

**COMPETITION LAW AND THE REGULATION OF
NON CONTROLLING MINORITY INTERESTS: THE
REGULATORY GAP**

Marco W. Hickey

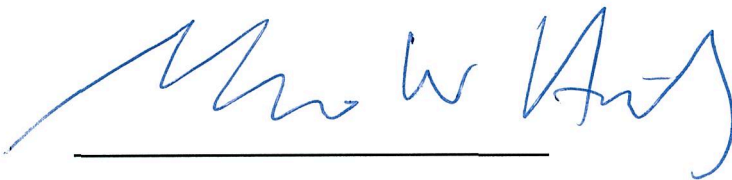
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Supervisor: Professor Alexander Schuster

DECLARATION

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Marco W. Hickey

ABSTRACT

COMPETITION LAW AND THE REGULATION OF NON CONTROLLING MINORITY INTERESTS: THE REGULATORY GAP

This thesis explores the regulation of minority interests (both cross and common) under Irish and EU competition law. It examines the economic theories of harm regarding cross and common minority shareholdings which, in turn, reveals that the principles regarding cross minority shareholdings are relatively well settled; whereas the debate as to the competitive effects of common shareholdings is alive and there is therefore no general consensus on the subject.

This thesis looks at the available empirical evidence of instances in which such shareholding links may give rise to anti-competitive effects. It examines the scope of the mergers regime in Part 3 of the Competition Act 2002 (2002 Act) in Ireland and the Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2004 EMCR) at EU level, respectively, to confirm that non-controlling minority interests are excluded under both systems. The author explores the shortcomings of the scope of the only remaining regulatory frameworks, in the form of the general competition rules in Sections 4 and 5 of the 2002 Act and Articles 101 and 102 of the Treaty on the Functioning of the European Union, available to control the acquisition of non-controlling minority interests. The thesis is focused on the limitations of the jurisdictional scope of the above systems, which in turn results in minority interests escaping substantive competition scrutiny. The author examines the jurisdictional experience of *ex-ante* control of minority interests in certain other countries to conclude that none of those selected jurisdictions serves as an ideal model on which to base a proposal for reform of the merger control regime in Ireland or the EU. He reviews and critiques the Commission's 2014 White Paper towards more effective EU merger control which contains proposals to bring minority interests within the scope of the 2004 EMCR under certain conditions.

This thesis reveals that the current jurisdictional limitations of existing Irish and EU competition law in relation to minority interests have diverted attention away from the substantive issues, which is where the focus should lie. Similarly, the Commission's proposals under the White Paper would entail the application of jurisdictional parameters of a limiting nature, again undoubtedly diverting attention away from the substantive analysis of minority interests. Building on the accumulated body of research underlying the preparation and production of this thesis, the author concludes by putting forward a series of proposals to fill the regulatory gap by recommending a jurisdictional framework in respect of the regulation of minority interests which will broaden the regulatory net, thus allowing for a greater focus on substantive, as opposed to jurisdictional, analyses of the different scenarios and complex issues which arise from cross and common shareholdings.

ACKNOWLEDGMENTS

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I wish to thank my family for all their support and understanding.

DEDICATION

This thesis is dedicated to my wife Julie, my children, James, Cristina and Henry, my mother Maria Vittoria and my late father Jeremiah.

RESEARCH METHODOLOGY

The author draws on his experience as a practicing solicitor specialising in EU and competition law and mergers and acquisitions,¹ as well as the authorship of the book titled *Merger Control*.² However, this thesis is much more theoretical than anything the author has undertaken to date. It is based on a close examination of the theory behind the legal issues faced in practice and touched upon in the above book. In identifying a regulatory gap in respect of non-controlling minority interests, the author has made use of his practical knowledge and the research skills he has gleaned as a postgraduate student. By focussing on the theoretical underpinnings of the law in this area, he has devised a blueprint-in the concluding chapter of this thesis-which is designed to close this regulatory gap.

The research materials used in the preparation of this thesis cover both primary sources such as statutes, EU legislation and case law from Ireland, the EU and a few of selected jurisdictions and secondary sources such as textbooks, articles in legal, economic and business-oriented periodicals and official publications. Wherever possible, the author has consulted both primary and secondary sources in order to create the most accurate picture of competition law relating to the regulation of minority interests in Ireland, the EU and US respectively. The author does not speak German or Portuguese and found himself relying on translated legal periodicals (as well as communicating with lawyers in Germany and with the Brazilian competition agency, Conselho Administrativo de Defesa Econômica (CADE)) in order to gain insights into the salient legal provisions in those jurisdictions.

This thesis initially reviews the economic theories of harm relating to minority interests and published empirical evidence of the impact of such minority interests in given sectors. It then examines in detail the relevant Irish and EU legislative jurisdictional framework for merger control and the general competition rules as they apply to minority interests and how they have been interpreted by the CCPC, the EU Commission and the Irish and EU courts in order to understand the scope and confines of the applicable regimes from a jurisdictional perspective. The thesis reviews case law on the jurisdictional analysis of minority interests under the general competition rules in order to set out the approach taken and expose the lack of reasoning and consistency in cases to date. The author explores

¹ The author is head of the EU, Competition and Regulated Markets Unit, and a senior partner in the Business Department specialising in mergers and acquisitions, at LK Shields Solicitors LLP.

² Marco W. Hickey, *Merger Control* (Round Hall 2013).

the jurisdictional framework for the review of minority interests under the laws of selected jurisdictions (both within and outside the EU) that purport to regulate the acquisition of minority interests, highlighting the shortcomings apparent from the experience in those jurisdictions. The thesis examines and critiques the content of the EU Commission's White Paper on cross shareholdings and the proposals to extend the EU Merger Control Regulation with a view to bringing non-controlling cross shareholdings within the scope of the *ex-ante* system of merger review and control and proposes a jurisdictional framework for Irish and EU merger control that seeks to address the issues regarding cross and common shareholdings that have been identified to date.

ORIGINAL CONTRIBUTION

This thesis is the first available detailed and comprehensive study of the following subjects:

- (i) The jurisdictional shortcomings or gaps in the legislative machinery available to control the acquisition of minority interests under Irish law;
- (ii) A dual-disciplinary analysis of minority interests from the perspectives of both Irish competition law and economic theories of harm;
- (iii) The implications of cross and common non-controlling shareholdings under Irish competition law;
- (iv) The proposals for jurisdictional reform at EU level when viewed from an Irish law perspective and a critique of same on the assumption that similar proposals, if adopted at EU level, would be implemented into domestic competition law; and
- (v) Most importantly, the formulation of recommendations for the jurisdictional reform of the existing regime in Ireland in respect of the regulation of minority interests. This newly devised regulatory strategy is designed to meet the objective of capturing transactions which are potentially harmful from a competition law perspective without imposing an undue burden on the CCPC and business. Most of these recommendations for reform are inspired by the flaws and lacunae in the current regime which have been identified in this thesis. It is salutary to point out that this blueprint for the reform of Irish law in this area could, if adapted accordingly, also be used in substantial measure to enhance the effectiveness of EU law on the regulation of minority interests.

STRUCTURE OF THESIS

This thesis is structured as follows:

Chapter 1 – Economic theories of harm regarding cross and common minority shareholdings and empirical evidence of such links giving rise to anti-competitive effects;

Chapter 2 - Existing definition of mergers and acquisitions in Part 3 of the Competition Act 2002 (2002 Act) and the definition of concentrations under Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (2004 EMCR) and the exclusion of non-controlling minority interests;

Chapter 3 – Current regulation of minority interests under the general competition rules in Sections 4 and 5 of the 2002 Act and Articles 101 and 102 of the Treaty on the Functioning of the European Union;

Chapter 4 – The application of Irish and EU merger control to pre-existing minority interests of the parties as part of the review of a subsequent notified merger transaction;

Chapter 5 – Jurisdictional experience of *ex-ante* control of minority interests in certain other countries; and

Chapter 6 – The Commission's White Paper Proposals to regulate minority interests by bringing them within the 2004 EMCR and the author's recommendations for reform of the Irish and EU merger rules to capture non-controlling minority interests.

**COMPETITION LAW AND THE REGULATION OF NON CONTROLLING
MINORITY INTERESTS: THE REGULATORY GAP**

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TABLE OF ABBREVIATIONS

1989 EMCR	Council Regulation 4064/89 of 21 December 1989 on the control of concentrations between undertakings
2002 Act	The Competition Act 2002 (as amended)
2004 EMCR	Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings
2013 Consultation	Commission consultation in 2013 seeking views on whether or not the 2004 EMCR should be extended to encompass “non-controlling minority shareholdings” which it defines as “structural links”
Beneficial Ownership Regulations	The European Union (Anti-Money Laundering: Beneficial Ownership of Corporate Entities) Regulations 2019
Bertrand competition	firms compete with differentiated goods in prices
CADE	Conselho Administrativo de Defesa Econômica
CCPC	The Competition and Consumer Protection Commission
CJEU	Court of Justice of the European Union
CMA	The Competition and Markets Authority
Cournot competition	firms compete in quantity
DoJ	Department of Justice
EA 2002	Enterprise Act 2002 (as amended)
EC Treaty	the Treaty establishing the European Economic Community
EU Consolidated Jurisdictional Notice	Commission Consolidated Jurisdictional Notice under Council Regulation (EEC) No 139/2004 on the Control of Concentrations Between Undertakings
EU Horizontal Merger Guidelines	Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings
EU Non-Horizontal Merger Guidelines	Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings
EU Remedies Notice	Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004
FTC	Federal Trade Commission
GWB	Gesetz gegen Wettbewerbsbeschränkungen in der Fassung der Bekanntmachung (Act against Restraints of Competition)

HHI	Herfindahl-Hirschman Index
HSR Act	Hart-Scott-Rodino Antitrust Improvements Act 1976
Merger Guidelines	CCPC Guidelines for Merger Analysis
MHHI	Modified Herfindahl-Hirschman Index
OECD	Organisation for Economic Co-operation and Development
OFT	The Office of Fair Trading
PPI	Price Pressure Index
SLC	Substantial lessening of competition
SWD Consultation 2013	Commission Staff Working Document Towards more effective EU merger control dated 25 June 2013
SWD Consultation Annex 1 2013	Annex 1 of Staff Working Document Towards more effective EU merger control dated 25 June 2013
SWD Consultation Annex II 2013	Annex II of Commission in the Staff Working Document Towards more effective EU merger control dated 25 June 2013
SWD White Paper	Commission Staff Working Document accompanying the White Paper Towards more effective EU merger control dated 9 July 2014
SWD White Paper	Commission Staff Working Document accompanying the White Paper Towards more effective EU merger control dated 9 July 2014
TFEU	Treaty on the Functioning of the European Union
UK Jurisdictional Merger Guidelines	Mergers: Guidance on the CMA's jurisdiction and procedure
US Horizontal Merger Guidelines	Horizontal Merger Guidelines of the US Department of Justice and the Federal Trade Commission
White Paper	Commission White Paper Towards more effective merger control dated 9 July 2014

INTRODUCTION AND AIMS OF THE THESIS

This thesis examines the regulatory framework applicable to the acquisition or holding of minority interests under Irish and EU competition law. Minority interests in this context can be broadly categorised as follows: (a) cross shareholdings or ownership, which refers to the acquisition or holding of a minority shareholding directly or indirectly by one party in another, often a competitor; and (b) common shareholdings or ownership, where one or more of a firm's shareholders directly or indirectly has a concurrent equity interest in one or more entities, usually rivals, such as an investment fund holding minority stakes in various entities competing on the same market. The thesis focuses on minority interests that do not amount to the acquisition of control, known as non-controlling interests. In Chapter 1, this work initially reviews the main economic theories of harm regarding cross and common shareholdings in order to ascertain the potential issues surrounding such links; this is followed by an analysis of the jurisdictional approach taken to date to the regulation of minority interests in Ireland and at EU level both: (i) under the system of merger control; and (ii) under the general competition rules prohibiting restrictive agreements and concerted practices and abuse of a dominant position. The thesis is very much focused on the jurisdictional scope or reach of the above systems of competition regulation as they apply to minority interests. In the absence of jurisdiction, the substantive review of such interests cannot take place. This jurisdictional analysis critiques the Irish and EU regimes and highlights their numerous and significant shortcomings in the context of the purported regulation of minority interests, demonstrating that the acquisition or holding of minority interests which are shown to be harmful can escape competition regulation (merger control and general competition rules) altogether.

The thesis examines the conditions that need to be met for the application of the general (non-mergers) Irish and EU competition rules which underline their inadequacy for regulating non-controlling minority interests. The above is compounded by the cases examining minority interests in the context of the above general competition rules, whose review exposes the paucity of reasoning and lack of consistency in the approach taken. The thesis takes cognisance of the above regulatory gaps in Irish and EU competition law, and conducts a comparative analysis of the competition law regimes applicable in other selected jurisdictions to demonstrate the options available to create a more streamlined and coherent system for the regulation of minority interests under Irish and EU law that is structured on terms that empower the competition agencies properly to review and control potentially harmful minority interests. The aim of the author is to suggest a regulatory framework, which is less hampered by jurisdictional hurdles and constraints, and more focused, on the one hand, on fostering competition by providing a well-defined but flexible

framework from a jurisdictional perspective which allows for the application of evolving economic theories of harm and thereby captures transactions which are potentially harmful from a competition law perspective and, on the other, by offering the competition enforcement agencies and businesses clarity as to the parameters and the operation of the applicable regulatory regime.

The framework for merger control in Ireland is Part 3 of the Competition Act 2002 ("**2002 Act**")¹. The term "merger or acquisition" is specifically defined in Part 3 to encompass mergers, acquisitions of control of undertakings and acquisitions of assets. Transactions involving the sale and purchase of shares typically fall to be considered as acquisitions of control of undertakings. Part 3 of the 2002 Act was inspired by the EU merger control model of *ex-ante* control of "concentrations"², which have, in what is known in EU merger control terminology, an "EU dimension". The EU Commission's Consolidated Jurisdictional Notice under Council Regulation (EEC) No 139/2004 on the Control of Concentrations Between Undertakings³ (the "**EU Consolidated Jurisdictional Notice**") provides detailed guidance on various jurisdictional issues related to Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings ("**2004 EMCR**")⁴, including the categories of transactions caught by the 2004 EMCR. The EU Consolidated Jurisdictional Notice examines *inter alia* the definition of "concentration"⁵ for the purposes of the 2004 EMCR. There is, at present, no Irish equivalent to the EU Consolidated Jurisdictional Notice addressing jurisdictional issues for the purposes of the 2002 Act. However, the EU Consolidated Jurisdictional Notice is of persuasive authority in the interpretation of the definition of mergers and acquisitions in the 2002 Act and in practice is often referred to by the Competition and Consumer Protection Commission ("**CCPC**")⁶ in its examination of jurisdictional issues under Part 3 of the 2002 Act.

¹ Prior to the entry into force of Part 3 of the 2002 Act on 1 January 2003, mergers and acquisitions were regulated by the Mergers, Take-Overs and Monopolies (Control) Act 1978 which was repealed by Section 48(b) of the 2002 Act.

² This is the term used in EU law to define the category of transactions that are subject to EU merger control as defined in Article 3 of Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (the EC Merger Regulation) [2004] OJ L24/1.

³ Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings [2008] C95/1.

⁴ Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (the EC Merger Regulation) [2004] OJ L24/1.

⁵ The equivalent under the 2002 Act is a merger or acquisition in Section 16(1) of the 2002 Act.

⁶ The CCPC replaced the former Competition Authority and was established on 31 October 2014 under Section 9(1) of the Competition and Consumer Protection Act 2014 ("**2014 Act**") and the Competition and Consumer Protection (Establishment Day) Order, SI 2014/36 as of 31 October 2014.

A proposed transaction which amounts to a merger or acquisition under Part 3 of the 2002 Act and exceeds certain turnover thresholds must be notified to the CCPC⁷ and cannot be implemented until the CCPC has determined that it may be put into effect or the CCPC is deemed to have determined that the merger may be put into effect.⁸ Similarly, at EU level, under the 2004 EMCR, a proposed transaction which gives rise to a "concentration" with an EU dimension, is subject to what is known as the standstill provision, which specifies that the transaction cannot be implemented until notified to, and approved by, the Commission⁹.

It is important to note that the trigger event for the compulsory notification of the purchase of shares both under the 2002 Act and the 2004 EMCR is the acquisition of control. Control is defined in Section 16(2) of the 2002 Act as follows:

“...control, in relation to an undertaking, shall be regarded as existing if, by reason of securities, contracts or any other means, or any combination of securities, contracts or other means, decisive influence is capable of being exercised with regard to the activities of the undertaking and, in particular, by—

(a) ownership of, or the right to use all or part of, the assets of an undertaking, or

(b) rights or contracts which enable decisive influence to be exercised with regard to the composition, voting or decisions of the organs of an undertaking.”

The 2004 EMCR similarly defines control as follows:

“2. Control shall be constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by:

(a) ownership or the right to use all or part of the assets of an undertaking;

(b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking.”

As can be seen from the above, a key feature of control under Irish and EU merger control laws is the ability to exercise decisive influence. The acquisition of a minority interest will only give rise to a merger or acquisition under the 2002 Act or a concentration under the

⁷ 2002 Act, s 18(1).

⁸ 2002 Act, s 19(10).

⁹ Article 7(1) of the EMCR 2004. The above is subject to limited exceptions set out in Articles 7(2) and (3) of the EMCR 2004.

2004 EMCR if it meets the all-important jurisdictional criterion of decisive influence. A proposed transaction which amounts to a merger or acquisition under Part 3 of the 2002 Act and does not meet the above turnover thresholds may be notified to the CCPC on a voluntary basis. Separately, all "media mergers" (as defined) are required to be notified both to the CCPC and to the Minister for Tourism, Culture, Arts, Gaeltacht, Sport and Media irrespective of the turnover of the parties.¹⁰ Similarly, the concept of control is central to the definition of media mergers.

It is clear that the definition of merger or acquisition, which entails the application of the key concept of control/decisive influence, is central to the system for the ex-ante review of transactions from a competition law perspective in Ireland and at EU level. As a result, a transaction falling outside the definition of merger or acquisition under Section 16(1) of the Irish 2002 Act or concentration under Article 3 of the 2004 EMCR, or which amounts to a merger or acquisition under the 2002 Act or concentration under 2004 EMCR, but does not meet the turnover thresholds set out in Section 18(1) of the 2002 Act or Article 1(2) of the 2004 EMCR for concentrations with an EU dimension, escapes automatic regulatory scrutiny and is only subject to challenge from a competition law perspective under the general competition rules which prohibit restrictive agreements and practices and/or abuse of a dominant position.¹¹ As we shall see in chapter 3, there are a number of significant issues with the application of the above general competition rules to non-controlling minority interests including jurisdictional scope and inconsistency of precedent. This thesis is designed to highlight the regulatory shortcomings arising from both the mergers and general competition frameworks and the consequent exclusion of non-controlling minority interests and to underline that the application of the above jurisdictional thresholds means that transactions which are potentially harmful, when viewed in the context of established theories of harm, escape automatic regulatory examination.

The cases reviewed in Chapter 4 clearly show that the CCPC and the EU Commission have carried out detailed examinations of the implications of minority interests in given situations and concluded that they gave rise to significant competition concerns giving rise to a substantial lessening of competition ("**SLC**") which necessitated the imposition of appropriate remedies. However, the door to carrying out the substantive review in these cases was opened by the notification of a separate subsequent transaction which amounted

¹⁰ Section 18(1)(b) and Part 3A of the 2002 Act (as amended) and the Competition Act (Section 18(5) and (6)) Order 2007, 2007/122 regulate media mergers. It is not my intention to cover media mergers in this thesis.

¹¹ Sections 4 and 5, respectively of the 2002 Act. The equivalent EU prohibitions on restrictive agreements and abuse of a dominant position are set out in Article 101 and 102 of the Treaty on the Functioning of the European Union [2012] OJ C326/47 ("**TFEU**").

to a merger or acquisition for Irish law purposes or concentration at EU level, and not the acquisition of the equity stake itself.

The significant gap in the regulation of minority equity structural links under the *ex-ante* system of merger control in Ireland and at EU level was emphatically exposed by a case in which the parties were high profile Irish companies, namely, Ryanair and Aer Lingus. As we shall see in Chapter 2, the *lacuna* in the Irish and EU merger control systems left the Commission in Brussels in the embarrassing and powerless position of being unable to intervene when called upon to do so in a situation that clearly involved a significant impact on trade between EU Member States. The Commission had to step aside and leave it to the UK competition authorities to intervene and take enforcement action to remedy the situation using domestic powers that had their origins in national legislation originating prior to the UK's membership of the European Economic Community on 1 January 1973.

As we shall see, the question of the control of cross shareholding minority interests has been the subject of much debate at EU level. Under the direction of Mr. Joaquín Almunia, who served as EU Competition Commissioner from 2010 to 2014, the EU Commission commenced a public consultation in 2013 inviting the expression of views on the reform of the 2004 EMCR to include minority interests.¹² Following the above consultation, the Commission in 2014 adopted its White Paper towards more effective EU merger control¹³ ("**White Paper**") putting forward proposals for specific amendments to the EU merger control regime to include minority interests. To date, the proposals have not been implemented. The proposals have lost momentum under the current Competition Commissioner, Ms. Margrethe Vestager, who on 12 March 2015, only a few months after being appointed on 1 November 2014, as part of her keynote address at a conference on 'Thoughts on Merger Reform and Market Definition' at Studienvereinigung Kartellrecht Brussels stated as follows:¹⁴

¹² White Paper on reform of the 2004 EMCR to include minority interests (2013).

<http://ec.europa.eu/competition/consultations/2013_merger_control/merger_control_en.pdf>

¹³ White Paper towards more effective EU merger control (2014).

<http://ec.europa.eu/competition/consultations/2014_merger_control/mergers_white_paper_en.pdf>

The White Paper was accompanied by a Commission staff working document ("**SWD 2014 Consultation**") which provided a more detailed analysis of the considerations underlying the White Paper and its policy proposals.

<http://ec.europa.eu/competition/consultations/2014_merger_control/staff_working_document_en.pdf>

¹⁴ Margrethe Vestager, Keynote address at Studienvereinigung Kartellrecht, 'Thoughts on Merger Reform and Market Definition' (Brussels, 12 March 2015).

<https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/thoughts-merger-reform-and-market-definition_en>

“What have we learned from the replies? While many acknowledge that there may be an enforcement gap, there is widespread concern regarding the proportionality of the White Paper’s approach to closing the gap. Is it balanced? Will it work well? Against this background, my conclusion is that the balance between the concerns that this issue raise and the procedural burden of the proposal in the White Paper may not be the right one and that the issues need to be examined further.”

Commissioner Vestager in March 2016 underlined that extending the 2004 EMCR to capture non-controlling interests would create “a lot of complexity” and that she was not convinced that it was a “change we absolutely have to make to our system”.¹⁵ The Commission in 2021 confirmed that the above were the reasons for not extending the 2004 EMCR to non-controlling minority interests.¹⁶ The above comments are surprising given the defects in the current system, which were unequivocally acknowledged by the Commission in Staff Working Document Towards more effective EU merger control dated 25 June 2013 at Annex 1 (“**SWD 2013 Consultation Annex 1**”)¹⁷ and the subsequent White Paper. Notwithstanding the above reservations, the Commission commissioned Spark Legal Network and Queen Mary University of London to carry out a study entitled *Support study for impact assessment concerning the review of the Merger Regulation regarding minority shareholdings*¹⁸ (“**Impact Assessment Study**”) which was published in February 2017 which described the purpose of the study as “to provide DG Competition with additional information on the topic of acquisitions of non-controlling minority shareholdings from the point of view of both competition and corporate law and practice in different jurisdictions”. The above underlines that the discussion about whether to include cross minority interests under the EU merger control regime was not entirely off the Commission’s agenda at that time. Significantly, the Commission in 2017 (at a time when Commissioner Vestager held the competition portfolio for two years) in its merger review in *Dow/DuPont*,¹⁹ following extensive research and analysis, unequivocally endorsed both:

¹⁵ Margrethe Vestager, Keynote address at Studienvereinigung Kartellrecht, ‘Refining the EU Merger Control System’ (Brussels, 10 March 2016).

<https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/thoughts-merger-reform-and-market-definition_en>

¹⁶ *Commission Staff Working Document Evaluation of Procedural and Jurisdictional Aspects of EU Merger Control* (European Commission, 26 March 2021).

<https://ec.europa.eu/competition/consultations/2021_merger_control/SWD_findings_of_evaluation.pdf>

¹⁷ The consultation period was from 20 June 2013 to 12 October 2013.

<http://ec.europa.eu/competition/consultations/2013_merger_control/merger_control_en.pdf>

¹⁸ European Commission, *Support study for impact assessment concerning the review of the Merger Regulation regarding minority shareholdings* (Spark Legal Network and Queen Mary University of London, 2016).

<<http://ec.europa.eu/competition/publications/reports/KD0416839ENN.pdf>>

¹⁹ *Dow/DuPont* (Case No M.7932) Commission Decision 27 March 2017.

(i) the economic theories of harm regarding cross shareholdings set out in what the Commission described as “three main economic papers analysing the theoretical unilateral impact of direct partial competitor ownership on competition” authored by *Reynolds and Snapp*,²⁰ *Bresnahan and Salop*²¹ and *Salop and O’Brien*²² respectively; and (ii) the economic theories of harm on common ownership espoused by *Azar, Schmalz and Tecu*,²³ *Anton, Ederer, Gine and Schmalz*,²⁴ *Elhauge*²⁵ and *Posner, Scott Morton and Weyl*,²⁶ acknowledging that they were based on the theories of harm developed for cross shareholdings, and applied them to the facts as part of its merger review. As we shall see, a significant debate has more recently emerged as to the competition law implications of common ownership, with some authors challenging this above theory of harm. The EU Commission’s science and knowledge service, the Joint Research Centre (“JRC”), published a report titled “Common Shareholding in Europe”²⁷ (“JRC Report”) which it describes as representing, to the best of JRC’s knowledge, “the first comprehensive study on firms’ ownership in the EU”²⁸ which arrived at the conclusion that “[i]n reality, the phenomenon of common shareholding proved to be particularly complex, and disentangling

²⁰ Robert J Reynolds and Bruce R Snapp, ‘The competitive effects of partial equity interests and joint ventures’ (1986) *International Journal of Industrial Organization*, 4(2), 141-153.

²¹ Timothy F Bresnahan and Steven C Salop, ‘Quantifying the competitive effects of production joint ventures’ (1986) *International Journal of Industrial Organization*, 4(2), 155-175.

²² Steven C Salop and Daniel O’Brien, ‘Competitive effects of partial ownership: Financial interest and corporate control’ (2000) *Antitrust Law Journal*, 67(3), 559-614.

²³ José Azar, Martin C Schmalz and Isabel Tecu, ‘Anti-Competitive Effects of Common Ownership’ (15 March 2017) *Journal of Finance*.

²⁴ Miguel Antón, Florian Ederer, Mireia Giné and Martin Schmalz, ‘Common ownership, competition, and top management incentives’ (2016) *Journal of Corporate Governance – Finance Working Paper No 511/2017*, 1328.
<<https://ssrn.com/abstract=2802332>>

²⁵ Einer R Elhauge, ‘Horizontal Shareholding’ (10 March 2016) 109 *Harvard Law Review* 1267, Harvard Public Law Working Paper No 16-17.
<<http://dx.doi.org/10.2139/ssrn.2632024>>

²⁶ Eric A Posner, Fiona Scott Morton and E Glen Weyl, ‘A Proposal to Limit the Anti-Competitive Power of Institutional Investors’ (2017) *Antitrust Law Journal*.

²⁷ Nicoletta Rosati, Pietro Bompreszi, Massimiliano Ferraresi, Annalisa Frigo and Michela Nardo, ‘Common Shareholding in Europe’ (2020) EUR 30312 EN, Publications Office of the European Union, Luxembourg, ISBN 978-92-76-20876-1, doi:10.2760/734264, JRC121476.

²⁸ The report highlights that based on firm-level balance sheet and ownership data, a set of new indices of common shareholding is used to describe the investment behaviour of shareholders at both industry and investor level, together with the strength of relationships within the networks of firms and of investors. The report devotes special attention to the top investors in the EU overall as well as in each industry, together with a brief overview of cross-investments within industries, when relevant. The baseline analysis is conducted on a historical dataset containing all listed companies active in the EU in the period 2007-2016 which includes all listed firms registered in the EU, plus all listed companies registered elsewhere, but holding shares in at least one firm registered in the EU. The average number of firms observed each year is 26,560 (24,857 in 2017 to 26,942 in 2016) – where on average about 57% are registered in the EU countries, the rest being registered outside the EU.

its various effects continues to be challenging". As a result, the Commission's unequivocal endorsement of the common ownership theory of harm in *Dow/DuPont* sits uncomfortably with more recent acknowledgments that the debate is still alive and the theory unsettled as per the Commission's more recent merger control decision in *Bayer/Monsanto*²⁹ and the JRC Report. While the author to some extent understands the Commission's reluctance to put forward proposals on common ownership in circumstances where the academic debate on the associated theories of harm is evolving (despite the Commission's initial endorsement in *Dow/DuPont*) and the empirical evidence is still being gathered, it is difficult to understand why proposals on cross ownership have not been advanced particularly given that the Commission has satisfied itself as to the applicable economic theories of harm and the framework machinery required to address the regulatory gap for cross ownership. Commissioner Vestager's comments on cross shareholdings appear to suggest that proportionality is at the centre of the Commission's reluctance to advance the proposals, notwithstanding the extensive proportionality analysis in the White Paper and given that proportionality has not prevented the Commission from framing the long-standing jurisdictional thresholds in terms of turnover such that many transactions are caught which pose absolutely no, or very little, competition concern but which are considered acceptable in the context of pursuing the policy objective of clarity and ease of application of the merger thresholds. At this stage, the issue of whether or not to extend the 2004 EMCR to cross shareholdings and the Commission's apparent change of policy in this regard under the stewardship of Commissioner Vestager has effectively, for now at least, been eclipsed by the more recent phenomenon of institutional minority common ownership investment arising from changed investment trends. The Commission's change of policy on cross shareholdings appears to have stifled progress on remedying the long-standing regulatory gap for non-controlling cross shareholdings as exposed by the *Ryanair/Aer Lingus* saga where the Commission was left standing powerless to intervene, requiring intervention at national level by the UK Office of Fair Trading using domestic powers that were not framed to address the multi-Member State issues involved. It appears that the Commission's current policy, not at this time, to extend the 2004 EMCR to cross minority interests is motivated by a change of view on proportionality as previously expressed by the Commission in the White Paper. No doubt, the Commission would also like to see how the debate and related evidence regarding the common ownership theory of harm emerges before reigniting any debate on cross ownership.

²⁹ *Bayer/Monsanto* (Case No M.8084) Commission Decision 21 March 2018.

COMPETITION LAW AND THE REGULATION OF NON CONTROLLING MINORITY INTERESTS: THE REGULATORY GAP

CHAPTER 1

MINORITY INTERESTS – THEORIES OF HARM – EMPIRICAL EVIDENCE OF HARM

The purpose of this Chapter is to introduce the economic theories of harm which have implications for minority interests and to examine the empirical evidence of the implications of such potentially harmful links. This is reflected in the structure of the present thesis which is an introduction to the theories of harm and the evidence of the existence of such interests, followed by a detailed examination of the legal framework for the control of minority interests and proposals for reform. Chapters 2 and 3 will examine the existing legal framework in Ireland and at EU level for the control of mergers and acquisitions and then competition law generally in order to clarify their scope, with a view to establishing the limitations of the existing legislative competition law machinery and how minority interests with potentially harmful effects may escape regulatory control and/or scrutiny. The Commission in Staff Working Document Towards more effective EU merger control dated 25 June 2013 at Annex 1 ("**SWD 2013 Consultation Annex 1**")³⁰ carried out a review of the economic theories of harm for the assessment of cross shareholdings which provides an excellent summary of economic thinking concerning the implications of such cross shareholdings. It should be noted that the SWD 2013 Consultation Annex 1 does not examine the theories of harm relating to common ownership as the debate had not emerged at that time. As a result, the first part of this chapter reviews the theories of harm on cross shareholdings followed by an overview of the more recent theories of harm related to common ownership.

1 CROSS SHAREHOLDINGS

1.1 Introduction

The main theories of harm on unilateral and coordinated effects as a consequence of cross shareholdings and the scope for efficiencies to arise out of such minority interests are examined below. For this purpose, the term minority interests typically refers to situations in which a shareholder holds less than 50% of the voting rights attached to the equity of the target firm in circumstances which do not confer control/decisive influence and therefore do not amount to a merger or acquisition

³⁰ The consultation period was from 20 June 2013 to 12 October 2013.

http://ec.europa.eu/competition/consultations/2013_merger_control/merger_control_en.pdf

under Part 3 of the Irish 2002 Act (or a concentration under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings ("**2004 EMCR**")³¹ and consequently, are not subject to the regime for the compulsory notification of mergers and acquisitions for merger control law purposes (the Commission in the SWD 2013 Consultation Annex 1 refers to such non-controlling minority shareholdings as "structural links"). Chapter 2 reviews the mergers provisions in Part 3 of the 2002 Act and the 2004 EMCR which reveals the limited circumstances in which a structural link or minority interest may amount to a merger or acquisition for Irish and EU law purposes.

The SWD 2013 Consultation Annex 1 concentrates on non-controlling minority shareholdings, the Commission describing them as "the most prevalent class of minority interests". It is acknowledged that other forms of minority interests which include interlocking directorships (IDs), loans to competitors and contracts for differences (CfDs)³² can also give rise to competition issues and that similar economic considerations can apply to such interests.³³

The Commission in the executive summary to SWD 2013 Consultation Annex 1 succinctly summarises the position regarding structural links and the 2004 EMCR as follows:

"The economic literature identifies certain scenarios where the legal definition of control and "decisive influence" under the EU Merger Regulation (hereafter "**Merger Regulation**") would not be met, but nevertheless the holder of a non-controlling minority shareholding (hereafter "structural links") may still be able to exert material influence over the target firm with potentially significant anti-competitive effects."

*Struijlaart*³⁴ emphasized in relation to both active and passive minority interests that "[t]he mere fact that an undertaking has an interest in the economic performance of

³¹ Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (the EC Merger Regulation) [2004] OJ L24/1.

³² Interlocking directorates refer to situations in which one or more companies have one or more members of their respective boards or a top executive in common. Contracts for differences are derivatives on other firms' equity or debt value. Please see *DotEcon Limited*, *Minority Interests in Competitors* (2010). An examination of such interests is beyond the scope of this thesis.

<<https://www.dotecon.com/assets/images/oftmic.pdf>>

³³ *DotEcon Limited*, *Minority Interests in Competitors* (2010).

<<https://www.dotecon.com/assets/images/oftmic.pdf>>

³⁴ Robin A Struijlaart, 'Minority Share Acquisitions below the Control Threshold of the EC Merger Control Regulation: An Economic and Legal Analysis' (2002) *World Competition* 25(2), 173-204.

another undertaking from which it was previously independent or less dependent, might lead to a change in the strategic behaviour of the acquiring, and perhaps of the acquired, undertaking. This may certainly be the case if the undertakings in question are competitors, are in vertical relation, or even active on neighbouring markets.”

The Commission in SWD 2013 Consultation Annex 1 highlights that there are a variety of reasons to invest in minority shareholdings including where they are a means to gain access to specific assets, including new technologies, additional financial resources, and innovative managerial practices. The OECD in its 2008 report on Policy Roundtables Minority Shareholdings (“**OECD 2008 Report**”) described possible reasons for acquiring minority interests as follows:

“Firms invest in equity shares of other firms for a variety of reasons. In many instances, equity investments may generate potential efficiencies, which justify the establishment of such structural links. For example, equity investments may be a means to diversify and spread costs and risks, to access new technologies or innovative managerial practices, to establish and strengthen business relationships, to ease the access to new markets, to fund and exploit joint activities (such as R&D), etc.”³⁵

*Pini*³⁶ emphasises that “...minority shareholdings will have unilateral anticompetitive effects whatever the reason to buy them. These effects stem indeed from an "automatic" realignment of the incentives on the part of the acquiring firm”

One of the most significant economic analyses of the competitive effects of structural links was carried out by *Salop and O'Brien* “*Competitive Effects of Partial Ownership: Financial Interest and Corporate Control*”.³⁷ They stressed that competitive effects of partial ownership depend critically on two separate and distinct elements, namely, financial interest and corporate control. This distinction is absent in merger analysis, which assumes that the acquiring firm (or person) automatically controls the acquired entity after the merger. With partial ownership interests,

³⁵ OECD Policy Roundtables, *Minority Shareholdings* (OECD, 2008).

<<http://www.oecd.org/competition/mergers/41774055.pdf>>

³⁶ Gian Diego Pini, ‘Passive-Aggressive Investments: Minority Shareholdings and Competition Law’ (2012) *European Business Law Review*, Vol 23, No 5.

³⁷ Steven C Salop and Daniel O'Brien, ‘Competitive effects of partial ownership: Financial interest and corporate control’ (2000) *Antitrust Law Journal*, 67(3), 559-614.

however, these elements are separable. The authors state that these can occur in ways that result in greater or lower harm to competition than a complete merger.

1.2 Financial Interests and Corporate Rights

*Salop and O'Brien*³⁸ underlined that financial interest refers to the acquiring firm's entitlement to a share of the profits of the acquired firm. Corporate control refers to the acquiring firm's ability to control or influence the acquired firm's competitive decision making, including pricing and product selection as well as sale of the company's assets. These two factors have separate and distinct impacts on the competitive incentives of the target and the acquiring firm. Financial interest affects the incentives of the acquiring firm, while corporate control affects the incentives of the acquired firm. In simplest terms, when a firm acquires a partial financial interest in a rival, the acquiring firm's unilateral pricing incentives to compete are reduced at the margin. If the acquiring firm also has control or influence over the rival, then the rival's incentives to compete are affected. Therefore, it is necessary to analyse financial interest and corporate control as distinct elements in order to understand the implications of partial ownership interests on competition.

*Salop and O'Brien*³⁹ highlighted that industrial organization economics generally is premised on an assumption that each firm sets its price in order to maximize its profits. In a perfectly competitive market, this profit maximization leads to a situation in which the firms set prices equal to their marginal costs. However, in an imperfectly competitive market with a limited number of competitors or product differentiation, competition does not generally lead to marginal cost pricing. Instead, each firm takes into account that it has some (possibly limited) control over the price it charges. It realizes that it can charge a higher price, albeit by selling less output. This optimal combination of price and output is affected by the firm's cost, the number of competitors, the degree of product differentiation, and the prices charged by the other firms in the market. In this type of imperfectly competitive market, a profit-maximizing firm must balance the benefits and costs of a price increase. The cost of a price increase is that it causes some sales to be lost as some customers substitute to products sold by other firms. The beneficial effect of a price increase is that each of the remaining sales contributes more profit because of the higher

³⁸ Steven C Salop and Daniel O'Brien, 'Competitive effects of partial ownership: Financial interest and corporate control' (2000) *Antitrust Law Journal*, 67(3), 559-614.

³⁹ Steven C Salop and Daniel O'Brien, 'Competitive effects of partial ownership: Financial interest and corporate control' (2000) *Antitrust Law Journal*, 67(3), 559-614.

price. The net effect on profits of a proposed price increase is the sum of these two effects. The firm's profit-maximizing price is one at which further price increases reduce the level of profits because the cost outweighs the benefit and depends on the degree of competition from other firms and the other factors mentioned above.

*Salop and O'Brien*⁴⁰ explain that the firm's incentives change if it acquires full ownership of one of its competitors in a merger transaction, which may give the firm an incentive to charge a higher price. This is because some of the customers it would lose when it increases price are diverted to its merger partner. Thus, a merger allows the acquiring firm to recapture some of the profits that would be lost from the price increase absent the merger. In a merger, the acquiring firm controls the pricing and output decisions of the acquired firm and also may raise the price charged by the acquired firm. When the acquiring firm also obtains corporate control over the acquired firm, as it would in a merger, the unilateral pricing incentives of the acquired firm also change which may lead the acquired firm to raise its price. The effect of the merger on the incentives of the acquired firm is analogous to the effect on the incentives of the acquiring firm. That is, an increase in the acquired firm's price increases the sales volume and profits of the acquiring firm as some fraction of the customers lost by the acquired firm from the price increase choose to substitute to the acquiring firm, thus raising the profits of the acquiring firm. If the acquiring firm controls the pricing of the acquired firm, it takes these higher incremental profits into account in setting the price of the acquired firm.

*Salop and O'Brien*⁴¹ stress that this incentives analysis applies directly to the case in which the acquiring firm purchases less than a 100% financial interest in the acquired firm. The acquiring firm still takes the customer recapture into account in its decision calculus. The acquiring firm factors the partial interest into its revaluation of incremental profits from a price increase, thereby increasing the acquiring firm's incentive to raise its price.⁴² The impact of the acquisition on the unilateral pricing incentives of the acquired firm depends on how the transaction affects the governance of the target which relates to the existence of corporate control or

⁴⁰ Steven C Salop and Daniel O'Brien, 'Competitive effects of partial ownership: Financial interest and corporate control' (2000) *Antitrust Law Journal*, 67(3), 559-614.

⁴¹ Steven C Salop and Daniel O'Brien, 'Competitive effects of partial ownership: Financial interest and corporate control' (2000) *Antitrust Law Journal*, 67(3), 559-614.

⁴² The incentive of the acquiring firm to increase prices is smaller than it would be in a full merger.

influence and is the second element in the evaluation of the competitive effects of partial ownership interests.

The Commission in SWD 2013 Consultation Annex 1 explains that although often greater financial interest is accompanied by greater corporate influence, there may be instances where the levels of financial interest and corporate influence differ considerably. The Commission in SWD 2013 Consultation Annex 1 states that financial interest or cash-flow rights are often relatively simple to quantify as an agent owning X% of a firm is entitled to X% of its profits and earns X% of the proceeds if the firm is entirely sold. The Commission explains that in contrast, the level of influence may be difficult to assess in practice. There are a variety of situations where a relatively small ownership share can provide its owner with significant influence over a firm arising from the dispersion and the lack of protection of the remaining shareholders.

