholding may have the ability and incentive to foreclose a target firm's downstream competitors from obtaining upstream inputs, an access remedy should be acceptable.⁷⁶

Experience in Germany, which among national agencies in the European Union has been most active in investigating the acquisition of non-controlling minority shareholdings, suggests a readiness to accept behavioral remedies in appropriate cases,⁷⁷ although the general preference where such acquisitions have raised competition concerns has been to prohibit them⁷⁸ or to order

⁷² Commission Notice on remedies acceptable under the Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (2008 O.J. C 267/1) ("Remedies Notice"), ¶17 ("Divestiture commitments are the best way to eliminate competition problems resulting from horizontal overlaps, and may also be the best means of resolving problems resulting from vertical or conglomerate concerns"). See also OECD Policy Roundtable, Remedies in Merger Cases, DAF/COMP(2011) 13, p. 234 ("commitments which are structural in nature ... are, as a rule, preferable from the point of view of the Merger Regulation's objective").

⁷³ Staff Working Document, *supra* note 3, ¶52.

⁷⁴ White Paper, *supra* note 2, ¶46; and Staff Working Document, *supra* note 3, ¶¶58 and 92.

⁷⁵ Staff Working Document, *Id.*, ¶57. See too Case COMP/M.4153, *Toshiba/Westinghouse*, Commission decision of September 9, 2006 (to address information sharing concerns arising from a 24.5 percent shareholding, Toshiba agreed to relinquish board representation and blocking rights in GNF).

⁷⁶ Remedies Notice, *supra* note 72, ¶¶61 *et seq.*

⁷⁷ See, e.g., 2013 Staff Working Document Annex II, pp. 10-14. See, e.g., B8-107/02 *EWE, E.DIS/ Stadtwerke Eberswalde*, Decision of the Bundeskartellamt of December 18, 2002 (EWE's and E.DIS's proposed acquisition of shareholdings in a downstream supplier, Stadtwerke Eberswalde, conditioned on a commitment giving Stadtwerke the sole right to appoint a chief executive officer and to independently enter into energy procurement contracts).

⁷⁸ See, e.g., B3-132/12 *Asklepios Kliniken/Rhön-Klinikum*, Decision of the German Bundeskartellamt of March 12, 2013; B8-67/09 – *EnBW/VNG*, Decision of the Bundeskartellamt of August 24, 2009; B8-67/09 – *EnBW/EWE*, Decision of the Bundeskartellamt of January 1, 2009; B8-93/07 *RWE/Stadtwerke Krefeld Neuss*, Decision of the

the divestiture of the acquired shareholdings.⁷⁹ Likewise, the tendency in the United Kingdom has been to order the divestiture of virtually all of the acquired shareholdings,⁸⁰ including in circumstances where, given the theories of harm at issue, behavioral remedies could well have been sufficient.⁸¹ Accordingly, should the EUMR's jurisdictional scope be expanded to include acquisitions of non-controlling minority shareholdings, the Commission will hopefully be more open to accepting appropriate behavioral remedies than it is today.⁸²

IX. GLOBAL CONSIDERATIONS

Over the past decade, many countries around the world have either adopted merger control regimes that are based on the EUMR or look to the Commission for guidance and inspiration on questions of policy and practice.⁸³ The proliferation of such regimes, together with the lack of harmonization in applicable jurisdictional, substantive, and procedural rules, has created a complex, burdensome,⁸⁴ costly, and occasionally bewildering landscape.⁸⁵ Moreover,

Bundeskartellamt of October 23, 2007; B4-1002/06 *Remondis/ Schweriner Abfallentsorgungs- und Straßenreinigungsgesellschaft*, Decision of the Bundeskartellamt of December 22, 2006; B8-83/03 *RWE AG/Stadt Wuppertal*, Decision of the Bundeskartellamt of November 4, 2003; and B9-164/98 *HABET/Lekkerland*, Decision of the Bundeskartellamt of February 25, 1999.