SWD 2013 Consultation Annex 1 primarily concentrates on the economic notion of control, that is, the extent to which the objectives of a minority stakeholder are taken into account in a firm's decisions. This may differ from legal notions of control. In particular, even in situations where the test of "decisive influence" as used in the context of the 2004 EMCR is not met, an external stakeholder may still have substantive influence in a firm. The main focus of this thesis, similar to SWD 2013 Consultation Annex 1, is on scenarios in which the criterion of "decisive influence" is generally not met, so that the minority shareholders have at most a "material influence" in the target firm.⁴³

1.2.1 Silent Financial Interest or Passive Structural links

A minority shareholder may not have any influence over the target's competitive behaviour in situations where the ownership share does not confer special corporate rights. In particular, this may be the case if the acquirer holds non-voting shares. The Commission clarifies that although passive minority shareholdings do not involve influencing the target's decisions, they might nevertheless raise competitive concerns to the

⁴³ These include fiduciary obligations and proportional control. Steven C Salop and Daniel O'Brien, 'Competitive effects of partial ownership: Financial interest and corporate control' (2000) *Antitrust Law Journal*, 67(3), 559-614. Salop and O'Brien also analyse situations where the acquiring firm gains significant control on the target firm in particular "Total Control" and "One-Way control". The Commission in SWD 2013 Consultation Annex 1 also refers to joint ventures where a similar mode of control is referred to as limited joint control by Timothy F Bresnahan and Steven C Salop, 'Quantifying the competitive effects of production joint ventures' (1986) *International Journal of Industrial Organization*, 4(2), 155-175.

extent that they induce the acquirer to increase prices. *Salop and O'Brien*⁴⁴ point out that a “silent financial interest does not lead to any change in the incentives of the acquired firm” which they describe as the “first-round effect”. They highlight that once the acquired firm raises its price, the acquiring firm and the other firms in the market then may have an incentive to raise their prices in response.

1.2.2 Structural Links that Confer Some Degree of Influence

*Salop and O'Brien*⁴⁵ developed a number of scenarios in which the minority shareholder may influence the decision of the target to a certain degree only.⁴⁶ Even though a minority shareholding may confer corporate

⁴⁴ Steven C Salop and Daniel O'Brien, 'Competitive effects of partial ownership: Financial interest and corporate control' (2000) *Antitrust Law Journal*, 67(3), 559-614.

⁴⁵ Steven C Salop and Daniel O'Brien, 'Competitive effects of partial ownership: Financial interest and corporate control' (2000) *Antitrust Law Journal*, 67(3), 559-614.

⁴⁶ The Commission describes as two particularly relevant scenarios discussed by Steven C Salop and Daniel O'Brien, 'Competitive effects of partial ownership: Financial interest and corporate control' (2000) *Antitrust Law Journal*, 67(3), 559-614 being proportional control and fiduciary obligations. Fiduciary obligation refers to a scenario in which control by the acquiring firm is constrained by legal rules that create an obligation to serve the interests of the minority shareholders, in particular those with no other holdings. These constraints can be built into the “corporate charter” or they may be required by the public stock exchange on which the shares trade. They also may arise from corporate law or antitrust law. Either way, in making decisions that affect the acquired firm, the Board of Directors of the acquired firm is constrained to ignore the impact of its actions on the acquiring firm, even if the acquiring firm has a large financial interest in the acquired firm. Instead, the Board must manage the acquired firm to act like an independent, stand-alone entity. It is for this reason that the acquiring firm's partial ownership may become effectively passive with regard to competitively sensitive issues. A partial ownership interest may enable the acquiring firm to appoint one or more directors. The acquiring firm's Board appointees can vote, but not in the private self-interest of the acquiring firm. Thus, the competitive incentives of the acquired firm are equivalent to those in the silent financial interest structure. Salop and O'Brien warn that some might question whether these fiduciary duties provide any real constraint, in particular, whether they can prevent a shareholder with interests in competing firms from controlling or influencing the acquired firm to take its competitive interests into account. It can be argued that it would be difficult for independent shareholders to detect and prove such a violation of fiduciary obligation. It is one thing to show that a firm made a sweetheart deal to lease a building from a director at an above-market price. It is arguably much more difficult to prove that the Board set a price (to divert customers at the margin to the competing firms owned by one or more shareholders) rather than a lower price that would maximize the stand-alone profits of the acquired firm. Without clear evidence, courts might defer to the business judgment of the Board. Salop and O'Brien highlight that however, this strong view may ignore the role of independent, public directors on the Boards of public companies and the public disclosures that must be made under securities laws. These directors owe clear, allegiance to the company and the independent shareholders, not the interests of the shareholders who own competing firms. They would likely vote for decisions that were in the interest of the acquired firm as a stand-alone entity, not in the interests of the shareholders who compete with the acquired firm. To side with those shareholders with competing interests would be a clear violation of the fiduciary duties of these directors. If the Board takes actions that favour competing companies at the expense of the independent shareholders, these independent directors might well have the incentives, expertise, and information needed to prove the violation of the fiduciary duties. They are also well situated to publicize the violation. Salop and O'Brien point out that it could be argued that the interested shareholders might use their influence to try to remove independent directors that behaved too independently. Salop and O'Brien warn that however, “this might be a risky tactic” and if the interested shareholders were to remove the independent

rights, legal provisions may protect other minority shareholders and therefore restrain the acquirer's ability to influence the target's decisions.⁴⁷ The acquiring firm may be induced by corporate law to essentially manage the partially acquired firm as if it were a stand-alone entity. The Commission explains that “[I]n practice, the partially owned firm”⁴⁸ may still have some degree of control but may in other respects act similar to the silent financial interest scenario presented above. The Commission explains that in some cases, it may be a good approximation to assume that the degree of influence the acquiring firm has in decisions of the target firm may be roughly proportional to its financial interest.⁴⁹ This scenario may for example occur if the minority shareholder may block certain decisions (e.g. in case of supermajority requirements) so that it is necessary to reach compromises with other shareholders. The Commission highlights that in special cases, even a relatively small financial interest may yet confer material influence on the minority shareholder. This may, for example, occur if the minority shareholder has been given special corporate rights or if the minority owner may form a coalition with other shareholders, thereby obtaining more influence than suggested by the joint financial interest.

The anticompetitive effects of the acquisition of cross minority shareholdings can be divided into the following:

- (a) unilateral anticompetitive effects where the minority interest can lead to higher prices and lower output to the detriment of consumers as they may create incentives unilaterally to increase

directors for voting according to their fiduciary obligation, or if they blocked certain disclosures, such conduct could raise serious legal and regulatory issues and expose the Board or the interested shareholders to significant legal risk. Thus, it seems far from settled that one or more of the shareholders, even if they collectively had a majority interest, could cause a company to pursue a course of conduct that advances their interests while conflicting with the best interests of the company. Salop and O'Brien conclude that “the degree of control under these circumstances remains an unsettled issue.”

Salop and O'Brien explain that proportional control refers to a scenario in which the Board and managers of the acquiring firm take into account their shareholders' interests in other firms. They take the shareholders' interests into account in proportion to their financial interests in the acquired firm. For example, if the acquiring firm is the only competitor with a financial interest in the acquired firm and it has a 25 percent stake, then the acquired firm's managers will make pricing and output decisions as if the acquired firm has a 25 percent financial interest in the acquiring firm.

⁴⁷ Please see discussion on fiduciary obligations (see n 51) and Steven C Salop and Daniel O'Brien, 'Competitive effects of partial ownership: Financial interest and corporate control' (2000) *Antitrust Law Journal*, 67(3), 559-614.

⁴⁸ The author believes that the Commission intended to refer to the target and not the acquirer.

⁴⁹ Steven C Salop and Daniel O'Brien, 'Competitive effects of partial ownership: Financial interest and corporate control' (2000) *Antitrust Law Journal*, 67(3) 559-614.

prices or reduce output. DotEcon Limited in its 2010 report for the Office of Fair Trading (now the Competition and Markets Authority)⁵⁰ put it simply by stating “a firm holding shares in a competitor may be expected to compete less aggressively because it benefits financially from the success of its rival and suffers some of the detrimental consequences of taking away business from the rival: if Firm A holds an equity stake in a competing Firm B, and competes fiercely against it, the financial losses incurred by Firm B will affect the value of the investment of Firm A. Therefore, Firm A will have a reduced incentive to compete against the company in which it has invested”; and

- (b) coordinated anticompetitive effects where the minority interest can lead to higher prices and lower output to the detriment of consumers as they may facilitate tacit collusion.

It is important to note that the Commission in its extensive 2017 Phase 2 merger decision in *Dow/DuPont*⁵¹ expressly confirmed its understanding that the three main economic papers analysing the theoretical unilateral impact of direct partial competitor ownership on competition are *Reynolds and Snapp*⁵², *Bresnahan and Salop*⁵³ and *Salop and O'Brien*.⁵⁴ The Commission in *Dow/DuPont* reviewed the global merger between Dow and DuPont and concluded that the merger raised significant competition concerns, *inter alia*, in certain pesticide markets within the agrochemical industry, both in terms of existing pesticides and innovation competition for new pesticides. The Commission carried out an extensive analysis of the prevalence of common shareholdings in the agrochemical industry which it took into account when examining whether or not the transaction gave rise to a significant impediment to effective competition. The above endorsement of the three main economic papers is significant as it is the

⁵⁰ DotEcon Limited, *Minority Interests in Competitors* (Office of Fair Trading, 2010).

<<https://www.dotecon.com/assets/images/oftmic.pdf>>

⁵¹ *Dow/DuPont* (Case No M.7932) Commission Decision 27 March 2017.

⁵² Robert J Reynolds and Bruce R Snapp, 'The Competitive Effects of Partial Equity Interests and Joint Ventures' (1986) *International Journal of Industrial Organization*, Vol 4, 141-153.

⁵³ Timothy F Bresnahan and Steven C Salop, 'Quantifying the competitive effects of production joint ventures' (1986) *International Journal of Industrial Organization*, 4(2), 155-175.

⁵⁴ Steven C Salop and Daniel O'Brien, 'Competitive effects of partial ownership: Financial interest and corporate control' (2000) *Antitrust Law Journal*, 67(3), 559-614.

first time that the Commission in any of its reported merger decisions conducts a detailed review of the economic literature surrounding cross ownerships outside of the 2013 Consultation or the White Paper of the following year.⁵⁵ The Commission in *Dow/Dupont* cites with approval the following summary by *Salop and O'Brien*:⁵⁶

“[i]ntuition might suggest that partial ownership is less competitively problematical than a full merger because the parties can continue to compete with one another after the transaction. Indeed, in their treatise, Phillip Areeda and Donald Turner conclude that a “noncontrolling acquisition has no intrinsic threat to competition at all.” However, this intuition is not always correct. We find that partial investments can raise either larger or smaller concerns than complete mergers. This may seem surprising, since a partial acquisition would appear to align the parties’ interests less in all cases than would a complete merger. The competitive effects of partial ownership depend critically on two separate and distinct elements: financial interest and corporate control. This distinction is absent in merger analysis, which assumes that the acquiring firm (or person) automatically controls the acquired entity after the merger. With partial ownership interests, however, these elements are separable.

⁵⁵ The Commission summarises the above economic papers as Robert J Reynolds and Bruce R Snapp, ‘The competitive effects of partial equity interests and joint ventures’ (1986) (IJIO), *International Journal of Industrial Organization*, 4(2), 141-153 analysing the unilateral competitive effects of direct partial financial interests and small joint ventures in the context of a Cournot homogeneous-product model and such potentially small, partial financial interests possibly resulting in lower equilibrium market output and higher equilibrium market prices when entry is difficult. The Commission refers to Timothy F Bresnahan and Steven C Salop, ‘Quantifying the competitive effects of production joint ventures’ (1986) *International Journal of Industrial Organization*, 4(2), 155-175 building on Robert J Reynolds and Bruce R Snapp, ‘The competitive effects of partial equity interests and joint ventures’ (1986) (IJIO), *International Journal of Industrial Organization*, 4(2), 141-153 by introducing the distinction between financial interest and corporate control. Salop and O’Brien (in Steven C Salop and Daniel O’Brien, ‘Competitive effects of partial ownership: Financial interest and corporate control’ (2000) *Antitrust Law Journal*, 67(3), 559-614) extend Timothy F Bresnahan and Steven C Salop (1986) to, among other things, account for a richer set of corporate control scenarios, including silent financial interests, total control, one-way control, Coasian joint control and proportional control, and multiple, overlapping, joint ventures. The Commission refers to Salop and O’Brien’s (2000) analysis as encompassing Cournot and Bertrand type competition. The Commission cites Duarte Brito, Ricardo Ribeiro and Helder Vasconcelos, ‘Divesting ownership in a rival’ (2014) *International Journal of Industrial Organization*, Vol 34, 9-24 as extending Salop and O’Brien (2000) by modelling the relationship between financial interest and control through the distinction between voting stock and preferred stock.

⁵⁶ Steven C Salop and Daniel O’Brien, ‘Competitive effects of partial ownership: Financial interest and corporate control’ (2000) *Antitrust Law Journal*, 67(3), 559-614.

They also can occur in ways that result in greater or lower harm to competition than a complete merger.”

As we shall see at Section 2 below, the Commission in *Dow/DuPont* expressly acknowledged that the analysis of the theoretical unilateral impact of common shareholders can be directly derived from the model developed by *Salop and O'Brien*⁵⁷ in relation to cross shareholdings.

Pini emphasises that anticompetitive unilateral and coordinated effects will depend on various factors which influence the firms' incentives to compete which may be divided as follows:

- (a) Structural: This includes factors such as the degree of market concentration, entry conditions, the presence of powerful buyers, the homogeneous or differentiated nature of the products concerned,⁵⁸ the respective diversion ratios,⁵⁹ the type of competition⁶⁰ in the market, its transparency and the number of companies already linked to each other;
- (b) Transaction Specific: This includes the companies' respective costs and margins,⁶¹ their market shares, the size of the minority shareholding, the rights connected to it, the reciprocity of the links, the presence of instruments other than minority shareholdings strengthening the anticompetitive effects, the industrial and commercial relation between the firms involved and the fact that the acquirer is the controlling shareholder; and
- (c) Other Real-world Factors: *Pini* in this context refers to the availability of information about the target, manager's incentives and the acquiring firm's ability to capture benefits.

⁵⁷ Steven C Salop and Daniel O'Brien, 'Competitive effects of partial ownership: Financial interest and corporate control' (2000) *Antitrust Law Journal*, 67(3), 559-614.

⁵⁸ The more differentiated the products concerned the more beneficial it is to take shares in another form.

⁵⁹ The amount of demand captured by Firm B in the event of a price increase by Firm A. The greater the diversion ratio the higher the incentive to raise price because a lot of customers will be partially recaptured by the passive stake in firm B.

⁶⁰ Bertrand or Cournot. Please see section 1.3.1 of this Chapter 1.

⁶¹ The magnitude of the anticompetitive effects is more significant if Firm B's margins are larger than A's.

1.3 Theories of Harm Concerning Cross Shareholdings

1.3.1 Horizontal Cross Shareholdings

(a) Unilateral (Direct) Effects

The Commission in SWD 2013 Consultation Annex 1 refers to *Reynolds and Snapp*⁶² and *Bresnahan and Salop*⁶³, as first showing that financial interests among competing firms (horizontal cross shareholdings), even without any control rights, may lead to less vigorous competition. *Salop and O'Brien*⁶⁴ pointed out that under suitable assumptions, horizontal minority ownerships have an anticompetitive effect in models where firms compete with differentiated goods in prices ("**Bertrand competition**") or where firms compete in quantity ("**Cournot competition**").

The Commission in SWD 2013 Consultation Annex 1 underlines that intuitively, when having a financial interest in competitors' profits, firms 'internalise' the positive effects from restricting their own output or raising their prices on their competitors' profits. Therefore, in the absence of entry, the equilibrium market output will typically decline, as one or more competitors increase the level of financial interests in rival firms. This usually implies that consumer surplus falls due to resulting higher prices.⁶⁵ The

⁶² Robert J Reynolds and Bruce R Snapp, 'The competitive effects of partial equity interests and joint ventures' (1986) (IJIO), International Journal of Industrial Organization, 4(2), 141-153.

⁶³ Timothy F Bresnahan and Steven C Salop, 'Quantifying the competitive effects of production joint ventures' (1986) International Journal of Industrial Organization, 4(2), 155-175. This paper was cited with approval by the Commission in the following EU merger control decisions when examining cross shareholdings as part of its assessment of the notified merger: *Exxon/Mobil* (Case No IV/M.1383) Commission Decision 29 September 1999; and *Schneider/Legrand* (Case No COMP/M.2283) Commission Decision 30 January 2002.

⁶⁴ Steven C Salop and Daniel O'Brien, 'Competitive effects of partial ownership: Financial interest and corporate control' (2000) Antitrust Law Journal, 67(3), 559-614.

⁶⁵ The Commission cites Joseph Farrell and Carl Shapiro, 'Antitrust Evaluation of Horizontal Mergers: An Economic Alternative to Market Definition' (2010) The BE Journal of Theoretical Economics, Vol 10, No 1 who point out that an acquisition of a passive ownership may have positive welfare effects under special circumstances. The Commission cites Joseph Farrell and Carl Shapiro, 'Asset ownership and market structure in oligopoly' (1990) RAND Journal of Economics, Vol 21, 275-292; David Flath, 'When is it Rational for Firms to Acquire Silent Interests in Rivals?' (1991) International Journal of Industrial Organization, Vol 9, 573-584 and David Reitman, 'Partial Ownership Arrangements and the Potential for Collusion' (1994) Journal of Industrial Economics, Vol 42, No 3, 313-322 which the Commission explains show that in the absence of efficiencies, acquisitions of passive ownership shares tend to be unprofitable in a model of Cournot competition if there are many firms in the market and if firms are not too asymmetric since then non-investing firms benefit from such an investment. DotEcon Limited in its 2010 report (DotEcon Limited, *Minority Interests in Competitors* (Office of Fair Trading, March 2010)

Commission explains that whereas a financial interest in a competing target firm tends to provide incentives for the acquiring firm to increase its own prices, the acquisition of corporate rights gives the acquirer the ability to raise its competitor's prices.⁶⁶ The Commission clarifies that if a structural link confers enough influence, the minority owner typically has incentives to induce the target to compete less aggressively as this typically feeds back into the to higher profits of the acquiring firm. Therefore, to the extent that structural links confer influence over the target company, the anti-competitive effects are likely to be higher than in a scenario where they give only rise to financial interests.

The Commission in SWD 2013 Consultation Annex 1 touches upon common shareholding interests by referring to investors that have minority shareholdings in several directly competing firms, where each of the target firms takes into account the externalities that its pricing decisions have on rivals in which the investor also holds a share. Depending on how managers in the target firms take the preferences of their shareholders into account, similar effects as described above may thus arise if investors own minority shareholdings in direct competitors.⁶⁷ Horizontal unilateral effects are not captured by an antitrust analysis based on conventional structural indexes, such as concentration ratios. Therefore,

refers to the optimal response of competitors as being to increase their capacity (albeit by less than the capacity reduction). As a result, total output in the market falls and price increases, and the market share of the Firm A falls. This means that consumers are worse off. DotEcon Limited asks one to now assume that Firm A has a share in Firm B, but not vice versa. If Firm A were to compete less aggressively by decreasing its quantity, Firm B and the other competitors would optimally increase their quantity, which would result in an adjustment of Firm A's quantity, and so forth. This means that Firm A would lose at the expense of its competitors, and even though it benefits to some extent from its competitors gains (namely to the extent of its financial interest in Firm B), it does not pay to take a share in Firm B, which would then create an incentive to compete less aggressively. DotEcon Limited explains in relation to differentiated Bertrand competition and non-reciprocal minority interests, the optimal response of Firm B (as well as other competitors) to an increase in price by Firm A is to increase their respective prices as well. In turn, Firm A will have an incentive to raise its price even further (that is, there will be positive feedback effects). Therefore, under these circumstances, it is beneficial for Firm A to take a share in Firm B.

<<https://www.dotecon.com/assets/images/oftmic.pdf>>

⁶⁶ The Commission cites the example of David Spector, 'Merger control and minority shareholdings: Time for a change?' (2011) Concurrences, No 3, 14-41.

⁶⁷ The Commission cites Steven C Salop and Daniel O'Brien, 'Competitive effects of partial ownership: Financial interest and corporate control' (2000) Antitrust Law Journal, 67(3), 559-614 and Ariel Ezrachi and David Gilo, 'EC Competition Law and the Regulation of Passive Investments Among Competitors' (2006), Oxford Journal of Legal Studies, Vol 26, No 2, 327-349.

Reynolds and Snapp as well as *Salop and O'Brien*⁶⁸ propose amended concepts to take into account the effects of horizontal structural links. Section 1.5 below describes quantitative concepts to take into account the unilateral effects of horizontal structural links.

The Commission asserts that typically, the competitive effects of the acquisition of a structural link are of a lower magnitude than those of a full merger. The Commission cites the proposition made by *Salop and O'Brien*⁶⁹ that a full merger can be thought of as an acquisition of control via corporate rights and of full financial rights. It is therefore intuitive, that for example, an acquisition of a passive structural link creates less upward pricing pressure since the acquiring firm only partially internalizes the externalities of a price increase by the target firm.⁷⁰ A similar reasoning holds as long as the acquired control is sufficiently narrow compared to the financial interest of structural links. However, structural links may lead to a relatively large price increase if the acquisition of a minority stake confers significant corporate rights on the acquirer.⁷¹ In cases of

⁶⁸ Steven C Salop and Daniel O'Brien, 'Competitive effects of partial ownership: Financial interest and corporate control' (2000) *Antitrust Law Journal*, 67(3), 559-614.

⁶⁹ Steven C Salop and Daniel O'Brien, 'Competitive effects of partial ownership: Financial interest and corporate control' (2000) *Antitrust Law Journal*, 67(3), 559-614.

⁷⁰ The Commission explains that it is straightforward to verify that regarding passive minority shareholdings, the change in the quantitative indices discussed in 3 below increases monotonically in the proportion of the acquired stake in the target firm, and stays always well below the change of these indices in case of a full merger.

⁷¹ The Commission refers to Duarte Brito, Luís Cabral and Hélder Vasconcelos, 'Duopoly Competition with Competitor Partial Ownership' (2010) Working Paper, Mimeo in analysing related issues. They show that turning voting shares into non-voting shares may increase consumer surplus.

Foros, Jarle Kin and Shaffer (in Øystein Foros, Hans Jarle Kin and Greg Shaffer, 'Mergers and Partial Ownership' (2010) CESifo Working Paper Series No 2912; Simon School Working Paper No FR 10-11) point out that the possibility of increasing prices by help of such a minority stake renders it particularly profitable for both participants to engage in such a transaction (see also H Karle, TJ Klein and KO Stahl, 'Ownership and Control in a Competitive Industry' (2011) TILEC Discussion Paper No 2011-013). They argue that in the Norwegian pay-TV market a minority shareholding with ample control rights of Telenor (that fully owns the pay-TV provider Canal Digital) in RTV led to very high prices. According to Ariel Ezrachi and David Gilo, 'EC Competition Law and the Regulation of Passive Investments Among Competitors' (2006) *Oxford Journal of Legal Studies*, Vol 26, No 2, 327-349, for the same reason the main shareholder of a firm may also find it very profitable to acquire (minority) shareholdings that confer significant influence in a direct competitor of that firm.

Duarte Brito, Luís Cabral and Hélder Vasconcelos, 'Duopoly Competition with Competitor Partial Ownership' (2010) Working Paper, Mimeo.

<<https://www.concorrenca.pt/sites/default/files/imported-media/WP41%2520crossholdingsJul2010.pdf>>

Øystein Foros, Hans Jarle Kin and Greg Shaffer, 'Mergers and Partial Ownership' (2010) CESifo Working Paper Series No 2912; Simon School Working Paper No FR 10-11.

this kind (which may be already covered by the existing merger control legislation to the extent that the legal criterion of “decisive influence” is met), economic theory predicts that the acquiring firm may coerce the target firm significantly to raise its prices, because the acquiring firm fully benefits from the positive externalities of the competitor's price increase but bears only part of the costs depending on the level of its financial ownership rights.

The Commission clarifies that there might be several countervailing factors that potentially attenuate the effects of structural links as discussed by *Dubrow* (2001)⁷² which include the presence of incomplete information, conflicting management incentives or the inability of the minority shareholder to capture the benefits earned by the target firm due to conduct of the acquiring firm. This points to the need carefully to analyse how decisions are taken in the context of a firm with structural links, and the extent to which investors' and management's incentives are aligned.⁷³

The Commission explains that concerns on the basis of unilateral effects of horizontal structural links are warranted primarily in settings where full mergers would clearly be anticompetitive (e.g. scenarios involving structural links between close competitors with significant market shares and high barriers to entry). Unilateral anticompetitive effects may arise even when a structural link only confers little influence. Moreover, minority stakes with relatively small financial interest may have significant unilateral effects in specific cases where substantial influence is conferred even though the criterion of “decisive influence” under the 2004 EMCR is not met.

<<http://ssrn.com/abstract=1539366>>

H Karle, TJ Klein and KO Stahl, 'Ownership and Control in a Competitive Industry' (2011) TILEC Discussion Paper No 2011-013.

<<https://research.tilburguniversity.edu/en/publications/ownership-and-control-in-a-competitive-industry>>

⁷² JB Dubrow, 'Challenging The Economic Incentives Analysis of Competitive Effects in Acquisitions of Passive Minority Equity Interests' (2001) *Antitrust Law Journal*, Vol 69, 113-145.

⁷³ Steven C Salop and Daniel O'Brien, 'The Competitive Effects of Passive Minority Equity Interests: Reply' (2011) *Antitrust Law Journal*, Vol 69, 611-625.

(b) **Coordinated Effects**

The unilateral effects of structural links discussed above is based on the assumption that firms in the market set prices independently. Coordinated effects involves examining how structural links affect the firms' incentives to tacitly or expressly collude in order to achieve supra-competitive profits.⁷⁴ The main focus in the context of coordinated effects is whether or not structural links among competitors facilitate or hamper collusion. *Fotis and Zevgoli*⁷⁵ describe coordinated effects in the context of minority shareholdings as follows:

"In most cases structural links enable the firms involved to coordinate their conduct (coordinated effects). Coordination between firms stems from the fact that the acquiring firm internalizes part of the target's profit. Moreover, the level of transparency is enhanced in the presence of corporate rights. In particular, when a one-way direct type of passive interest is under scrutiny the one-way exchange of information (from the target to the acquiring firm) enables the latter to monitor the commercial policy of the former. However, when a reciprocal minority shareholding is under scrutiny, then the exchange of information is reciprocal between the firms involved and therefore the level of transparency is enhanced.

The level of transparency in a market is enhanced further in the case where indirect minority shareholdings with their associated corporate rights are under examination. Indirect passive interests are of great importance to antitrust authorities since they strengthen information exchange and increase the ability of firms to coordinate their actions. These two critical characteristics enlarge the scope of coordination and enable the coordinated

⁷⁴ Steven C Salop and Daniel O'Brien, 'Competitive effects of partial ownership: Financial interest and corporate control' (2000) *Antitrust Law Journal*, 67(3), 581 coin the notion of Coasian Joint Control is a case in which "the managers of the acquiring firm try to maximize the joint profits of both the acquired firm and the acquiring firm". They also point out that unilateral incentives to deviate so as to maximize independent profits may prevent the Coasian outcome from being achieved. This scenario is therefore reminiscent of collusion.

⁷⁵ Panagiotis Fotis and Nikolaos Zevgolis, *The Competitive Effects of Minority Shareholdings Legal and Economic Issues* (Bloomsbury 2016).

players to detect possible deviations from the common aim of maximizing the monopoly profits.”⁷⁶

The Commission in SWD 2013 Consultation Annex 1 highlights that economic theory has derived a number of necessary conditions that have to be met in order for the colluding parties to reach terms of coordination and sustain the coordination over time.⁷⁷ The Commission clarifies that the following conditions may be particularly affected by structural links:

- The market conditions must be sufficiently transparent to allow each cartel member to monitor the other firms’ behaviour; and
- In order to deter deviations from the common strategy, the threat of future retaliation must be sufficiently severe and credible.

(i) **Information and Transparency**

The acquisition of a structural link may enhance transparency as it typically offers the acquiring firm a privileged view on the commercial activities of the target. According to the OECD 2008 Report, even “passive minority shareholders may have access to information that an independent competitor would not have, such as plans to expand, to merge with or to acquire other firms, plans to enter into major new investments; plans to expand

⁷⁶ Tommy Staahl Gabrielsen, Erling Hjelmeng and Lars Sjørgard, ‘Rethinking Minority Share Ownership and Interlocking Directorships: The Scope for Competition Law Intervention’ (December 2011) European Law Review concluded the following under the heading “Conclusion-passive investments”:

“In general, MSOs have an ambiguous effect on collusive stability. MSOs may stabilise collusion, and one important mechanism is when MSOs serve to align size differences between firms.

If an MSO is passive and there is no potential for co-ordinated effects, we expect this to produce anti-competitive unilateral effects. The obvious reason is that the acquiring firm now has stakes in the target company, and, if the acquiring firm behaves less aggressively, it can benefit through its share of profits in the target company. The potential for anti-competitive effects is present even with one-way MSO, but will be larger the more MSO links there are between competing firms. A controlling shareholder investing in the firm’s competitor has stronger incentives to dampen competition than the firm itself.”

⁷⁷ The Commission refers to Marco Ivaldi, Bruno Jullien, Patrick Rey, Paul Seabright and Jean Tirole, ‘The Economics of Tacit Collusion - Final Report For DG Competition, European Commission (March 2003) IDEI Toulouse.

<https://ec.europa.eu/competition/mergers/studies_reports/the_economics_of_tacit_collusion_en.pdf>

production or to enter or expand into new markets”?⁷⁸ It is possible that a structural link that additionally confers a high degree of corporate rights also provides access to more detailed information. Reciprocal ownership links between competitors may therefore permit a higher degree of information exchange.

The Commission explains that the extent of increased information flows due to minority ownerships depends on the information that is already publicly available. Information may for example be publicly accessible due to reporting obligations in the case of publicly traded companies.⁷⁹

(ii) **Incentives to Coordinate**

The Commission in SWD 2013 Consultation Annex 1 states that for a given level of transparency, the scope of collusion depends on the colluding party's profits when adhering to the common strategy as compared to those in case of a deviation. A firm's overall profits from deviation reflect both the profit of the deviating firm until the remaining colluding parties realize that a deviation has occurred and the profit earned by that firm once all market participants have reacted to the deviation. The Commission in SWD 2013 Consultation Annex 1 states that passive structural links generally produce at least two countervailing effects. On the one hand, due to partial ownerships firms internalize part of the losses that they inflict on rivals when they deviate, therefore reducing the incentives to deviate. On the other hand, they can also soften competition following the break-down of the

⁷⁸ OECD Policy Roundtables, *Minority Shareholdings* (OECD, 2008).

<www.oecd.org/dataoecd/40/38/41774055.pdf> and <<http://www.oecd.org/competition/mergers/41774055.pdf>>

⁷⁹ For example, in an Irish context, companies whose equity securities are listed on the main securities market operated by the Irish Stock Exchange plc need to comply with the disclosure obligations set out in Euronext Dublin Rulebook Book II Listing Rules 21 July 2019.

collusive scheme and hence strengthen the incentives for firms to deviate.⁸⁰

The Commission summarises the position by highlighting that horizontal structural links may have effects on market participants' ability and incentives to coordinate, especially if firms can credibly resort to aggressive deterrent strategies or if competition can be expected to be intense absent any coordination. Therefore, special attention to this issue would be warranted in industries where there have been past episodes of intense price wars (as a result of which market participants incurred losses), or where aggressive punishments are likely to be implemented in the future if coordination breaks down.

1.3.2 Non-Horizontal Cross Shareholdings

Non-horizontal transactions may lead to competition concerns, in particular in relation to input or customer foreclosure.⁸¹ As in the case of full mergers, structural links can also lead to non-horizontal effects.⁸² As with horizontal shareholdings, an important distinction can be made between controlling and passive ownership. Specific to vertical shareholdings is their direction: a forward shareholding arises if an upstream firm owns shares of a downstream firm⁸³ and a backward

⁸⁰ David A Malueg, 'Collusive behavior and partial ownership of rivals' (1992) *International Journal of Industrial Organization*, Vol 10, Issue 1; David Gilo, Yossi Mosche and Yossi Spiegel, 'Partial Cross ownership and Tacit Collusion' (2006) *RAND Journal of Economics* Vol 37, 1; Kai-Uwe Kühn and Michael Rimmner, 'The Comparative Statics of Collusion Models' (2006) CEPR Discussion Paper No 5742; OECD Policy Roundtables, *Minority Shareholdings* (OECD, 2008); and David Gilo, 'The Anticompetitive Effect of Passive Investment' (2000) *Michigan Law Review*, Vol 99, 1-47.

⁸¹ Guidelines on the assessment of non-horizontal mergers under Council Regulation on the control of concentrations between undertakings [2008] OJ C 265/6, 6-25, para 18.

⁸² There are several cases of the Commission in which a non-horizontal theory of harm involving minority shares was pursued. Examples are *E.ON/MOL*. (Case No COMP/M.3696) Commission Decision 21 December 2005; *Toshiba/Westinghouse* (Case No COMP/M.4153) 19 September 2006; or *IPIC/MAN Ferrostaal* (Case No COMP/M.5406) Commission Decision 13 March 2009. One particularly relevant form of vertical (minority) shareholdings is vertical joint ventures. For example, often joint ventures are set up in order to provide inputs to its parents. See e.g. *Framatome/Siemens/Cogema/JV* (Case No COMP/M.1940) 6 December 2000.

⁸³ Please see the following for a discussion on vertical minority cross shareholdings: Yossi Spiegel, 'Backward integration, forward integration, and vertical foreclosure' (2011) *Mimeo*; Patrick Rey and Jean Tirole, 'A Primer on Foreclosure, Handbook of Industrial Organization' (2007) Elsevier; David Gilo and Yossi Spiegel, 'Partial vertical integration in telecommunication and media markets in Israel' (2011) *Israel Economic Review*, Vol 9, No 1; and Nadav Levy, Yossi Spiegel and David Gilo, 'Partial

shareholding arises if a downstream firm owns shares of the upstream firm.

The Commission in SWD 2013 Consultation Annex 1 highlights that the following areas may give rise to competition concerns in vertical situations:

- (a) If upstream firms can discriminate among buyers, partial backward integration, particularly where it confers material influence in upstream firms, may lead to input foreclosure;
- (b) Vertical minority shares in a downstream firm that confer far-reaching control rights may be conducive to customer foreclosure;
- (c) When upstream firms differ in their costs to produce input goods, passive forward vertical minority shares may be used as a commitment device to soften downstream competition;
- (d) Forward passive shareholdings tend to reduce double marginalization but may to some extent also facilitate partial foreclosure and may help upstream firms to commit to higher prices if contracts with downstream firms are not observable to all downstream customers;
- (e) Backward minority shareholdings that confer on the downstream firm control over the upstream firm tend to significantly facilitate input foreclosure;
- (f) Passive backward shareholdings may dampen downstream competition and thereby lead to increased consumer prices;
- (g) Passive backward shareholding can distort competition in tender markets; and
- (h) Although the economic literature has focused on input foreclosure, it is conceivable that similar considerations hold for customer foreclosure.

Vertical Integration, Ownership Structure and Foreclosure' (February 2018) American Economic Journal, Microeconomics, Vol 10 No 1, 132.

1.3.3 Effects of Cross Shareholdings on Entry

Structural links may in certain circumstances deter future entry. In its contribution to the OECD 2008 Report, the Commission pointed out that competition concerns could arise when a structural link either significantly impedes third-party access to the equity of the target via acquisition, or when it makes it less likely that the acquirer enters itself in the market where the target is active.

Minority stakes in potential competitors by incumbents may induce the potential competitor not to enter.⁸⁴ By virtue of the structural link, the potential entrant partly internalizes the loss that entry inflicts on the incumbent and may therefore credibly commit to not entering.

In certain circumstances, structural links in a competitor may potentially deter a third firm from taking over the remaining shares of the target firm. If the third firm would be in a position to improve the competitiveness of the competitor, the minority shareholder may thus prevent the competitor from becoming stronger.⁸⁵ However, this strategy seems only effective if the third firm cannot effectively enter without acquiring the target firm. In addition, the third firm may nevertheless have incentives to acquire the remaining shares of the target firm, because the minority ownership tends to soften competition even after entry of the third firm.

Furthermore, the prospect of (partial) foreclosure as a consequence of partial backward or forward integration may deter entry in the first place.⁸⁶

The Commission in SWD 2013 Consultation Annex 1 states that apart from these specific cases, horizontal structural links should be conducive to entry since they tend to soften competition. In the absence of entry-barriers, potential anti-competitive effects of structural links may thus be attenuated by subsequent entry.

⁸⁴ Francisco Enrique Gonzalez-Diaz, 'Minority Shareholdings And Interlocking Directorships: The European Union Approach' (2012) *Antitrust Chronicle*, Vol 1, No 1.

⁸⁵ Competitiveness could be improved e.g. by providing access to more efficient production technology or by being able to invest large amounts of capital in R&D.

⁸⁶ Please see for instance *Stadtwerke Garbsen*, Bundeskartellamt Decision, B8-820000-U-111/94 30.9.1994.

1.4 Cross Shareholdings and Efficiencies

The Commission in SWD 2013 Consultation Annex 1 states that structural links mainly create a financial interest in the performance of other firms in the market, typically without much scope for rationalization or avoiding cost duplication,⁸⁷ the Commission concluding that therefore, “synergies seem to be limited for horizontal structural links.”

The Commission highlights that many sources of efficiencies realized by vertical integration may also be relevant for vertical structural links.⁸⁸ Preferences of upstream and downstream firms may be aligned to some extent by passive minority interests. This may help alleviating double marginalization, mitigating inefficiencies caused by asymmetric information or improving the service which is provided by downstream firms.⁸⁹ Minority shareholdings may be helpful to overcome difficulties arising from incomplete contracts, that is, from not being able to take into account all possible contingencies.⁹⁰ For instance, issues to do with incomplete contracts may be particularly prevalent in research and development (R&D).⁹¹ Control rights conferred by minority shareholdings may further facilitate vertical cooperation. Similarly, cross-shareholdings might be useful in aligning the incentives of firms involved in alliances or joint ventures. This may be relevant when these projects require relationship-specific investments.⁹² *Ono, Nakazato, Davis and Alley*⁹³

⁸⁷ David Gilo, ‘The Anticompetitive Effect of Passive Investment, Michigan Law Review’ (2000) Vol 99, 1-47 briefly discusses efficiencies.

⁸⁸ For typical effects of vertical integration, see European Commission, ‘Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings’ (18 October 2008) 2008/C 265/07, paras 52-57 or Martin K Perry, ‘Vertical Integration: Determinants and Effects’ (1989) Handbook of Industrial Organization, Vol 1, North Holland, Amsterdam.

⁸⁹ Werner Güth, Nikos Nikiforakis and Hans-Theo Normann, ‘Vertical cross-shareholding: Theory and experimental evidence’ (2007), International Journal of Industrial Organization, Vol 25, No 1, 69-89 show how vertical structural links may facilitate trade if the seller has private information on the sold good.

⁹⁰ Sudipto Dasgupta and Zhigang Tao, ‘Bargaining, bonding, and partial ownership’ (2000) International Economic Review, Vol 41, No 3, 609-635 as well as Michael H Riordan, ‘Ownership without control: Toward a theory of backward integration’ (1991) Journal of the Japanese and International Economies, Vol 5, No 2, 101-119 analyse to what extent passive structural links in a vertical setting alleviate inefficiencies due to incomplete contracts.

⁹¹ C Edward Fee, Charles J Hadlock and Shawn Thomas, ‘Corporate equity ownership and the governance of product market relationships’ (2006) The Journal of Finance, Vol 61, No 3, 1217-1251 report that indeed equity stakes are much more common when the supplier is a R&D-intensive firm or when a significant fraction of the sales are made to the customer.

⁹² Structural links may alleviate hold-up problems. This may lead to more efficient investment choices. For the hold-up problem please see Yeon-Koo Che and Jozef Sakovics, ‘Hold-up Problem’ (2008) The New Palgrave Dictionary of Economics, Palgrave Macmillan, Second Edition.

⁹³ Hiroshi Ono, Takuya Nakazato, Colin Davis and Wilson Alley, ‘Partial Ownership Arrangements in the Japanese Automobile Industry; 1990-2000’ (2004) 7(2) Journal of Applied Economics 355.

looked at the Japanese automobile industry and concluded that minority interests among domestic firms may indicate an interest in partner firms that produce products of a similar nature “thus allowing for cost reduction through parts standardisation”.

1.5 Measuring the Unilateral Effects of Horizontal Cross Shareholdings

The Commission in SWD 2013 Consultation Annex 1 approaches measurement by first describing quantitative concepts to take into account the unilateral effects of horizontal structural links and then discusses their application in practice.⁹⁴ If firms are supposed to compete in quantities, the Commission suggests a modified Herfindahl-Hirschman Index (“**MHHI**”). In a framework of price competition, the Commission proposes a version of the Price Pressure Index (“**PPI**”).

The Commission acknowledges that assessing the degree of influence of a minority shareholder in decisions of the target firm may be difficult. *Salop and O'Brien*⁹⁵ and *Brito, Cabral and Vasconcelos* (2008)⁹⁶ and (2010)⁹⁷ discuss scenarios in which the degree of influence can be related to the equity share of the minority owner. In particular, in the scenario of “Proportional Control” the influence of the acquiring firm over the acquired firm is basically proportional to its financial interest.⁹⁸ The acquired firm thus behaves as if it had the same financial interest in the acquiring firm as the latter has in the acquired firm. For example, if the acquiring firm has a 25% stake in the target, under “proportional control” the target would act so as to maximize its own and 25% of the acquirer's profits. “Proportional control” may for example occur if the minority shareholder may block certain decisions (e.g. in case

⁹⁴ Duarte Brito, Ricardo Ribeiro and Helder Vasconcelos, ‘Measuring Unilateral Effects in Partial Acquisitions’ (2013) CEPR Discussion Paper No 9354, London, Centre for Economic Policy Research.

<<http://www.cepr.org/pubs/dps/DP9354.asp>>

⁹⁵ Steven C Salop and Daniel O'Brien, ‘Competitive effects of partial ownership: Financial interest and corporate control’ (2000) *Antitrust Law Journal*, 67(3), 559-614.

⁹⁶ Duarte Brito, Luís Cabral and Hélder Vasconcelos, ‘Duopoly Competition with Common Shareholders’ (2008) Working Paper.

<http://www.concorrenca.pt/vPT/Estudos_e_Publicacoes/Working_Papers/Documents/WP32_Brito_Cabral_Vasconcelos_2008.pdf>

⁹⁷ Duarte Brito, Luís Cabral and Hélder Vasconcelos, ‘Duopoly Competition with Competitor Partial Ownership’ (2010) Working Paper.

<http://www.concorrenca.pt/vPT/Estudos_e_Publicacoes/Working_Papers/Documents/WP41%20crossholdingsJul2010.pdf>

⁹⁸ Steven C Salop and Daniel O'Brien, ‘Competitive effects of partial ownership: Financial interest and corporate control’ (2000) *Antitrust Law Journal*, 67(3), 559-614.

of supermajority requirements) so that compromises with other shareholders have to be found.

Brito, Cabral and Vasconcelos (2008)⁹⁹ and (2010)¹⁰⁰ developed, what the Commission describes as, “a more sophisticated model of proportional control” that takes into account the dispersion of shareholders and allows for both preferred and voting stock.¹⁰¹

1.5.1 Cournot Competition and the Modified Herfindahl-Hirschman Index (“MHHI”)

The conventional HHI is calculated by summing up the squared market shares of the market participants.¹⁰² In an oligopoly model of quantity competition among firms that produce homogeneous goods and are protected by entry barriers, the conventional HHI is related to the average margin between the market price and cost.¹⁰³ The change in HHI caused by a full merger (the delta or Δ) equals twice the product of the merging firms’ market shares.¹⁰⁴ Similarly, the MHHI is an indicator of the average price-cost margin that additionally takes into account the anti-competitive effects of partial ownerships. *Salop and O’Brien*¹⁰⁵ derive a general formula for the MHHI that allows for partial ownerships entailing different degrees of financial interest and control rights. The MHHI is defined such

⁹⁹ Duarte Brito, Luís Cabral and Hélder Vasconcelos, ‘Duopoly Competition with Common Shareholders’ (2008) Working Paper

<http://www.concorrenca.pt/vPT/Estudos_e_Publicacoes/Working_Papers/Documents/WP32_Brito_Cabral_Vasconcelos_2008.pdf>

¹⁰⁰ Duarte Brito, Luís Cabral and Hélder Vasconcelos, ‘Duopoly Competition with Competitor Partial Ownership’ (2010) Working Paper.

<http://www.concorrenca.pt/vPT/Estudos_e_Publicacoes/Working_Papers/Documents/WP41%20crossholdingsJul2010.pdf>

¹⁰¹ The European Commission also acknowledges the importance of shareholder fragmentation on effective control. Please see *Arjomari/Wiggins* (Case No IV/M.0025) Commission Decision 10 December 1990 OJ C321/16 where the Commission found that Arjomari was able to exercise decisive influence over Wiggins with 39% of the shares since the rest was spread among 107,000 other shareholders, none of whom holding more than 4%.

¹⁰² Formally, when s_i denotes the market share of firm i , $HHI = \sum_{i=1}^n s_i^2$

¹⁰³ Keith Cowling and Michael Waterson, ‘Price cost margins and market structure’ (1976) *Economica*, Vol 43, 267-274 have shown that if n firms compete with c_i , denoting marginal cost of firm i , s_i referring to the market share of firm i , p being the equilibrium price and ϵ the demand elasticity, then $\sum_{i=1}^n s_i \frac{p(c_i - \bar{c})}{p} = \frac{1}{\epsilon} HHI$

¹⁰⁴ Formally, $\Delta HHI = 2 s_a s_b$.

¹⁰⁵ Steven C Salop and Daniel O’Brien, ‘Competitive effects of partial ownership: Financial interest and corporate control’ (2000) *Antitrust Law Journal*, 67(3), 559-614.

that it collapses to the conventional HHI in the absence of any partial ownership. The delta between the MHHI pre- and post-acquisition provides an estimate of the competitive effects caused by the transaction. Similar to the HHI, computations based on the MHHI are only rough indicators in that “they assume a relevant market that entails no substitution to products outside the market, prohibitive entry barriers, no other competitive effects factors, and no efficiency benefits”.¹⁰⁶ The Commission provides the example of a market where firms A, B and C with market shares of 40%, 30% and 30%, respectively, are active. Before any transaction takes place, the HHI and the MHHI are 3,400. If firm A takes over firm B, the HHI increases by 2,400, thereby indicating a merger with very significant effects on concentration.¹⁰⁷ When firm A acquires a passive 10% minority stake, the MHHI increases only by 120.¹⁰⁸ According to the Horizontal Merger Guidelines of the European Commission (2004), a delta of less than 150 would be unlikely to raise competition concerns in case of a full merger as long as certain special factors are absent. As the MHHI and the HHI are similar concepts, this threshold could also be used to conclude as a first rough indication that concerns are unlikely to arise in this case. In contrast, if firm A would acquire a stake of 25% in firm B and also obtain “proportional control”, then the MHHI would increase by 780, indicating a stronger effect on concentration and the possibility that competition concerns may arise.¹⁰⁹

1.5.2 Bertrand Competition and the Price Pressure Index (“PPI”)

The concept of PPI, provides a rough estimate of competitive effects of acquisitions in a Bertrand oligopoly framework with differentiated

¹⁰⁶ Steven C Salop and Daniel O'Brien, 'Competitive effects of partial ownership: Financial interest and corporate control' (2000) Antitrust Law Journal, 67(3), 559-614.

¹⁰⁷ For simplicity, the merged entity is assumed to obtain the joint market share of both merging firms. This for example could be the case in a capacity driven market.

¹⁰⁸ If firm A acquires a passive minority ownership share θ_{AB} in firm B, then $\Delta MHHI = \theta_{AB} s_A s_B$. See, Steven C Salop and Daniel O'Brien, 'Competitive effects of partial ownership: Financial interest and corporate control' (2000) Antitrust Law Journal, 67(3), 595.

¹⁰⁹ Formally, if firm A acquires the minority ownership share θ_{AB} and also obtains “proportional control” in firm B, then $\Delta MHHI = \left(\theta_{AB} + \frac{\theta_{AB}^2}{1 - \theta_{AB}^2 + \theta_{AB}^2} \right) s_A s_B$. See Steven C Salop and Daniel O'Brien, 'Competitive effects of partial ownership: Financial interest and corporate control' (2000) Antitrust Law Journal, 67(3), 559-614.

products.¹¹⁰ *Salop and O'Brien*¹¹¹ refer to PPIs as indicators that measure the economic pressure to change prices in response to a change in ownership structures. Unlike the MHHI analysis, however, a separate PPI indicates the pricing pressure of each firm in the market. Therefore, a separate delta (Δ) for each firm that is affected by the acquisition has to be computed. The pressure to increase price after an acquisition depends on the reduction in the opportunity cost of raising prices. An advantage of the PPI approach over the MHHI concept is its ability to incorporate efficiency benefits into the analysis in a practical way.

If firm A acquires a passive structural link in target firm B, the pricing pressure of firm A increases in the level of A's financial interest in firm B, in B's margin relative to A's marginal cost and in the proportion of sales diverted from A to B after a price increase of A.¹¹² The diversion ratio, which refers to the proportion of sales diverted from A to firm B after a price increase of A, depends on how "close" the products of the two firms are. Intuitively, B's margin relative to A's marginal cost and the diversion ratio jointly indicate, how much of the profit lost by firm A after a price increase will be recouped by firm B. Acquiring a financial interest in firm B allows firm A to partially internalize the positive effect of its price increase on firm B's profits.

The Commission explains that it is straightforward to apply the PPI when analysing more complicated acquisitions. For example, when the acquisition of a minority share also confers a degree of influence in the target firm, then the acquiring firm will typically also induce the target firm to raise its prices, which typically feeds back to higher profits of the

¹¹⁰ The PPI is defined slightly differently compared to the related concept of upward pricing pressure (UPP) as discussed by Joseph Farrell and Carl Shapiro, 'Antitrust Evaluation of Horizontal Mergers: An Economic Alternative to Market Definition' (2010) *The B.E. Journal of Theoretical Economics*, Vol 10, No 1. The latter concept does not express the pricing pressure relatively to the own marginal costs.

¹¹¹ Steven C Salop and Daniel O'Brien, 'Competitive effects of partial ownership: Financial interest and corporate control' (2000) *Antitrust Law Journal*, 67(3), 559-614.

¹¹² Formally, if firm A acquires the passive minority ownership share θ_{AB} in firm B, then $\Delta PPI_A = \beta_{AB} \tilde{r}_{BA} \frac{(p_A - c_A)}{c_A}$, where $\tilde{r}_{BA} = -\frac{\partial Q_B / \partial p_A}{\partial Q_A / \partial p_A}$ is the diversion from firm A to firm B. Please see Steven C Salop and Daniel O'Brien, 'Competitive effects of partial ownership: Financial interest and corporate control' (2000) *Antitrust Law Journal*, 67(3), 559-614.

acquiring firm. Therefore, in this scenario, the PPIs of both the acquiring and the target firm increase.¹¹³

1.5.3 Issues Concerning the Application of MHHI and PPI

The Commission in SWD 2013 Consultation Annex identifies various issues with the MHHI and PPI. As the OECD 2008 Report points out, the MHHI methodology is relatively easy to implement, as it is based on information which is normally available to antitrust enforcers (such as the parties' market shares and the percentage of the ownership acquired), whereas the PPI methodology requires a set of information (such as the profit margins and the diversion ratios for differentiated products) that may be more difficult to obtain.¹¹⁴ Importantly, these quantitative tools do not replace a comprehensive analysis of the factors that may be relevant in a competitive assessment, and as such they only provide an indication of the possible competitive effects of a minority shareholding in a competitor.

The Commission explains that when assessing the impact that a network of widespread structural links might have in a particular market, indirect effects have to be taken into account when applying the MHHI or PPI concepts.¹¹⁵ For example, when firm A has a structural link of 20% in firm B which has a structural link of 20% in C, then 4% of firm C's profits indirectly accrue to firm A via its structural link stake in B. When ignoring indirect structural links, the unilateral effects are typically underestimated. Therefore, before the above mentioned concepts can be applied, the effective (i.e. direct and indirect) ownership stake of all firms has to be

¹¹³ Formally, if firm A acquires the minority ownership share θ_{AB} in firm B and also obtains proportional control in firm B, then ΔPPI_A of firm A is the same as in n 76 while for firm B, $\Delta PPI_B = \frac{\theta_{AB}}{(1-\theta_{AB})^2 + \theta_{AB}^2} \theta_{AB} \frac{(2A-\epsilon_A)}{\epsilon_B}$, where θ_{AB} is the diversion ratio from firm B to firm A. Please see Steven C Salop and Daniel O'Brien, 'Competitive effects of partial ownership: Financial interest and corporate control' (2000) *Antitrust Law Journal*, 67(3), 559-614.

¹¹⁴ This issue is discussed more extensively in the context of the concept of upwards pricing pressure. For a summary of the literature on this respect, see Gregory J Werden and Luke Froeb, 'Choosing Among Tools for Assessing Unilateral Merger Effects' (2011) *Vanderbilt Law and Economics Research Paper* No 11-19.

¹¹⁵ More precisely, indirect minority shareholdings have to be taken into account whenever target firms hold themselves minority shareholdings in rivals. Please see David Flath, 'Horizontal shareholding interlocks' (1992) *Managerial and Decision Economics*, Vol 13, No 1, 75-77.

computed.¹¹⁶ Indirect shareholdings are typically not relevant if investors have minority shareholders in several competing firms.

It is clear that there are significant practical issues in applying the MHHI test when examining the competition implications of the existence of common shareholdings in a relevant market. Despite the Commission's assertion in SWD 2013 that the MHHI was "relatively easy to implement" in relation to cross shareholdings, the Commission in more recent merger review decisions under the 2004 EMCR has not applied the MHHI to common shareholdings in examining common shareholdings and the conditions of competition as part of its merger analysis. The Commission in its March 2017 decision in the *Dow/DuPont*¹¹⁷ case in the context of common shareholding, acknowledged that the computation of MHHI requires assumptions on shareholders' control and more particularly, the MHHI computation involves establishing the effective control exerted by each shareholder on each firm and that several assumptions can be made, providing more or less control to some types of shareholders. The Commission acknowledged that it did not perform a case-specific assessment that would justify applying a specific assumption on the control weights and that as a consequence, the Commission was not relying on a MHHI computation as part of its merger analysis. A year later, the Commission in *Bayer/Monsanto*,¹¹⁸ when examining common shareholdings as part of its merger analysis under the 2004 EMCR, simply noted in a footnote the position it had taken in *Dow/DuPont* a year earlier in regard to the MHHI and did not make any further reference to the MHHI. In each of the above cases, the Commission considered that in the presence of common shareholding: (i) concentration measures, such as market shares or the HHI, are likely to underestimate the level of concentration of the market structure and, thus, the market power of the parties; (ii) common shareholding is a reality in the biotech and agrochemical industry, both in terms of the number of common shareholders as well as with respect to the level of shares possessed by

¹¹⁶ David Flath, 'Horizontal shareholding interlocks' (1992) *Managerial and Decision Economics*, Vol 13, No 1, 75-77 and Erik Dietzenbacher, Bert Smid and Bjørn Volkerink, 'Horizontal integration in the Dutch financial sector' (2000) *International Journal of Industrial Organization*, Vol 18, 1223-1242 discuss a computational method of deriving effective ownership stakes in the case of passive minority shares.

¹¹⁷ *Dow/DuPont* (Case No M.7932) Commission Decision 27 March 2017.

¹¹⁸ *Bayer/Monsanto* (Case No M.8084) Commission Decision 21 March 2018.

these common shareholders; and, therefore, (iii) common shareholding in these industries are to be taken as an element of context in the appreciation of any significant impediment to effective competition.

1.6 Empirical Literature on Cross Shareholdings

This section examines various studies containing empirical evidence of the anti-competitive effects of cross shareholding minority stakes. The Commission in SWD 2013 Consultation Annex 1 underlined that its analysis is mainly based on theoretical considerations as there was at the time only “limited empirical literature on the effects of structural links”.¹¹⁹ *Pini* after stating that the analysis of the potential anticompetitive effects of minority shareholdings in competitors and their evaluation by the antitrust authorities is of “paramount importance both from a theoretical and practical standpoint”, confirms that it is “nonetheless important to note that it is very difficult to demonstrate empirically a direct connection between the presence of minority shareholdings in competitors and a reduced competition in the market since a myriad of factors come into play”. *Pini* underlines that the phenomenon of structural links between competitors has been the subject of a number of empirical studies which demonstrate the widespread practice of structural links in certain markets and provide empirical examples of reduced levels of competition “usually characterizing these markets”.

Various studies which have been published which adduce evidence of possible negative competition consequences of minority interests in specified industries or at least that increases in prices have as a matter of fact followed the acquisition of minority interests in the sectors under review thereby suggesting the possibility of a causal link between the minority interests and the adverse competition consequences/price increase are reviewed below. *Nain and Wang*¹²⁰ examined 579

¹¹⁹ The Commission refers to Wilson A Alley, 'Partial Ownership Arrangements and Collusion in the Automobile Industry' (1997) 45(2) Journal of Industrial Economics, 191 who estimates the degree of anti-competitive effects due to cross-shareholdings but states that it is impossible to estimate the effect a change in minority shareholdings has on the degree of collusion due to limitations of his data. David Reiffen, 'Partial Ownership and Foreclosure: An Empirical Analysis' (1998) Journal of Regulatory Economics, Vol 13, No 3, 227-244 empirically examines the effect of partial vertical integration on the incentive to foreclose rivals. His findings could be (partly) explained by efficiencies or by the lack of significant influence of the acquiring firm in the target's business decisions after the transaction. Philip M Parker and Lars-Hendrik Roller, 'Collusive Conduct in Duopolies: Multimarket Conduct and Cross-ownership in the Mobile Telephone Industry' (1997) 28(2) Rand Journal of Economics, 304 estimate a structural model of competition for the US cellular telephone industry but use a different notion of “cross-ownership” with different competitive effects than structural links as discussed in this appendix.

¹²⁰ Amrita Nain and Yan Wang, 'The Anti-Competitive Effects of Minority Stake Acquisitions' (2012) Competition Policy International.

acquisitions of passive minority shareholdings among rival firms (firms operating in the same four-digit SIC code) across 119 manufacturing industries in the US during the period 1980 to 2009.¹²¹ *Nain and Wang* found that minority stake acquisitions were more likely to occur in less concentrated markets. They estimated that a 1% decline of the 4-firm concentration ratio (CR-4)¹²² enhanced the likelihood of silent partial acquisitions by 6.4%. The authors then examined whether or not minority stake acquisitions are associated with a decline in the degree of competition in the industry. The authors examined the real producer price index (RPPI) and price-cost margins (PCM) using annual panel data on the 119 industries over the 30 year period. The authors found that “[c]ontrolling for production costs, wages and demand shocks”, the RPPI was “significantly higher” following minority stake acquisitions than before. They also found that PCMs were higher following minority stake acquisitions even after controlling for several factors that were known to affect industry profit margins. To rule out the possibility that these results captured trends in prices and profits unrelated to the minority interest, the authors conducted “placebo” tests,¹²³ the results of which helped highlight the finding that the increase in prices and profits was observed only in industries that experienced a minority stake acquisition and only after the minority stake acquisition was announced.

Nain and Wang addressed causality highlighting that an unobserved exogenous shock may have triggered the acquisition of a rival’s equity while simultaneously pushing up prices and profit margins. The observed uptick in RPPI and PCM did not prove that the minority stake acquisition caused a change in market power. To test whether the change in RPPI and PCM could be attributable to changes in market power brought about by minority stake acquisitions, they pointed out that models of imperfect competition, showed that lower output and higher prices were a structural outcome of minority stake acquisitions because owning a rival’s equity internalizes any losses imposed on the rival from competing aggressively. They found that the higher prices were sustainable only if barriers to entry were high. When entry is easy, any increase in profit margins resulting from a change in market power was

¹²¹ The industries examined covered a wide range including chemicals and allied products, instruments and electronic and other electrical equipment which represented 37.68%, 14.68% and 12.61% of the total sample respectively.

¹²² The CR-4 is a concentration index which measures the degree of concentration in the market. It is defined as the sum of the market shares of the four biggest firms in the market (in terms of market shares).

¹²³ In the first placebo test, they took industries that experienced a minority stake acquisition and assigned random event dates to those industries and then examined the change in industry prices and profits after the random event date and found no discernible change in RPPI or PCM. In the second test, they took the dates on which actual minority stake acquisitions were announced and assigned random industries to those dates. They found no change in the RPPI and PCM of the randomly selected industries after the actual event dates.

quickly competed away. Therefore, they examined the change in RPPI and PCM for sub-samples of industries with high and low barriers to entry. Using capital intensity and capital expenditures as proxies for barriers to entry, they showed that the increase in RPPI and PCM following minority stake acquisitions was observed only in industries with high barriers to entry. Moreover, in placebo tests, where either the industry or the acquisition date was randomized, they did not find an increase in RPPI and PCM even in the sub-sample of industries with high barriers to entry. The finding was supportive of the thesis that changes in prices and profit margins following minority stake acquisitions were attributable to changes in market power. The next set of tests addressed the causality issue by linking the changes in prices and profit margins directly to the characteristics of the minority acquisition. Existing theory predicted that output contraction is greater when the percentage of shares acquired was higher. They argued that moreover, any contraction in output due to a minority stake will have a bigger impact on industry prices when the firms participating in the equity ownership arrangement are larger.¹²⁴ Taking these predictions to the data, *Nain and Wang* found that the increase in RPPI and PCM following minority stake acquisitions was greater when the percentage of shares acquired was higher and that both RPPI and PCM increased by a greater amount when the total assets or sales market share of an acquirer was higher. Similarly, a target firm's total assets and market share were, for the most part, positively related to the increases in industry profits and prices.¹²⁵

Nain and Wang published a subsequent paper in 2013¹²⁶ in which they obtained a sample of 998 minority stake acquisitions of rivals' stock across 111 manufacturing industries from 1980 to 2010 and tested the market power hypothesis using both industry-level and firm-level tests. In the industry-level tests, they examined changes in output prices using monthly panel data on the RPPI and changes in industry mark-ups using annual panel data on PCM. Controlling for production costs, wages, demand shocks, and intensity of horizontal merger activities, they found that RPPI was significantly higher after minority stake acquisitions than before.

¹²⁴ The authors cited Robert J Reynolds and Bruce R Snapp, 'The competitive effects of partial equity interests and joint ventures' (1986) *International Journal of Industrial Organization*, 4(2), 141-153; Joseph Farrell and Carl Shapiro, 'Antitrust Evaluation of Horizontal Mergers: An Economic Alternative to Market Definition' (2010) *The B.E. Journal of Theoretical Economics*, Vol 10, No 1.

¹²⁵ The same conclusion was drawn by the same authors in Amrita Nain and Yan Wang, 'The Product market Impact of Minority Stake Acquisitions' (September 2013) *Management Science*.

¹²⁶ Amrita Nain and Yan Wang, 'The Product market Impact of Minority Stake Acquisitions' (September 2013) *Management Science*.

They also found that PCM was higher following minority stake acquisitions, even after controlling for several factors that were known to affect industry profit margins. They applied the same placebo and causality tests as above. The conclusions drawn were the same as in the above 2012 study.

A number of studies have been conducted in relation to the impact of Japanese keiretsu groups. *Alley*¹²⁷ defined keiretsu groups as groups of firms that have common financial links to any of the following: (i) the six keiretsu groups in Japan, namely, Mitsui, Mitsubishi, Sumitomo, Fuyo, Sanwa and Dai-Ichi Kangyo or other financial institutions which are called financial keiretsu (horizontal keiretsu); (ii) a group consisting of a parent company and its suppliers and its subcontractors which is called a supplier keiretsu (vertical keiretsu); (iii) a group comprising of a parent company and its subsidiaries and affiliated firms (vertical keiretsu); or (iv) a group comprising of a manufacturer and its affiliated wholesalers and distributors, which is called a distribution keiretsu (vertical keiretsu). *Flath*¹²⁸ described how in 1980 many of the largest corporations in Japan were affiliated with one or another of six business groups identified above.¹²⁹ The firms affiliated with any one group were linked to one another by a complicated web of interlocking stockholding. *Flath* stated that inquiries identified various economic rationales for minority stakes, including that banks in Japan held stock in the companies to which they lent to reduce the agency costs of debt,¹³⁰ companies acquired stock in rivals to achieve cartelisation and cross- shareholding interlocks between trading partners could be used to attain vertical integration or to bond firms to observe contractual stipulations. *Flath* stated that perhaps the economic rationale for the groups was in assuring that whatever bilateral shareholding interlocks are formed, they will also induce the greatest possible indirect shareholding among the same set of firms. Indirect shareholding existed when a company held stock in a company that itself held stock in another company. Whatever advantages resided in direct shareholding links were also present in the case of indirect shareholding.

¹²⁷ Wilson A Alley, 'Partial Ownership Arrangements and Collusion in the Automobile Industry' (1997) 45(2) Journal of Industrial Economics 191.

¹²⁸ David Flath, 'Indirect Shareholding within Japan's Business Groups' (1992) Working Paper No 59 Working Paper Series Centre on Japanese Economy and Business, Graduate School of Business, Columbia University 38 Economics Letters, 223.

¹²⁹ Then considered the modern counterparts of the pre-war zaibatsu.

¹³⁰ The rationale for this strategy was based on the fact that these minority shareholdings were used to resolve agency problems of debt. See David Flath, 'Shareholding Interlocks in the Keiretsu, Japan's Financial Groups' (1993) 75 Review of Economics and Statistics 249.

Flath examined indirect shareholding in the six keiretsu groups of Japan using 1980 data.¹³¹ The author stated that several conclusions could be drawn from the data. Firstly, indirect shareholding was around one fourth as great as direct shareholding, which seemed "large enough to matter". Secondly, indirect share links were greatest on average in the groups having the greatest direct share links, Sumitomo and Mitsubishi. Thirdly, indirect and direct shareholdings by financial firms were greater on average than shareholding by non-financial firms. The greatest extent of cross-shareholding in Japan was linking firms that were members of a same business group. Alignment of firms into groups maximised the extent of indirect shareholding that resulted from any direct shareholding. By proposing and estimating a measure of indirect shareholding, *Flath* argued that indirect shareholding in the keiretsu groups, particularly indirect shareholding by keiretsu banks, was indeed "large enough to be a plausible motivation for the groups' very existence".

*Flath*¹³² in a 1995 paper contended that cross-shareholding between non-financial firms that were trading partners did in fact *serve* the economic purpose of deterring opportunistic behaviour and was not merely symbolic. The firm that held shares in a trading partner could credibly threaten to divest should the trading partner behave opportunistically, withdrawing from it the bargaining advantage that the equity position had conferred. In this manner, a firm may establish a partial equity position in a trading partner to deter opportunism. Equity links were greater between keiretsu firms that by virtue of the industries to which they belonged were likely to be trading partners. Furthermore, equity links were greater where opportunism was less deterred by the mere loss of reputation with the trading partner. Opportunism by a supplier would entail substitution of products or services having inferior quality to what was claimed. Opportunism by a customer would entail misrepresenting its own investments that reduced the supplier's costs. *Flath* asserted that the pattern of

¹³¹ The focal firms were the member firms of the six respective "presidents' councils" of the major keiretsu: Mitsui, Mitsubishi, Sumitomo, Fuyo, Sanwa, and Dai-Ichi Kangyo. There were about 175 companies including most of the largest ones in Japan. In 1980, all together these companies comprised about a fourth of all corporate assets in Japan. The average fractions of outstanding shares held within the respective presidents' councils in 1980 were: Sumitomo (27%), Mitsubishi (29%), Dai-Ichi Kangyo (14%), Sanwa (17%), Mitsui (17%), Fuyo (16%), but about half of these shares were held by financial institutions of the respective groups. Typically, the direct share interest of any one company in another was in a range of 3% or less.

¹³² David Flath, 'The Keiretsu Puzzle' (1995), Center on Japanese Economy and Business, Columbia University, Working Paper No 93, 1.

<<https://academiccommons.columbia.edu/doi/10.7916/D8VT20J0/download>>

cross-shareholding among fellow presidents' club members of the six financial keiretsu exhibited all of the above characteristics.

*Parker and Roller*¹³³ examined the structure and conditions in the telecommunications industry in the US to see if this led to collusion and pricing which included an analysis of the possibility that minority shareholdings among firms in the telecommunication industry in the US might cause collusive behaviour and price increases. In particular, they considered the effects of cross-market behaviour on collusion where two wireline operators competed in one market and the same two operators were joint venture partners in a non-operator in another market. The period they covered was from 1984 to 1988. In the early 1980s, the FTC categorized the US into 305 non-overlapping markets in which in each market two firms were awarded licenses in order to provide competing mobile cellular mobile services. During the period from 1983 to 1988, all 305 metropolitan cellular markets had two licensees operating their networks. However, at the beginning of the period, some providers enjoyed a monopoly period until the second licensee appeared in the same geographical market. The study indicated that if the providers jointly operated a license in another market, this led to “significant cross-ownership effects” in that they tended to collude more than otherwise. They found that since independent operators had fewer restrictions to co-own other operators than regional Bell operating companies (“**RBOC's**”), this explained the authors' findings that RBOCs colluded less than independent operators. The authors succinctly summarised the above by stating that “In other words, one reason that RBOCs collude less, is that they co-own less”. Furthermore, multimarket conduct significantly increased collusion, while the pricing behaviour of the monopolist did not affect prices after the entry of the second provider.

*Dietzenbacher, Smid and Volkerink*¹³⁴ examined the effect of horizontal passive minority shareholdings on firms' price-cost margins in the Dutch financial sector in 1997. They noted that although the theoretical effects of minority shareholdings had received considerable attention in published literature, “empirical analyses are extremely rare due to a lack of data” citing *Flath's* analysis of Japanese Keiretsu as an exception to the above. The authors examined data on cross-shareholdings between the four largest financial conglomerates in the Netherlands and concluded

¹³³ Philip M Parker and Lars-Hendrik Roller, 'Collusive Conduct in Duopolies: Multimarket Conduct and Cross-ownership in the Mobile Telephone Industry' (1997) 28(2) *Rand Journal of Economics* 304.

¹³⁴ Erik Dietzenbacher, Bert Smid and Bjørn Volkerink, 'Horizontal Integration in the Dutch Financial Sector' (2000) Vol 18 *International Journal of Industrial Organization* 1223.

if the firms competed in a Cournot fashion, the price-cost margins of the firms with minority shareholdings were 13% higher than the corresponding margins of the firms without passive interests. The authors concluded that if the firms competed in a Bertrand fashion, the price-cost margins of the firms with minority shareholdings were 1 to 2% higher than the corresponding margins of the firms without passive interests.

*Amundsen and Bergman*¹³⁵ explored the implications of minority interests in the Swedish and Norwegian electricity markets. They referred to the integration of the markets in the Nordic countries with a view to diluting market power in Sweden. The authors pointed out that companies with a strong position in generation, like Vattenfall in Sweden and Statkraft in Norway, acquired holdings in distribution and supply companies and in other generation companies.¹³⁶ *Amundsen and Bergman* assessed the impact of minority shareholdings on competition by comparing prices and quantities in the Nordic power market with and without the presence of minority interests. Statkraft was the only firm with significant holdings in other firms. The results presented suggested these holdings in conjunction with the behaviour implied by the passive ownership model had a significant impact both on the profit maximising output level of Statkraft and on the prices of electricity in Norway and Sweden. More particularly, compared to situations where no minority stake existed, Statkraft reduced its level of output, and thus managed to increase electricity prices in both Sweden and Norway. The much smaller firms, Sydkraft and Gräninge, however, produced the same level of output irrespective of whether or not minority interests existed. The author explained that the reason for this was that both Sydkraft and Gräninge were producing at a level where the marginal cost curve was vertically increasing so that the profit maximizing output was the same at both price levels.

The total generation of power was lower in Sweden when minority interests existed compared to conditions where they did not exist. The two authors explained that

¹³⁵ Eirik S Amundsen and Lars Bergman, 'Will Cross-Ownership Re-establish Market Power in the Nordic Power Market?' (2002) 23(2) *Energy Journal* 73.

¹³⁶ For example, Statkraft bought 17% of Sydkraft, the second largest power producer in Sweden, and Sydkraft bought 20% of Gräninge, another Swedish power generating company. In addition, two major generation companies, Stockholm Energi and Gullspång, merged and formed Birka Energi, which became the third largest power producer in Sweden. In addition to ownership changes within Sweden and the entrance of Norwegian Statkraft as a major owner in Sydkraft the degree of foreign ownership has increased significantly on the Swedish power market. Thus the German power company EON has acquired a major share of Sydkraft, the Finnish energy company Fortum owns 50 percent of Birka Energi, and the French power company EDF is a minority owner of Gräninge.

behind the output reduction was a decrease by Vattenfall and an increase by the "Fringe." In the case of Statkraft, the lower output under minority interest conditions was reflected in lower sales both to Norwegian and Swedish customers. From the point of view of Vattenfall and the other generators, this meant that the residual demand had increased on both sub-markets. *Ceteris paribus*, this meant that the profit maximizing output and sales of Vattenfall increased. In the case of the Swedish sub-market the sales by Vattenfall thus increased. However, the sales by Vattenfall on the Norwegian sub-market also depended on transmission costs. *Amundsen and Bergman* highlighted that in cases where no minority interest existed, the electricity prices differed between the two countries, reflecting congestion in the Norwegian-Swedish inter-connector. The price for transmitting power from Norway to Sweden was higher than the price for transmission in the opposite direction. Thus, going from the "No Ownership" case to the situation involving minority interests meant that the marginal cost of transmission increased. Thus, from the point of view of Vattenfall, the demand by Norwegian customers increased, but at the same time the cost of supplying these customers increased as well. The net effect of these two changes was that there was a reduction of Vattenfall's sales to Norwegian customers which explained the fall in Vattenfall's output.

Amundsen and Bergman examined the impact of Statkraft's ownership in other power companies on Statkraft's profit. The results suggested that profit maximization in the presence of cross-ownership led to a lower profit in Statkraft itself but that this was more than fully compensated by the share of profit in the firms partially owned by Statkraft.

Amundsen and Bergman stated that it was obvious that mergers between generators operating on the Nordic market would re-establish at least part of the horizontal market power that had recently disappeared, particularly if some of the major generators would merge. However, their analysis suggested that outright mergers may not be necessary. The major generators could re-establish part of the lost horizontal market power by becoming passive minority owners in other generating companies. With minority positions in other generating companies, the major firms had incentives to produce less than under Cournot competition between independent firms, thus accepting lower profit in their own operations in exchange for a share of the higher profit in other companies resulting from a higher market price.

The prevalence of minority interests in the Italian banking industry has been the subject of analysis. This industry was once described by the former Chairman of the Italian competition authority, Giuliano Amato, as a "petrified forest" and as characterized by a complex web of cross-ownership and interlocking directorships.¹³⁷ *Trivieri*¹³⁸ carried out a detailed examination of the effects of minority shareholdings among Italian banks on competition in the banking sector for the period 1996-2000. The author stated that the results obtained from the econometric investigation provided empirical evidence that, during the second half of the 1990s (that is to say the period in which cross-ownership became relevant in the Italian banking sector), the Italian banks linked by cross-ownership "behaved less competitively than credit firms not involved in the same phenomenon". The author stated that the conclusion as to a diminution of competition arising from the existence of minority stakes emerged quite clearly when a particular category of small cooperative banks, Banche di Credito Cooperativo ("**BCCs**"), were excluded from the analysis. The author asserted that since BCCs may be viewed as non-profit banks, it was plausible to reckon that they may have had a different competitive behaviour pattern compared to the other categories of the Italian credit firms. The exclusion of BCCs allowed the author to investigate the possible effects of cross-ownership on competition by examining banks which had similar competitive strategies. *Trivieri* stated that the empirical evidence he examined appeared to corroborate the results of the studies which have shown that cross-ownership may represent an obstacle to competition among firms in an industry. With regard specifically to the Italian banking system, the results obtained seemed to lend support to the claim that cross-ownership between Italian banking groups "may constitute a serious threat to competition in the national credit sector". The author stated that, at a policy level, it made "sense to share the view of some authors (Messori, 1999; Inzerillo and Messori, 2000, for example) who claim the need to take initiatives aimed at dismembering the maze of cross-ownership in the Italian banking system, thus promoting a more competitive relationship between the players in the industry and improving the outcome of the restructuring process that the Italian banking sector is still undergoing."

¹³⁷ U Inzerillo and Marcello Messori, 'Le privatizzazioni bancarie in Italia' in S de Nardis, "Le privatizzazioni italiane" (Il Mulino, Bologna, 2000).

Marcello Messori, 'La concentrazione del settore bancario: effetti sulla competitività e sugli assetti, proprietari' (2001) 151 Quaderni Ceis 1.

¹³⁸ Francesco Trivieri, 'Does Cross-Ownership Affect Competition? Evidence from the Italian Banking Industry' (2007) 17 International Financial Markets, Institutions and Money 79.

*Foros, Kind and Shaffer*¹³⁹ examined the main effect of active minority shareholdings on firms' pricing decisions in the pay-TV market in Norway and Sweden. Demand and supply conditions in these markets were similar. In both countries, there were two providers that offered pay-TV-subscriptions via satellite (Canal Digital and Viasat), and for the majority of households, the only viable alternative to satellite subscription was the digital terrestrial platform (DTT), which was supplied by one firm in each country (RTV in Norway and Boxer in Sweden). Despite these similarities in the two countries, the prices in Norway and Sweden differed markedly. The subscription fee for RTV was significantly higher than for Boxer and Canal Digital charged a lower price than its DTT competitor in Norway but a higher price than its DTT competitor in Sweden. *Foros et al* considered that the differences in prices in the two markets were based on the different ownership structures in the two countries. The Swedish provider of digital terrestrial platform was independently owned whereas the Norwegian telecommunications incumbent Telenor owned 100% of the shares in Canal Digital and 33.3% of the shares in RTV. The authors stated that if Telenor had corporate control in RTV, then Telenor would indeed have an incentive to increase RTV's price - perhaps substantially - in order to reduce the competitive pressure on Canal Digital. If Telenor owned 100% of the shares in both companies, Telenor would induce RTV and Canal Digital to set the same (high) prices, other things being equal. The authors stated that however, since Telenor only had 33% of the shares in RTV, it had incentives to set a higher price for the services offered by RTV than for the services offered by Canal Digital in Norway and that this might be true even if consumption of the former had a lower perceived quality.

It is important to acknowledge that certain jurisdictions have applied industrial policy considerations to their treatment (promotion or tolerance) of cross-shareholdings that might conflict with a strict competition policy approach.

1.7 **A Different Policy Approach to Cross Shareholdings in Certain Jurisdictions- Japan and Korea**

It should be noted that certain jurisdictions have approached their treatment of cross minority shareholdings by the implementation of industrial policy considerations which may conflict with a strict competition policy analysis, as understood in the Euro

¹³⁹ Øystein Foros, Hans Jarle Kind and Greg Shaffer, 'Mergers and Partial Ownership' (2010) CESifo Working Paper Series No 2912; Simon School Working Paper No FR 10-11.

<<http://ssrn.com/abstract=1539366>>

American model of competition/antitrust policy. In section 1.6 above, we looked at some empirical evidence on the implications of the Japanese corporate Keiretsu model of business relationships which, include cross shareholdings.¹⁴⁰ The arguments in support of Keiretsu include that they are a form of business organisation that entails efficiency gains, reflect historical circumstances in Japan and are adapted to Japan's unique business and market environment.¹⁴¹ The above contrasts with the US policy position that Keiretsu are collusive, anticompetitive and exclusionary and that they allow Japanese firms to gain an unfair advantage in domestic and international competition and to close off the market to foreign entrants.¹⁴² The origins of collaboration in the form of Japanese keiretsu is the post war enactment in Japan of the Antimonopoly Act in 1947 at the insistence of the US. The US saw economic democratisation as part of the Japan's transition to democracy and part of that was the dismantling of the predecessor to keiretsu, the *zaibatsu*,¹⁴³ which were family-owned conglomerates that had led to the prevalence of oligopolies in Japan prior to and during the second world war. The 1947 Antimonopoly Act was far reaching and included a prohibition against cross shareholding.¹⁴⁴ It prohibited mergers and acquisitions between competitors, required all mergers and acquisitions to be approved by the Japan Fair Trade Commission (**JFTC**), prohibited the creation of holding companies as principal businesses and the holding by corporations of interests in other corporation and non-holding companies could not hold shares in corporations without the approval of the JFTC.¹⁴⁵ The above competition legislation soon became subordinated to Japan's industrial policies which were based on two assumptions: firstly, that efficiency is associated with firm size so the higher the market concentration, the more efficient the use of resources; and secondly, that price competition destroys

¹⁴⁰ Artur F Tomeczek, 'The evolution of Japanese keiretsu networks: A review and text network analysis of their perceptions in economics' (2022) *Japan & The World Economy* 62, 101132.

J Mark Ramseyer, 'Cross-shareholding in the Japanese Keiretsu' (1998) Harvard Law School.

Sarah Klim, RBFL Student Editor, 'A Historical Perspective on the Japanese Keiretsu' (2021) Boston University School of Law Review of Banking & Financial Law.

¹⁴¹ Paul Sheard, 'Keiretsu, Competition and Market Access' (1994) Institute for International Economics.

¹⁴² Paul Sheard, 'Keiretsu, Competition and Market Access' (1994) Institute for International Economics.

¹⁴³ Nakamura, Naofumi. 'The Present State of Research on Zaibatsu: The Case of Mitsubishi' (2002) *Social Science Japan Journal*, Vol 5, No 2, 233–42.

¹⁴⁴ Michael W Dowdle, John Gillespie and Imelda Maher, *Asian Capitalism and the Regulation of Competition* (Cambridge University Press 2013).

¹⁴⁵ The Trade Association Act 1948 was also enacted at the insistence of the US which prohibited not only cartels but also dispute arbitration and lobbying ("unduly influencing legislation or government policy").

the growth necessary to achieve international competitiveness.¹⁴⁶ The above draconian competition laws were substantially amended and their enforcement became lax after the US occupation ended. Japan, at that time, had made a clear policy choice of favouring industrial, over competition, policy in this regard.

Korea pursued industrial policy of promoting business expansion that involved close ties between government and business groups known as *chaebols*. A chaebol generally refers to a collective of firms under the single common administrative and financial control of one family.¹⁴⁷ Chaebols, ostensibly run by professional managers responsible for individual firms within the conglomerate, are actually controlled by a single chongsu¹⁴⁸ who is an unofficial or unappointed general manager who makes the final corporate decisions for the entire group. The chongsu acts as supreme decision-maker and representative of the owner family. The family might only own a small shareholding in certain entities in the chaebol network or group. The various entities in the chaebol are linked by minority cross-shareholdings. The chongsu is effectively the CEO of the chaebol even though all the affiliates in the network are legally independent entities with their own board of directors and presidents. The term used for the Chongsu of “chairman of the group” is a fictitious title as the group does not exist in any legal sense.¹⁴⁹ Therefore, notwithstanding the absence of majority equity stakes or formal corporate positions, control by the family is exercised over the companies in the network of cross-shareholdings through the role of chongsu. For example, Mr. Lee, acts as chongsu of the Samsung chaebol, and holds a mere 0.57% of the overall group shares, and his family, only 1.07% of the entire group’s stocks.¹⁵⁰ Up until October 2022,¹⁵¹ he held no formal position in

¹⁴⁶ Michael W Dowdle, John Gillespie and Imelda Maher, *Asian Capitalism and the Regulation of Competition* (Cambridge University Press 2013).

¹⁴⁷ Chaebol literally translates as a group or party of wealth: chae (財) means wealth or fortune, and bol (閥) means a group or party.

¹⁴⁸ Chongsu in Korean literally translates as a general head.

¹⁴⁹ Sea-Gin Chang, *Financial Crisis and Transformation of Korean Business Groups The Rise and Fall of Chaebols* (Cambridge University Press 2003).

¹⁵⁰ The Lee family controls the Samsung group with 1.67% of the overall group shares. This is possible through the cross-shareholding structure of the chaebol group. Its main vehicle for corporate control is Everland (an amusement park private firm).

¹⁵¹ Samsung Newsroom, ‘Jay Y Lee Appointed Samsung Electronics Executive Chairman’ (27 October 2022).

<<https://news.samsung.com/global/jay-y-lee-appointed-samsung-electronics-executive-chairman>>

the Samsung group such as Chairman of the board or CEO, yet he exerted control through Samsung's vast cross shareholding.¹⁵²

The historical explanations offered for the timing of the emergence of the Korean chaebols were broadly either that: (i) Korean Chaebols were largely a continuation on earlier works and infrastructures, social and physical, held over from the Japanese colonial era¹⁵³ (ii) they arose out of the outbreak and during the Korean War in the 1950s.¹⁵⁴ The historic links between government and chaebols in Korea has been extensive. The Korean government's development policy was focused on capital accumulation for rapid growth-producing activity and supported chaebol to harness their entrepreneurial energies as a faithful partner for the new political goal of national economic development post the Korean war.¹⁵⁵ Chaebols were developed by the government offering them monopolies of production or financial benefits to assure their rapid accumulation of capital. Most economic policies benefited those large export-oriented companies which faithfully followed the government's development plans. Conversely, the success of the government's economic policies depended on the economic success of these chaebol companies. The main force pushing the Korean economy in the direction of technological and capital-intensive industries came from political leadership. The latter have been described as "ruling political and bureaucratic elites [who] were an independent economic force to be reckoned with, rather than being mere political tools of the business class."¹⁵⁶ The close ties between government and the chaebols has been the subject of much criticism within Korea fuelled last year by the grant of a Presidential pardon to Mr Lee following his conviction on certain charges relating to bribes alleged to win favour for a proposed merger of two Samsung units.¹⁵⁷ The

¹⁵² David Murillo and Yun-Dal Sung, 'Understanding Korean Capitalism: Chaebols and their Corporate Governance' (September 2013) ESADEgeo Position Paper 33.

<https://itemsweb.esade.edu/research/esadegeo/201309Chaebols_Murillo_Sung_EN.pdf>

¹⁵³ Kevin Hjortshøj O'Rourke, Jeffrey Gale Williamson, 'The Spread of Modern Industry to the Periphery since 1871' (2017) Oxford University Press.