⁷⁹ See, e.g., B8-27/04 *Mainova/AVG*, Decision of the Bundeskartellamt of July 22, 2004; B8-21/03 *E.ON/Stadtwerke Eschwege*, Decision of the Bundeskartellamt of September 9, 2003; B8-149/01 *E.ON/RAG Beteiligungs GmbH*, Decision of the Bundeskartellamt of February 26, 2002; and B8-109/01 *E.ON AG / BP p.l.c.*, Decision of the Bundeskartellamt of January 17, 2002. See too J. P. Schmidt, *Germany: Merger control analysis of minority shareholdings – A model for the EU?* 2 COMPETITION L.J. 208 (2013), who estimates that, between 2005 and 2012, of the 32 transactions prohibited in Germany, 4 or 12.5 percent involved the acquisition of non-controlling minority shareholdings. See also Impact Assessment, *supra* note 50, ¶46.

⁸⁰ In *BSkyB/ITV*, *BSkyB* was ordered to reduce its 17.9 percent shareholding in *ITV* to below 7.5 percent. *BSkyB and ITV plc*, Secretary of State for Business, Enterprise & Regulatory Reform Final Report (January 29, 2008). In *Ryanair/Aer Lingus*, *Ryanair* was ordered to divest all but 5 percent of its 29 percent shareholding in *Aer Lingus*. *Ryanair Holdings plc and Aer Lingus Group Plc*, Competition Commission Final Report (August 28, 2013). Confirmed on appeal by the Competition Appeal Tribunal (1219/4/8/13 *Ryanair Holdings PLC v Competition and Markets Authority* [2014] CAT 3). Under appeal to the Court of Appeal.

⁸¹ In *Ryanair/Aer Lingus*, for example, where the principal theories of harm pursued by the U.K. Competition Commission concerned the possibility that *Ryanair* might prevent the sale of *Aer Lingus* slots at Heathrow airport or frustrate a merger with another airline, commitments not to act in this way should in principle have addressed the agency's concerns.

⁸² See, e.g., Remedies Notice, *supra* note 72, ¶¶17 and 69, which distinguish between “divestitures, other structural remedies, such as granting access to key infrastructure or inputs on non-discriminatory terms, and commitments relating to the future behaviour of the merged entity” that are considered acceptable in only exceptional circumstances.

⁸³ See, e.g., N. Kroes, former Competition Commissioner, “Competitiveness—the common goal of competition and industrial policies” (2008) SPEECH/08/207 (“Our rules are working, and our European approach is setting the new global standards”).

⁸⁴ Data computed by *Global Competition Review* show that close to 15,000 notifications were filed around the world in 2012, incurring delay and cost for thousands of transactions. See *Global Competition Review, Rating Enforcement: The Annual Ranking of the World's Leading Competition Authorities*, GCR 14 (June 2012).

⁸⁵ See, e.g., D. Cooperman, Senior Vice President, General Counsel and Secretary Oracle Corporation, Testimony before the U.S. Antitrust Modernization Commission (November 8, 2005); and J. W. Rowley QC and O. K. Wakil, *International Mergers: The Problem of Proliferation*, FORDHAM COMP. L. INST. 297–317 (B. E. Hawk, ed. 2007).

antitrust agencies in emerging market jurisdictions do not always apply merger control rules in the same way as their U.S. or EU counterparts.

Accordingly, there is a real risk that any expansion of the EUMR would be copied in more than 100 jurisdictions, including the 25 or so EEA countries that do not currently subject structural links to review under their applicable merger control rules. This could significantly increase the incidence of global merger control with the attendant costs and risk that pro-competitive investments and legitimate corporate transactions would be delayed or not pursued.

X. CONCLUSION

Any extension of the EUMR's scope of application to capture non-controlling minority shareholdings would represent a significant change that could materially increase the number of reportable transactions, thereby increasing compliance costs and regulatory uncertainty. Given the existing possibilities available to the Commission to apply Articles 101 and/or 102 to structural links, together with the existence of national merger control laws in the European Union that apply to the acquisition of non-controlling minority shareholdings, the burden rests on the Commission to demonstrate the existence of a material gap in the EUMR's scope of application.

Although there is theoretical support for the notion that structural links may in certain circumstances raise antitrust concerns, the available evidence is insufficient to justify the EUMR's expansion. Accordingly, in this author's view, the answers to the two questions framed at the outset—has the case for change been persuasively made and are the modalities of the Commission's proposal appropriate?—are “no” and “no.” Should, however, the Commission decide to press ahead, a voluntary system based on clear and certain thresholds would be preferable to the proposal outlined in the White Paper.