¹⁵⁴ Rhyu, Sang-Young, 'The Origins of Korean Chaebols and their Roots in the Korean War' (2005) The Korean Journal of International Relations, Vol 45, No 5.

¹⁵⁵ Minho Kuk, 'The Governmental Role in the Making of Chaebol in the Industrial Development of South Korea' (Spring-Summer 1988) Asian Perspective, Spring-Summer 1988, Vol 12, No 1, 107.

¹⁵⁶ Minho Kuk, 'The Governmental Role in the Making of Chaebol in the Industrial Development of South Korea' (Spring-Summer 1988) Asian Perspective, Spring-Summer 1988, Vol 12, No 1, 107.

¹⁵⁷ Frances Mao, 'Lee Jae-yong: Why South Korea just pardoned the Samsung "prince"' BBC News (London, 12 August 2022).

<<https://www.bbc.co.uk/news/world-us-canada-62501514>>

above was followed by his formal appointment as executive Chairman of Samsung Electronics in October 2022.¹⁵⁸

2 COMMON SHAREHOLDINGS

Common shareholding is a situation where one or more of a firm's shareholders directly or indirectly has a concurrent equity interest in one or more entities in the firm's rivals, such as an institutional investor (bank, insurance company, mutual fund or pension fund) holding minority stakes in various entities competing on the same market. The growth in the popularity of investment funds, and in particular index-tracker funds (or index funds), has increased the likelihood that a given institutional investor will hold shares in competing companies, as well as the likelihood that other investors will have holdings in the same companies. The shareholdings will typically be much smaller of course than in the problematic cross ownership cases.

The EU Commission's science and knowledge service, the Joint Research Centre ("JRC"), in 2020 published a report titled Common Shareholding in Europe which suggests a strong presence of common shareholdings in all of the five strategic industries examined, namely, oil and gas, electricity, telecommunications, trading platforms and beverages manufacturers.¹⁵⁹ The study found that 67% of all listed firms active in the EU are cross-held by common shareholders holding at least 5% in each company. With regard to the US, it is estimated that institutional investors own about 70% to 80% of all stock in S&P 500 companies.¹⁶⁰ According to *Fichtner, Heemskerk and Garcia-Bernardo*,¹⁶¹ Blackrock, Vanguard, and State Street when combined constitute the single largest shareholder in at least 40 percent of all listed companies in the United States and the largest owner in 438 of the 500 firms in the S&P 500.¹⁶²

Choe Sang-Hun, 'Samsung's De Facto Chief, Freed From Prison a Year Ago, is Pardoned' *New York Times* (New York, 12 August 2022).

<<https://www.nytimes.com/2022/08/12/business/samsung-pardon-south-korea.html>>

¹⁵⁸ Samsung Newsroom, 'Jay Y Lee Appointed Samsung Electronics Executive Chairman' (27 October 2022).

<<https://news.samsung.com/global/jay-y-lee-appointed-samsung-electronics-executive-chairman>>

¹⁵⁹ Please see section 2.3 below.

¹⁶⁰ Menesh S Patel, 'Common Ownership, Institutional Investors and Antitrust' (2 January 2018) American Bar Association.

¹⁶¹ Jan Fichtner, Eelke M Heemskerk and Javier Garcia-Bernardo, 'Hidden power of the Big Three, Passive index funds, re-concentration of corporate ownership, and new financial risk' (2016) *Business and Politics*.

¹⁶² Please see n 165. '80% of equity market cap held by institutions' *Pensions & Investments* (25 April 2017).

<<https://www.pionline.com/article/20170425/INTERACTIVE/170429926/80-of-equity-market-cap-held-by-institutions>>

2.1 The Emerging Theories of Harm

The competition law implications of common ownership has recently been the subject of significant scholarly debate and discussion particularly in the US. Neither the SWD 2013 Consultation nor the White Paper addresses common ownership.¹⁶³ The debate surrounding the competition issues arising from common ownership has become much more prevalent in recent years particularly since the 2008 global financial crisis when investment by individuals, businesses and pension funds has changed dramatically with the trend moving away from directly held shares.¹⁶⁴ Investors are increasingly purchasing units of funds such as ETFs that pool assets as such investments reduce the exposure to the risks associated with shares in individual companies by diversifying holdings. These funds seek to track the performance of an index such as the S&P 500. A number of studies in the US have helped fuel the debate over the potential anti-competitive effects of common ownership. More specifically, *Azar, Schmaltz and Tecu*¹⁶⁵ highlighted that the empirical literature thus far largely assumed that common ownership interests by financial institutions didn't matter for firms' objectives and product market outcomes. They pointed out that the question of whether or not this assumption is warranted has first order implications for many areas of economics, such as finance, industrial organization, macroeconomics, as well as antitrust policy. *Azar, Schmaltz and Tecu* studied the effect of common ownership on product market outcomes in the U.S. airline industry by asking firstly, how large current levels of common ownership were, and what were the implications for market concentration measures, and secondly, if present day common ownership levels adversely affect product market competition? They found evidence of large anti-competitive incentives due to common ownership links at the market level, and empirical results indicative (but not conclusive) of a causal link between common ownership and higher product prices. In particular, in the US airline industry, the MHHI indicated levels of market concentration that far exceeded those indicated by the HHI, being the conventional measure of market concentration. They found that when firms have reduced incentives to compete due

¹⁶³ The Commission in the context of the preferred transparency option refers to an existing equity interest as possibly sufficing to establish the presence of the acquirer on a market which is the same or upstream or downstream of the target when applying the criteria for having to submit an information notice without referring to common shareholders.

¹⁶⁴ Directorate for Financial and Enterprise Affairs Competition Committee, *Common Ownership by Institutional Investors and its Impact on Competition Background - Note by the Secretariat* (OECD, 29 November 2017).
<[https://one.oecd.org/document/DAF/COMP\(2017\)10/en/pdf](https://one.oecd.org/document/DAF/COMP(2017)10/en/pdf)>

¹⁶⁵ Joseř Azar, Martin C Schmalz and Isabel Tecu, 'Anti-Competitive Effects of Common Ownership' (15 March 2017) *Journal of Finance*.

to common ownership, prices are higher and output is lower. Specifically, using fourteen years of market-firm-level quarterly panel data, they found that airline ticket prices were 3-7% higher because of common ownership, compared to a counterfactual world in which firms are separately owned, or in which firms entirely ignore their owners' anti-competitive incentives caused by common ownership. They exploited variation in common ownership concentration generated by the merger of two large asset managers that arguably occurred for reasons unrelated to expected route-level differences in US airline ticket prices, and found that product prices were 10-12% higher due to common ownership. According to *Azar, Schmaltz and Tecu*, these results suggested both a large deadweight loss (i.e. decreased efficiency of the economy) and a large transfer from consumers to producers due to common ownership.

*Azar, Raina and Schmalz*¹⁶⁶ conducted a study on the relationship between prices and common ownership and partial ownership interests in the banking sector. They used a generalized version of the MHHI that accounts for both common ownership and partial ownership interests and found that their generalized metric was positively related to the amount of bank deposit fees and deposit thresholds. The authors conducted an instrumental variables regression and difference-in-difference analysis to establish a causal connection between prices and the generalised metric.

*Appel, Gormley and Keim*¹⁶⁷ investigated empirically whether passive investors affected firms' governance and performance in the US. Their finding suggested that passive mutual funds influenced firms' governance choices, and that they exerted their influence through their large voting blocs and in particular, they found that passive mutual funds had a significant impact on each of the three aspects of firms' governance. Firstly, an increase in ownership by passive funds was associated with an increase in board independence. Secondly, passive ownership was associated with the removal of takeover defences. Finally, an increase in passive ownership was associated with firms being less likely to have unequal voting rights. They noted that "[o]ur evidence suggests that a key mechanism by which passive investors exert their influence is through the power of their large voting blocs".

¹⁶⁶ José Azar, Sahil Raina and Martin Schmalz, 'Ultimate Ownership and Bank Competition' (23 July 2016) Wiley Online Library.

<papers.ssrn.com/sol3/papers.cfm?abstract_id=2710252>

¹⁶⁷ Ian Appel, Todd A Gormley and Donald B Keim, 'Passive investors, not passive owners' (2016) *Journal of Financial Economics*, 121(1), 111-141.

Fichtner, Heemskerk and Garcia-Bernardo investigated to what extent BlackRock, Vanguard and State Street pursue an active corporate governance strategy. They examined “*how coordinated voting behaviour of asset managers is in corporate elections as well as how often they vote with management.*” Using data from the Institutional Shareholder Services (ISS), a major proxy voting advisory firm, they found that (i) funds within BlackRock, Vanguard and State Street tended to vote similarly in almost all instances (more than 99% of votes for each of them); (ii) their voting behaviour is similar to that of most large mutual funds and they vote with management in more than 90% of votes, (iii) they tend to ally with management against shareholders’ proposals, and (iv) half of the opposition to a positive management recommendation is related to the (re)election of directors. In other words, *Fichtner, Heemskerk and Garcia-Bernardo* claim to show that BlackRock, Vanguard and State Street typically support firm’s management and use their shareholder power to replace management when they are dissatisfied.

*Azar and Tzanaki*¹⁶⁸ recently concluded:

“Common ownership fundamentally upsets the well-settled merger enforcement ecosystem. Not only it challenges basic principles informing merger policy such as the presumed profitability of mergers for the merging firms and the merger-specificity of potential efficiencies but also it works against implementing tools and presumptions in merger practice such as concentration indices for screening out unproblematic from potentially harmful mergers. In a nutshell, preexisting common ownership affects the analysis and quantification of unilateral effects arising out of mergers among commonly held portfolio companies in an oligopolistic industry. The incremental effect of a merger taking place in an environment of common ownership may be either smaller or larger by comparison to a counterfactual with no common ownership.”

The approach taken by *Azar, Schmaltz and Tecu* and *Azar, Raina and Schmaltz* in the above scholarly works and the empirical findings made in them have been the subject of an intense debate with some scholars questioning the findings made in

¹⁶⁸ José Azar and Anna Tzanaki, ‘Common Ownership and Merger Control Enforcement’ in Ioannis Kokkoris and Claudia Lemus (eds) *Research Handbook in Law and Economics of Competition Enforcement* (Edward Elgar Publishing 2022) IESE Business School Working Paper.

<<https://ssrn.com/abstract=3822444>>

such studies. *Rock and Rubinfeld*¹⁶⁹ and *O'Brien and Waehrer*¹⁷⁰ have asserted that the underlying empirical estimates are erroneous because they do not adequately control for variables that are correlated with both price and the MHHI, or price and the MHHI delta, such as market share. *O'Brien and Waehrer* argue that if such confounding variables are not properly accounted for, then depending on the econometric specification, it is possible to find a statistically significant relationship between price and the MHHI and MHHI delta even if common ownership actually has no effect on price. *Rock and Rubinfeld* and *O'Brien and Waehrer* argue that the instrumental variables regressions do not sufficiently address the econometric issue, endogeneity, and that, for these reasons, the empirical findings do not show a causal relationship between common ownership and competitive effects. *O'Brien and Waehrer* conclude that "emerging research at present does not scientifically establish that an increase in common ownership involving minority shareholdings causes higher prices in the industries examined. *Rock and Rubinfeld* state that "what has grabbed headlines is ... the claim that concentration of shareholdings in the hands of diversified institutional investors has increased the price of airline tickets by as much as 10%....We are unconvinced". *O'Brien*¹⁷¹ has recently sought to demonstrate that oligopoly theory does not predict that equilibrium prices (the left-hand side variable in the common ownership regressions) can be represented as a function of the modified concentration measures and cost and demand variables, which raises uncertainty about the conclusions of those empirical studies. *Kennedy, O'Brien, Song and Waehrer*¹⁷² use oligopoly theory to estimate a structural equation evaluating the effects of common ownership on prices in the airline industry. In contrast to the findings made by *Azar, Schmalz, and Tecu, Kennedy, O'Brien, Song and Waehrer* do not find that common ownership increases airline prices.

¹⁶⁹ Edward B Rock and Daniel L Rubinfeld, 'Antitrust for Institutional Investors' (July 2017) NYU Law and Economics Research Paper No 17-23.

<papers.ssrn.com/sol3/papers.cfm?abstract_id=2925855>

¹⁷⁰ Daniel P O'Brien and Keith Waehrer, 'The Competitive Effects of Common Ownership: We Know Less Than We Think' (2017) 81(3) Antitrust Law Journal 729. It is interesting to note that the Daniel P. O'Brien is the same person that co-authored Steven C Salop and Daniel O'Brien, 'Competitive effects of partial ownership: Financial interest and corporate control' (2000) Antitrust Law Journal, 67(3), 559-614 which argued in favour of the conclusion that cross minority interests could give rise to competition issues.

¹⁷¹ Daniel P O'Brien, 'Price Concentration Analysis: Ending the Myth and Moving Forward' (July 2017) (unpublished manuscript).

<papers.ssrn.com/sol3/papers.cfm?abstract_id=3008326>

¹⁷² Pauline Kennedy, Daniel P O'Brien, Minjae Song and Keith Waehrer, 'The Competitive Effects of Common Ownership: Economic Foundations and Empirical Evidence' (24 July 2017) SSRN.

<<https://ssrn.com/abstract=3008331>> or <<http://dx.doi.org/10.2139/ssrn.3008331>>

Various scholars have put forward different proposals as thresholds for the analysis of common ownership. *Elhauge*¹⁷³ advocates the investigation of any horizontal stock acquisition which has or will create a MHHI delta of over 200 in a market with an MHHI over 2500, in order for the agencies to determine if those acquisitions raised or are likely to raise prices. *Posner, Morton and Weyl*¹⁷⁴ have suggested limiting investors within oligopolistic industries to hold (1) the shares of a “single effective firm”, or (2) no more than 1% of the share of the industry, unless the entity holding the shares is a free-standing, “purely passive” index fund. Under their proposal, the Department of Justice and Federal Trade Commission annually would compile a list of industries designated as oligopolies based primarily on the HHI of those industries exceeding 2500 but also on a set of additional factors, such as whether the industry has extremely high levels of institutional common ownership. Under their proposal, an investor is considered to hold the shares of more than a “single effective firm” if the investor is “invested in more than one firm, and the total market share of all firms [the investor] holds any stake in is greater than HHI/10000 in the oligopoly.” Under their proposal, an index fund is deemed “purely passive” if “it commits to engage in no communication with top managers or directors, to vote its shares in proportion to existing votes so that it has no influence in any corporate governance decision and to own and trade stocks only in accordance with clear and non-discretionary public rules, such as matching an index as closely as possible.” *Posner, Morton and Weyl* advocate that the policy would be implemented by an antitrust enforcement policy through which the federal antitrust agencies would publicly commit to a safe harbour for large investors who meet the stated criteria.

The above proposals put forward by *Elhauge* and by *Posner, Morton and Weyl* have been the subject of criticism which is examined in section 2.4 below.

¹⁷³ Einer R Elhauge, ‘Horizontal Shareholding’ (10 March 2016) 109 Harvard Law Review 1267, Harvard Public Law Working Paper No 16-17.

<<https://ssrn.com/abstract=2632024>> or <<http://dx.doi.org/10.2139/ssrn.2632024>>

Einer Elhauge, ‘The Growing Problem of Horizontal Shareholding’ (Spring 2017) CPI Antitrust Chron Vol 1, No 3.

¹⁷⁴ Eric A Posner, Fiona Scott Morton and E Glen Weyl, ‘A Proposal to Limit the Anti-Competitive Power of Institutional Investors’ (2017) Antitrust Law Journal.

2.2 EU Merger Control Decisions

Most significantly, the European Commission in its 2017 decision in the *Dow/DuPont*¹⁷⁵ merger notified under the 2004 EMCR, carried out a detailed examination of the implications of institutional common shareholders and applied it in its assessment of the proposed merger in the agrochemical industry.¹⁷⁶ Annex 5 of the Commission's decision, which runs for 20 pages, is devoted entirely to an "assessment of the effects of common shareholding on market shares and concentration levels". The Commission cited the common ownership theory of harm to reinforce its concerns that the proposed transaction would have a negative impact on innovation competition in the crop protection sector. The Commission concluded that, in general, market shares used by the Commission for the purposes of the assessment of the proposed transaction tended to underestimate the concentration of the market structure and, thus, the market power of the parties to the notified deal, and that common shareholding in the agrochemical industry was to be taken into account in the appreciation of any significant impediment to effective competition. The Commission noted that large shareholders are often large "passive" mutual funds, in the sense that, these shareholders tend to construct well-diversified portfolios of individual stocks, most often based on index funds, with long investment horizons and infrequent selling, and tend not to buy and sell shares for the purpose of influencing managerial decisions.¹⁷⁷ The Commission stressed that nevertheless, passive investors are not passive owners but that they engage in active discussions with companies' board and management, with a view to influencing the companies' long-term strategy. The Commission pointed out that the parties had a specific treatment for large shareholders and that despite the claims made by the parties that material non-public information may not be selectively disclosed to just one shareholder and that US law requires any answer/information given to a shareholder to be consistent with public disclosed information, nevertheless large shareholders had a privileged access to the companies' management and could, therefore, share their views and have the opportunity to shape the companies' management's incentives accordingly.¹⁷⁸ The Commission reviewed some of the academic works

¹⁷⁵ *Dow/DuPont* (Case No M.7932) Commission Decision 27 March 2017.

¹⁷⁶ The Commission analysis is contained in a separate Annex V titled "Assessment of the Effects of Common Shareholding on Market Shares and Concentration Measures".

¹⁷⁷ See, for example, James Chen, 'Passive Investing' (December 2020), Investopedia and Ian Appel, Todd A Gormley and Donald B Keim, 'Passive investors, not passive owners' (2016) *Journal of Financial Economics*, 121(1), 112.

<<http://www.investopedia.com/terms/p/passiveinvesting.asp>> .

¹⁷⁸ The above was confirmed by several stakeholders.

cited above including *Appel, Gomley and Keym* and *Azar, Schmalz and Tecu* and *Fichtner, Heemskerk and Garcia-Bernardo* and highlighted that the above “have provided empirical evidence that “passive” investors are, in fact, active owners, in the sense that they act to influence the behaviour of the firms in which they have shares.” The Commission concluded that the distribution of equity holders in the agrochemical industry contained a significant tail of atomistic shareholders citing the examples of BASF, Bayer and Syngenta. The Commission concluded that overall, the control exerted by large shareholders seemed more important than their ownership equity share suggested.¹⁷⁹

The Commission in *Dow/DuPont* cited the “three main economic papers analysing the theoretical unilateral impact of direct partial competitor ownership on competition” as *Reynolds and Snapp*,¹⁸⁰ *Bresnahan and Salop*¹⁸¹ and *Salop and O’Brien*¹⁸² which the Commission acknowledged had been discussed by it in the context of the 2013 Consultation. The Commission cited the summary provided by *O’Brien and Salop*¹⁸³ where they stated that partial investments can raise either larger or smaller concerns than complete mergers and that the competitive effects of partial ownership depend critically on two separate and distinct elements, namely, financial interest and corporate control, which distinction is absent in merger analysis, which assumes the acquisition of control. The Commission concluded that the impact on the acquired firm’s incentives depends on how the transaction affects the governance of the acquired firm, that is on the acquiring firm’s degree of control, which can range from no control at all (silent financial interest), to partial control, to

¹⁷⁹ The Commission in this context referred to the Commission Notice on the concept of concentration under Council Regulation (EEC) No 139/2004 on the control of concentrations between undertakings (“**Commission Consolidated Jurisdictional Notice**”) at pages 1 to 48 which recognises that, for a minority shareholder, sole control can be acquired on a de jure and/or de facto basis and that the Commission should assess whether the minority 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, where, on the basis of its shareholding, the historic voting pattern at the shareholders’ meeting and the position of other shareholders, a minority shareholder is likely to have a stable majority of the votes at the shareholders’ meeting, then that large minority shareholder is taken to have sole control.

¹⁸⁰ Robert J Reynolds and Bruce R Snapp, ‘The competitive effects of partial equity interests and joint ventures’ (1986) *International Journal of Industrial Organization*, 4(2), 141-153.

¹⁸¹ Timothy F Bresnahan and Steven C Salop, ‘Quantifying the competitive effects of production joint ventures’ (1986) *International Journal of Industrial Organization*, 4(2), 155-175.

¹⁸² Steven C Salop and Daniel O’Brien, ‘Competitive effects of partial ownership: Financial interest and corporate control’ (2000) *Antitrust Law Journal*, 67(3), 559-614.

¹⁸³ Please see section 1.2.2 above for quotation from Steven C Salop and Daniel O’Brien, ‘Competitive effects of partial ownership: Financial interest and corporate control’ (2000) *Antitrust Law Journal*, 67(3), 559-614 cited by the Commission.

total control.¹⁸⁴ It is important to note that the Commission acknowledged that the analysis of the theoretical unilateral impact of common shareholders could be directly derived from the model developed by *Salop and O'Brien*¹⁸⁵. The Commission clarified that, as explained in detail in *Azar, Schmalz and Tecu*,¹⁸⁶ *Salop and O'Brien*¹⁸⁷ developed a model of oligopoly in which firms maximize a weighted sum of the portfolio profits accruing to their shareholders, where a shareholder's weight in a firm's objective function is proportional to the fraction of the control of the firm held by that shareholder. The Commission concluded that as a consequence, the theoretical framework, the methodology and the conclusions of *Salop and O'Brien*¹⁸⁸ apply to common shareholdings.

The Commission concluded that the economic literature provided empirical evidence consistent with common shareholders having a negative impact on price competition and in this context cited *Azar, Schmalz and Tecu* and *Anton, Ederer, Gine and Schmalz*¹⁸⁹, *Elhauge*¹⁹⁰ and *Posner, Scott Morton and Weyl*.¹⁹¹ The Commission significantly refers to "economic rationale leading to the indication that significant common shareholding is likely to lower rivalry in price competition applies also to innovation competition". The Commission expanded that the above economic literature on cross-shareholding, which extends to common shareholding, tends to show that common shareholding of competitors reduces incentives to compete as the benefits of competing aggressively to one firm come at the expense of firms that

¹⁸⁴ For a detailed analysis, please see Steven C Salop and Daniel O'Brien, 'Competitive effects of partial ownership: Financial interest and corporate control' (2000) *Antitrust Law Journal*, 67(3), 559-614 section III.C.

¹⁸⁵ Steven C Salop and Daniel O'Brien, 'Competitive effects of partial ownership: Financial interest and corporate control' (2000) *Antitrust Law Journal*, 67(3), 559-614.

¹⁸⁶ José Azar, Martin C. Schmalz and Isabel Tecu, 'Anti-Competitive Effects of Common Ownership' (15 March 2017) *Journal of Finance*.

¹⁸⁷ Steven C Salop and Daniel O'Brien, 'Competitive effects of partial ownership: Financial interest and corporate control' (2000) *Antitrust Law Journal*, 67(3), 559-614.

¹⁸⁸ Steven C Salop and Daniel O'Brien, 'Competitive effects of partial ownership: Financial interest and corporate control' (2000) *Antitrust Law Journal*, 67(3), 559-614.

¹⁸⁹ Miguel Anton, Florian Ederer, Mireia Gine and Martin C Schmalz, 'Common ownership, competition, and top management incentives' (2016) *Ross School of Business Working Paper 1328*
<<https://ssrn.com/abstract=2802332>>

¹⁹⁰ Einer R Elhauge, 'Horizontal Shareholding' (10 March 2016) 109 *Harvard Law Review* 1267, *Harvard Public Law Working Paper No 16-17*.
<<https://ssrn.com/abstract=2632024> or <http://dx.doi.org/10.2139/ssrn.2632024>>

¹⁹¹ Eric A Posner, Fiona Scott Morton and E. Glen Weyl, 'A Proposal to Limit the Anti-Competitive Power of Institutional Investors' (2017) *Antitrust Law Journal*.

belong to the same investors' portfolio.¹⁹² The Commission acknowledged that while the economic literature has, to the best of the Commission's knowledge, focused on the effects of cross shareholding and common shareholding on price competition, the economic rationale of such effects applies to innovation competition.¹⁹³ The Commission explained that by increasing its efforts in R&D, a firm incurs a cost that decreases its current profits in expectation of future benefits brought by the resulting products of its innovation. Such future benefits would necessarily materialize through price competition of future products which, given the specificities of the agrochemical industry, in particular the fact that the total size of the crop protection industry is typically not related to innovation, is likely to be mainly at the expense of its competitors. In other words, the decision taken by one firm, today, to increase innovation competition has a downward impact on its current profits and is also likely to have a downward impact on the (expected future) profits of its competitors. This, in turn, will negatively affect the value of the portfolio of shareholders who hold positions in this firm and in its competitors. Therefore, as for current price competition, the presence of significant common shareholding is likely to negatively affect the benefits of innovation competition for firms subject to this common shareholding. The Commission formed the view that the agrochemical industry was characterized by a significant level of common shareholding, and that in the context of innovation competition, such findings provided indications that the reaction of competitors to a decrease in innovation effort by the merged entity was likely to be more limited than if these competitors were independent from the firm resulting from the transaction under review.

The Commission examined the question of whether current market shares and concentration measures such as the HHI underestimated the market concentration and the market power of the parties. The Commission emphasized that the HHI and the related safe harbours in the Horizontal Merger Guidelines are based on a

¹⁹² The Commission cites Eric A Posner, Fiona Scott Morton and E. Glen Weyl, 'A Proposal to Limit the Anti-Competitive Power of Institutional Investors' (2017) *Antitrust Law Journal*; Robert J Reynolds and Bruce R Snapp, 'The competitive effects of partial equity interests and joint ventures' (1986) *International Journal of Industrial Organization*, 4(2), 141-153; Timothy F Bresnahan and Steven C Salop, 'Quantifying the competitive effects of production joint ventures' (1986) *International Journal of Industrial Organization*, 4(2), 155-175; Steven C Salop and Daniel O'Brien, 'Competitive effects of partial ownership: Financial interest and corporate control' (2000) *Antitrust Law Journal*, 67(3), 559-614; Duarte Brito, Luís Cabral and Helder Vasconcelos, 'Divesting ownership in a rival' (2014) *International Journal of Industrial Organization*, Vol 34, 9-24; and José Azar, Martin C Schmalz and Isabel Tecu, 'Anti-Competitive Effects of Common Ownership' (15 March 2017) *Journal of Finance*;

¹⁹³ Please see Annex 4 to the Decision for more detailed explanations.

number of assumptions, including that each firm maximizes its own profits irrespective of the profits generated by other competitors. The Commission referred to the HHI as being an important first element of appreciation of the likely anticompetitive effect of a concentration between undertakings. The Commission explained that the HHI assumes, among other things,¹⁹⁴ that competitors are fully independent one from the other and that each competitor maximizes the profit it generates on its own, irrespective of the profits generated by other competitors. The Commission referred to the Horizontal Merger Guidelines and economic theory underpinning the definition of the HHI. Firstly, the Horizontal Merger Guidelines explicitly stipulate, in its paragraph 20(c), that significant cross-shareholdings among market participants is one of the special circumstances in which the HHI-defined safe harbour can be ignored. Secondly, the HHI is theoretically underpinned by the economic model *à la Cournot*, in which firms compete by producing an homogenous good and each firm is identified as one entity which maximizes its own profit absent any consideration for the other firms' profits.¹⁹⁵ The Commission expressly acknowledged that the HHI can be modified in order to account for the likely anticompetitive effects resulting from the existence of common shareholders. The Commission referred to *Reynolds and Snapp*, *Bresnahan and Salop*¹⁹⁶ and *Salop and O'Brien*¹⁹⁷ who suggested and enhanced, the creation of a MHHI which would account for the existence of partial ownership of competitors as well as common shareholders. The Commission highlighted that the version developed by *Salop and O'Brien* is a "more general one, in the sense that it allows for a richer set of corporate control scenarios and multiple, overlapping ventures, as well as common shareholders".¹⁹⁸

¹⁹⁴ The HHI is also related to competition between companies being *à la Cournot*, meaning that companies compete on the amount of output they will produce, which each decides on independently of each other and at the same time.

¹⁹⁵ Annex 5 to the Statement of Objections, para 59. This was not disputed in the Parties' response to the Statement of Objections.

¹⁹⁶ Timothy F Bresnahan and Steven C Salop, 'Quantifying the competitive effects of production joint ventures' (1986) *International Journal of Industrial Organization*, 4(2), 155-175.

¹⁹⁷ Steven C Salop and Daniel O'Brien, 'Competitive effects of partial ownership: Financial interest and corporate control' (2000) *Antitrust Law Journal*, 67(3), 559-614.

¹⁹⁸ Steven C Salop and Daniel O'Brien, 'Competitive effects of partial ownership: Financial interest and corporate control' (2000) *Antitrust Law Journal*, 67(3), 559-614, appendix C for a full description of the theoretical underpinnings of the various versions of MHHIs as well as their computation. The Commission referred to the following formula where N denoted the number of firms in the industry, each firm being identified by subscript j , and s_j each firm- j 's market share. M denoted the overall number of shareholders of the firms in the industry, each owner being identified by subscript i . Each owner- i had an ownership share in firm- j measured by β_{ij} and a degree of control over firm- j measured by γ_{ij} . The computation of the MHHI was:¹⁹⁸

The Commission acknowledged that the computation of MHHI requires assumptions on shareholders' control and more particularly, the MHHI computation involves establishing the effective control exerted by each shareholder on each firm. Several assumptions can be made, providing more or less control to some types of shareholders.¹⁹⁹ The notifying parties argued that how ownership may translate into control was an open question in economics and finance, and the answer was likely to vary from case to case and that the Commission did not use data or other evidence to measure control weights when analysing the likely competitive effects of the proposed merger of DuPont and Dow. The parties suggested that such measurement could result from the investigation of the existence of mechanisms that would incentivize firms' managers to take decisions that do not solely maximize their company's profits but that factor in competitors' profits, for example through the assessment of managers' compensation schemes. The parties noted that if a majority of shareholders prefer a strategy different than that preferred by some other set of shareholders, then the majority will prevail. The outcome of voting in this case is not a decision that weighs the incentives of shareholders in proportion to their ownership shares, but one that reflects majority rule. The Commission acknowledged that it did not perform a case-specific assessment that would justify applying a specific assumption on the control weights and that as a consequence, the Commission did not rely on a MHHI computation.

$$MHHI = HHI + \sum_{j=1}^N \sum_{\substack{k=1 \\ k \neq j}}^N \left(\frac{\sum_{i=1}^M \gamma_{ij} \beta_{ik}}{\sum_{i=1}^M \gamma_{ij} \beta_{ij}} \right) s_k s_j$$

The Commission explained that the difference between the MHHI and the HHI lay in the term on the right which reflects the competitive effects of cross-ownership within the industry, and which is directly related to β_{ij} , each owner- i 's ownership share in firm- j and to γ_{ij} , each owner- i 's degree of control over firm- j . The Commission clarified that several types of control can be factored in. The simplest one being "proportional control" which describes a situation in which each shareholder's influence over the firm in which it holds shares is proportional to its equity share. Under such assumption, the Board and managers of the firm are assumed to take into account their shareholders' interests in their competitors, as defined by their shareholders' equity shares in those competitors.

¹⁹⁹ For example, all shareholders, irrespective of their type (institutional, mutual funds, individuals, etc.) can be assumed to exert the same type of control, which is related to their equity shares. Alternatively, some shareholders can be assumed not to take part in the firms' decision making process, for examples by not voting at general assemblies. In such circumstances, the control exerted by the remaining shareholders would be mechanically augmented as a reflection of that fact. The Commission stated that other assumptions could also be made and cited the example of when there are indications that some types of shareholders have more prominent access to the firms' management, it could be assumed that those firms have more control than their equity shares, or that their equity shares, re-normalized to account for the inactive shareholders would suggest.

The Commission concluded that in light of the above considerations and taking account of the recent insights provided, both theoretically and empirically, by the economic literature as regards the influence of the number of common shareholders as well as the level of shares possessed by them on the behaviour of companies in industries in which common shareholding is a widespread feature, common shareholding was a reality in the agrochemical industry and that in particular, a small number of common shareholders, 17, collectively owned around 21% of BASF, Bayer and Syngenta and around 29%-36% of Dow, DuPont and Monsanto. The Commission considered that, in general, market shares used by the Commission for the purpose of the assessment of the transaction tended to underestimate the concentration of the market structure and, thus, the market power of the parties, and that common shareholding in the agrochemical industry was to be taken as an element of context in the appreciation of any significant impediment to effective competition.

It is abundantly clear from the terms of the *Dow/DuPont* decision that the Commission unequivocally endorsed the economic theories of harm advocated by *Azar, Schmaltz and Tecu*. From reading the Commission's decision, one does not get any sense of hesitation by the Commission about endorsing the above or that its approval was in some way qualified. Interestingly, at around the time of the adoption of the Commission's decision in *Dow/DuPont*, the first academic works challenging the approach taken, and findings made, by *Azar, Schmaltz and Tecu*, completed by such authors as *Rock and Rubinfeld* and *O'Brien and Waehrer* were published. More recently, the Commission appears to have adopted a more cautious approach. The current Competition Commissioner, Margrethe Vestager at the FIW Symposium in Innsbruck, Austria, on 16 February 2018²⁰⁰ acknowledged that companies operating in the EU may be “getting more closely linked” and that “it’s becoming more common for the same investors to hold shares in different companies in the same industry”. Speculating that, in theory, such a development could lead to investors urging rival companies in which they hold interests not to “compete too hard”, Commissioner Vestager indicated that the European Commission is looking into how common this sort of common ownership might be.

²⁰⁰ Commission Staff Working Document *Evaluation of procedural and jurisdictional aspects of EU merger control* (European Commission, 26 March 2021).

<https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/competition-changing-times-0_en>

The Commissioner admitted that European data on this issue lags behind that available in the US. The Commissioner stated that the Commission's review would be designed to examine whether it is common in Europe for companies in the same industry to have the same shareholders, and, if so, what effects such common ownership would have on competition. Commissioner Vestager stressed that the Commission would not assume that an increase in common ownership invariably diminished competition within an industry, but would instead seek "to understand what effect common ownership really has", noting that "just because investors might benefit from less competition doesn't necessarily mean companies will oblige." The above statement from Commissioner Vestager is at a discernible distance from the clear and unambiguous endorsements and pronouncements made by the Commission in *Dow/DuPont*. It is noteworthy that one year after the *Dow/DuPont* decision, the Commission in its decision in the *Bayer/Monsanto*²⁰¹ merger taken under the 2004 EMCR adopted a much more cautious approach, the Commission acknowledging the debate over the competitive effects of common shareholdings as follows:

"In relation to the points raised by the Parties in their response to the Statement of Objections, the Commission recognizes the debate related to the possible effects of the presence of common shareholders on competitors' incentives to compete in an industry and the characteristics of common shareholding that would generate such effects."

The Commission also stated in *Bayer/Monsanto* as follows:

"Second, the Commission notes that the debate regarding common shareholdings is relatively recent and not yet entirely settled."

The Commission's science and knowledge service, the Joint Research Centre (JRC), recently published a report titled "Common Shareholding in Europe" which it described as the first comprehensive study on common ownership in the EU.²⁰² The

²⁰¹ *Bayer/Monsanto* (Case No M.8084) Commission Decision 21 March 2018.

²⁰² The report highlights that based on firm-level balance sheet and ownership data, a set of new indices of common shareholding is used to describe the investment behaviour of shareholders at both industry and investor level, together with the strength of relationships within the networks of firms and of investors. The report devotes special attention to the top investors in the EU overall as well as in each industry, together with a brief overview of cross-investments within industries, when relevant. The baseline analysis is conducted on a historical dataset containing all listed companies active in the EU in the period 2007-2016 which includes all listed firms registered in the EU, plus all listed companies registered elsewhere, but

findings of the report are vague and the conclusions drawn are limited. Although the report concluded that the research suggested “a positive association between common shareholding and the market power of firms”, the conclusions were heavily caveated and the report inconclusive.

The Commission in *Bayer/Monsanto* approved the acquisition of Monsanto by Bayer conditional on a divestiture package which was designed to address the overlaps that would have arisen in seeds, pesticides and digital agriculture. The Commission examined common shareholdings both in the context of arriving at the conclusion that the proposed transaction gave rise to an SLC and in examining the remedy package offered. The Commission used the service provider S&P Global Market Intelligence (Capital IQ) to collect information on shareholders of the main companies active in the seed and traits and crop protection industry which revealed that 29 equity holders collectively accounted for a significant portion of the equity share of each of BASF, Bayer, DowDuPont and Monsanto.²⁰³ The most important shareholders²⁰⁴ were described to the Commission as being so-called “passive” shareholders. The Commission reiterated that the shareholders are often large “passive” mutual funds holdings, in the sense that these shareholders tend to construct well-diversified portfolios of individual stocks, most often based on index funds, with long investment horizons and infrequent selling, and tend not to buy and sell shares for the purpose of influencing managerial decisions. Nevertheless, “passive” investors acknowledge that they exert influence on individual firms with an industry-wide perspective.²⁰⁵ On the basis of the reported equity holders,

holding shares in at least one firm registered in the EU. The average number of firms observed each year is 26,560 (24,857 in 2017 to 26,942 in 2016) - where on average about 57% are registered in the EU countries, the rest being registered outside the EU.

²⁰³ 26% of the equity shares of BASF, 27% of Bayer, 39% of DowDuPont and 37% of Monsanto.

²⁰⁴ BlackRock, The Vanguard Group, State Street Global Advisors and Norges Bank Investment Management.

²⁰⁵ For example, in a letter sent in February 2015 to board members of the Vanguard funds' largest portfolio holdings, Vanguard's chairman and chief executive F William McNabb III stated that Vanguard, one of the largest mutual funds holdings that manages approximately USD 3.6 trillion in assets, will seek active interactions with firms they invest in: *“[i]n the past, some have mistakenly assumed that our predominantly passive management style suggests a passive attitude with respect to corporate governance. Nothing could be further from the truth.”* Glenn H Booraem, controller of the Vanguard Group's funds and a Vanguard principal, complemented that view: *“[w]e believe that engagement is where the action is. We have found through hundreds of direct discussions every year that we are frequently able to accomplish as much—or more—through dialogue as we are through voting. Importantly, through engagement, we are able to put issues on the table for discussion that aren't on the proxy ballot. We believe that our active engagement on all manner of issues demonstrates that passive investors don't need to be passive owners. [...] The bottom line is that we believe that the vast majority of boards and management teams are appropriately focused on the same long-term value objectives as we are.”*

DowDuPont and Monsanto seemed to be the most “consanguine” agrochemical firms, as they shared a significant number of equity holders with, overall, large positions in both firms. DowDuPont’s reported equity holders owned 62% of Monsanto, while they owned 24%-32% of BASF and Bayer. Monsanto’s reported holders represented 61% of DowDuPont, and 29%-34% of BASF and Bayer. The Commission held that the evidence showed that the level of attendance at shareholders’ meetings allowed for a limited group of common shareholders to collectively influence several players.

The Commission considered, similar to *Dow/DuPont*, that in the presence of (i) common shareholding, the usual concentration measures, such as market shares or the HHI, were likely to underestimate the level of concentration of the market structure and, thus, the market power of the parties; (ii) common shareholding was a reality in the biotech and agrochemical industry, both in terms of the number of common shareholders as well as with respect to the level of shares possessed by these common shareholders; and, thus, (iii) common shareholding in these industries was to be taken as an element of context in the appreciation of any significant impediment to effective competition that is raised. With regard to the suitability of BASF as purchaser of the business to be divested, the Commission expressly recognised the debate related to the possible effects of the presence of common shareholders in an industry but highlighted that “[a]t the same time, the presence of common shareholders does not, as such, disqualify BASF *prima facie* as a suitable purchaser for the purposes of the Decision.” The Commission stated that firstly, unlike other indicators of concentration such as market shares or HHI, the presence of common shareholders should be taken as an “element of context” in the appreciation of possible significant impediments to effective competition. The Commission considered that, since common shareholdings are a reality in the biotech and agrochemical industry, this feature should be taken into account as an element of context at the time of the purchaser assessment, but should not as such disqualify BASF *prima facie* as a suitable purchaser. Secondly, the Commission noted the debate regarding common shareholdings was relatively recent and not yet entirely settled. Thirdly, the Commission noted that the aim of the remedy was to replicate the role of Bayer in the market absent the transaction and that in this respect, the Commission noted that Bayer, absent the transaction, would also be a player characterised by certain shareholders that are common with some of its competitors. Fourthly, the Commission noted that in light of the already concentrated level of certain relevant markets, the remedies package would ensure

that a sufficient number of independent competitors was preserved by the remedy in each of the markets where a significant impediment to effective competition was identified. With regard to the argument that BASF was not a suitable purchaser because it is one of only a few large players in a concentrated industry, the Commission noted that the commitments would result in BASF becoming a new global player in seeds and trait development which would ensure that the number of players in this concentrated sector was not reduced. Furthermore, the possible effects on competition of BASF's purchase had to be assessed based on the market power of BASF and the divested businesses in the "relevant product and geographic markets" and not abstractly at industry level. The fact that BASF was a large player in the agrochemical industry overall or in the pesticides industry, did not mean, in and of itself, that BASF would not be a suitable purchaser. This was to depend on the market position of BASF on specific relevant markets and the overlaps between BASF and the divested businesses therein. The Commission stated that industry-wide concentration may provide context for the analysis of the different affected relevant markets. However, the focus of the competitive analysis was on market power in the relevant markets and the Commission had to assess, at the stage of the suitable purchaser assessment, whether the acquisition of the divested businesses and assets by BASF would create competition problems.

It is interesting to note that the Commission in the public version of the decision made no reference in the *Bayer/Monsanto* decision to any of the academic works on common shareholding which it had cited in the *Dow/DuPont* decision a year earlier and its only reference to the MHHI was the following statement in a footnote²⁰⁶ "...the Commission does not rely on the modified HHI computation in this Decision, as this would require a case-specific assessment that would justify applying a specific assumption on the effective control exerted by each shareholder on each firm". The Commission acknowledged the objections raised by the parties regarding the Commission's review of the economic literature in *Dow/DuPont* but the Commission rejected the critique by stating that the parties submitted "limited arguments for that purpose". The discussion of the above objections is largely redacted from the public version of the determination.

It is somewhat surprising that the Commission in *Dow/DuPont* appears to fully endorse the theory of harm, the decision containing various broad statements that

²⁰⁶ Please see n 113 of *Dow/DuPont* (Case No M.7932) Commission Decision 27 March 2017.

common ownership is likely to soften competition.²⁰⁷ It should be noted that, at the time of the decision, *Ehlaunge* was the only paper cited by the Commission supportive of the theory that had been published in a peer-reviewed journal²⁰⁸ and does not mention the literature that disputes the validity of the common ownership theory of harm. In contrast, the Commission cited a blog post in support of its narrative that common ownership adversely affects innovation competition.²⁰⁹ It is not clear from the text of the Commission's decision in *Dow/DuPont* the precise extent to which the Commission took into account the common ownership theory of harm in arriving at the conclusion that the proposed transaction gave rise to a substantial lessening of competition. The Commission made it abundantly clear that was not relying on an MHHI computation as part of its merger analysis in this case as it had not performed a case-specific assessment that would justify applying a specific assumption on the control weights. Despite the conclusions drawn by the Commission that common shareholding was a reality in the agrochemical sector, that the usual shareholding concentration measures such as market shares or the HHI were likely to underestimate the level of concentration of the market structure and, thus, market power of the parties to the transaction and that common shareholding in the agrochemical industry was to be taken as an element of context in the appreciation of any significant impediment to effective competition, it is difficult to determine precisely the role played by these merger specific conclusions in concluding that the transaction gave rise to such an impediment to effective competition necessitating the extraction of the divestiture remedy offered by the parties in order to allow the Commission to approve the transaction. *Buhart and Henry*²¹⁰ observed:

“It appears, though it is not certain, that the Commission's analysis of, and conclusions pertaining to, common ownership in *Dow/DuPont* and

²⁰⁷ *Dow/DuPont* (Case No M.7932) Commission Decision 27 March 2017, paras 2348 ('[t]he economic literature on cross-shareholding, which extends to common shareholding, tends to show that common shareholding of competitors reduces incentives to compete'), 2349 ('recent empirical studies provide indications that the presence of significant common shareholding in an industry is likely to have material consequences on the behaviour of the firms') and 2352 ('innovation competition in crop protection should be less intense as compared with an industry with no common shareholding').

²⁰⁸ Alec J Burnside and Adam Kidane, 'Common ownership: an EU perspective', *Journal of Antitrust Enforcement* (November 2020) Vol 8, Issue 3, 456–510.

²⁰⁹ Martin C Schmalz, 'How Passive Funds Prevent Competition', www.EricPosner.com (18 May 2015).

<<https://ericposner.com/martin-schmalz-how-passive-funds-prevent-competition/>>

²¹⁰ Jacques Buhart and David Henry, 'Common ownership under the EUMR - Sailing a bit too close to the wins' (February 2020) *Concurrences Competition Law Review*, 233.

Bayer/Monsanto were ultimately inconsequential in the final outcome of the Commission's competitive analysis of these cases."

The author doubts whether, at this stage, the common ownership theory of harm would meet the requisite evidential standard of proof enunciated by the EU courts for application by the Commission in merger control cases. This matter is explored in detail in Chapter 4.

2.3 Common Shareholdings/Recent Empirical Evidence/The JRC Report

The EU Commission's science and knowledge service, the Joint Research Centre ("**JRC**"), in 2020 published a report titled "Common Shareholding in Europe" ("**JRC Report**") which it describes as representing, to the best of JRC's knowledge, "the first comprehensive study on firms' ownership in the EU, shedding light upon the picture of common shareholding and identifying the main investors in all listed firms active in the EU15 and in five strategic industries: oil and gas, electricity, telecommunications, trading platforms and beverages manufacturers."²¹¹ The findings of the report are vague and the conclusions drawn are limited. It is significant to note that the report does not call for, or support, any change to the regulatory framework calling on further research to be undertaken.

The JRC constructs a database setting out all listed firms active in the EU from 2007-2016, including data on each firm such as historic ownership and financial information. The analysis suggests a strong presence of common shareholdings in all industries, for example, that in 2016, 87.2% of all shareholders of companies in the JRC's dataset held participation in only one company (85.7% in 2007) and that therefore common shareholders constituted 12.8% of all shareholders (14.9% in 2007). The number of listed firms that were cross-held by block-holders (common shareholders with at least 5% participation in more than one company) was found to have been increasing, rising from about 15,500 in 2007 to about 17,500 in 2016.

²¹¹ The report highlights that based on firm-level balance sheet and ownership data, a set of new indices of common shareholding is used to describe the investment behaviour of shareholders at both industry and investor level, together with the strength of relationships within the networks of firms and of investors. The report devotes special attention to the top investors in the EU overall as well as in each industry, together with a brief overview of cross-investments within industries, when relevant. The baseline analysis is conducted on a historical dataset containing all listed companies active in the EU in the period 2007-2016 which includes all listed firms registered in the EU, plus all listed companies registered elsewhere, but holding shares in at least one firm registered in the EU. The average number of firms observed each year is 26,560 (24,857 in 2017 to 26,942 in 2016) - where on average about 57% are registered in the EU countries, the rest being registered outside the EU.

Around 67% of the analysed companies were cross-held by block-holders with at least 5% participation. Looking at portfolios, top common shareholders held shares in as many as 25% of the firms in the market, i.e. more than 6,000 companies overall. The report found that they tended to invest equally among the chosen firms, rather than giving priority to certain specific companies by buying higher percentages of shares. The firms included in the largest portfolios represented a significant proportion of the total value of the market, reaching a coverage of above 80% of total assets and more than 90% of market capitalisation in almost all years. This meant that the top investors not only held shares in a considerable number of firms (around 25%), but also typically choose the largest enterprises, leaving out only minor players - which together did not account for more than 10-20% of the market value. The report finds that the preference for the largest market players had become stronger over time and that when both total assets and market capitalisation are multiplied by the percentage of shares actually held, the JRC finds that in 2016 the top common shareholder held within its grasp 3.8% of total weighted market capitalisation and 6.6% of the weighted total assets in the EU. These percentages were 2.3% and 3.6% respectively in 2008. The JRC finds that an acceleration in the control of total assets or market capitalisation can be observed as of 2012.

The JRC Report explores the link between common shareholding and competition, notably the idea that higher mark-ups should be observed in markets with higher common shareholdings. The report highlights that this phenomenon was already present when the JRC's observation started in 2007, and remained stable throughout the period of observation, so no specific trend for overall common shareholding could be explored for its econometric strategy. Instead, a change in the identity of the main players was clearly detected, exhibited through the rise of the large investment funds and a contemporaneous drop in the participation of banks and insurance companies. The report describes the 2009 merger of BlackRock with BGI as the largest 'substitution' event between funds and banks and of unprecedented proportions in the history of mergers between asset management funds, and has therefore played a crucial role in shaping the various studies on common shareholding. This was true for all analysed markets, including beverages, the market eventually used by the JRC as test case for the econometric analysis.

The report underlines that the econometric modelling posed several challenges, principally the lack of an established theory showing how common shareholding

affects businesses, and thus competitive outcomes. Further challenges addressed included the following:

- (i) the definition of market boundaries and proximity, done in collaboration with experts in the field;
- (ii) the use of a measure for common shareholding that overcomes the drawbacks of the MHHI, being the most widely used in economic literature. The JRC developed new measures taken from the literature on sparse matrices and networks; and
- (iii) the use of an appropriate measure of competition. The JRC emphasised that although prices remained the preferred indicator for changes in competitive forces on the market, obtaining data on prices at the required level of specificity was still a challenge. Instead, they used a measure of market power, approximated by the Lerner index²¹².

The impact of the change in common shareholding induced by the BlackRock-BGI merger was estimated using a difference-in-differences approach, by comparing - before and after the event - the mark-up of firms exposed to the merger (treated group of treated firms) to that of firms that did not have any pre-merger relations with BlackRock and/or BGI (control group or control firms). The mark-up was measured through the Lerner Index, calculated either on the difference between sales and variable costs or on the difference between operating profits and financial costs, to account for fixed costs. The estimations performed indicated that the merger between BlackRock and BGI did in fact have an effect on mark-ups of the firms in their portfolios. After the merger, firms that were already held by BlackRock and/or BGI showed a Lerner Index on average 0.07 points higher than control firms, suggesting that the merger triggered an increase in profitability of firms already exposed to BlackRock and/or BGI. Analogous results were obtained using an alternative competition measure as the outcome, the Lerner Index adjusted for cost of capital. The JRC found that the increase in the Lerner Index seemed to have

²¹² A measure of the relative price-cost margin which can be calculated using data from typical balance sheets and profit and loss accounts.

been driven more by a marked increase in revenues rather than a decrease in costs. It found that the impact of the merger seems to be positively related to time, as the Lerner Index significantly increased with the number of years.²¹³ The main intuition behind these findings was that the merger event prompted a sizable increase in the Lerner Index in treated firms during the initial years, after which the market self-correction took place. The JRC also explored the possibility that the degree of exposure to the merger may influence the actual extent of the effect. It found that the effect was larger for those companies which were only marginally part of the BlackRock or BGI portfolios before the merger, having benefitted most from the event.²¹⁴

The JRC concluded that the results of its research appeared "to suggest a positive association between common shareholding and the market power of firms." However, the JRC entered a notable qualification to the above conclusion stating that the findings of the study had to be treated with caution, in particular, the following caveats should be considered. Firstly, earlier data on the common shareholding structure of firms would help confirm that BlackRock and BGI in 2007 did not specifically target companies that would have performed well after the crisis. The JRC did not find evidence of this, but its sample was, on its own admission, limited. In a similar vein, multiple observations prior to the merger would strengthen the evidence of a common trend between treated and control firms - a key identifying assumption of the difference-in-differences design underlying the analysis. Secondly, the study focused only on the beverages sectors, however, while carefully accounting for other industries' specificities and possible data shortcomings, the methodology could, according to the JRC, be applied to possible future investigations in other markets. Thirdly, the Lerner Index was used - following the literature - as a proxy of market competition. The JRC highlighted that data on prices would have helped reinforce the evidence on common shareholding and competitive outcomes, as it would enable controlling for the heterogeneity of products sold by firms. Moreover, any country/product changes in the market could be factored-in.

²¹³ 2 and 3 years on from the merger, treated firms showed a Lerner Index approximately 0.06 points larger than that of control firms, reaching the maximum value of a difference of 0.08 points after 7 years, while disappearing in the 8th year.

²¹⁴ In particular, the impact of the merger for a firm held at 1% by BGI and/or BlackRock led to an increase of the Lerner Index of 0.10 points on average. The impact significantly reduced to 0.05 if the shares held increased to 4%. For firms participated in at 5% or more, there seemed to be no significant impact on the Lerner Index.

The JRC made a final observation concerning possible unobservable factors that may have affected profitability, other than the merger under consideration. The report noted that there were a series of possible mechanisms of influence through which asset managers may affect a firm's competitive outcome. Typically, such mechanisms included network effects, general policy consensus between asset managers, or even a specific threshold in ownership that allows for effective leverage, under which a shareholder in practice does not have a strong impact. These factors were not directly observable in the JRC study and, according to the JRC, potentially could be further investigated, depending on the availability of additional specific data. The JRC concluded that "[i]n reality, the phenomenon of common shareholding proved to be particularly complex, and disentangling its various effects continues to be challenging. Given that the literature in this area has not yet investigated in depth the channels through which influence is exerted, this certainly constitutes a good candidate for future research."

2.4 Critique of Common Ownership Theory of Harm

The common ownership theory of harm has been the subject of intense criticism from many academics including the distinguished Judge Douglas H. Ginsburg of the United States Court of Appeals for the District of Columbia.²¹⁵ *Burnside and Kidane*²¹⁶ categorise the criticisms of the theory of harm into the following:

- 2.4.1 The methodology exaggerates the voting power and thus any possible influence which may be attributed to investment funds, and in this context, the proponents of the theory of harm are criticized for failing to draw a distinction between asset ownership and management.²¹⁷ *Burnside and Kidane*²¹⁸ explain that asset managers, acting as agents, manage assets on behalf of clients who are the owners of those assets and that this may take place through pooled investment vehicles such as UCITs or other funds in which case the vehicles are the 'clients' and the investors in a

²¹⁵ 'More Economic Evidence Needed on Questions of Harm from Common Ownership, DC Circuit Judge Says' (MLex, 19 February 2019).

<<http://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1067100&siteid=191&rdir=1>>

²¹⁶ Alec J Burnside and Adam Kidane, 'Common ownership: an EU perspective, *Journal of Antitrust Enforcement*' (November 2020) Vol 8, Issue 3, 456–510.

²¹⁷ Douglas H Ginsburg and Keith Klovers, 'Common Sense about Common Ownership' (2018) *Concurrences Review*, No 2-2018.

²¹⁸ Alec J Burnside and Adam Kidane, 'Common ownership: an EU perspective, *Journal of Antitrust Enforcement*' (November 2020) Vol 8, Issue 3, 456–510.

given vehicle have a pro rata ownership interests in that vehicle. Each client enters into a separate arrangement with the manager at the outset of the relationship, which determines how the adviser will manage the client's assets. Therefore, despite the fact that the asset manager may be listed as an 'owner' of shares that are held in the vehicle on certain public records, their ability to exercise the rights attached to those shares including, inter alia, proxy voting is subject to the terms of the contractual arrangement with the client. There are various possibilities regarding the way in which votes may be cast ranging from clients retaining complete voting discretion over their holdings to clients fully delegating voting power to the investment manager.

- 2.4.2 The empirical evidence in support of the common ownership theory of harm does not take into account the heterogeneity of fund incentives within and across different fund families, and in particular whether they would in reality have an ulterior preference for anticompetitive outcomes.²¹⁹ *Burnside and Kidane*²²⁰ highlight that fund families include active and index-based funds, and given their radically different investment strategies and measures of performance, their interests are not naturally aligned. Index funds charge low management fees and seek to replicate an index (meaning that performance as compared a rival fund tracking the same index is primarily based on tracking error), whereas active funds charge higher management fees and performance is based on outperforming a specific index. If an investment manager for an index fund were to dedicate resources to actions that increase the value of a portfolio company (and by extension the value of the portfolio that tracks the index), those actions would not result in superior fund performance compared to rival index funds.²²¹ So, for example, the investment manager would not be able to increase its fees relative to such competing

²¹⁹ Douglas H Ginsburg and Keith Klovers, 'Common Sense about Common Ownership' (2018) *Concurrences Review*, No 2-2018.

Barbara Novick, Michelle Edkins, Tom Clark and Alexis Rosenblum, 'ViewPoint: The Investment Stewardship Ecosystem' (July 2018) BlackRock, 13.

<<https://www.blackrock.com/corporate/literature/whitepaper/viewpoint-investment-stewardship-ecosystem-july-2018.pdf>> - accessed 11 September 2019.

²²⁰ Alec J Burnside and Adam Kidane, 'Common ownership: an EU perspective, *Journal of Antitrust Enforcement*' (November 2020) Vol 8, Issue 3, 456–510.

²²¹ Lucian A Bebchuk, Alma Cohen and Scott Hirst, 'The Agency Problems of Institutional Investors' (2017) 31 *Journal of Economic Perspectives* 89.

funds. For active funds, firm performance, which has a corresponding impact on portfolio returns, plays a far more significant role in attracting customers to an active fund. *Burnside and Kidane*²²² assert that it follows that it is unwarranted to assume that the maximisation of portfolio value easily translates into superior relative performance for both index-based funds and active funds.

- 2.4.3 The variables used to measure the causal effects of common ownership have been heavily criticised.²²³ The key criticism levelled against the use of the MHHI (and the GHHI) is that neither variable is capable of establishing the causal effects of competitive outcomes such as higher prices/deposit fees. O'Brien, who devised the MHHI model together with Salop, is among the staunchest critics of the use of MHHI as a means of assessing possible competitive effects of common ownership. He has underlined that the empirical specifications in the airlines and banking papers authored by *Azar, Schmaltz and Tecu* and *Azar, Raina and Schmaltz* respectively are "not consistent with the theory of partial ownership that motivates the research."²²⁴ In particular, the MHHI is a concentration measure, and as such critics contend that it does not provide a basis for empirical causal effects in antitrust. In other words, the relationship between price and the components of the MHHI does not measure the price effects of common ownership, and this is widely accepted in industrial organisation.²²⁵ Critics have also pointed out that

²²² Alec J Burnside and Adam Kidane, 'Common ownership: an EU perspective, *Journal of Antitrust Enforcement*' (November 2020) Vol 8, Issue 3, 456–510.

²²³ Jacob Gramlich and Serafin Grundl, 'Testing for Competitive Effects of Common Ownership' [2017] Finance and Economics Discussion Series 2017-029, Washington: Board of Governors of the Federal Reserve System; Pauline Kennedy and others, 'The Competitive Effects of Common Ownership: Economic Foundations and Empirical Evidence' [2017]; Daniel P O'Brien and Keith Waehrer, 'The Competitive Effects of Common Ownership: We Know Less Than We Think' (2017) 81(3) *Antitrust Law Journal* 729; and Thomas A Lambert and Michael E Sykuta, 'The Case for Doing Nothing about Institutional Investors' Common Ownership of Small Stakes in Competing Firms' (2018) University of Missouri School of Law Legal Studies Research Paper No 2018- 21.

²²⁴ Daniel P O'Brien and Keith Waehrer, 'The Competitive Effects of Common Ownership: We Know Less Than We Think' (2017) 81(3) *Antitrust Law Journal* 729.

²²⁵ Jacob Gramlich and Serafin Grundl, 'Testing for Competitive Effects of Common Ownership' [2017] Finance and Economics Discussion Series 2017-029, Washington: Board of Governors of the Federal Reserve System; Pauline Kennedy and others, 'The Competitive Effects of Common Ownership: Economic Foundations and Empirical Evidence' [2017]; Daniel P O'Brien and Keith Waehrer, 'The Competitive Effects of Common Ownership: We Know Less Than We Think' (2017) 81(3) *Antitrust Law Journal* 729; and Thomas A Lambert and Michael E Sykuta, 'The Case for Doing Nothing about Institutional Investors' Common Ownership of Small Stakes in Competing Firms' [2018] University of Missouri School of Law Legal Studies Research Paper No 2018- 21.

the MHHI is an endogenous measure since it depends on market shares, which are affected by the same underlying factors that drive prices.²²⁶ In addition, the MHHI depends on the financial shares of investors, which may also be endogenous.²²⁷ *Burnside and Kidane*²²⁸ assert that although the above airlines and banking papers sought to address endogeneity concerns by running panel regressions, there is still a danger that factors that affect prices but are also related to market shares (or the financial shares of investors) and the MHHI are omitted as explanatory variables.²²⁹ The omission of explanatory variables could give rise to an apparent correlation between price and the MHHI, even if common ownership has no effect on price.²³⁰ *Burnside and Kidane*²³¹ highlight that other studies have found that common ownership has no effect on price.²³² Nevertheless, even if the endogeneity issues were capable of being

²²⁶ Jacob Gramlich and Serafin Grundl, 'Testing for Competitive Effects of Common Ownership' [2017] Finance and Economics Discussion Series 2017-029, Washington: Board of Governors of the Federal Reserve System; Pauline Kennedy and others, 'The Competitive Effects of Common Ownership: Economic Foundations and Empirical Evidence' [2017]; Daniel P O'Brien and Keith Waehrer, 'The Competitive Effects of Common Ownership: We Know Less Than We Think' (2017) 81(3) Antitrust Law Journal 729; and Thomas A Lambert and Michael E Sykuta, 'The Case for Doing Nothing about Institutional Investors' Common Ownership of Small Stakes in Competing Firms' [2018] University of Missouri School of Law Legal Studies Research Paper No 2018- 21.

²²⁷ Daniel P O'Brien and Keith Waehrer, 'The Competitive Effects of Common Ownership: We Know Less Than We Think' (2017) 81(3) Antitrust Law Journal 729; Pauline Kennedy and others, 'The Competitive Effects of Common Ownership: Economic Foundations and Empirical Evidence' [2017].

²²⁸ Alec J Burnside and Adam Kidane, 'Common ownership: an EU perspective, Journal of Antitrust Enforcement' (November 2020) Vol 8, Issue 3, 456–510.

²²⁹ Daniel P O'Brien and Keith Waehrer, 'The Competitive Effects of Common Ownership: We Know Less Than We Think' (2017) 81(3) Antitrust Law Journal 729.

²³⁰ Daniel P O'Brien and Keith Waehrer, 'The Competitive Effects of Common Ownership: We Know Less Than We Think' (2017) 81(3) Antitrust Law Journal 729.

²³¹ Alec J Burnside and Adam Kidane, 'Common ownership: an EU perspective, Journal of Antitrust Enforcement' (November 2020) Vol 8, Issue 3, 456–510.

²³² Jacob Gramlich and Serafin Grundl, 'Testing for Competitive Effects of Common Ownership' [2017] Finance and Economics Discussion Series 2017-029, Washington: Board of Governors of the Federal Reserve System; Patrick J Dennis, Kristopher Gerardi and Carola Schenone, 'Common Ownership Does Not Have Anti-competitive Effects in the Airline Industry' [2018]; Pauline Kennedy and others, 'The Competitive Effects of Common Ownership: Economic Foundations and Empirical Evidence' [2017]; BlackRock, 'FTC – Competition and Consumer Protection in the 21st Century – Hearing #8' (BlackRock, Comment Letter, 15 January 2019); Andrew Koch, Marios Panayides and Shawn Thomas, 'Common Ownership and Competition in Product Markets' (2018) 29th Annual Conference on Financial Economics and Accounting, Journal of Financial Economics; and Haifeng Wan, Jan-Carl Plagge, James Rowley and Roger A Aliaga-Diaz, Common Ownership and Industry Profitability: A Crossindustry View (1 August 2019).

resolved, *O'Brien and Waehrer*²³³ maintain that the criticism still stands, i.e. the theory of cross/partial ownership does not predict prices.

- 2.4.4 The robustness of the evidence of the various mechanisms of influence put forward by the proponents of the theory of harm has been questioned, in particular voting, voice (direct communications with management), executive compensation, and passivity (a failure to push for aggressive competition).²³⁴ As mentioned above, critics have observed that proponents of the theory of harm do not account for the heterogeneity of investor interests. It follows that the likelihood of different fund families consistently voting their shares as a single bloc to collectively exert influence is remote. There is also no evidence of operational matters, including product market strategy, being put to the vote in shareholder meetings. The issues subject to a shareholder vote are determined by a company's constituent documents and applicable laws and regulations. In practice, these issues do not involve the day-to-day running of a company and largely have no impact on management's discretion to determine the competitive strategy. *Rock and Rubinfeld*²³⁵ noted that "we see no evidence that shareholders vote on competitive strategy and no evidence that directors run on a "platform" that is directed towards a competitive strategy";

*Burnside and Kidane*²³⁶ explain that proponents of the theory of harm do not consider the regulatory incentives of asset managers to avoid the appearance of changing or influencing control of a portfolio company, and in this context, cite Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relation to undertakings for collective investment in transferable securities (UCITS) ("**UCITS**

²³³ Daniel P O'Brien and Keith Waehrer, 'The Competitive Effects of Common Ownership: We Know Less Than We Think' (2017) 81(3) Antitrust Law Journal 729.

²³⁴ BlackRock, 'ViewPoint: The Investment Stewardship Ecosystem' *BlackRock* (July 2018) 13; Edward B Rock and Daniel L Rubinfeld, 'Defusing the Antitrust Threat to Institutional Investor Involvement in Corporate Governance' [2017] NYU Law and Economics Research Paper No 17-05; and Lucian A Bebchuk, Alma Cohen and Scott Hirst, 'The Agency Problems of Institutional Investors' (2017) 31 Journal of Economic Perspectives 89.

²³⁵ Edward B. Rock and Daniel L. Rubinfeld, 'Antitrust for Institutional Investors' (July 2017) NYU Law and Economics Research Paper No 17-23.

²³⁶ Alec J Burnside and Adam Kidane, 'Common ownership: an EU perspective, Journal of Antitrust Enforcement' (November 2020) Vol 8, Issue 3, 456–510.

Directive”)²³⁷ which explicitly provides that asset managers shall not acquire any shares carrying voting rights which would enable it to exercise significant influence over the management of the issuer. In the U.S., in order to benefit from favourable filing deadlines and limited disclosure of certain information regarding beneficial ownership of portfolio securities in Schedule 13G of the Securities Exchange Act 1934, asset managers must avoid acting in a manner that would be deemed to be seeking to influence control of the issuer.²³⁸

2.4.5 The directors and officers of portfolio companies owe fiduciary duties to all shareholders, but the common ownership theory of harm assumes that management consistently acts in the interests of common shareholders and so in violation of their fiduciary duties. *O’Brien and Waehrer* assert that the question of whether common ownership induces management to act in a manner which is inconsistent with their fiduciary duties is an empirical one and that there is a distinct lack of evidence of this.

2.5 The Ongoing Debate

The Competition Committee of the OECD met in December 2017 at which it expressly acknowledged the increase in common ownership and that there was a “vigorous debate over whether this phenomenon translates to competition problems in a market.”²³⁹ Many of the invited experts contributing to the debate were the scholarly authors whose names and works are cited above.²⁴⁰ The Committee acknowledged that the debate had been particularly intense with regard to proposals to address potential competition problems associated with common ownership. Significantly, the Committee concluded as follows:

“[d]espite the critiques of empirical models estimating the effect of common ownership, as well as the incentive and ability of institutional investors to influence firm behaviour in a manner that benefits their industry-wide

²³⁷ Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) [2009] OJ L302.

²³⁸ Lucian A Bebchuk, Alma Cohen and Scott Hirst, ‘The Agency Problems of Institutional Investors’ (2017) 31 *Journal of Economic Perspectives* 89.

²³⁹ Common Ownership by Institutional Investors and its Impact on Competition.
<[https://one.oecd.org/document/DAF/COMP\(2017\)10/en/pdf](https://one.oecd.org/document/DAF/COMP(2017)10/en/pdf)>

²⁴⁰ These included Daniel O’Brien, Daniel Rubinfeld, Einer Elhauge and Martin Schmalz.

ownership interests, the underlying conceptual concerns associated with common ownership remain. This can have profound implications for competition, as well as our understanding of market functioning generally, and therefore merits further academic examination.”

The Committee highlighted that in the meantime, competition authorities may wish to use market studies as an opportunity to gain visibility in markets with substantial institutional investor ownership, and may also wish to consider whether there is scope for examining common ownership under extant merger review and cartel legislation. The Committee suggested that the competition authorities can also begin consulting financial sector regulators and policymakers on potential policy solutions. It appears that Commissioner Vestager has endorsed the above approach by emphasizing that more research needs to be conducted.²⁴¹

The competition agencies of many of the most developed anti-trust jurisdictions in Europe have approached the debate on common ownership with measured enthusiasm and caution given the ongoing debate. The German Monopolies Commission in its 2018 Biennial Report²⁴² reiterated that it was at this stage premature to “take either competition law or regulatory measures” and that before doing so “the academic community needs to deliver further insights and empirical evidence needs to be gathered of the link between common ownership and anticompetitive effects. In Europe in particular these links have not yet been systematically investigated. That is why the Monopolies Commission welcomes the announcement of the Directorate-General for Competition of the European Commission to address this issue in more detail.”

²⁴¹ Please see:

Margrethe Vestager, Keynote address at Studienvereinigung Kartellrecht, ‘Thoughts on Merger Reform and Market Definition’ (Brussels, 12 March 2015).

<https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/thoughts-merger-reform-and-market-definition_en>

Margrethe Vestager, Keynote address at Studienvereinigung Kartellrecht, ‘Refining the EU Merger Control System’ (Brussels, 10 March 2016).

<https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/refining-eu-merger-control-system_en>

²⁴² Chapter II of the XXII Biennial Report of the Monopolies Commission (“**Competition 2018**”) in accordance with Section 44 para 1, sentence 1 of the German Act against Restraints of Competition.

<<http://www.monopolkommission.de>>

The German Monopolies Commission referred to merger reviews of planned mergers between companies active in markets characterised by a high level of common ownership as presenting “a different picture” and in this context made reference to the decisions of the Commission in the *Dow/DuPont* case as follows:

“When reaching its decision on the proposed merger between Dow and DuPont the European Commission for the first time took account of relevant considerations. The Monopolies Commissions welcomes the fact that the European Commission plans to take account of common shareholdings in its future decision-making as well. It would like to encourage the Federal Cartel Office (Bundeskartellamt) to likewise give consideration to common shareholdings of institutional investors in relevant cases.”

The United Kingdom prepared a submission in December 2017 to the OECD²⁴³ in which it stated that the existing literature provides:

“some evidence that the incentives created by common ownership may negatively impact on competition in oligopolistic markets. However, commentators and industry participants have highlighted a number of potential drawbacks to the quantitative indicators used in the literature. This suggests that further work is required to test the robustness of these indicators, most notably MHHI, on which all the current literature relies for measuring unilateral effects.”

It is clear that the debate as to the competitive effects of common ownership is in its relative infancy and that there is, at present, no general consensus as to the antitrust/competition implications of such interests. Furthermore, the debate, although initially focussed in, and mainly involving contributions from, the US, has more recently extended to other jurisdictions with contributions having been made at the December 2017 OECD conference by Argentina, Brazil, Chile, Germany, Mexico, Portugal, Russia, Slovenia, Ukraine, the UK and the US. It is noteworthy that the European Commission was not a participant at, or contributor to, the December 2017 OECD conference.

²⁴³ Directorate for Financial and Enterprise Affairs Competition Committee, *Common ownership by institutional investors and its impact on competition - Note by the United Kingdom* (OECD, 23 November 2017). The above submission noted that there was evidence of common ownership in the UK retail banking and insurance sectors “albeit to a lesser extent to that found in the studies from the US.”

[https://one.oecd.org/document/DAF/COMP/WD\(2017\)92/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2017)92/en/pdf)

3 SUMMARY

From this Chapter, it can be seen that the theories of harm in relation to cross shareholdings are reasonably well established. The theories of harm in relation to common ownership are in their relative infancy, evolving and by no means settled. The Commission unequivocally endorsed the theories of harm in the *Dow/DuPont* decision in respect of both cross and common shareholdings. The Commission's endorsement of the theories of harm regarding common ownership appears to have been somewhat premature. The Commission has since adopted a much more cautious approach in relation to common ownership which was reflected in its decision in *Bayer/Monsanto*, the recent JRC Report and pronouncements by Commissioner Verstager that more work needs to be done in this area. Indeed, the consensus among many of the competition authorities in mature antitrust jurisdictions around the world appears to be that it is too early legislatively to intervene on common ownership given the ongoing debate and lack of consensus. The above economic background sets the scene for Chapters 2 to 4 which examine the legislative toolkit available to the CCPC and the EU Commission in the form of merger control and the general, non-merger, prohibition against restrictive agreements and concerted practices and abuse of a dominant position, to address the competition issues arising from the acquisition of cross and common minority interests.

As we shall see in the succeeding chapters, the Irish and EU competition regimes comprising merger control and the general competition rules are inadequate in a number of material respects rendering the competition agencies powerless to intervene in significant cases, including the attempt by Ryanair to acquire Aer Lingus which resulted in a very drawn out legal battle that indeed exposed the shortcomings of both merger control and the general competition regimes to tackle the acquisition of a cross minority interests between competitors in highly concentrated, in some cases, duopolistic markets. The Commission and the CCPC were forced to accept the absence of jurisdiction and leave it to the UK competition authorities to intervene using their broader jurisdiction on material influence to capture minority interests and take enforcement action. Indeed, if the Ryanair/Aer Lingus situation were to play out today, nothing would change and the CCPC and the Commission would both still labour under the above jurisdictional deficiency and again, it would be the competition agencies in the UK, post Brexit, that would enjoy the requisite jurisdiction to intervene.

COMPETITION LAW AND THE REGULATION OF NON CONTROLLING MINORITY INTERESTS: THE REGULATORY GAP

CHAPTER 2

MERGERS AND ACQUISITIONS REGULATED BY PART 3 OF THE COMPETITION ACT 2002 AND THE EU MERGER CONTROL REGULATION

1 INTRODUCTION

The purpose of this Chapter is to examine the Irish and EU merger control systems, in particular to identify the trigger event for having to submit *ex-ante* a notification to the Competition and Consumer Protection Commission (“**CCPC**”) under Part 3 of the Irish Competition Act 2002 (as amended) (the “**2002 Act**”) or the EU Commission under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (“**2004 EMCR**”).¹ This Chapter will demonstrate that the categories of transaction that are subject to the *ex-ante* system of compulsory notification are based on the acquisition of control as defined and that, therefore, the acquisition of a typical minority interest, not giving rise to the acquisition of control, falls outside the scope of the above regimes, thereby exposing the regulatory gap.

2 STRUCTURE OF THIS CHAPTER

This Chapter entails an analysis of the following jurisdictional issues delineating the scope of the respective Irish and EU merger control systems in terms of the acquisition of minority interests:

- 2.1 The different limbs of the definition of transactions caught by the Irish and EU merger control regimes;
- 2.2 Each of the limbs of the definitions to determine the circumstances in which a minority interest may amount to a merger or acquisition for Irish merger control purposes or a concentration at EU level, and which will reveal the very limited circumstances in which a compulsorily notifiable transaction arises by virtue of the acquisition of a minority interest;

¹ Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings [20 January 2004] OJ 24/1.

- 2.3 The seminal decision in *Aer Lingus Plc v European Commission*² in which the General Court clarifies that the acquisition of a minority interest, falling short of sole or joint control, will not give rise to a “concentration” for the purposes of the 2004 EMCR which, by analogy, supports the proposition that the acquisition of such a non-controlling minority interest will not give rise to a merger or acquisition for Irish merger control purposes; and
- 2.4 The substantive merger review of a transaction which gives rise to a merger or acquisition which is compulsorily notifiable can include an analysis of a pre-existing non-controlling minority interest held by one or more of the parties. In other words, the competition agencies have jurisdiction to review a pre-existing non-controlling minority interest as part of a separate and subsequent transaction which itself is independently caught by the *ex-ante* merger control regime. However, the acquisition of the potentially harmful minority interest of itself does not trigger a notification, and it is only on the occurrence of the subsequent notifiable event, which of course may never transpire, that triggers a mandatory notification requirement subject to satisfying the relevant turnover thresholds.

3 MERGERS AND ACQUISITIONS DEFINED

Section 16(1) of the 2002 Act defines a merger or acquisition as follows:

- "(a) 2 or more undertakings, previously independent of one another, merge, or
- (b) one or more individuals who already control one or more undertakings, or one or more undertakings, acquire direct or indirect control of the whole or part of one or more other undertakings, or
- (c) the acquisition of part of an undertaking, although not involving the acquisition of a corporate legal entity, involves the acquisition of assets that constitute a business to which a turnover can be attributed, and for the purposes of this paragraph “assets” includes goodwill.”

² Case T-411/07 *Aer Lingus Group Plc v European Commission* Case [2010] ECLI:EU:T:2010:281.

The above definition of merger and acquisition in Section 16(1) of the Irish 2002 Act is very much modelled on the 2004 EMCR.³ The transactions caught by the 2004 EMCR are defined in Article 3(1) as a “concentration” which is deemed to arise where a change of control on a lasting basis results from:

“(a) the merger of two or more previously independent undertakings or parts of undertakings, or

(b) the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings.”

The 2004 EMCR does not contain a separate limb of the definition of concentration in respect of the acquisition of assets equivalent to Section 16(1)(c) of the 2002 Act. Asset purchases are expressly covered by Article 3(1)(b) of the 2004 EMCR on the acquisition of control of undertakings (reproduced above) and therefore Article 3(1)(b) effectively covers at EU level transactions falling under Sections 16(1)(b) and (c) of the 2002 Act.

As can be seen from the above, there are three categories of transaction caught by Part 3 of the 2002 as follows: (i) mergers; (ii) acquisitions of direct or indirect control of all or part of an undertaking including full-function joint ventures; and (iii) acquisitions of assets that constitute a business to which a turnover can be attributed. As stated above, the definition of concentration under the 2004 EMCR covers mergers and acquisitions of control to include the acquisition of assets. Below, the author examines the scope of each of the three limbs of the definition of merger or acquisition in Section 16(1) of the 2002 Act and their equivalent at EU level which will confirm that acquisitions of minority interests that do not amount to the acquisition of “control” or are not part of a transaction giving rise to control fall outside the definition of merger or acquisition and are, therefore, outside the scope of the regime for the compulsory or voluntary notification of mergers and acquisitions under Part 3 of the 2002 Act and the 2004 EMCR respectively.

³ Following the amendments brought about the Competition and Consumer Protection Act 2014 (the “**2014 Act**”), CCPC published on its website a merger Q&A with Úna Butler (the then Director of legal Service at the CCPC), who in discussing the changes to the merger control regime, repeatedly made references to how the changes brought “the Irish merger review regime into line with the EU merger review regime”.

<<https://www.ccpc.ie/business/merger-qa-una-butler-director-legal-services/>>

4 MERGERS-SECTION 16(1)(A) OF THE 2002 ACT

The expression “merger” is not defined in the 2002 Act or in the 2004 EMCR.⁴ A merger can arise on a legal or *de facto* basis. A legal merger arises where two or more independent entities combine in circumstances where one or more of the parties cease to exist. The Commission in Section B of the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings⁵ (the “**EU Consolidated Jurisdictional Notice**”) specifies that a merger occurs for the purposes of the 2004 EMCR when two or more independent undertakings amalgamate into a new undertaking and cease to exist as separate legal entities or where an undertaking is absorbed by another, the latter retaining its legal identity while the former ceases to exist.⁶

The Commission points out that a merger may also occur where “in the absence of a legal merger, the combining of the activities of previously independent

⁴ Please see section 4 of this Chapter for the Commission’s explanation of the term merger in the context of the 2004 EMCR.

⁵ [2008] OJ C 95/1.

⁶ EU Consolidated Jurisdictional Notice, para 9. An example of an Irish statutory framework for the implementation of legal mergers is the European Communities (Cross-Border Mergers) Regulations 2008, SI 157/2008 which implement into Irish law Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies [2005] OJ L310/1 and provide for the merger of limited liability entities including private limited companies formed under Irish law. Part 9 of the Companies Act 2014 (as amended) provides for legal merger by acquisition, absorption or formation of a new company. The Building Societies Acts 1989 to 2006 makes provision for two or more building societies to amalgamate by forming a building society as their successor and for the transfer of engagements from one building society to another in circumstances where the transferring building society is dissolved. Similarly, the Credit Union Acts 1997 to 2020 provide for the amalgamation of credit unions and for the transfer of engagements from one credit union to another in circumstances where the transferring credit union is dissolved. There are many examples of legal mergers which have been notified to, and reviewed by, the Competition Authority/CCPC under Part 3 of the 2002 Act. In *GE/Lufkin* (M/13/016) Determination of the Competition Authority 22 May 2013, the proposed transaction involved General Electric Company (“GE”) of the US acquiring sole control of Lufkin Industries Inc. of the US by way of GE’s subsidiary, Red Acquisition Inc. merging with and into Lufkin Industries Inc. In *Bank of America Corporation/MBNA Corporation* (M/05/057) Determination of the Competition Authority 7 October 2005 where the Authority was notified of a proposal under which MBNA Corporation (incorporated in Delaware, USA and listed on the New York Stock Exchange) would merge into Bank of America Corporation (also incorporated in Delaware, USA and listed on the New York Stock Exchange). The determination describes the merger proposal being effected by the conversion of MBNA common stock into BoA common stock and BoA as the surviving entity after the merger. In *Motorola/Netopia* (M/07/001) Determination of the Competition Authority 29 January 2007, the Authority was notified of the proposal where Motorola Inc. would acquire all of the issued share capital of Netopia Inc. Neither the target and nor the purchaser was incorporated in Ireland. In *BNY/Mellon* (M/07/018) Determination of the Competition Authority 1 June 2007, the Authority reviewed the proposed merger between Bank of New York Company, Inc. and Mellon Financial Corporation under which as a result of the transaction, Bank of New York Company, Inc. and Mellon Financial Corporation would merge into a new Delaware corporation jointly owned by Bank of New York Company, Inc. and Mellon Financial Corporation.

undertakings ,results in the creation of a single economic unit”.⁷ The EU Consolidated Jurisdictional Notice specifies that the above may arise in particular where two or more undertakings, while retaining their individual legal personalities, establish contractually a common economic management, or the structure of a dual listed company.⁸ If this leads to a *de facto* amalgamation of the undertakings concerned into a single economic unit, the operation is considered to be a merger.⁹

It is clear from the above that neither the limb of the definition of merger or acquisition under Section 16(1)(a) of the 2002 Act nor the reference to merger under Article 3(1)(a) of the 2004 EMCR apply to the acquisition of a minority interest unless the

⁷ EU Consolidated Jurisdictional Notice, para 10.

⁸ EU Consolidated Jurisdictional Notice, para 10.

⁹ The EU Consolidated Jurisdictional Notice specifies that a prerequisite for the determination of a common economic unit is the existence of a permanent, single economic management and that other relevant factors may include “internal profit and loss compensation or a revenue distribution as between the various entities within the group, and their joint liability or external risk sharing” (EU Consolidated Jurisdictional Notice, para 10). The EU Consolidated Jurisdictional Notice continues by pointing out that the *de facto* amalgamation may be solely based on contractual arrangements or it can be reinforced by cross-shareholdings between the undertakings forming the economic unit (EU Consolidated Jurisdictional Notice, para 10). In *PriceWaterhouse/Coopers & Lybrand* (Case No IV/M.1016) Commission 20 May 1998, the Commission had to decide the preliminary issue of whether or not the combination of PriceWaterhouse (“PW”) and Coopers & Librand (“C&L”) would result in the creation of a merger for the purposes of the 1989 EMCR. The merger was to be achieved by a series of transactions and contractual arrangements to which the two networks were to be combined on a worldwide basis. The parties were to accede to a new integrated structure called the “Combination Agreement” which was to reflect the existing structure of PW as set out in the PriceWaterhouse Combination Agreement. The Commission pointed out that in practical terms, the PW firms carrying on business in any particular territory were to merge with the C&L firms which carried on business in the same territory. Depending on the national laws regarding the provision of audit and accounting services, the Commission stated that integration was to be achieved either (i) by way of a formal merger of the relevant firms; or (ii) by the acquisition by one entity of the business and assets of the other; or (iii) the formal dissolution of the relevant firms and the creation of a new successor firm. The new combined entities resulting from the local mergers were subsequently to accede to a new Combination Agreement. Both PW and C&L were structured as international networks of separate and autonomous national firms operating under a common name and observing common professional standards. The Commission in its decision states that it was necessary to examine whether the parties’ groups of firms could be regarded as single undertakings whose combination would constitute a single concentration within the meaning of the 1989 EMCR. For this purpose, it was necessary to examine whether the PW Combination had a sufficiently high degree of concentration of decision making and financial interests to confer on it the character of a single economic entity. The Commission pointed out that the Combination Board introduced by PriceWaterhouse reviewed and provided guidance to the national firms essentially on all aspects of the conduct of their business, and was introduced in order to allow the European PW firms to operate in a manner which harmonised the interests of proprietors of the individual PW firms and promoted their collective interests, thereby reducing their incentives to make business decisions which promoted the interests of their own firm at the expense of another combination firm. The Commission pointed out that, separately, PW had entered into bilateral arrangements with other PW firms around the world on which they agreed to pool resources and co-ordinate their strategies to their mutual benefit, and the Commission referred also to the fact that the PW Europe Combination was extended in a combination contract among the PW firms operating in Europe and the USA. The Commission concluded that the above features indicated considerable centralisation of management and concluded that the combination had the effect that the constituent PW firms would function collectively as a single economic unit and that the transaction constituted a single concentration to which PW taken as a whole was one party. The Commission left open the question as to whether or not the C&L firms constituted a single economic entity.

minority interest forms part of the broader arrangement resulting in a *de jure* or *de facto* merger.

5 ACQUISITION OF ASSETS-SECTION 16(1)(C) OF THE 2002 ACT

5.1 Asset Transactions Covered

Section 16(1)(c) of the 2002 Act specifies that a merger or acquisition is deemed to occur where the acquisition of part of an undertaking, although not involving the acquisition of a corporate legal entity, involves the acquisition of assets that constitute a business to which a turnover can be attributed, and for this purpose assets includes goodwill.

5.2 Acquisition of Minority Interest falling outside Section 16(1)(c) of the 2002 Act

It is clear from the above that the limb of the definition of merger or acquisition under Section 16(1)(c) of the 2002 Act is not intended to apply to the acquisition of shares and that therefore it appears that it does not apply to the acquisition of a minority interest except where the transaction involves the transfer of a business and the assets being transferred include one or more minority interests.

6 ACQUISITION OF CONTROLLING INTEREST SECTION 16(1)(B) OF THE 2002 ACT/ARTICLE 3(1)(B) OF THE 2004 EMCR

Section 16(1)(b) of the 2002 Act and Article 3(1)(b) of the 2004 EMCR governs the acquisition of control of an undertaking under Irish and EU merger control laws respectively. "Control", for this purpose, may be acquired by one or more individuals or other undertakings. The trigger event under Section 16(1)(b) and Article 3(1)(b) of the 2004 EMCR is the acquisition of "direct or indirect control" of the whole or part of one or more other undertakings.¹⁰ The acquisition of shares including minority

¹⁰ Section 16(4) of the 2002 Act specifies as follows:

"The creation of a joint venture to perform, on an indefinite basis, all the functions of an autonomous economic entity shall constitute a merger falling within subsection (1)(b)."

Similarly, Article 3(4) specifies as follows:

"The creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity shall constitute a concentration within the meaning of paragraph 1(b)."

The full-functionality criterion determines whether or not the creation of a joint venture is caught by Part 3 of the 2002 Act or Article 3(b) of the 2004 EMCR. "Full functionality" in this context is understood to mean full functionality from an operational perspective and not regarding the strategic decisions of the joint venture, as otherwise a jointly-controlled undertaking could

interests may fall under Section 16(1)(b) of the 2002 Act and Article 3(1)(b) of the 2004 EMCR.

Most transactions notified to, and reviewed by, the CCPC under Part 3 of the 2002 Act involve transactions falling within Section 16(1)(b). This category is based on

never be considered a full-function joint venture (please see the judgment of the General Court in *T-282/02 Cementbouw Handel & Industrie v Commission* [2006] ECR II-319 in the context of the 1989 EMCR). The full-functionality criterion applies to the creation of joint ventures under Section 16(4) of the 2002 Act and Article 3(4) of the 2004 EMCR. The Commission's analysis of the concept of full functionality in the EU Consolidated Jurisdictional Notice is at least of persuasive authority in examining full functionality under Section 16(4) of the 2002 Act. The Commission makes a distinction between the creation of a new joint venture which needs to be full function to be caught by the 2004 EMCR and the new acquisition of an existing undertaking on a joint basis which gives rise to a concentration independently of whether or not the criterion of full functionality is met. The EU Consolidated Jurisdictional Notice points out that Article 3(1)(b) of the 2004 EMCR (the equivalent provision in the 2002 Act is Section 16(1)(b)) states that a concentration shall be deemed to arise where control is acquired by one or more undertakings of a whole or parts of another undertaking even though the acquired undertaking would no longer be considered full function after the transaction (e.g. because it will sell exclusively to the parent undertakings in future) (EU Consolidated Jurisdictional Notice, para 91). The Commission highlights that Article 3(4) of the 2004 EMCR provides that the creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity (so called full-function joint ventures) shall constitute a concentration within the meaning of the 2004 EMCR (EU Consolidated Jurisdictional Notice, para 92). The full-functionality criterion therefore delineates the application of the 2004 EMCR for the creation of joint ventures by the parties, irrespective of whether such a joint venture is created as a "greenfield operation" or whether the parties contribute assets to the joint venture which they previously owned individually (EU Consolidated Jurisdictional Notice, para 92). The fact that a joint venture may be a full-function undertaking and therefore economically autonomous from an operational viewpoint does not mean that it enjoys autonomy as regards the adoption of its strategic decisions (para 93 of the EU Consolidated Jurisdictional Notice). The Commission stresses that, otherwise, a jointly-controlled undertaking could never be considered a full-function joint venture and therefore the condition laid down in Article 3(4) would never be complied with. The Commission in paragraph 93 of the EU Consolidated Jurisdictional Notice refers to the judgment of the General Court in *T-282/02 Cementbouw Handel & Industrie v Commission* [2006] E.C.R. II-319. It is therefore sufficient for the criterion of full functionality if the joint venture is autonomous in an operational respect (EU Consolidated Jurisdictional Notice, para 93). The CCPC, in their determinations concerning full-function joint ventures, often does not provide much analysis of the full functionality of the joint venture. For example, in *EBS/Britannia* (M/07/039) Determination of the Competition Authority 27 August 2007, the Authority refers to the creation of the joint venture between EBS and Britannia for the purpose of launching a new intermediary mortgage lender in Ireland which was to "operate autonomously in the market". It should be noted that in Case C 248/16 *Austria Asphalt GmbH & Co OG v Bundeskartellamt* [2017] ECLI:EU:C:2017:643, the CJEU ruled that a concentration is deemed to arise upon a change from sole to joint control only if the joint venture created by such a transaction performs on a lasting basis all the functions of an autonomous economic entity.

Part 3 of the 2002 Act and the 2004 EMCR regulate the creation of new full function joint ventures. Therefore, a minority interest that gives rise to joint control in the context of a newly created full function joint venture falls within Section 16(4) of the 2002 Act and Article 3(4) of the 2004 EMCR. A newly created joint venture that does not meet the full functionality requirement falls outside of Part 3 of the 2002 Act. It is understood that the entry and exit of joint controllers of an existing joint venture can be caught under Section 16(1)(b) of the 2002 Act and Article 3(1)(b) even where the joint venture is not a full function joint venture although the decision of the CJEU in *Austria Asphalt GmbH & Co OG v Bundeskartellamt* could indicate that the CJEU might view this differently if called upon to do so. Therefore, at least for the time being, a clear distinction needs to be made between the establishment of a joint venture and subsequent changes to controlling interests in a joint venture.

the acquisition of control, which is defined in Section 16(2) as existing in the following circumstances:

"...if, by reason of securities, contracts or any other means, or any combination of securities, contracts or other means, decisive influence is capable of being exercised with regard to the activities of the undertaking and, in particular, by:

- (a) ownership of, or the right to use all or part of, the assets of an undertaking, or
- (b) rights or contracts which enable decisive influence to be exercised with regard to the composition, voting or decisions of the organs of an undertaking".

The 2002 Act specifies that in determining whether a decisive influence of the kind referred to in Section (2) is capable of being exercised "regard shall be had to all the circumstances of the matter and not solely to the legal effect of any instrument, deed, transfer, assignment or other act done or made".¹¹

Section 16(3) of the 2002 Act specifies that control is acquired by an individual or other undertaking if he or she or it:

- "(a) becomes holder of the rights or contracts, or entitled to use the other means, referred to in *subsection (2)*, or
- (b) although not becoming such a holder or entitled to use those other means, acquires the power to exercise the rights derived therefrom".

The 2002 Act specifies that the creation of a joint venture "to perform, on an indefinite basis, all the functions of an autonomous economic entity shall constitute a merger falling within subsection (1)(b)".¹²

¹¹ Section 16(5) of the 2002 Act.

¹² Section 16(4) of the 2002 Act. The equivalent provisions in the 2004 EMCR (Article 3(2) to (4)) are as follows:

- "2. Control shall be constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by:
 - (a) ownership or the right to use all or part of the assets of an undertaking;
 - (b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking.

The above definition of merger or acquisition for Irish merger control purposes is very much modelled on the definition of concentration in the 2004 EMCR¹³. It is also important to point out that the above definition of acquisition of control encompasses many different types of transaction, ranging from the acquisition of private limited companies, the making of public bids, the creation and dismantling of joint ventures, the making of bids by consortia, management buy-ins and management buy-outs and Schemes of Arrangement under Section 201 of the Companies Act 1963 (the “1963 Act”)¹⁴. The definition of control encompasses the purchase of shares in a legal entity, such as a private limited company, public limited company or unlimited

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3. Control is acquired by persons or undertakings which:
 - (a) are holders of the rights or entitled to rights under the contracts concerned; or
 - (b) while not being holders of such rights or entitled to rights under such contracts, have the power to exercise the rights deriving therefrom.
 4. The creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity shall constitute a concentration within the meaning of paragraph 1(b)."

¹³ "1. A concentration shall be deemed to arise where a change of control on a lasting basis results from:

- (a) the merger of two or more previously independent undertakings or parts of undertakings, or
 - (b) the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings.
2. Control shall be constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by:
 - (a) ownership or the right to use all or part of the assets of an undertaking;
 - (b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking.
 3. Control is acquired by persons or undertakings which:
 - (a) are holders of the rights or entitled to rights under the contracts concerned; or
 - (b) while not being holders of such rights or entitled to rights under such contracts, have the power to exercise the rights deriving therefrom.
 4. The creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity shall constitute a concentration within the meaning of paragraph 1(b)."

¹⁴ In *Bernard McNamara/Derek Quinlan/DDDA/South Wharf* (M/06/082) Determination of the Competition Authority 11 December 2006, the Competition Authority was notified of a transaction under which Becbay Limited would acquire the issued share capital of South Wharf plc by way of a scheme of arrangement under Section 201 of the 1963 Act. South Wharf plc was a public limited company whose shares were listed on the Irish Stock Exchange. Please see also *Alchemy/Calyx* (M/07/032) Determination of the Competition Authority 11 July 2007. The Competition Authority has reviewed a number of proposed transactions under Part 3 of the 2002 Act which were to be implemented by way of a Scheme of Arrangement under the equivalent provisions of the laws of England and Wales in *3i/Interflora* (M/04/069) Determination of the Competition Authority 21 December 2004; *Babcock & Brown/Esot/eircom* (M/06/035) Determination of the Competition Authority 7 July 2006; *Investec/Kensington* (M/07/035) Determination of the Competition Authority 25 July 2007; *Premier/Imprint* (M/08/016) Determination of the Competition Authority 29 May 2008; and *Investec/Rensburg Sheppards* (M/10/011) Determination of the Competition Authority 13 May 2010; and in Northern Ireland in *Arcapita/Viridian* (M/06/075) Determination of the Competition Authority 15 November 2006, and in Australia in *Singapore Technologies/eircom* (M/09/025) Determination of the Competition Authority 2 December 2009.

company, including a minority interest, provided that the acquisition involves the acquisition of control on a sole or joint basis.

7 CONTROL-SOLE OR JOINT

Although it is beyond the scope of this thesis to explore in detail the concept of control for the purposes of Irish and EU merger control, a brief summary of circumstances in which a minority interest can give rise to control for Irish and EU merger control purposes is set out below:

- 7.1 Sole control is where the acquiring undertaking acquires the power to determine the strategic commercial decisions of the other undertaking typically by acquiring a majority of the issued voting share capital of the target company or where only one shareholder is able to veto strategic decisions in an undertaking, but this shareholder does not have the power, on its own, to impose such decisions (the Commission describes this in the Commission's Consolidated Jurisdictional Notice as the "so-called negative sole control").
- 7.2 Sole control can be acquired on a *de jure* or *de facto* basis.
- 7.3 Sole control can be acquired by a minority shareholder on a *de jure* basis:
 - 7.3.1 Where an undertaking acquires a majority of the voting rights of a company¹⁵; or
 - 7.3.2 Where specific rights are attached to the shares acquired by the minority shareholder such as the power to appoint more than half of the members of the board of directors of the relevant entity; or
 - 7.3.3 Where the minority shareholder has the right to manage the activities of the company and to determine its business policy on the basis of the organisation structure.¹⁶

¹⁵ A purchaser may acquire a minority interest of less than 50% of the issued share capital of the target in circumstances where the issued share capital of the company is divided into ordinary voting shares (for example 30% of the issued share capital) and non-voting preference shares (70% of the issued share capital) and the purchaser is only acquiring all or a majority of the voting shares.

¹⁶ EU Consolidated Jurisdictional Notice, para 57. The Commission in the EU Consolidated Jurisdictional Notice provides the example of a typical situation of negative sole control occurring where one shareholder holds 50% of the issued share capital of a company whilst the remaining 50% of shares are held by several other shareholders (assuming that this does not lead to positive sole control on a *de facto* basis) or where there is a qualified majority required for the adoption of strategic decisions which in fact confer veto rights upon one shareholder only irrespective of whether it is a majority or a minority shareholder.

7.4 Sole control can, in limited circumstances, be acquired by a minority shareholder on a *de facto* basis where:

- (i) The minority shareholder is likely to achieve a majority of the votes cast at a shareholders meeting, given the level of its shareholding and the evidence resulting from the presence of shareholders in the shareholders' meetings in previous years;¹⁷ or
- (ii) The grant to a minority shareholder of the option to increase or convert shares in the relevant entity, can in certain limited circumstances, be regarded as amounting to *de facto* sole control even prior to the actual exercise of those rights where the option is to be exercised in the near future in accordance with legally binding agreements.¹⁸

7.5 A minority interest, which is acquired in circumstances where the minority stake forms part of a series of transactions in shares acquired with a view to acquiring the target entity, can be regarded as part of one single merger or acquisition for the purposes of the 2002 Act or one concentration for the purposes of the 2004 EMCR. The Commission refers to recital 20 of the 2004 EMCR highlighting that a single concentration can arise in cases where control over one undertaking is acquired by a series of transactions in securities from one or several sellers taking place within

Since this shareholder can produce a deadlock situation, the shareholder acquires decisive influence within the meaning of Section 16(2) of the 2002 Act. In the *Cinven Limited/Angel Street Holdings* (Case No COMP/M.2777) Commission Decision 8 May 2002, the Commission reviewed a transaction involving an acquisition of a target by four different groups and one issue was whether or not the shareholder holding 52.6% had acquired sole control over the target. The shareholder in question was entitled to appoint two out of the five directors. The Commission pointed out that while the shareholder could not impose its will, it appears that only it could exercise control over the target by virtue of its sole veto right over a range of strategic decisions including all major financial commitments as well as the approval of the budget in the business plan. The Commission pointed out that the shareholder could exert a decisive influence over the target by alone being able to create a deadlock situation by blocking key decisions. The other shareholders each appointed one of the members of the target's board and were unable to veto strategic decisions other than "investor-type" protections to protect the value of the target. It was held that the majority shareholder would acquire sole control. The EU Consolidated Jurisdictional Notice also refers to *BBVA/BNL* (COMP/M.3537) Commission Decision 20 August 2004; *BBVA/BNL* (Case No COMP/M.3768) Commission Decision 27 April 2005; *VW-Audi/VW-Audi Vertriebszentren* (Case No COMP M.3198) Commission Decision 29 July 2003; *CCIE/GTE* (Case No IV/M.258) Commission Decision 25 September 1992; and *Diester Industrie/Bunge/JV* (Case No COMP/M.3876) Commission Decision 30 September 2005.

¹⁷ The Commission in the EU Consolidated Jurisdictional Notice points out that the Commission will carry out a "prospective analysis and take into account foreseeable changes of the shareholders' presence which might arise in future following the operation. The EU Consolidated Jurisdictional Notice refers to *Societe Generale de Belgique/Generale de Banque* (Case No IV/M. 343) Commission Decision 3 August 1993, *RTL/M6* (Case No COMP/M. 3330) Commission Decision 12 March 2004 and *Mediobanca/Generali* (Case No IV/M.159) Commission Decision 19 December 1991.

¹⁸ EU Consolidated Jurisdictional Notice, para 60. Please see *Ford/Hertz* (Case No IV/M.397) Commission Decision 7 March 1994.

a reasonably short period of time.¹⁹ The concentration in these scenarios is not limited to the acquisition of the 'one and decisive' share, but will cover all the acquisitions of securities which take place in a reasonably short period of time.²⁰ In *Ryanair/Aer Lingus*²¹ the Commission referred to Ryanair Holdings Plc acquiring different tranches of shares in Aer Lingus Group Plc over a short period of time namely, the first 19% stake less than 10 days before launching the public bid followed by the acquisition of a further 6% interest shortly thereafter, in circumstances where Ryanair had confirmed that its acquisition of shares in Aer Lingus was part of a plan to acquire control of Aer Lingus, the entire operation comprising the acquisition of shares before and during the public bid period as well as the public bid itself constituted a single concentration within the meaning of Article 3 of the 2004 EMCR.²² Clearly, the above principle only applies where the minority stake forms part of a series of transactions in securities and is part of a plan to acquire control of the target. The above principle does not apply to the acquisition of a non-controlling minority interest of itself.

- 7.6 Joint control exists if the parent companies must reach agreement on major decisions concerning the controlled undertaking. Joint control (which includes changes from sole control to joint control) can be established on a de jure or de facto basis. Joint control can be acquired by a minority shareholder through the grant of an equality of voting rights,²³ the grant of veto rights,²⁴ the joint exercise of voting rights such as a pooling agreement or the presence of strong common interests²⁵ or where a minority shareholder has a particular knowledge and experience of the business of the relevant entity, and the majority shareholder plays a modest or non-existent role in the daily management of the joint venture business, and the majority

¹⁹ EU Consolidated Jurisdictional Notice, para 48.

²⁰ EU Consolidated Jurisdictional Notice, para 48.

²¹ *Ryanair/Aer Lingus* (Case No COMP/4439) Commission Decision 27 June 2007.

²² The General Court on appeal in Case T-411/07 *Aer Lingus Group Plc v European Commission* Case [2010] ECLI:EU:T:2010:281.

ECLI:EU:T:2010:281 upheld the Commission's approach to the concept of single concentration.

²³ EU Consolidated Jurisdictional Notice, para 64.

²⁴ EU Consolidated Jurisdictional Notice, paras 65 to 73. Please see *Bank of Scotland/Kandel plc* (M/04/018) Determination of the Competition Authority 26 April 2004; *Bank of Scotland/Polypipe* (M/07/037) Determination of the Competition Authority 1 August 2007; *Citigroup/Facey* (M/08/002) Determination of the Competition Authority 19 February 2008; *SRF III/Touax* (M/09/012) Determination of the Competition Authority 6 August 2009; *Metro/Herald* (M/09/013) Determination of the Competition Authority 6 November 2009; *Industri Capital/Maggotteaux* (M/07/004) Determination of the Competition Authority 1 January 2007; *MLM/Gaiety/Setanta/JV* (M/010/012) Determination of the Competition Authority 20 May 2010.

²⁵ EU Consolidated Jurisdictional Notice, paras 74 to 80.

shareholder's presence is motivated by financial, long term strategy, brand image or general policy considerations.²⁶

In summary, it is clear that the acquisition of a minority interest falls within the compulsory notification regime under Irish and EU merger control laws only if it gives rise to sole or joint control on a *de jure* or *de facto* basis. The acquisition of a minority interest which falls short of the above standard of control falls outside the merger review jurisdiction of the CCPC and the Commission respectively. In practice, most minority cross or common shareholding interests do not entail the acquisition of control for Irish and EU merger control purposes and consequently, escape regulatory review. In Chapter 1, we explored various theories of harm related to minority shareholdings and noted that theories of harm exist which confirm that minority interests which do not amount to the acquisition of control can pose significant competition concerns and yet clearly fall short of the jurisdictional confines attracting the application of the above systems of merger control. The above rigid delineation of the jurisdictional limits of the Irish and EU merger control machinery in the context of minority interests underlines the glaring regulatory gap in the existing Irish and EU merger control armoury which renders the CCPC and the Commission powerless to intervene. As we shall see in Section 8 below, the above regulatory gap was starkly exposed by the background to, and decision of the General Court in, the *Aer Lingus* case, rendering both the CCPC and the Commission unable to utilise their respective merger control toolkits to regulate the significant minority interest held by Ryanair in Aer Lingus despite the fact that the two airlines overlapped on 35 routes, together held 100% of the market on 22 of those routes and over 60% of the market on the remaining overlap routes.

The General Court in *Aer Lingus Group Plc v European Commission*²⁷ examined a series of questions regarding the application of various provisions of 2004 EMCR to the acquisition of cross shareholdings.

²⁶ EU Consolidated Jurisdictional Notice, para 81.

²⁷ Case T-411/07 *Aer Lingus Group Plc v European Commission* Case [2010] ECLI:EU:T:2010:281.

Please see the following:

Mark Furse, 'Testing the limits: Ryanair/Aer Lingus testing the boundaries of merger control' (2016) *European Competition Journal*, Vol 12, Issue 2-3, 462-483.

<<https://www.tandfonline.com/doi/abs/10.1080/17441056.2017.1292719>>

Leigh M Davison, 'Accommodating Minority Shareholdings Within the European Union Merger Control Regime: Advocating a More Cooperative Way Forward' (2017) *Liverpool Law Rev*, 38 259-286.

<<https://link.springer.com/article/10.1007/s10991-017-9201-y>>

8 TREATMENT OF MINORITY CROSS SHAREHOLDINGS UNDER EU MERGER CONTROL REGIME-JUDGMENT OF THE GENERAL COURT IN AER LINGUS GROUP PLC V EUROPEAN COMMISSION

8.1 Ryanair Minority Stake in Aer Lingus v European Commission/General Court Clarifies Treatment of Minority Stakes under 2004 EMCR

On 5 October 2006 Ryanair Holdings Plc announced its intention to launch a public bid for the entire issued share capital of Aer Lingus Group Plc which was notified to the Commission under the 2004 EMCR. The announcement of the public bid was made three days after Aer Lingus' shares were listed on the Irish Stock Exchange. Ryanair acquired shares in Aer Lingus before, on the day of, and after, the day of the announcement of the public bid, thereby securing a 29.3% stake in Aer Lingus.²⁸

The Commission, by decision dated 20 December 2006, found that the notified operation raised serious doubts as to its compatibility with the common market²⁹ and decided to open a Phase 2 merger review under Article 6(1)(c) of the 2004 EMCR. The Commission at the end of the Phase 2 merger review declared the concentration incompatible with the common market³⁰ on the basis that the two airlines overlapped on 35 routes, together held 100% of the market on 22 of those routes and over 60% of the market on the remaining overlap routes, Ryanair and Aer Lingus were each other's closest competitors on all affected routes, the merger would eliminate actual and potential competition between the parties to the detriment of consumers, customers had no countervailing power and limited or no possibilities of switching suppliers, entry was unlikely to defeat the anticompetitive effects of the merger, the possible efficiencies were unlikely to outweigh the competitive harm and

Oliver Koch, 'Yes, we can (prohibit) – The *Ryanair/Aer Lingus* merger before the Court' (2010) Competition Policy Newsletter No 2.

<http://ec.europa.eu/competition/publications/cpn/2010_3_9.pdf>

Panagiotis Fotis and Nikolaos Zevgolis, *The Competitive Effects of Minority Shareholdings Legal and Economic issues* (Bloomsbury 2016).

Weijer Ver Loren Van Themaat and Berend Reuder, *European Competition Law: A Case Commentary* (Second Edition, Edward Elgar Publishing 2018).

Catalin Stefan Rusu, 'EU Merger Control and Acquisition of (Non-Controlling) Minority Shareholdings - The State of Play' (February 2014) CLaSF WP Series 10.

²⁸ Before the public bid, Ryanair had acquired a minority stake of 16.03% in Aer Lingus. On the day of the announcement of the public bid, Ryanair increased its stake to 19.21%. Shortly thereafter, Ryanair acquired further shares increasing its stake to 25.15% by 28 November 2006. On 27 June 2007, Ryanair increased its stake to 29.3%.

²⁹ With effect from 1 December 2009, the TFEU has replaced the expression "common market" with "internal market".

³⁰ *Ryanair/Aer Lingus* (Case No COMP/4439) Commission Decision 27 June 2007.

that the package of proposals put forward by Ryanair were insufficient to address the competition concerns involved.

The Commission in the prohibition decision stated that given that Ryanair acquired the first 19% of the share capital of Aer Lingus within a period of less than ten days before launching the public bid and acquired a further 6% shortly thereafter, the entire operation consisting of the acquisition of shares before and during the public bid as well as the announcement of the public bid itself amounted to a single concentration for the purposes of the 2004 EMCR.³¹ During the merger review by the Commission, Aer Lingus made a number of submissions to the Commission and requested the Commission to require Ryanair to dispose of its shareholding in Aer Lingus and to take interim measures in accordance with Articles 8(4)³² and (5)³³ of the 2004 EMCR and that if the Commission concluded that it had no power to act under Articles 8(4) or (5) of the 2004 EMCR, the Commission needed to make a clear statement that national competition authorities were not precluded by Article 21(3)³⁴ of the 2004 EMCR, which precludes Member states from applying national competition legislation to a concentration with an EU dimension, from exercising their powers in relation to the minority shareholding in question.

The Commission rejected the contention that it had jurisdiction to act on various grounds and Aer Lingus brought an action for annulment before the General Court against the Commission's decision under Article 230 of the EC Treaty.³⁵

³¹ 2004 EMCR, para 12.

³² Article 8(4) of the 2004 EMCR provides that where the Commission finds that a concentration has already been implemented and the concentration has been declared incompatible with the common market, the Commission may:

- "- require the undertakings concerned to dissolve the concentration, in particular through the dissolution of the merger or the disposal of all the shares or assets acquired, so as to restore the situation prevailing prior to the implementation of the concentration; in circumstances where restoration of the situation prevailing before the implementation of the concentration is not possible through dissolution of the concentration, the Commission may take any other measure appropriate to achieve such restoration as far as possible.
- order any other appropriate measure to ensure that the undertakings concerned dissolve the concentration or take other restorative measures as required in its decision."

³³ Article 8(5)(c) of the 2004 ECMR provides that the Commission may take interim measures appropriate to restore or maintain conditions of effective competition where a concentration has already been implemented and is declared incompatible with the common market. There is no equivalent provision in the 2002 Act empowering the CCPC to take interim measures for prohibited mergers or acquisitions that have been implemented although it could be argued that the CCPC has the power to apply to the High Court seeking interim measures in respect of a merger or acquisition that has been implemented and which was the subject of a determination that it would give rise to a substantial lessening of competition.

³⁴ Article 21(3) of the 2004 EMCER provides as follows:

"3. No Member State shall apply its national legislation on competition to any concentration that has an EU dimension."

³⁵ Now Article 263 of the TFEU.

8.1.1 The Contested Decision of the Commission

The salient points of the Commission's decision could be summarised as follows:

- (a) A concentration arises only where an undertaking acquires control, that is the possibility of exercising decisive influence over another undertaking and this is apparent from Article 3(1) and (2) of the 2004 EMCR.
- (b) It is apparent from Article 8(4) of the 2004 EMCR, that if the Commission finds that a concentration has already been implemented and that the concentration has been declared incompatible with the common market, it may require the undertakings concerned to dissolve the concentration, in particular through the disposal of all the shares or assets acquired, so as to restore the situation prevailing prior to the implementation of the concentration. It noted that it may also take any other appropriate measures to ensure that the undertakings concerned dissolve the concentration or take measures to restore the situation prevailing prior to the implementation of the concentration.
- (c) The notified concentration had not been implemented and that the contested shareholding did not grant Ryanair control of Aer Lingus. The 25.17% minority stake held at the date of the notified public bid did not grant Ryanair *de jure* or *de facto* control of Aer Lingus within the meaning of Article 3(2) of the 2004 EMCR. The Commission acknowledged that minority shareholdings may, in certain circumstances, lead to a finding of control but there were no indications that such circumstances existed in this case. According to the information available to the Commission, Ryanair's rights as a minority shareholder (in particular the right to block so-called "special resolutions" pursuant to the Irish Companies Acts) were associated exclusively with rights related to the protection of minority shareholders and that such rights did not confer control in the sense of Article 3(2) of the 2004 EMCR. Furthermore, Aer Lingus itself did not seem to suggest that this minority stake would lead to control by Ryanair over Aer Lingus

and had not provided the Commission with any evidence which would suggest the existence of such control.

- (d) The Commission refuted the analysis suggested by Aer Lingus that Ryanair's minority shareholding represented a partial implementation of the concentration declared by the Commission to be incompatible with the common market, which should be dissolved in accordance with Article 8(4) of the 2004 EMCR. The Commission held that the suggested interpretation of the acquisition of the minority shareholding as a "partial implementation" covered by Article 8(4) of the 2004 EMCR was difficult to reconcile with the wording of that provision, which clearly referred to a concentration that "has already been implemented". As the decisive element of a concentration under the 2004 EMCR – the acquisition of control – was missing, there was no concentration which "has already been implemented" and the parties thus could not be required to "dissolve the concentration". The Commission's competence was limited to situations in which the acquirer had control over the target.³⁶ The Commission decided that the case was clearly distinguishable from past cases where Article 8(4) of the 2004 EMCR was applied, such as *Tetra Laval/Sidel*³⁷ or *Schneider/Legrand*.³⁸ where the public bid had already been successfully completed and the acquirer had acquired control of the target. In so far as Article 8(5) of the 2004 EMCR used the same expression as Article 8(4) to identify the situations in which the Commission may act, and given that, in the present case, no concentration had been implemented, the Commission rejected, for the same reasons, Aer Lingus's request to adopt interim measures pursuant to Article 8(5) of the 2004 EMCR.³⁹

³⁶ The Commission stated that the purpose of decisions under Article 8(4) of the 2004 EMCR was to address the negative effects on competition that were likely to result from the implementation of a concentration as defined in Article 3 of the 2004 EMCR. The Commission held that in this case, such negative effects could not occur, since Ryanair had not acquired, and could not acquire, control of Aer Lingus by way of the proposed concentration.

³⁷ *Tetra Laval/Sidel* (Case No COMP/M.2146) Commission Decision [2004] OJ L38/1.

³⁸ *Schneider/Legrand* (Case No COMP/M.2283) Commission Decision [2004] OJ L101/134.

³⁹ Finally, in relation to the request for an interpretation of Article 21 of the 2004 EMCR, regarding Ryanair's shareholding of 25.17% in Aer Lingus, the Commission stated that paragraph 3 of that article merely imposed an obligation on the Member

Aer Lingus brought an action before the General Court for annulment of the Commission's decision claiming that the Commission's decision breached Articles 8(4) and 8(5) by finding, following the Ryanair decision prohibiting implementation of the proposed concentration, that it did not have the power to require Ryanair to divest its minority shareholding in Aer Lingus and take appropriate measures to restore the situation prevailing before the concentration or take interim measures under the 2004 EMCR.

8.1.2 **Article 8(4) only applies to a Concentration that has been Implemented?**

The General Court clarified that the contested decision was adopted at a time when the Commission had declared that the concentration notified by Ryanair was incompatible with the common market. Since the Commission did not address the issue of Ryanair's minority shareholding in Aer Lingus in the decision declaring the acquisition incompatible with the common market under Article 8(3) of the 2004 EMCR, it could still do so in a separate decision adopted on the basis of the final sentence of Article 8(4). The General Court highlighted that however, as was correctly stated in the contested decision, the other condition laid down in Article 8(4) of the 2004 EMCR was not satisfied, since the notified concentration had not been implemented. The General Court pointed out that from the moment when the decision finding incompatibility with the common market was adopted, it was no longer possible for Ryanair, *de jure* or *de facto*, to exercise control over Aer Lingus or to exercise decisive influence on that undertaking.

States and did not confer any specific duties or powers on the Commission. The Commission held that, therefore, it did not have the power to give the binding interpretation of a provision addressed to the Member States and that it was not in a position to act in response to Aer Lingus' request for an interpretation. The Commission stated that, if a Member State failed to comply with Article 21(3) of the 2004 EMCR, the Commission still had the power to start an infringement procedure under Article 226 EC Treaty (now Article 258 of the TFEU). Similarly, if Aer Lingus was of the opinion that a national competition authority was obliged to act with respect to Ryanair's minority shareholding pursuant to its national legislation on competition, it could have brought the matter before that authority and/or the competent national court. If a national court considered that an interpretation of Article 21(3) of the 2004 EMCR was necessary to enable it to give judgment, it could have requested the Court of Justice to give a preliminary ruling pursuant to Article 234 EC Treaty (now Article 267 of the TFEU) in order to clarify the interpretation of that provision and to ensure a consistent interpretation of the Community law at issue.

8.1.3 **Acquisition of Non-Controlling Minority Stake Not a Concentration**

The General Court was very clear in concluding that the acquisition of a minority interest which did not confer control as defined in Article 3 of the 2004 EMCR did not constitute a concentration for the purposes of the 2004 EMCR. Significantly, the General Court stated:

“64 It is apparent from the above that the acquisition of a shareholding which does not, as such, confer control as defined in Article 3 of the merger regulation does not constitute a concentration which is deemed to have arisen for the purposes of that regulation. On that point, European Union law differs from the law of some of the Member States, in which the national authorities are authorised under provisions of national law on the control of concentrations to take action in connection with minority shareholdings in the broader sense (see paragraphs 21 and 49 above).

65 Contrary to the applicant’s claims, the concept of 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 within the above meaning.”

Most significantly, it is clear that the General Court endorsed the position that the Commission’s prohibition decision did not prevent Ryanair from maintaining its minority interest in Aer Lingus even though the acquisition of the minority interest formed part of the notified concentration declared incompatible with the common market and that the minority interest and the public bid were to be regarded as part of a single concentration for the purposes of the 2004 EMCR. Furthermore, the Court held that, despite the finding that the acquisition of the minority was part of a single concentration to acquire control of Aer Lingus, the toolkit available to it to prevent the implementation of concentrations in Articles 7 and 8 of the 2004 EMCR did not extend to requiring the divestment of the minority interest in the circumstances.

8.1.4 Absence of Power of Commission to Require Disposal of Minority Interest Under Article 8(4) of 2004 EMCR

The Court emphasised that the Commission was not granted the power to dispose of the minority interest under the 2004 EMCR and that according to the actual terms used in Article 8(4), the power to require the disposal of all the shares acquired by an undertaking in another undertaking exists only “to restore the situation prevailing prior to the implementation of the concentration”. If control has not been acquired, the Commission does not have the power to dissolve the concentration. The Court underlined that if the legislature had wished to grant the Commission broader powers than those laid down in the 2004 EMCR, it would have enacted a provision to that effect.⁴⁰

8.1.5 Absence of Control Arising from Minority Stake

The General Court held that in response to Aer Lingus’ arguments in relation to the alleged negative effects on competition, the Commission was correct in the contested decision to reject the claim that those effects could actually be assimilated to a form of control in the present case. The Court stated that it was worth noting generally in that regard that the 2004 EMCR does not seek to protect companies from commercial disputes between them and their shareholders or to remove all uncertainty in relation to the approval of important decisions by those shareholders. If the management of Aer Lingus considered that Ryanair’s conduct as a shareholder was abusive or unlawful, it could bring the matter before the competent national courts or authorities.

The General Court pointed out that although it was true that the facts put forward by Aer Lingus suggested that the relations between its management and Ryanair were tense and that they had opposing views on a number of points, they still did not prove – as is required for the

⁴⁰ The Court stated that from a factual point of view, it was not disputed that Ryanair’s shareholding in Aer Lingus did not confer on Ryanair the power to “control” Aer Lingus. Aer Lingus stated that “[it] accept[s] the assumption, made in paragraph 11 of the [c]ontested [d]ecision, that Ryanair did not, as at 27 June 2007, have “control” within the meaning of Article 3(2) [of the merger regulation]”. Equally, Aer Lingus did not claim that Ryanair’s shareholding of 29.3% in Aer Lingus from August 2007 conferred control of the company on it, but merely stated that that shareholding gave it “substantial opportunities to seek to interfere with the management and commercial strategy of Aer Lingus”.

Commission to be able to have recourse to Article 8(4) of the 2004 EMCR – that it was possible to exercise decisive influence on that undertaking. Thus, in so far as concerns the claim that Ryanair used its shareholding to seek access to Aer Lingus' confidential strategic plans and business secrets, the only evidence provided in support of that claim was a letter in which Ryanair requested, in general terms, a meeting to be held with the management of Aer Lingus. The application did not contain any evidence that confidential information was actually exchanged during such a meeting. In any event, such an exchange of information would not be a direct consequence of the minority shareholding, but would constitute subsequent conduct on the part of the two companies which could potentially be examined under Article 101 of the TFEU.

Similarly, as regards the claim that Ryanair voted against a special resolution that would have allowed the board of directors to issue shares without having first to offer them to existing shareholders, as is generally required under company law, it was apparent from the comments of Aer Lingus' CEO, reported in *The Irish Times* of 7 July 2007 in an article entitled 'Ryanair blocks Aer Lingus bid to reduce holding' and cited by the Commission without being disputed by Aer Lingus, that the failure of that resolution did not have a significant impact on the company. In so far as concerns the claim that Ryanair requisitioned two extraordinary general meetings in order to reverse strategic decisions adopted by Aer Lingus, the Commission stated, without being contradicted by Aer Lingus, that the board of directors of Aer Lingus rejected those two requests and that the planned decisions were implemented in spite of Ryanair's opposition. The General Court was satisfied that that example illustrated the fact that, contrary to the Aer Lingus' claims, Ryanair was not in a position to be able to impose its will.

Aer Lingus claimed that Ryanair mounted a campaign against Aer Lingus' management. The General Court in its judgement stated that the claim should be understood as another reference to the two extraordinary general meetings requisitioned by Ryanair and to the correspondence and public statements relating thereto. As the Commission pointed out in its pleadings, Aer Lingus rejected those two requests and implemented its decision as planned. Even if it were true that Ryanair had disrupted the management of Aer Lingus for several weeks, that would still not prove

that it was able to exercise decisive influence on that undertaking within the meaning of the 2004 EMCR.

8.1.6 Minority Shareholder in a Competitor in Duopolistic Market Does Not Necessarily Give Rise to Control

Aer Lingus argued that a minority shareholding in a competitor undertaking in a duopoly inherently distorted competition because a company with such a shareholding has less incentive to compete with a company in whose profitability it is interested. The General Court held that this claim was disproved by the facts, not disputed by Aer Lingus, that after the acquisition of its shareholding in Aer Lingus, Ryanair entered four routes previously served only by Aer Lingus and increased its frequencies on six other routes where it competed with Aer Lingus.⁴¹ That theoretical argument was not sufficient, in any event, to show, as such, a form of control by Ryanair of Aer Lingus able to justify the divestment of the minority shareholding at issue.

Aer Lingus argued that Ryanair's shareholding had a material impact on Aer Lingus's shares, making them less favourable for the latter. The Court held that in principle, the attractiveness of Aer Lingus both financially and on the stock market was not based solely on Ryanair's minority shareholding, but had to take into account the entire capital of that undertaking, in which other significant shareholders may also have a stake. Furthermore, even supposing that Ryanair's shareholding may have affected Aer Lingus's attractiveness, that would not be sufficient to show that there is control within the meaning of the 2004 EMCR.

The General Court held that the bounds of the powers invested in the Commission for the purposes of merger control would be exceeded if it were accepted that the Commission may order the divestment of a minority shareholding on the sole ground that it represented 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. An examination of the Commission's previous practice showed, in any event, that all the decisions adopted at that time by the Commission

⁴¹ Please see Ryanair's press releases entitled "Ryanair announces six new routes from Dublin" of 15 August 2007 and "31st new route from Shannon base and three new routes from Dublin" of 25 October 2007.

under Article 8(4) of the 2004 EMCR concerned concentrations which had already been implemented, in which the target company had ceased to be an independent competitor of the purchasing company. Unlike in the present case, those decisions did not concern the applicability of Article 8(4) to the concentration at issue, but merely the measures appropriate to restore the competition which had been eliminated by the implementation of the concentration. The Commission's previous practice in relation to the treatment of minority shareholdings under Article 8(4) of the 2004 EMCR could not therefore usefully be invoked to call into question the criteria laid down in that provision. Consequently, the Commission could not be accused of infringing Article 8(4) of the 2004 EMCR by considering that no concentration had been implemented in the present case and that it did not have the power to require Ryanair to dispose of its shareholding in Aer Lingus.

8.1.7 Commission Has No Power to Use Article 8(4) Even Though Minority Interest and Notified Operation Treated as a Single Concentration

The General Court was clear that the above assessment was not affected by the fact that the Commission considered, during the examination procedure, that the shareholding acquired by Ryanair on the market just before and during the public bid – which, in its words, constituted a 'single concentration' – should be regarded as falling within the scope of that bid. For at that stage, namely that of the examination procedure, the Commission was not concerned with 'restoring the situation prevailing prior to the implementation of the concentration' in the event that it were to adopt a decision declaring incompatibility, even where the notified concentration has been implemented. Those concerns arise only once a final decision has been adopted and when it is necessary to draw consequences from that decision after it becomes apparent that the situation at hand is not in accordance with it. The Court clarified that during the examination procedure, the Commission seeks rather to prevent situations in which a concentration is implemented even though it might still be declared incompatible with the common market. The General Court held that that is the goal of Article 7 of the 2004 EMCR, which seeks to ensure that one of the founding principles of the regulation

is respected, namely that concentrations with a Community dimension⁴² cannot be implemented without first being notified to, and authorised by, the Commission.

It should be noted that the Commission in its White Paper⁴³ makes it clear that Article 8(4) of the 2004 EMCR should be amended to make it clear that the Commission is provided with the express power to order a divestiture of a non-controlling minority interest in circumstances where the minority interest formed part of a single transaction which has been declared incompatible with the internal market.

8.1.8 **Suspensory Effect and Derogation**

The General Court referred to Article 7(1) of the 2004 EMCR which prohibits a concentration with an EU dimension from being implemented either before its notification or until it has been declared compatible with the common market. Article 7(2) states that paragraph 1 does not prevent the implementation of a public bid or of a series of transactions in securities, by which control within the meaning of Article 3 is acquired from various sellers, provided that the concentration is notified to the Commission pursuant to Article 4 without delay and that the acquirer does not exercise the voting rights attached to the securities in question, or does so only to maintain the full value of its investments based on a derogation granted by the Commission.

In summary, under Article 7(1) of the 2004 EMCR, a concentration with an EU dimension may not be implemented until it has been declared compatible with the internal market following a Phase 1 or 2 merger review or until it is deemed to be declared compatible with the internal market under Article 10(6) of the 2004 EMCR. There are two exceptions to the principle of suspension under the 2004 EMCR, one in the case of public bids and the other where an express derogation is granted by the Commission. It should be noted that there is no provision in the 2002 Act for any exceptions to the principle that a merger or acquisition which requires notification to the CCPC may not be put into effect without CCPC

⁴² Now referred to as an "EU dimension".

⁴³ Section 5.2.4 of the Commission Staff Working Document accompanying the White Paper.

<http://ec.europa.eu/competition/consultations/2014_merger_control/staff_working_document_en.pdf>

approval (as required by Section 19(1) of the 2002 Act) although under Section 19(12A) (inserted by the 2014 Act), the CCPC is expressly granted jurisdiction to request or accept a notification of a merger or acquisition which was “purported to have been put into effect” without having been notified.

The General Court focused on the automatic derogation from the obligation to suspend in the case of public bids or acquisition of control by means of a series of transactions in securities involving various sellers. To be able to benefit from that derogation, the interested parties must notify the Commission of the concentration without delay and not exercise the voting rights attached to those securities. As the Commission submitted in its pleadings, that derogation effectively transfers the risk of having the operation prohibited to the acquirer. If, after the examination procedure, the Commission considers that the notified operation must be prohibited, the securities acquired to implement the concentration have to be disposed of, as is illustrated in *Tetra Lava/Sidell*⁴⁴ and *Schneider*⁴⁵. In that regard, the acquisition of a shareholding which does not, as such, confer control for the purposes of Article 3 of the 2004 EMCR may fall within the scope of Article 7. The Court held that the Commission’s approach must be understood as using the concept of ‘single concentration’ to limit the risk of finding itself in a situation, in which a decision finding incompatibility would need to be supplemented by a decision to dissolve, in order to put an end to control acquired even before the Commission has taken a decision on its effects on competition. When the Commission requested Ryanair not to exercise its voting rights, whereby it was also pointed out that those voting rights did not grant Ryanair control of Aer Lingus, it merely asked Ryanair to avoid putting itself in a situation in which it would be implementing a concentration liable to give rise to a measure adopted on the basis of Article 8(4) and (5) if found to be incompatible with the common market.⁴⁶

⁴⁴ Case COMP/M.2416.

⁴⁵ Case COMP/M.2283.

⁴⁶ Regarding the exclusive competence of the Commission, the Court pointed out that Article 21(3) of the 2004 EMCR states that “[n]o Member State shall apply its national legislation on competition to any concentration that has a Community dimension” and that it thus does not confer the power on the Commission to adopt a measure producing binding legal effects of such a kind as to affect Aer Lingus’s interests. The Court held that the Commission can therefore not be criticised for having reiterated, in its response, the legal framework applicable to the case and the consequences to be drawn from it, in

8.2 **Ryanair/Aer Lingus and the Regulatory Gap**

The *Ryanair/Aer Lingus* case clearly underlines the regulatory gap by unequivocally confirming that the acquisition of a non-controlling minority interest does not give rise to a concentration for the purposes of the 2004 EMCR. As a result, the acquisition of a non-controlling minority interest falls outside of the ex ante system of EU merger control. The above jurisdictional limitation is entirely divorced from the possible substantive competition issues which can arise from a non-controlling minority interest. Indeed, the Commission in its decision in *Ryanair/Aer Lingus* - following the Phase 2 merger review - declared the proposed acquisition as incompatible with the common market on the basis that the two airlines overlapped on 35 routes, together held 100% of the market on 22 of those routes and over 60% of the market on the remaining overlap routes, Ryanair and Aer Lingus were each other's closest competitors on all affected routes, the merger would eliminate actual and potential competition between the parties to the detriment of consumers, customers had no countervailing power and limited or no possibilities of switching suppliers, entry was unlikely to defeat the anticompetitive effects of the merger and the possible efficiencies were unlikely to outweigh the competitive harm. It is clear that the duopolistic market structure and other circumstances outlined above posed significant competition issues when applying the theories of harm discussed in Chapter 1, particularly in terms of unilateral and coordinated effects. The General Court endorsed the position that the Commission's prohibition decision did not prevent Ryanair from maintaining its minority interest in Aer Lingus even though at the time of the purchase of the minority interest, Ryanair admitted that it intended to launch a bid to acquire control of Aer Lingus, and that, therefore, the acquisition of the minority interest formed part of a single notified concentration which was declared incompatible with the common market. Furthermore, the Court held that, despite the finding that the acquisition of the minority was part of a single concentration to acquire control of Aer Lingus, the toolkit available to it to prevent the implementation of concentrations in Articles 7 and 8 of the 2004 EMCR did not extend to requiring the divestment of the minority interest in the circumstances.

particular in so far as concerns the actions provided for in Article 226 EC Treaty (now Article 258 of the TFEU) and Article 234 EC Treaty (now Article 267 of the TFEU). The Court held that Aer Lingus invited the Court to examine a hypothesis which is invalid in so far as the application of Article 8(4) and (5) of the 2004 EMCR was not based on erroneous conclusions as claimed by Aer Lingus. The General Court held that where there is no concentration with an EU dimension, the Member States remain free to apply their national competition law to Ryanair's shareholding in Aer Lingus in accordance with the rules in place to that effect.

9 THE TREATMENT OF A MINORITY INTEREST UNDER PART 3 OF THE 2002 ACT

The CCPC has consistently confirmed that Section 16(1)(b) of the 2002 Act is limited to the acquisition of *de jure* and *de facto* control. The Competition Authority in its Submission to the Department of Enterprise Trade and Employment in relation to the Public Consultation on the Operation and Implementation of the Competition Act 2002 of December 2007⁴⁷ raised the issue of the jurisdictional confinement of the Irish mergers to acquisitions of control, highlighting the shortcomings of Section 4(1) of the 2002 Act to regulate non-controlling minority interests and the fact that some attendees at its 2005 Mergers Conference had asserted that passive investments should not be made subject to the merger review process since, in their view, competition concerns in relation to passive investments arise only in oligopolistic markets, and therefore, rare situations, and that the regime would lack clarity and certainty and not conform to best ICN practice. Furthermore, the Competition Authority in its submission to the OECD Competition Committee at the OECD Policy Roundtables Minority Shareholdings 2008⁴⁸ confirmed that the acquisition of

⁴⁷ Public Consultation on the Operation and Implementation of the Competition Act 2002 December 2007 S/07/008. The Competition Authority stated as follows:

- “3.54 In a number of merger cases the Competition Authority has paid close attention to minority shareholdings that fall short of control and has as part of the clearance of the merger required divestment.
- 3.55 At the moment the only way that the Competition Authority can deal with partial investments that may pose SLC concerns is via Section 4 of the Act, which is less than ideal. At best Section 4 is awkward; at worst, it does not apply at all.
- 3.56 At the April 2005 Mergers Conference hosted by the Competition Authority, some did not agree with the idea that passive investments should be made subject to the merger review process since, in their view, competition concerns in relation to passive investments arise only in oligopolistic markets, the situation is too rare to need to be brought into legislation. It would also lack clarity and certainty, and thus would not conform to ICN best practice.
- 3.57 Despite these views the Competition Authority thinks that it is worthwhile to raise the issue of minority investments that fall short of decisive control for discussion. Two issues need to be addressed. First, should the control be ex post or as with current merger control, ex ante. Second, what definition of partial or minority investment should be used? One possible way forward is for the Act to be changed to include reference to “material influence”, as exists in the UK and was recently applied in the BSKyB case referred to above. An alternative would be to specify a level of partial investment in the target. For example, something below 30% which triggers under Irish takeover rules the necessity of the partial investor making a takeover bid. In the interests of certainty and clear bright lines one option would be to have an ex ante approach based on a partial investment level at the high end of 0% to 30% with a review of the workings of this approach after four years.”

⁴⁸ The Competition Authority stated as follows:

“The merger provisions of the Competition Act 2002 employ the concept of decisive influence to delimit the scope of the Act with respect to mergers. Decisive control is the concept used by the EU and the Authority follows the European Commission’s guidance in the concept as set out in the New Jurisdictional Notice. No quantitative threshold is set for the percentage of shares required to exercise decisive control. However, situations of minority control that fall short of decisive control do not fall within the remit of the Act.

minority interests that fell short of conferring decisive influence were outside the definition of merger or acquisition under Part 3 of the 2002 Act and stated that one possible solution was to introduce a material influence test like that applicable in the UK.⁴⁹

There is no reason to believe that an Irish Court would arrive at a decision different from that of the General Court in the *Aer Lingus/European Commission* case referred to above in the context of determining whether or not a minority interest can amount to a merger or acquisition for the purposes of Section 16(1)(b) of the 2002 Act. Part 3 of the 2002 Act is very much modelled on EU merger control. The definition of merger or acquisition in Section 16 of the 2002 Act contains language which is very similar to the definition of concentration in Article 3 of the 2004 EMCR. If it difficult to see the basis on which an Irish court would decide not to follow the decision of the General Court in *Aer Lingus/European Commission* in the context of applying Part 3 of the 2002 Act. On the contrary, it is highly likely that an Irish Court would follow the interpretation provided by the General Court in the context of the 2004 EMCR particularly given that the mergers provisions of the 2002 Act follow the model in the 2004 EMCR, the structure and language used in the 2002 Act is very similar to 2004 EMCR and there is an express reference to the 2004 EMCR in Section 18(4) of the 2002 Act.⁵⁰ One could say that the interpretation of EU and national merger control systems were in some way brought closer together by the judgment of the ECJ in *Ernst & Young P/S v Konkurrencerådet* where the Court held that it had jurisdiction to accept a request for a preliminary ruling under Article 267 of the TFEU on the interpretation of the 2004 EMCR even though the issue in the national proceedings concerned domestic Danish merger control, where the Danish law contained no direct reference to the provisions of EU law whose interpretation was being sought and the Danish law did not exactly reproduce the provisions of the 2004 EMCR. The ECJ held that it had jurisdiction on the basis that the *travaux préparatoires* to the Danish merger control law showed that the Danish legislature's intent was to harmonise national merger control law with that of the EU and the referring court held that Danish law should be interpreted in the light of the case-law

The Authority has recently addressed the issue of minority control in the context of the current review of the Competition Act. One solution to the problem of the minority control is the UK concept of material influence."

OECD Policy Roundtables, *Minority Shareholdings* (OECD, 2008).

<<http://www.oecd.org/competition/mergers/41774055.pdf>>

⁴⁹ Please see Chapter 5.

⁵⁰ Section 18(4) of the 2002 Act states as follows: "Nothing in this section or any other provisions of this Act prejudices the operation of the Council Regulation."

of the General Court. Assuming an Irish court follows the approach taken by the General Court in *Aer Lingus/European Commission* in the context of Part 3 of the 2002 Act, the CCPC's jurisdiction to review on an *ex-ante* basis a proposed transaction concerning the acquisition of a minority interest only arises once the proposal would give rise to the acquisition of control/decisive influence either on a *de jure* or *de facto* basis within the meaning of Section 16(1) of the 2002 Act. The proposed acquisition of a minority interest falling short of such control would therefore fall outside of the compulsory notification regime set out in Parts 3 and 3A of the 2002 Act.

Assuming that an Irish court would follow the approach taken by the General Court in *Aer Lingus/European Commission* when interpreting the provisions of section 16(1) of the 2002 Act, the following principles would apply:

- 9.1 A minority interest which does not give rise to sole or joint control on a *de jure* or *de facto* basis within the meaning of Section 16(2) does not, of itself, give rise to a merger or acquisition under Part 3 of the 2002 Act; and
- 9.2 A single merger or acquisition will arise in cases where control over one undertaking is acquired by a series of transactions in securities from one or several sellers taking place within a reasonably short period of time. The merger or acquisition in these scenarios is not limited to the acquisition of the 'one and decisive' share, but will cover all the acquisitions of securities which take place in the reasonably short period of time.

It should be noted that Section 19(1) of the 2002 Act specifies that a merger or acquisition which requires notification under Part 3 of the 2002 Act must not be implemented until:

- (a) The CCPC has determined that the merger or acquisition may be put into effect under Section 21 or 22 of the 2002 Act; or
- (b) The CCPC has made a conditional determination in relation to the merger or acquisition; or
- (c) The period in Section 21(2) has elapsed without the CCPC having informed the undertakings which made the notification of its determination under Section 21(2)(a) or (b); or

- (d) 120 working days after the appropriate date have elapsed, or where a requirement to supply further information was imposed under Section 20(2), 120 working days and any period of extension that applied pursuant to Section 22(4A) after the appropriate date have elapsed, without the CCPC having made a determination under Section 22, whichever occurs first.

There is no equivalent in Part 3 of the 2002 Act to Articles 7(2) and 8(4) and (5) of the 2004 EMCR. Therefore, it is submitted that following the decision of the General Court in *Aer Lingus/European Commission*, the position under Part 3 of the 2002 Act is that the acquisition of a minority interest which, of itself, falls short of control does not constitute implementation of a merger or acquisition even where it is part of a plan to acquire control. In other words, if a purchaser has purchased a minority stake, which of itself falls short of control, in circumstances where the purchaser intends to acquire further securities as part of a series of transactions which will give rise to control but has not, at that stage acquired the remaining shares or other rights leading to sole or joint control, the acquisition of the above minority stake, of itself, will not be regarded as the partial implementation of the merger or acquisition.

Furthermore, it is submitted that the CCPC has no power to insist on the non-exercise of voting rights attaching to such a non-controlling interest given the absence in Part 3 of the 2002 Act of an equivalent provision to Article 7(2) of the 2004 EMCR.

10 DIFFICULTIES IN APPLYING THE TEST OF CONTROL

As can be seen from the above, the concept of control is central to the jurisdictional delineation of the Irish and EU merger control systems. As discussed in Chapter 1, there are various economic theories of harm which underline that non-controlling minority interests can pose issues from a competition perspective but escape the *ex-ante* system of merger control in Ireland and at EU level. It should be noted that quite apart from the limitations inherent in defining the jurisdictional scope of the *ex-ante* regime by reference to the concept of control, it is often very difficult to apply the control test as used in Irish and EU merger control law. *Outokumpu/Inoxum*⁵¹ is a good example of a case that illustrates the difficulties in arriving at a decision on the existence of control. The Commission appears to have taken an initial position in the Phase 1 merger review on whether or not an interest gave rise to control and

⁵¹ *Outokumpu/Inoxum* (Case No COMP/M.6471) Commission Decision 7 November 2012.

then changed its position in the subsequent Phase 2 review. In *Outokumpu/Inoxum*, the Commission reviewed the acquisition by Outokumpu Oyj of control of the undertaking Inoxum GmbH and Nirosta GmbH and the stainless steel division of ThyssenKrupp AG. The Commission had to decide as a matter of jurisdiction whether or not after the notified transaction, ThyssenKrupp, Solidium or any other person would have sole or joint control of Outokumpu. The Commission appears initially to have rejected the submission by Outokumpu that post-merger neither Solidium nor ThyssenKrupp would be able to exercise *de jure* or *de facto* sole or joint control of Outokumpu. However, the Commission changed its view during the Phase 2 merger review and concluded, on the facts, that no such control would exist post completion of the notified concentration. The *Outokumpu/Inoxum* case underlines the complexity of making the assessment of control in certain cases which, significantly, thereby demarcating the jurisdictional scope of the Irish and EU merger control regimes as they apply to minority interests.

11 ACQUISITION OF COMMON SHAREHOLDINGS AND MERGER CONTROL

It is abundantly clear that the acquisition by institutional investors of minority interests in businesses that compete with each other generally falls outside the Irish and EU merger control regimes, on the basis that the common shareholdings are not acquired as part of transactions giving rise to the requisite sole or joint control to fall within the definition of a merger or acquisition in Part 3 of the 2002 Act or the definition of a concentration in Article 3 of the 2004 EMCR. *Elhauge*⁵² has suggested that the 2004 EMCR “could be interpreted to mean that, if a series of acquisitions gave a set of horizontal shareholders enough shares that they might collectively exercise decisive influence over business activities, perhaps in part because other shareholders are dispersed, then the acquisitions that conferred that potential collective influence are subject to the merger regulation.” *Elhauge* asserts that The German Monopolies Commission in its 2018 Biennial Report⁵³ suggested such an interpretation. A review of the above report does not reveal such a suggestion. Indeed, The German Monopolies Commission concluded that it was at this stage premature to “take either competition law or regulatory measures” and

⁵² Einer Elhauge, 'How Horizontal Shareholding Harms Our Economy and Why Antitrust Law Can Fix It' (2020) 10 Harvard Business Law Review Issue 2 and Einer Elhauge, 'New Evidence, Proofs, and Legal Theories on Horizontal Shareholdings' (2018) Harvard Law School.

⁵³ Chapter II of the XXII Biennial Report of the Monopolies Commission (“Competition 2018”) in accordance with section 44, paragraph 1, sentence 1 of the German Act against Restraints of Competition.

<<http://www.monopolkommission.de>>

that before doing so “the academic community needs to deliver further insights and empirical evidence needs to be gathered of the link between common ownership and anticompetitive effects. In Europe in particular these links have not yet been systematically investigated.”

Ehlaug’s proposition is fundamentally flawed as it does not properly address a number of key steps necessary to found jurisdiction under Part 3 of the 2002 Act or the 2004 EMCR in the context of common shareholdings acquired by institutional investors. Firstly, the share acquisitions must be linked to give rise to a merger/acquisition for the purposes of Section 16 of the 2002 Act or a concentration under Article of the 2004 EMCR. As *Burnside and Kidane*⁵⁴ highlight, a series of acquisitions by institutional investors is incapable of being characterised as a single concentration. The acquisition of shares by multiple investors must be shown to be “unitary in nature” which requires an assessment of the “economic reality” of the situation and the economic aim of the parties and to be interdependent, in such a way, that one transaction would not have occurred without the other.⁵⁵ Recital 20 of the 2004 EMCR explains that it is 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.⁵⁶ The EU Consolidated Jurisdictional Notice clarifies that “if different transactions are not interdependent and if the parties could proceed with one of the transactions if the other ones would not succeed, it seems appropriate to assess these transactions individually under the Merger Regulation”.⁵⁷ The required conditionality can be established on a *de facto* or *de jure* basis. The above requirement of interdependence is overlooked by *Ehlaug* when asserting the possibility of jurisdiction. As *Burnside and Kidane* point out, *Ehlaug* does not address or adduce any evidence of how institutional investors could or have previously acted in concert to acquire the shares and that there is no valid basis for aggregating acquisitions by investment funds that pursue fundamentally different strategies and aims. They underline that “[g]iven different aims that are pursued even by funds that belong to the same family, the likelihood that acquisitions of

⁵⁴ Alec J Burnside and Adam Kidane ‘Common ownership: an EU perspective, *Journal of Antitrust Enforcement*’ (November 2020) Vol 8, Issue 3, 456–510.

⁵⁵ EU Consolidated Jurisdictional Notice, para 38.

⁵⁶ Judgment of the Court of First Instance in *Cementbouw v Commission* Case T-282/02 [2006] ECR II-319.

⁵⁷ EU Consolidated Jurisdictional Notice, para 38.

shares by funds that belong to different families are de jure or de facto interdependent within the meaning of the EUMR is impossibly remote”.

Separate from the requirement of share acquisitions by common shareholders being unitary and inter-dependent in nature, the shareholdings of institutional investors must be capable of conferring joint control in order for jurisdiction to be triggered under Part 3 of the 2002 Act or the 2004 EMCR. As discussed in section 7.2 above, “very exceptionally”, collective action giving rise to joint control can occur on a *de facto* basis by the commonality of interests between shareholders to the effect that they would not act against each other. The Commission explains that indicative of such a commonality of interests is a high degree of mutual dependency as between the shareholders or a high degree of dependency of one shareholder on another such as economic and financial dependence on a minority shareholder or where only the minority shareholder has the required know how for, and will play a major role in, the operation of the joint venture whereas the majority shareholder is a mere financial investor. The Commission underlines that in the absence of strong common interests such as those outlined above, the possibility of changing coalitions between minority shareholders will normally exclude the assumption of joint control.⁵⁸ *Elhauge* acknowledges that the EU Consolidated Jurisdictional Notice provides that “[i]n general, a common interest as financial investors (or creditors) of a company in a return on investment does not constitute a commonality of interests leading to the exercise of de facto joint control” but asserts that the use of the phrase “in general” is to acknowledge that sometimes it “is” the case and that horizontal shareholdings by institutional investors that lead to anticompetitive effects merit being treated as an exceptional case. He asserts that anticompetitive horizontal shareholdings are not covered by the above statement in the EU Jurisdictional Notice “because with such horizontal shareholdings the common interest is not just a return on an investment in “a company”, but is rather in anticompetitive profits across multiple competing firms”. *Burnside and Kidane* point out, this would be irrelevant to the assessment, even assuming there was a plausible basis to infer such a common interest. In particular, establishing a commonality of interests that is capable of giving rise to *de facto* joint control ultimately turns on the degree of mutual dependency between the minority shareholders, as opposed to the substance of the interest. As pointed out in section 7.6 above, there needs to be a high degree of mutual dependency between the shareholders, in particular, due to

⁵⁸ EU Consolidated Jurisdictional Notice, para 80.

economic or financial dependence or the minority shareholder(s) contributing critical knowhow.⁵⁹

As mentioned above, proving *de facto* joint control is further complicated by the fact that the possibility of changing coalitions among minority shareholders typically excludes joint control. *Ehlaug* focusses on the fact that the Commission states that the possibility of changing coalitions between minority shareholders will “normally” exclude the assumption of joint control and that therefore this does not mean “always” and that common shareholdings “merit being treated as an exceptional case”. However, *Ehlaug* does not adduce any cogent evidence in support of this proposition. It is very difficult to imagine the possibility of common institutional shareholders achieving a stable and consistent majority that displaces the possibility of changing coalitions in the context of a widely-dispersed shareholder base. *Burnside and Kidane* elegantly summarise the position as follows:

“It follows from the above that in the absence of (i) proven links between institutional investors, (ii) a commonality of interests that stems from mutual dependency, and (iii) a stable coalition that is capable of consistently garnering the majority of votes, there is no valid basis in fact or in law to establish *de facto* joint control. But all three elements are missing, making the application of the EUMR to common ownership a simple non-starter. To argue that the absence of a commonality of interests and/or a stable coalition does not entirely exclude *de facto* joint control, because something that is generally or normally the case does not mean that it is always the case, takes the argument no further: the evidentiary burden that needs to be discharged remains, and the prospect of doing so successfully is remote. Similarly, Elhauge’s repeated assertions, that common ownership by institutional investors that gives rise to anti-competitive effects merits being treated as ‘an exceptional case’, do not address how the application of the EUMR could be appropriately extended to common ownership. Even if the thesis that common ownership is anticompetitive were true, there must be a change of control in order to trigger an EUMR review. It is not enough to say that a change in prevailing enforcement practice would be required: fundamental changes to jurisdiction under the EUMR would have to be undertaken.”

⁵⁹ Please see *Nokia Corporation/SP Tyres UK Ltd* (Case No IV/M.458) Commission Decision 21 June 1994 and *Channel Five* (Case No IV/M.673) Commission Decision 22 December 1995.

12 EXAMINATION OF MINORITY INTERESTS AS PART OF A MERGER REVIEW

Although the acquisition of a minority interest not giving rise to sole or joint control falls outside the definition of merger or acquisition in Part 3 of the 2002 Act and Article 3(1) of the 2004 EMCR, it is clear that the CCPC or the Commission may examine non-controlling minority interests in the context of reviewing a transaction that clearly gives rise to a merger or acquisition. For example, the CCPC may be notified of a proposed transaction involving the purchase of 100% of the issued share capital of the target, thereby, unquestionably giving rise to the acquisition of sole control and, therefore, clearly coming within the jurisdiction of the CCPC for merger review (assuming that it meets the turnover thresholds or amounts to a media merger). The CCPC may, as part of the merger review, examine minority interests held by the purchaser or the target on the relevant markets as part of its substantive assessment as to whether or not the notified merger/acquisition gives rise to a substantial lessening of competition. It must be emphasised that the jurisdiction of the CCPC substantively to review the minority interest and to accept minority interest divestiture proposals and impose corresponding conditions arose in cases which involved the notification of a separate transaction which itself amounted to a merger or acquisition for the purposes of Section 16(1) of the 2002 Act or Article 3(1) of the 2004 EMCR which was independent and separate from the pre-existing minority interest concerned. In other words, the trigger event for the review of the competition implications of the existing minority interest was the notification of the subsequent notifiable transaction and not the acquisition of the minority interest itself which pre-dated the notified transaction. In Chapter 4, we review certain Irish and EU merger cases in which non-controlling minority interests were examined as part of the substantive review of a notified transaction. It is noteworthy that in each case the CCPC found that the notified transaction, of itself, did not give rise to a substantial lessening of competition but that the pre-existing minority equity interest raised significant competition issues and, therefore, the notified transaction could only be approved by the offer of a remedy in which the structural link was to be divested or at least severely controlled.

With regard to common shareholdings, as we shall see in Chapter 4, the Commission in *Dow/DuPont*⁶⁰ and *Bayer/Monsanto*,⁶¹ in relation to transactions notified under the 2004 EMCR, took account of the existence of common

⁶⁰ *Dow/DuPont* (Case No M.7932) Commission Decision 27 March 2017.

⁶¹ *Bayer/Monsanto* (Case No M.8084) Commission Decision 21 March 2018.

shareholdings in the relevant sector. In each of the above cases, the Commission concluded that in the presence of (i) common shareholding, concentration measures, such as market shares or the HHI, were likely to underestimate the level of concentration of the market structure and, thus, the market power of the parties; (ii) common shareholding was a reality in the biotech and agrochemical industry, both in terms of the number of common shareholders as well as with respect to the level of shares possessed by these common shareholders; and, thus, (iii) common shareholding in these industries were to be taken as an element of context in the appreciation of any significant impediment to effective competition that is raised.

Below, I briefly look at how the EU has framed the jurisdictional thresholds for the compulsory notification of transactions, outside of the field of competition policy, to include non-controlling minority interests in areas such as foreign direct investment. This is a much broader-based jurisdictional approach than that adopted, in a competition context, under the 2004 EMCR.

13 NON-CONTROLLING MINORITY INTERESTS AND FOREIGN DIRECT INVESTMENT

EU legislative initiatives designed to pursue the screening of foreign direct investment (FDI) policy objectives, outside of the sphere of competition policy, have been framed wide enough to target the acquisition of certain non-controlling minority interests. Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union⁶² empowers Member States to adopt measures to screen FDI in their territory on the grounds of security or public order. A good example of the use by a Member State of FDI legislation is the investment by Chinese state-owned COSCO Shipping Group in one of Hamburg's four shipping

⁶² OJ 2019 L791/1. The relationship between foreign direct investment and merger control has been the subject of recent discussion within the OECD. In November 2022, the OECD's Competition Committee jointly with the Investment Committee held a hearing to explore the relationship between FDI screening for essential security interests and merger control. In advance of the above hearing, an OECD Competition Policy Roundtable Background Note was prepared to inform the discussion. During the hearing, experts and delegates discussed whether conflicts may arise between FDI screening and merger control, for instance with regards to the outcomes of their respective analysis and the remedies and mitigation measures imposed. Although delegates found that so far conflicts have not materialised, this may change in the future, as FDI screening mechanisms become more established. Thus, enhanced co-operation and co-ordination may be warranted, following the pioneering example of some jurisdictions.

<<https://www.oecd.org/daf/competition/the-relationship-between-fdi-screening-and-merger-control-reviews-2022.pdf>>

container terminals. Under Germany's FDI laws,⁶³ the acquisition by a foreign investor of 10% of the voting rights or assets of a relevant German company require notification to the German Ministry for Economic Affairs and Climate Action. Following the notification of the proposed acquisition by COSCO of a 35% minority interest in the Hamburg port terminal, the Ministry, approved by the German cabinet, ordered that COSCO's acquisition of voting rights to remain below 25%,⁶⁴ on the grounds that the acquisition of 35% as notified would constitute a "threat to public order and security". The decision prohibits COSCO from acquiring any additional influence over the port terminal. It appears that the Ministry for Economic Affairs and Climate Action, various German Ministries and governmental agencies and the EU Commission favoured an outright prohibition whereas the Chancellor's office and the City of Hamburg favoured approval up to the 25% limit. Ireland is in the process of enacting legislation to implement Regulation 2019/452 namely, the Screening of Third Country Transactions Bill 2022,⁶⁵ which, if enacted in the current text, will require the notification of transactions being carried out by third country undertakings that relate to or impact on matters such as critical infrastructure, critical technologies, supply of critical inputs, access to sensitive information and freedom and pluralism of the media. The Bill specifically covers the acquisition of minority interests by including, among the criteria for mandatory notification, the acquisition by a third country undertaking of shares or voting rights in a relevant undertaking in the State from 25% or less to more than 25% or from 50% or less to more than 50%.

The above recent developments on FDI highlight how other policy objectives in the context of minority interests have been prioritised at EU level, and to that extent, highlights the current policy not to introduce changes at this stage to the treatment of minority interests (cross or common) under the EU regime for merger control.

⁶³ German Foreign Trade and Payments Act (Außenwirtschaftsgesetz-AWG) and the German Foreign Trade and Payments Ordinance (Außenwirtschaftsordnung-AWV).

⁶⁴ Press release from Bundesministerium für Wirtschaft und Klimaschutz dated 26 October 2022. The details of the decision remain confidential.

<<https://www.bmwk.de/Redaktion/DE/Pressemitteilungen/2022/10/20221026-bundeskabinett-verabschiedet-teiluntersagung-im-investitionsprufverfahren-hamburger-hafen.html>>

⁶⁵ As of 9 March 2013, the Bill has had its third reading in Dáil Eireann.

14 SUMMARY OF VERY LIMITED CIRCUMSTANCES IN WHICH ACQUISITION OF MINORITY INTEREST FALLS WITHIN THE DEFINITION OF MERGER OR ACQUISITION

The acquisition of a minority interest may amount to a merger or acquisition for the purposes of Section 16(1) of the 2002 Act or concentration in Article 3(1) of the 2004 EMCR in the following circumstances only:

- 14.1 The acquisition of a minority interest may amount to a merger or acquisition under Section 16(1)(b) of the 2002 or a concentration under Article 3(1)(b) but generally not under Section 16(1)(a) or (c) of the 2002 Act or Article 3(1)(a). In order for the acquisition of a minority interest to be caught by Section 16(1)(b) of the 2002 Act or Article 3(1)(b) of the 2004 EMCR, the minority interest must confer on the acquirer “control”. Control is defined in Section 16(2) of the 2002 Act and the 2004 EMCR by reference to the limited concept of “decisive influence”. As a result, the acquisition of a minority interest must confer control/decisive influence on a *de jure* or *de facto* basis in order to constitute a merger or acquisition under Part 3 of the 2002 Act or concentration under the 2004 EMCR.
- 14.2 Examples of exceptional circumstances discussed above in which a minority shareholder may acquire *de jure* sole control are the following:⁶⁶
 - 14.2.1 Where a prescribed majority of votes are required for the taking of certain decisions by the target company, the acquisition of a simple majority of voting rights may not confer the power to determine strategic decisions but it may be sufficient to confer a blocking right on the acquirer and therefore give rise to negative sole control;
 - 14.2.2 A minority shareholder holding shares with particular rights, sometimes referred to as golden shares in Ireland, which enable the shareholder to determine the strategic commercial behaviour of the target company such as the right to appoint or remove a majority of the members of the board of the directors.

⁶⁶ Please see section 7.3 of this Chapter below.

14.3 Examples of where a minority shareholder may acquire de facto sole control in particular circumstances as discussed above are⁶⁷ :

14.3.1 Where the minority shareholder is highly likely to achieve a majority at the shareholder's meetings given the level of its shareholding and the evidence resulting from the attendance at meetings in previous years;

14.3.2 The holding by a minority shareholder of an option to purchase or convert shares in circumstances where the option will be exercised in the near future in accordance with legally binding arrangements or where an option is granted in particular circumstances such as those set out in Ford/Hertz⁶⁸, where a minority shareholder could exercise certain conversion rights at short notice and without the need for further cash which would confer on it the right to appoint a majority of the board.

14.4 A minority interest may give rise to joint control on a *de jure* or *de facto* basis. Examples of situations where joint control has been found to exist are:

14.4.1 Where there is an equality of voting rights or where the shareholder has a right to appoint an equal number of members of the board of directors;

14.4.2 The grant of veto rights over significant decisions regarding the running of the relevant entity;

14.4.3 The joint exercise of voting rights;

14.4.4 Where a minority shareholder has a particular knowledge and experience of the business of the relevant entity and the majority shareholder plays a modest or non-existent role in the daily management of the joint venture business and the majority shareholder's presence is motivated by financial, long term strategy, brand image or general policy considerations.

14.5 The acquisition of a minority interest where control over one undertaking is acquired by a series of transactions in securities from one or several sellers taking place within a reasonably short period of time will amount to a merger or acquisition.⁶⁹ The merger or acquisition in these scenarios is not limited to the acquisition of the 'one

⁶⁷ Please see section 7.4 of this Chapter below.

⁶⁸ *Ford/Hertz* (Case No IV/M.397) Commission Decision 7 March 1994.

⁶⁹ EU Consolidated Jurisdictional Notice, para 48.

and decisive' share, but will cover all the acquisitions of securities which take place in the reasonably short period of time.⁷⁰ Therefore, the acquisition of a minority stake, which does not of itself amount to control, will be regarded as giving rise to a single merger or acquisition in circumstances where it takes place with one or more other purchases of securities in a reasonably short period of time and such purchases of securities lead to the acquisition of control. In *Aer Lingus v European Commission*, the Commission referred to Ryanair acquiring different tranches of shares in Aer Lingus over a short period of time namely, the first 19% stake less than 10 days before launching the public bid followed by the acquisition of a further 6% interest shortly thereafter in circumstances where Ryanair had confirmed that its acquisition of shares in Aer Lingus was part of a plan to acquire control of Aer Lingus. The Commission decision, which was upheld by the General Court, found that the entire operation comprising the acquisition of shares before and during the public bid period as well as the public bid itself constituted a single concentration within the meaning of Article 3 of the 2004 EMCR. Clearly, the above principle only applies where the minority stake forms part of a series of transactions in securities and is part of a plan to acquire control of the target. Therefore, the acquisition of a minority interest as part of a series of transactions in securities as above can give rise to a merger or acquisition subject to the *ex-ante* system of control.

- 14.6 The acquisition of a minority stake not giving rise to sole or joint control or not being part of a series of transactions in securities as per 13.5 above does not, of itself, amount to a merger or acquisition under Section 16(1) of the 2002 Act and is, therefore, not subject to the *ex-ante* system provided for in Part 3 of the 2002 Act.
- 14.7 Common shareholdings clearly do not amount to the acquisition of joint control - given the absence of interdependence of the share purchases of institutional common shareholders - for them to be treated as one and the same transaction and the fact that the purchases made by such shareholders will typically not give rise to the requisite level of *de facto* joint control due to the obvious absence of strong commonality of interest between such shareholders.

15 THE REGULATORY GAP

As demonstrated in section 14 above, minority interests in most cases fall outside the definition of merger or acquisition in Section 16(1) of the 2002 Act and concentration under the 2004 EMCR, respectively, and, therefore, are not required

⁷⁰ EU Consolidated Jurisdictional Notice, para 48.

to be notified on a compulsory basis under Part 3 of the 2002 Act or the 2004 EMCR. As we saw in Chapter 1, when examining well established economic theories of harm, the acquisition of minority interests, be they cross or common shareholdings, may in certain circumstances pose significant competition issues. The above analysis exposes a significant regulatory gap in the framework for the *ex-ante* review of transactions which potentially pose competition issues. The acquisition of harmful minority stakes is neither subjected to the competition scrutiny under Irish or EU competition law, nor within the reach of potential remedies which are afforded by the now, well established, merger review regime provided for in Part 3 of the 2002 Act and by the 2004 EMCR, respectively. Non-controlling minority interests only fall to be examined under the merger control regime as part of the assessment of a separate and independent transaction which itself gives rise to a merger or acquisition, such as where the notified operation is an acquisition of sole control of a target and the target holds one or more minority interests. It is interesting to note that the EU has recently framed the jurisdictional thresholds for the mandatory notification of transactions under the third country screening of foreign direct investment transactions to include certain non-controlling minority acquisitions but clearly decided not to similarly extend the thresholds for merger control purposes. The above *lacuna* in merger control results in a situation where the only machinery available in Irish competition law to control the acquisition of harmful non-controlling minority interests is the application of the general competition rules set out in Sections 4 and 5 of the 2002 Act or the EU equivalent in Articles 101 and 102 of TFEU. As we shall see in Chapter 3, the general competition rules are wholly inadequate in seeking to control minority interests for various reasons, including the fact that they typically apply *ex-post* facto in that their application is dependent on the CCPC, the Commission or a third party taking action to challenge a minority interest that has already been put in place and, therefore, possibly has had harmful effects and the fact that the successful application of the general competition rules require the CCPC, the Commission or the complainant to overcome technical jurisdictional hurdles such as the establishment of an “agreement” under section 4(1) of the 2002 Act or Article 101 TFEU or the existence of a “dominant position” for the purposes of Section 5(1) of the 2002 Act or Article 102 TFEU. Indeed, the EU Commission in its White Paper, expressly pointed out that it entertained doubts over whether the acquisition by Ryanair of shares in Aer Lingus *via* the Irish Stock Exchange amounted to an agreement for the purposes of Article 101 of the TFEU and prompted the EU Commission to refrain from taking action on the basis of Article 101 of the TFEU.

COMPETITION LAW AND THE REGULATION OF NON CONTROLLING MINORITY INTERESTS: THE REGULATORY GAP

CHAPTER 3

THE EXISTING REGIME FOR REGULATING NON-CONTROLLING MINORITY INTERESTS/THE REGULATORY GAP

1 EXISTING REGIME/INTRODUCTION TO APPLICATION OF GENERAL IRISH AND EU COMPETITION RULES TO MINORITY INTERESTS/THE REGULATORY GAP

The entire regulatory infrastructure for the control of minority shareholding interests which is available to the Irish Competition and Consumer Protection Commission (“**CCPC**”) and the EU Commission consists of: (i) the merger control regime providing for the *ex-ante* control of mergers and acquisitions as defined; and (ii) the general competition rules comprising of the prohibitions against restrictive agreements and abuse of a dominant position. In Chapter 2, the author carried out a review of the scope of merger control regimes under Irish and EU laws respectively which reveals that that neither of the Irish or EU merger control systems captures the acquisition of non-controlling minority interests. The non-application of the EU merger control regime to such minority shareholdings was confirmed by the General Court in *Aer Lingus*¹ in proceedings arising out of the attempted takeover by Ryanair of Aer Lingus. The purpose of this Chapter is to examine the only competition law framework for regulating the acquisition of non-controlling minority interests under Irish and EU law. This Chapter will reveal significant shortcomings in the above regimes which underscores the regulatory gap and obviates the need for reform.

At present, Irish and EU competition law regulates the acquisition of non-controlling minority interests by the application of the general competition rules governing restrictive agreements and practices and abuse of a dominant position. More specifically, Section 4(1) of the Competition Act (as amended) (“**2002 Act**”) and Article 101 of the Treaty on the Functioning of the European Union (“**TFEU**”)² prohibit restrictive agreements, decisions and concerted practices unless exempted. Section 5(1) of the 2002 Act and Article 102 of the TFEU prohibit undertakings that occupy a dominant position from abusing that position. The

¹ Case T-411/07 *Aer Lingus Group Plc v European Commission* Case [2010] ECLI:EU:T:2010:281.

² Treaty on the Functioning of the European Union [2012] C326/47.

Court of Justice of the European Union (“**CJEU**”) in its judgment in the *Philip Morris*³ case confirmed that Article 85(1) of the Treaty establishing the European Economic Community (“**EC Treaty**”) (now Article 101 of the TFEU) and Article 86 of the EC Treaty (now Article 102 of the TFEU) could apply to and the acquisition of a minority interest in a competitor.⁴ This landmark ruling set out the principle that Article 85(1) could apply to the acquisition of an equity interest in a competitor where the stake “serves as an instrument for influencing the commercial conduct of the companies in question” so as to restrict or distort competition on the market in which they carry on business and that, according to the CJEU,

1.1 This “will be true in particular where”:

1.1.1 The acquisition amounts to legal or *de facto* control of the commercial conduct of the competitor; or

1.1.2 Where the agreement provides for commercial cooperation between the companies or creates a structure likely to be used for such cooperation.

1.2 This “may” be true where the agreement gives the investing company the possibility of reinforcing its position at a later stage and taking effective control of the other company.

The CJEU held that Article 86 (as it was then) could apply to the acquisition by a dominant undertaking of an equity interest in a competitor where the shareholding results in “effective control” of the target “or at least some influence” on its commercial policy.

The principle established by the CJEU in *Philip Morris* that Articles 101 and 102 (as they are now known) could apply to the acquisition of legal, *de facto* or future effective control in a competitor, gave the political impetus to the adoption of Council Regulation (EC) No

³ Joined Cases 142 and 156/84 *British American Tobacco and another v Commission of the European Communities* [1987] ECR 1899.

⁴ The Treaty establishing the European Economic Community was signed in Rome on 25 March 1957 and entered into force on 1 January 1958 (the relevant competition provisions were Articles 85 and 86). The Treaty on the European Union [1992] OJ 191/1 was signed in Maastricht on 7 February 1992 and came into force on 1 November 1993 (it did not change the numbering of the relevant competition law provisions), the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts [1997] OJ C340/1 was signed in Amsterdam on 2 October 1997 and entered into force on 1 May 1999 (the relevant competition provisions became Article 81 and 82) and the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] C306/1 was signed in Lisbon on 13 December 2007 and came into force on 1 December 2009 and renamed both Treaties as the Treaty on the Functioning of the European Union (TFEU)). (the relevant competition provisions currently applicable are Articles 101 and 102 TFEU).

<<http://data.europa.eu/eli/treaty/teec/sign>>.

4064/89 of 21 December 1989 on the control of concentrations between undertakings⁵ (“**1989 EMCR**”), which for the first time, at EU level, provided for the prior control of concentrations exceeding given thresholds.⁶ As can be seen from Chapter 2, the 1989 EMCR, like its successor, namely, Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings⁷ (“**2004 EMCR**”) regulated the acquisition of control. As a result, the principle that Articles 101 and 102 could apply to the acquisition of an equity interest in a competitor giving rise to legal, *de facto* or future effective control was made largely redundant by the adoption of the system of EU merger control. However, the portion of the CJEU's judgement confirming the application of Article 101 and 102 to non-controlling minority interests was not affected by the introduction of the system of EU merger control to the extent that the latter regime was confined to acquiring controlling minority interests.

The principle enunciated by the CJEU in *Philip Morris* that the acquisition of a minority stake in a competitor (not giving rise to *de jure*, *de facto* or future effective control) could give rise to implications under Articles 101 and 102 of the TFEU still exists, and is currently unaffected by, EU merger control. There are a number of reported decisions at EU level in which the above prohibitions were applied post the introduction of the system of EU merger control. As we saw in Chapter 2, the General Court confirmed in *Aer Lingus* that the system for the prior notification of concentrations with an EU dimension under the 2004 EMCR does not apply to minority interests falling short of control (as defined), thereby exposing the regulatory gap in the machinery for the compulsory *ex-ante* control of mergers and acquisitions at EU level. The conditions that need to be met for a finding of a breach of Section 4(1) or 5(1) of the 2002 Act and Article 101 and 102 in the context of minority interests are examined below or, in other words, the circumstances in which Section 4(1)/5(1) of the 2002 Act and Articles 101/102 of the TFEU may serve to control the acquisition of minority interests which will reveal significant difficulties both in terms of the jurisdictional hurdles involved, the absence of prior control and the enforcement gap in that the system, which relies on breaches being uncovered largely through complaints by third parties.

⁵ Council Regulation (EC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings [1990] OJ L257/13.

⁶ The 1989 EMCR has been replaced by Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L24/1.

⁷ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L24/1.

2 SECTIONS 4/5 AND ARTICLES 101/102 AND MINORITY INTERESTS

As mentioned above, Section 4(1) and Article 101(1) of the TFEU prohibit restrictive agreements, decisions and concerted practices unless exempted and Section 5(1)/Article 102 prohibit undertakings that occupy a dominant position in the State/internal market or a substantial part of it from abusing that position.

2.1 Sections 4 and 5 of the 2002 Act

Section 4(1) of the 2002 Act prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition in trade in any goods or services in the State or in any part of the State unless the conditions for an exemption in Section 4(5) are satisfied.⁸ Section 5(1) of the 2002 Act prohibits any abuse by one or more undertakings of a dominant position in trade for any goods or services in the State or in any part of the State.⁹

⁸The text of Section 4 of the 2002 Act is as follows:

"4.-(1) Subject to the provisions of this section, all agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition in trade in any goods or services in the State or in any part of the State are prohibited and void, including in particular, without prejudice to the generality of this subsection, those which-

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions,
- (b) limit or control production, markets, technical development or investment,
- (c) share markets or sources of supply,
- (d) apply dissimilar conditions to equivalent transactions with other trading parties thereby placing them at a competitive disadvantage,
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which by their nature or according to commercial usage have no connection with the subject of such contracts.

(2) An agreement, decision or concerted practice shall not be prohibited under subsection (1) if it complies with the conditions referred to in subsection (5) or falls within a category of agreements, decisions, or concerted practices the subject of a declaration for the time being in force under subsection (3).

(3) Either competent authority may in writing declare that in its opinion a specified category of agreements, decisions or concerted practices complies with the conditions referred to in subsection (5), but only with the concurrence of the other competent authority. If the competent authority that made the declaration later forms the opinion that the category no longer complies with those conditions, it may revoke the declaration, but only with the concurrence of the other competent authority.

(4) The competent authority shall publish, in such manner as it thinks fit, notice of the making of a declaration under subsection (3), and of any revocation by it of such a declaration.

(5) The conditions mentioned in subsections (2) and (3) are that the agreement, decision or concerted practice or category of agreement, decision or concerted practice, having regard to all relevant market conditions, contributes to improving the production or distribution of goods or provision of services or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit and does not-

- (a) impose on the undertakings concerned terms which are not indispensable to the attainment of those objectives,
- (b) afford undertakings the possibility of eliminating competition in respect of a substantial part of the products or services in question."

⁹ The text of Section 5 of the 2002 Act is as follows:

2.2 Text of Articles 101 and 102 of TFEU

Article 101 of the TFEU prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market unless the conditions for the grant of an exemption under Article 101(3) are satisfied.¹⁰ Article 102 of the TFEU prohibits any abuse

"5.-(1) Any abuse by one or more undertakings of a dominant position in trade for any goods or services in the State or in any part of the State is prohibited.

(2) Without prejudice to the generality of subsection (1), such abuse may, in particular, consist in-

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions,
- (b) limiting production, markets or technical development to the prejudice of consumers,
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage,
- (d) making the conclusion of contracts subject to the acceptance by other parties of supplementary obligations which by their nature or according to commercial usage have no connection with the subject of such contracts."

¹⁰ The text of Article 101 of the TFEU is as follows:

"Article 101

(ex Article 81 TEC)

1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development, or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings,
- any decision or category of decisions by associations of undertakings,
- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

by one or more undertakings of a dominant position within the internal market or in a substantial part of it in so far as it may affect trade between Member States.¹¹

2.3 Requirement for “Agreement” or ”Decision” or “Concerted Practice” under Section 4/Article 101

One of the constituent elements that must be found to exist for a finding of a breach of Section 4(1) of the 2002 Act and Article 101 of the TFEU, respectively, is the existence of an agreement between undertakings or a decision by an association of undertakings or a concerted practice between undertakings. There are various decisions of the European Courts defining the concept of an agreement for the purposes of Article 101 of the TFEU¹² which make it clear that the agreement for this purpose can be proved by direct documentary evidence such as a written agreement¹³ or by inference from the conduct of the parties.¹⁴ In *BAI and Commission v Bayer*,¹⁵ the CJEU held an agreement within the meaning of Article 85(1) of the Treaty of the European Economic Community¹⁶ is capable of being regarded as having been concluded by tacit acceptance and that for this purpose:

“...it is necessary that the manifestation of the wish of one of the contracting parties to achieve an anti-competitive goal constitute an invitation to the other party, whether express or implied, to fulfil that goal jointly, and that applies all the more where, as

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.”

¹¹ The text of Article 102 of the TFEU is as follows:

“Article 102

(ex Article 82 TEC)

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.”

¹² Kelvin Hui Fai Kwok, ‘The Concept of “Agreement Under Article 101 TFEU: A Question of EU Treaty Interpretation’ (20 December 2018) 44 European Law Review 196, University of Hong Kong Faculty of Law Research Paper No 2019/028.

<<https://ssrn.com/abstract=3364499>>

¹³ Case 41/69 *ACF Chemiefarma v Commission* [1970] ECR 661.

¹⁴ Case C277/87 *Sandoz* [1990] ECR I-45.

¹⁵ Cases C-2&3/01P *BAI and Commission v Bayer* [2004] ECR I-23.

¹⁶ Now the TFEU.

in this case, such an agreement is not at first sight in the interests of the other party, namely the wholesalers. ¹⁷

In *Commission v Volkswagen*¹⁸, the CJEU stated as follows:

“...in order to constitute an agreement within the meaning of Article 81(1) EC [now known as Article 101 TFEU], it is sufficient that an act or conduct which is apparently unilateral be the expression of the concurrence of wills of at least two parties, the form in which that concurrence is expressed not being by itself decisive. “

The EU Commission carried out a consultation in 2013 seeking views on whether or not the 2004 EMCR should be extended to encompass “non-controlling minority shareholdings” which it defines as “structural links” (“**2013 Consultation**”) as part of the system of *ex-ante* mandatory notification to the Commission of transactions which meet given turnover thresholds and, for this purpose, it published Commission Staff Working Document Towards more effective EU merger control¹⁹(“**SWD 2013 Consultation**”)²⁰. The Commission, in the SWD 2013 Consultation, examined the existing non-merger machinery for controlling minority interests in Article 101 of the TFEU, and in this context, cast doubt over the existence of an agreement to found jurisdiction to intervene under Article 101 in certain cases as follows:

“Whereas the Court of Justice in the past considered that structural links may fall under Article 101 TFEU, 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.”

¹⁷ Bayer had imposed an export ban on wholesalers which the Commission held amounted to an agreement for the purposes of Article 85(1) of the EC Treaty. The Court of First Instance (“CFI”, now the “**General Court**”) on appeal held that the Commission had erred in its assessment of the facts and the legal conclusion it drew that the imposition of the export ban amounted to an agreement in the circumstances and the CJEU on appeal upheld the CFI’s decision on this point and dismissed the appeal.

¹⁸ Case C74/04P *Commission v Volkswagen* [2006] ECR I-6585.

¹⁹ Commission Staff Working Document Towards more effective EU merger control.

<http://ec.europa.eu/competition/consultations/2013_merger_control/merger_control_en.pdf>

²⁰ Commission Staff Working Document Towards more effective EU merger control. The consultation period was from 20 June 2013 to 12 October 2013.

<http://ec.europa.eu/competition/consultations/2013_merger_control/merger_control_en.pdf>

The Commission in 2014 published its White Paper Towards more effective merger control dated 9 July 2014²¹ (“**White Paper**”) together with the Commission Staff Working Document accompanying the White Paper Towards more effective EU merger control dated 9 July 2014²² (“**SWD White Paper**”). In its SWD White Paper, the Commission explained in the context of minority interests that the requirement for an agreement to be established was viewed by the Commission as a limitation on the application of Article 101 to the acquisition of minority interests as follows:

“However, the Commission's ability to use Article 101 and Article 102 TFEU to intervene against anti-competitive minority shareholdings may be limited. Regarding Article 101, it is not clear whether acquiring a minority shareholding would constitute an “agreement” having the object or effect of restricting competition within the meaning of Article 101 TFEU in all cases. Particularly regarding acquisitions of a series of shares via the stock exchange, the application of Article 101 TFEU might present a number of conceptual difficulties such as whether there is an agreement. If there is, the Commission would still have to determine whether such an agreement would have the object or effect of restricting competition and, if so, which purchase agreement specifically does so. The same is probably true for the articles of association of a company, the purpose of which is generally to determine the corporate governance of the company and the relationship between it and its shareholders.”²³

²¹ European Commission, *White Paper: Towards more effective EU merger control* (9 July 2014).

<<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014DC0449&from=EN>>

²² Commission staff working document provided a more detailed analysis of the considerations underlying the White Paper and its policy proposals.

<http://ec.europa.eu/competition/consultations/2014_merger_control/staff_working_document_en.pdf>

²³ The above contrasts sharply with the view expressed by the Commission in its Green Paper on the Review of Council Regulation (EEC) No 4064/89 [1989] OJ L395/1 adopted on 11 December 2001 as to the adequacy of its Article 101 toolkit as follows:

“109. At this stage the Commission is not in the possession of comprehensive data as to the prevalence of minority shareholdings and interlocking directorships. However, based on current experience, it appears that only a limited number of such transactions would be liable to raise competition concerns that could not be satisfactorily addressed under Articles 81 and 82 EC. Under this assumption it would appear disproportionate to subject all acquisitions of minority shareholdings to the ex ante control of the Merger Regulation. At the same time it appears doubtful whether an appropriate definition could be established capable of identifying those instances where minority shareholdings and interlocking directorships would warrant such treatment.”

<<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52001DC0745&from=EN>>

Similar to share acquisitions *via* a stock exchange, it has also been suggested that “hostile” acquisitions of shares without the consent of the target falls outside Article 101(1) on the basis of the absence of an agreement or concerted practice.²⁴

The above reference in the SWD White Paper to the Articles of Association is intended to refer to the provisions of the company laws of certain Member States which expressly refer to the constitution of a company as amounting to an agreement between shareholders. For example, Section 31 (1) of the Irish Companies Act 2014 provides as follows:

“31. (1) Subject to the provisions of this Act, the constitution shall, when registered, bind the company and the members of it to the same extent as if it had been signed and sealed by each member, and contained covenants by the company and each member to observe all the provisions of the constitution and any provision of this Act as to the governance of the company.”

In other words, the effect of the above-mentioned Section 31(1) is that once a person becomes a member of an Irish registered company, the member is statutorily deemed to have entered into an agreement with the other members to observe the provisions of the constitution and the Companies Act 2014.

*Burnside*²⁵ asserts that the application of national company laws such as Section 31(1) of the Companies Act 2014, which creates an agreement among shareholders with each other and with the company, suffices to found an agreement between undertakings for Article 101 purposes arguing that the agreement based on such a provision is “far more real than others which the European Commission has chosen to pursue, identifying agreements (for example) from the course of conduct between a manufacturer and its wholesalers”. He continues by arguing that the above company law agreement based on constitutional documents “is far more real than the contrivance of attacking a share acquisition agreement, as was done (to suit the Commission’s then agenda) in *Philip Morris*. If this is an enforcement gap it is one of the Commission’s own choosing, not one based on

²⁴ Anna Tzanaki, ‘The Legal Treatment of Minority Shareholdings Under EU Competition Law: Present and Future’ (April 2015) University of Piraeus - Essays in Honour of Professor Panayiotis I Kanellopoulos, Sakkoulas Publications, 861-886.

Lionel Lesur and Jacques Buhart, ‘Minority Shareholding and Competition Law: A Necessary European Reform’ (December 2013) *Concurrences*.

²⁵ Alec J Burnside, ‘Minority Shareholdings: An overview of EU and national case law’ (September 2013) *e-Competitions Bulletin* No 56676 13.

impotence.”²⁶ *Bas*²⁷ suggests that the above statutory contract addresses both the issue of the existence of an agreement and the requirement that the agreement be between undertakings.²⁸

The Commission in *Competition policy brief*²⁹ reiterated its doubts on the question of the existence of an agreement.

The President of the General Court in *Aer Lingus Group Plc v Commission of the European Communities*³⁰ in his order made on foot of the application by Aer Lingus for interim measures, raised doubts over the existence of an agreement for the purposes of Article 101 where he stated that “Article 81 EC might, *prima facie*, be difficult to apply in cases, such as the present, in which the infringement in question arises from the acquisition of shares on the market and, therefore, the necessary meeting of minds might be difficult to establish...”

The Irish Competition Authority³¹ at the 2008 OECD Policy Roundtable on Minority Shareholdings underlined the above jurisdictional issue as follows:

“The Competition Authority recently had cause to consider whether minority shareholdings could be amenable to analysis as an anti-competitive agreement. Any agreement between competitors to hold shares in each other or to have cross directorships would clearly be open to scrutiny under the prohibition under the Competition Act 2002. However, in the case where the shares are acquired in the public market from other third parties (many of whom may not be undertakings under

²⁶ The above position is supported by Kadir Bas, ‘Reforming the Treatment of Minority Shareholdings in the EU: Making the Problem Worse Instead of Better?’ (2015) *World Competition* 38 No 1, 77-106.

²⁷ Kadir Bas, ‘Reforming the Treatment of Minority Shareholdings in the EU: Making the Problem Worse Instead of Better?’ (2015) *World Competition* 38 No 1, 77-106.

²⁸ Please see section 2.4 of this Chapter.

²⁹ “Article 101 only applies to *agreements* that have the *object* or *effect* of restricting competition, such as cartels. When it comes to the purchase of minority shareholdings, it is difficult if not impossible to identify a relevant “agreement” in the first place, for instance in the case of purchases via the stock exchange or from multiple sellers. Even where a share purchase agreement exists, these transactions are on the face of it competition-neutral, which makes it in most cases legally difficult to prove an anti-competitive object or effect. Alternatively, one would have to demonstrate that the articles of association or by-laws of a company were anti-competitive. This is far-fetched, as their purpose is to organise the corporate governance of a legal person. Also, it would affect parties to the agreement who have not pursued any anti-competitive objectives, such as the seller of a shareholding or the other shareholders of the target company”. Issue 15 October 2014.”

³⁰ Order of the President of the General Court Case T-411/07 *Aer Lingus Group Plc v Commission of the European Communities* [2008] ECR II 411.

³¹ Now the Competition and Consumer Protection Commission (“CCPC”). The CCPC replaced the former Competition Authority and was established on 31 October 2014 under Section 9(1) of the Competition and Consumer Protection Act 2014 (“2014 Act”) and the Competition and Consumer Protection (Establishment Day) Order (SI No 367 of 2014) as of 31 October 2014.

our legislation) it would seem difficult to apply the prohibition on anti-competitive agreements. Hence, in many cases it would be difficult (if not impossible) to look at a series of transactions whereby one competitor became a minority shareholder in its competitor as a series of anti-competitive agreements between undertakings.”³²

No doubt, the CCPC was referring to the *Ryanair/Aer Lingus* case although it did not expressly say so.

The CCPC in its submission³³ as part of the 2013 Consultation specifically acknowledged the limitations of Article 101 of the TFEU arising from the requirement to find the existence of an agreement.

*Struijlaart*³⁴ raises doubts over the issue of having to find an agreement in the context of the acquisition of non-controlling minority interests by stating that “one might wonder whether Article 81(1) (now known as Article 101(1) TFEU) could apply in situations in which a minority acquisition would not be accompanied by other agreements” and that in such case “it would appear unlikely that there would be an agreement or concerted practice in the sense of Article 81(1).” He points out that at the time of writing the above article in 2002, there had not been any cases in which the Commission applied Article 81(1) to minority share acquisitions which were not part of a wider set of agreements.

Struijlaart examines the questions of share acquisitions on stock markets. He stresses that “Article 81(1) envisages behaviour displayed by two or more undertakings together” and asserts that it “would be too far-fetched to consider an agreement on the sale and purchase of shares as an agreement in the sense of Article 81(1). He argues that it would, “save in very exceptional and specific circumstances-be contrary to legal certainty if an undertaking selling on a stock market (where it will very often not even sell itself but through an intermediary stock broker) would see the sales agreement declared void and might even be fined, simply because it has sold a shareholding in a competitor of the buyer. It must be

³² OECD Policy Roundtables, *Minority Shareholdings* (OECD, 2008).

<<http://www.oecd.org/competition/mergers/41774055.pdf>>

³³ “The Authority recognises that although in certain circumstances it may be possible to pursue a case involving the acquisition of a non-controlling minority shareholding or the creation of structural links under Article 101 or Article 102 of the Treaty of European Union (“TEU”), such cases would be fraught with pitfalls and difficulties. Article 101 for example at the very outset requires an ‘agreement’ (whether written or not) to exist and such a situation would not arise where shares are built up in a company based on the acquisition of shares traded freely on a stock exchange, whereas a private share purchase agreement for shares in a private company may constitute an ‘agreement’ for the purposes of Article 101.”
<http://ec.europa.eu/competition/consultations/2013_merger_control/irish_competition_authority_en.pdf>

³⁴ Robin A Struijlaart, ‘Minority Share Acquisitions below the Control Threshold of the EC Merger Control Regulation: An Economic and Legal Analysis’ (2002) *World Competition* 25(2), 173-204.

assumed that a stronger form of understanding between seller and buyer will be necessary for this to be justified.”

It is submitted that there is a significant risk that any agreement between shareholders which is statutorily created under Section 31(1) of the Companies Act 2014 in Ireland or its equivalent under the laws of any other Member State would be viewed by the Irish or EU courts as principally for the purpose of corporate governance in particular for determining the rights and obligations of directors and shareholders and therefore too remote from the share sale and purchase arrangement which gives rise to the possible restriction of competition and, therefore, as not amounting to an “agreement” between undertakings whose object or effect is to give rise to a restriction of competition for Irish or EU competition law purposes. In other words, the requisite nexus between the agreement created by statute and the restriction of competition in question would appear to be lacking. Furthermore, it is difficult to see how a Court would accept that an agreement exists for the purposes of Section 4 or Article 101 where shares are purchased *via* a stock exchange typically through brokers where the identity of the counterparty is not known, and therefore, there is no clear discernible “agreement” or “concerted practice” between the seller, on the one hand, and either the target company itself, or the acquirer, of the shares on the other. The significant doubt over the presence of an agreement in relation to the purchase by Ryanair of shares in Aer Lingus *via* stock exchange transactions rendered the EU Commission powerless to intervene under Article 101 of the TFEU once it was established by the General Court that the stake did not give rise to control, and was therefore outside of the remit of the EU merger control regime.³⁵

The issue over the existence of an agreement or concerted practice has featured in academic debate regarding the application of Article 101 to common ownership. *Elhauge*³⁶ has argued that *Philip Morris* allows horizontal shareholdings to be condemned as agreements under Article 101 and that the concept of concerted practices “applies readily to horizontal shareholdings, which causes firms to no longer behave independently because they are indirectly linked through their common shareholders in a way that influences their competitive behaviour. Such horizontal shareholding thus suffices to create a concerted practice among the competing firms.” The above is fundamentally flawed and does not properly take account of the decisions of the European Courts cited above regarding the requisite elements that need to exist for a finding as to the existence of an agreement or

³⁵ Please see Chapter 2.

³⁶ Einer Elhauge, ‘How Horizontal Shareholding Harms Our Economy-and Why Antitrust Law Can Fix It’ (2020) 10 Harvard Business Law Review Issue 2.

Einer Elhauge, ‘New Evidence, Proofs, and Legal Theories on Horizontal Shareholdings’ (2018) Harvard Law School.

concerted practice for the purposes of Article 101. As *Burnside and Kidane*³⁷ point out, *Philip Morris* involved negotiated agreements whereas, shares in a common ownership setting are typically acquired on the open market from unknown vendors. Unlike share transfers in limited companies, common ownership does not involve the entry into of direct joint agreements or arrangements among institutional investors, or between institutional investors and listed companies for the acquisition of shares.

2.4 Requirement that the Agreement or Concerted Practice be “between undertakings” under Section 4/Article 101

Section 4(1) of the 2002 Act/Article 101(1) TFEU only apply to agreements between undertakings. The term undertaking is defined in Section 3(1) of the 2002 Act as “a person being an individual, a body corporate or an unincorporated body of persons engaged for gain in the production, supply, or distribution of goods or the provision of a service”³⁸. There are various decisions of the Irish Courts, the CCPC and its predecessor, the Competition Authority, the EU Commission and the European courts exploring the concept of undertaking for the purposes of Irish and EU competition law.³⁹ Section 4(1)/Article 101(1) can only apply if two or more of the parties each constitutes an undertaking which may be problematic in transactions involving the sale and purchase of equity stakes by individuals. For example, if a seller, being an individual, is selling a minority stake in a target, and the selling individual independently controls a business which is unrelated to the target business, the selling individual may be regarded as a undertaking, and the Share Sale Agreement might be viewed as an agreement between undertakings, whereas if the selling individual had no such outside business interest, he may not be regarded as an undertaking

³⁷ Alec J Burnside and Adam Kidane, ‘Common ownership: an EU perspective, *Journal of Antitrust Enforcement*’ (November 2020) Vol 8, Issue 3, 456–510.

³⁸ There is no equivalent definition of “undertaking” in EU competition law. For a discussion of the concept of undertaking at EU level, please see Alison Jones, ‘The boundaries of an undertaking in EU Competition Law’ (2012) *European Competition Journal*, 8(2), 301-331 and Okeoghene Odudu, ‘The Boundaries of EC Competition Law: The Scope of Article 81’ (2006) Oxford Academic, ch 3.

<<https://academic.oup.com/book/4456/chapter-abstract/146467767?redirectedFrom=fulltext>>

³⁹ Please see n 38 above. Please see *Sibra Building Company Limited v Palmerstown Centre Development*, unreported, High Court, Keane J, 24 November 1994.; *Deane v VHI* [1992] 2 IR 319; *Medicall Ambulance Limited v Health Service Executive* [2011] ECH 76; Case C-475/99 *Ambulanz Glockner v Landkreis* [2001] ECR I-8089; *Greally v The Minister for Education and others* [1995] 3 I.R. 481; *Carrigaline Community Broadcasting Co Ltd t/a South Coast Community Television Broadcasting Service and Gabriel Hurley v Minister for Transport, Energy and Communications and others* [1997] 1 ILRM 241; *Wheelbin Services Limited v County Council of the County of Kildare*, unreported, High Court, Ó Caoimh J, 21 December 1999; Competition Authority Investigation into alleged Anticompetitive conduct by the Health Service Executive relating to the administration of the Community Drug Schemes Enforcement Decision 10 October 2008 (ED/01/008); *Island Ferries Teoranta v Galway County Council* [2013] IEHC 587; and *Lifeline Ambulance Services Limited v Health Service Executive* [2012] IEHC 432.

and the prohibitions in Section 4(1)/Article 101(1) would not apply. In *Reuter/BASF*,⁴⁰ the Commission held in the context of a restrictive covenant in a sale and purchase agreement that the seller, Dr Reuter, was to be regarded as an undertaking for the purposes of Article 85 (as it was then), since he engaged in economic activity through firms which remained under his control and by exploiting the results of his own research and by acting as a commercial advisor to third parties. Clearly, it was his independent business interests that rendered him an undertaking, failing which the agreement would have fallen outside Article 85. In other words, the characterisation of the seller as an undertaking becomes crucial to the application of Section 4(1)/Article 101(1), failing which, the prohibition does not apply (assuming that the purchaser is an undertaking). The above produces the absurd situation where the seller's position or role, defines the application of the prohibition, even though competition law often ignores the seller's position on the basis that it is irrelevant to an assessment of the competitive effects or implications of the transaction at issue. For example, Part 3 of the 2002 Act, which contains the regime for the prior notification of mergers excludes at Section 18(2)(b) the seller as an undertaking involved in a merger or acquisition as follows:

“(b) subject to *paragraph (c)* an undertaking shall not be deemed to be involved in a merger or acquisition by virtue only of its being the vendor of any securities or other property involved in the merger or acquisition”.

The requirement that there be two or more undertakings can place a highly technical jurisdictional barrier to the application of Section 4(1)/Article 101(1). The determination of whether a person is acting as an undertaking can entail a substantial amount of analysis,⁴¹ which in some cases, has little or no impact on the substantive competition issues.

It is curious that the Commission and the CCPC have regarded an individual as an undertaking for the purpose of Section 4/Article 101 on the basis of the future purchase of a business. In *Nutricia*,⁴² the Commission regarded the individual, Drs de Rooij, as an undertaking for the purposes of Article 85 of the EC Treaty on the basis that he, as purchaser of a business, was the future proprietor of the business. Similarly, in *Phil Fortune and Budget Travel*,⁴³ the Irish Competition Authority held that Phil Fortune, a former

⁴⁰ Case IV/28.996 *Reuter/BASF* Commission Decision [1976] OJ L254/40.

⁴¹ Please see n 38 and 39 above.

⁴² Case IV/30.408 *Nutricia* Commission Decision [1983] OJ L376/22 on appeal Case 42/84 *Remia v Commission* [1985] ECR 2545.

⁴³ *Phil Fortune and Budget Travel* (Decision No 9) Decision of the Competition Authority 14 September 1992.

employee of the target business, as the purchaser of the target business, was acting as an undertaking in the context of the agreement for the purchase of the business. It is submitted that the above characterisation of the individual buyer as an undertaking on the basis of a future purchase of a business is flawed as, at the time of the entry into the relevant agreement, the purchase transaction had not completed, and of course may never complete. It is noteworthy that the main limb of the definition of merger or acquisitions in Section 16(1)(b) of the 2002 Act expressly limits this aspect of the definition to individual buyers “who already control one or more undertakings”. Similarly, Article 3(1)(b) of the 2004 EMCR refers to the acquisition by one or more persons “already controlling at least one undertaking” which the Commission clarifies in the EU Consolidated Jurisdictional Notice means that acquisitions of control by natural persons are only considered to give rise to a concentration for the purposes of the 2004 EMCR if the natural persons carry out further economic activities on their own account or if they control at least one other undertaking for competition law purposes.⁴⁴ The above would, for merger control purposes, clearly exclude characterising an individual as an undertaking on the basis of a future uncompleted prospective purchase.

In certain cases, the Irish Competition Authority regarded an individual holding a controlling minority equity interest before and after an acquisition as an undertaking for the purposes of Section 4(1)/Article 101 by virtue of the equity interest concerned. In *Cambridge-ACT/Imari*,⁴⁵ the Competition Authority considered the acquisition by Cambridge Investments Limited/Cambridge Equity Fund of a 19% minority interest in Imari Limited. In its decision, the Authority held that Mr. O'Neill, as a founding shareholder and managing director of the target with responsibility for the day to day management of the target holding 29% and 21% of the issued share capital of the target pre and post-acquisition, respectively, meant that he “exercises considerable de facto control over the business” and was therefore an undertaking. In *Scully Tyrell & Company and Edberg Limited*,⁴⁶ the Authority held that a number of individuals that were selling a business but retaining a 38% interest were undertakings both because they owned and controlled the target prior to the acquisition and because they, as part of the retention of the 38% interest, were granted extensive powers under the shareholders agreement and therefore going forward would be able to exert control over many facets of the target's operations.

⁴⁴ EU Consolidated Jurisdictional Notice, para 12. Please see section 2 of Chapter 1.

⁴⁵ *Cambridge-ACT/Imari* (Decision No 24) Decision of the Competition Authority 21 June 1993.

⁴⁶ *Scully Tyrell & Company and Edberg Limited* (Decision No 12) Decision of the Competition Authority 29 January 1993.

The CCPC at the 2008 OECD Policy Roundtable on Minority Shareholdings touched upon the difficulty posed by the jurisdictional requirement that the parties act as undertakings for Article 101 to apply.⁴⁷

It is clear that the purchase by a company, on a stock exchange, of non-controlling equity interests in a competitor such as occurred in *Ryanair/Aer Lingus*, apart from the issue of the existence of an agreement or practice as discussed in 2.3 above, suffers from the separate jurisdictional impediment of not involving a plurality of undertakings in circumstances where the seller does not control another business.

It is at best surprising that the Commission, in either the SWD 2013 Consultation or in the White Paper/SWD White Paper, does not explore the requirement that the agreement be between undertakings as a limitation in the application of Article 101 to minority interests.

2.5 Dominance/Section 5(1)/Article 102

The Commission has consistently signalled the limitations of applying Article 102 to the acquisition of minority interests. In the SWD 2013 Consultation, the Commission highlights the difficulties of applying Article 102 in terms of the hurdle of having to establish dominance and abuse in relation to minority interests as follows:

“The structural link is built up by the acquisition of a series of shares via the stock exchange. The requirements of Article 102 TFEU, that the acquiring undertaking should already be dominant and that the acquisition should constitute an abuse would allow the Commission to deal with the competitive harm which may arise from structural links only in very narrow circumstances.”⁴⁸

The Commission in the SWD White Paper reiterates the above limitations as follows:

“Regarding Article 102 TFEU, this provision requires that the undertaking acquiring a minority shareholding already hold a dominant position and that the acquisition would constitute an abuse of that dominant position. The circumstances under

⁴⁷ OECD Policy Roundtables, *Minority Shareholdings* (OECD, 2008).

<<https://www.oecd.org/daf/competition/41774055.pdf>>

⁴⁸ SWD 2013 Consultation, para 6.

which the Commission can intervene against competitive harm arising from acquisitions of minority shareholdings are therefore quite narrow.”⁴⁹

The Commission in *Competition policy brief*⁵⁰ states as follows:

“Article 102 does not offer a straightforward way of tackling minority shareholdings either. First of all, in order for an acquisition of a minority shareholding to constitute an abuse of a dominant position, the buyer would have to hold a pre-existing dominant position in the relevant market. Second, the acquisition of the shareholding would have to be qualified as an “abuse”, i.e. as an attempt to foreclose competitors or exploit customers.”

The CCPC in its submission⁵¹ as part of the 2013 Consultation underlines the limitations of Article 102 of the TFEU in regulating non-controlling minority interests as follows:

“With respect to Article 102, the requirement, at the outset to prove the existence of a dominant position and then to prove that this dominant position has been abused through the acquisition of structural links can make challenging a partial acquisition difficult, as the Commission has set out.”

Section 5 of the 2002 Act and Article 102 of TFEU prohibit any “abuse by one or more undertakings of a dominant position” which has been interpreted to apply not only to single firm dominance but also to joint or collective dominance. The existence of a structural link such as a minority interest has been held to be a factor which should be taken into account in determining whether or not two or more independent undertakings occupy a joint or collective dominant position. In *Flat Glass*⁵², the General Court held as follows:

“There is nothing, in principle, to prevent two or more independent economic entities from being, on a specific market, united by such economic links that, by virtue of that fact, together they hold a dominant position vis-à-vis the other operators on the same market. This could be the case, for example, where two or more independent undertakings jointly have, through agreements or licences, a technological lead

⁴⁹ SWD White Paper, para 62.

⁵⁰ *Competition policy brief* (Issue 15 October 2014).

⁵¹ CCPC submission as part of 2013 Consultation.

⁵² Cases T-68, 77-78/89 *Società Italiana Vetro SpA v Commission* [1992] ECR II-1403.

affording them the power to behave to an appreciable extent independently of their competitors, their customers and ultimately of their consumers.”

Clearly, structural links in the form of equity interests may serve as an instrument for the co-ordination of behaviour, thus qualifying as “economic links” which may establish a collective or joint dominant position. Advocate General Fennelly in his opinion in *Compagnie Maritime Belge Transports*⁵³ stated as follows:

“It is not necessary to specify exhaustively or at all the nature of the relationships or economic links. They might be the use of model conditions of supply drawn up by a common trade association cross-shareholdings, common directorships or even family links with economic consequences.”

In *Irish Sugar*⁵⁴, the CJEU ruled that “a joint dominant position consists in a number of undertakings being able together, in particular because of factors giving rise to a connection between them, to adopt a common policy on the market and act to a considerable extent independently of their competitors, their customers, and ultimately consumers.”

In *Irish Sugar*, the Commission concluded that Irish Sugar Plc, and its distributor Sugar Distributors Limited, held a joint dominant position on the basis of various links between them including a 51% interest held by Irish Sugar Plc in Sugar Distributors Limited and associated board representation.

As a collective dominant position may be based on structural links, for example in the form of an equity interest, the creation of an additional link may be seen as an unlawful strengthening of that position. As pointed out by *Gabrielsen Hjelmeng and Sørsgard*⁵⁵, a collective dominant position may be strengthened if the acquisition of an equity interest increases transparency in the market. Minority acquisitions can increase market transparency as they provide the holder with an opportunity to obtain a privileged view on the commercial activities of the target.⁵⁶ Therefore Section 5 or Article 102 may apply to the

⁵³ Cases C-395 and 396/96P *Compagnie Maritime Belge Transports* [2000] ECR I-1365.

⁵⁴ T-228/97 *Irish Sugar Plc v Commission* [1999] ECR II-2969.

⁵⁵ Tommy Staahl Gabrielsen, Erling Hjelmeng and Lars Sørsgard, ‘Rethinking Minority Share Ownership and Interlocking Directorships: The Scope for Competition Law Intervention’ (2011) Sweet & Maxwell, Reprinted from *European Law Review*, Issue 6.

⁵⁶ OECD Policy Roundtables, *Minority Shareholdings* (OECD, 2008).

<<https://www.oecd.org/competition/mergers/41774055.pdf>>

acquisition of an equity interest in the context of collective or joint dominance, provided that a collective or joint dominant position already is found to exist.

It should be noted that the principle of collective dominance is limited. *Burnside and Kidane*⁵⁷ highlight that EU case law has consistently accepted that the economic links that are indicative of a collective dominant position consist of the relationship of interdependence between undertakings in an oligopolistic market, which enables them to anticipate the behaviour of their competitors and thus creates an incentive to align competitive behaviour. *Burnside and Kidane*⁵⁸ point out that “...oligopolistic collective dominance is the equivalent of oligopolistic coordination that primarily stems from market interactions and not, or at least not to a decisive extent, from structural or commercial links or direct or indirect communications between the oligopolists.” It appears from the *Airtours*⁵⁹ and *Impala*⁶⁰ decisions of the General Court and CJEU respectively, that the following conditions must be found to exist for a finding of collective dominance. Firstly, the oligopolists must be able to reach a shared understanding of the terms of coordination and, in particular, the parameters that lend themselves to being a focal point of the coordination. Secondly, the coordination must be sustainable, in particular, coordinating undertakings must be able to effectively monitor whether the terms of the coordination are being adhered to, which requires a sufficient degree of market transparency. Thirdly, the implementation of the common policy must be sustainable, which presupposes the existence of some form of credible deterrent mechanism in the event one of the oligopolists deviates from the terms of coordination. Fourthly, it must be demonstrated that there are no competitive constraints that are capable of jeopardising the results expected from the coordination.

The limitations of Article 102 have been the subject of academic debate in the context of common ownership. *Elhauge* asserts Article 102 TFEU can readily be applied to “condemn horizontal shareholding when it creates a collective dominance that produces excessive pricing”. He argues that:

“Unlike oligopoly pricing, horizontal shareholding does not reflect an unavoidable act, like pricing. Holding leading shares in horizontal competitors is easily avoidable

⁵⁷ Alec J Burnside and Adam Kidane, ‘Common ownership: an EU perspective, *Journal of Antitrust Enforcement*’ (November 2020) Vol 8, Issue 3, 456–510.

⁵⁸ Alec J Burnside and Adam Kidane, ‘Common ownership: an EU perspective, *Journal of Antitrust Enforcement*’ (November 2020) Vol 8, Issue 3, 456–510.

⁵⁹ Case T-342/99 *Airtours v Commission* [2002] ECLI:EU:T:2002: 146.

⁶⁰ Case C413/06 *P Bertelsmann and Sony Corp of America v Independent Music Publishers and Labels Association* [2008] ECLI: EU: C: 2008:392.

conduct and hardly necessary for market competition. The offense can thus readily be defined in a way that lets investors know what sort of conduct they need to avoid.”

The author agrees with *Burnside and Kidane* that the above reasoning is flawed and “inherently problematic” and fails to take account of two well established principles of EU law namely, that liability for competition law infringements is personal to the infringer and that a finding of collective dominance requires the existence of certain oligopolistic market conditions over and above the presence of common shareholdings. With regard to personal responsibility, *Elhauge*’s proposition implies that institutional investors could be held liable for abuses committed by their portfolio companies which flies in the face of the well-established competition law principle of personal responsibility. The CJEU has consistently held that given the serious nature of infringements of Articles 101 and 102, responsibility for committing such infringements is personal in nature and means that responsibility for an infringement should be attributed to the natural or legal person that operates the infringing undertaking at the time the infringement is committed.⁶¹ The CJEU in *Akzo Nobel*⁶² stated that it was clear from settled case-law that the conduct of a subsidiary may be imputed to the parent company in particular where, although having a separate legal personality, that subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company having regard in particular to the economic, organisational and legal links between those two legal entities. In *Akzo Nobel*, the CJEU made it clear that in the case of a parent and its wholly owned subsidiary, the parent company is able to exercise decisive influence over the conduct of the subsidiary and that there is a rebuttable presumption that the parent company does in fact exercise such decisive influence. In *Goldman Sachs v Commission*,⁶³ the General Court reiterated that the Commission is entitled to apply that presumption where the parent company is in a similar situation to that of a sole owner, such as where the parent holds a very high majority stake and all the voting rights. In that case, the General Court upheld a Commission decision finding Goldman Sachs jointly and severally liable for the anti-competitive conduct of a portfolio company in which it at the time held between 91.1% and 84.4% of the total equity and 100% of the voting rights. It should be noted that the CJEU and the General Court in each case required a finding of decisive influence in order to attract the principle that the parent was jointly and severally liable for the competition infringement. Therefore, there is no legal basis to attribute responsibility for the infringement of a portfolio

⁶¹ Case C-440/11P *Portielje v Commission* [2013] ECLI:EU:C:2014:464; Case C-49/92 P *Commission v Anic Participazioni* [1999] ECR I-4125 and Case C-97/08 P *Akzo Nobel and Others v Commission* [2009] ECR I-8237.

⁶² Case C-97/08 P *Akzo Nobel and Others v Commission* [2009] ECR I-8237.

⁶³ Case T-419/14 *Goldman Sachs v Commission* [2018] ECLI:EU:T:2018:445.

company to a passive, index-led investor, unless it exercises decisive influence over the company at the time of the abusive conduct.

Furthermore, the “contractual and structural links” referred to by *Elhauge* as being brought about by common ownership are not in themselves capable of giving rise to collective dominance. As pointed out above, EU case law has consistently accepted that the economic links that are indicative of a collective dominant position consists of the relationship of interdependence between undertakings in an oligopolistic market, which enables them to anticipate the behaviour of their competitors and thus creates an incentive to align competitive behaviour. *Burnside and Kidane* point out that oligopolistic collective dominance is the equivalent of oligopolistic coordination that primarily stems from market interactions and not, or at least not to a decisive extent, from structural or commercial links or direct or indirect communications between the oligopolists. In *Airtours*, the General Court expressly rejected the Commission’s assertion that the existence of common institutional investors constituted evidence of collective dominance.⁶⁴

From the above, it can be seen that there are significant impediments to the use of Section 5 and Article 102 for controlling the acquisition of cross and common shareholdings. Each require a finding of single or collective dominance and a separate finding of the abuse of such dominance. Therefore, in effect, the application of the abuse of dominance rules will be confined to highly concentrated markets with few players.

Below the author examines the judgment of the CJEU in *Philip Morris* and cases decided since *Philip Morris* in order to understand the Commission's thinking in applying Articles 101 and 102 to the acquisition of minority interests and explore how the above principles have been applied in Ireland. It should be noted that the judgment of the CJEU is the only

⁶⁴ The General Court in Case T-342/99 *Airtours v Commission* [2002] ECLI:EU:T:2002: 146 stated at para 91 as follows: “Finally, contrary to the Commission’s contention (see paras 137 and 138 of the Decision), the fact that to some extent (30% to 40% of the shares) the same institutional investors are found in *Airtours*, *First Choice* and *Thomson* cannot be regarded as evidence that there is already a tendency to collective dominance in the industry. It is sufficient to point out in that regard that, as the Commission itself has acknowledged in its defence (para 73), there is no suggestion in the Decision that the group of institutional shareholders forms a united body controlling those quoted companies or providing a mechanism for exchange of information between the three undertakings. Furthermore, the Commission cannot contend that those shareholders are a further force for cautious capacity management, unless it has examined to what extent they are involved in the management of the companies concerned. Finally, even assuming that it were proved that they are capable of exercising some influence on the management of the undertakings, since the concerns of the common institutional investors with respect to growth (and thus capacity) merely reflect a characteristic inherent in the relevant market, the Commission would still have to establish that the fact that institutional investors hold shares in three of the four leading tour operators amounts to evidence that there is already a tendency to collective dominance.”

reported decision of the European and Irish courts in which the application of Articles 101 and 102 to the acquisition of non-controlling minority interests is discussed in detail. There is no reported decision of the Irish courts setting out the implications of minority interests under Sections 4 or 5 of the 2002 Act. It is noteworthy that even before *Philip Morris*, the Commission had started to apply Article 85 to minority interests. In *Mecaniver/PPG*,⁶⁵ Mecaniver sold 81% of its 100% interest in Boussois, its French flat glass manufacturing subsidiary, to PPG, a major worldwide producer of flat glass. Mecaniver retained a 19% voting interest in Boussois and was represented on its board. Mecaniver also had a 20% interest in a Spanish flat glass producer. The Commission granted a negative clearance, finding that the transaction did not fall within Article 85(1) because (i) Mecaniver could not influence the competitive behaviour of either Boussois or the Spanish entity given that full and effective (i.e. sole) control was vested in the majority shareholder of each entity; (ii) the majority shareholder in each entity had an option to acquire Mecaniver's minority interests; and (iii) the Commission was of the view that Mecaniver's minority interests were temporary on the basis that Mecaniver had announced its intent to withdraw from the flat glass industry.

The *Philip Morris* decision is examined in detail below given its significance in terms of defining the scope of application of Articles 101 and 102 of the TFEU to non-controlling minority interests, thereby exposing the inherent limitations of the only existing EU competition law machinery to challenge such stakes. We will see how the *Philip Morris* formulation is couched on terms that rendered it not available for use by the EU Commission or the Irish CCPC to control Ryanair's interest in Aer Lingus despite the competitive harm and multi- Member State dimension of the case. Below, the author will examine reported cases at EU level since the decision of the CJEU in *Philip Morris* which underline the distinct lack of consistency in the approach taken by the CJEU towards applying the principles enunciated in *Philip Morris*, or at least fail to explain, in clear terms in its jurisprudence, the rationale or basis for the approach taken, leading to confusion and difficulty of application. The author highlights how neither the Commission nor the CCPC has resolved the above by way of guidelines or notice, leading to a highly imperfect competition toolkit governing non-controlling cross shareholdings.

⁶⁵ Case IV/30.666 *Mecaniver/PPG* Commission Decision [1985] OJ L35/54.

3 BAT AND REYNOLDS V COMMISSION ("PHILIP MORRIS")/THE LANDMARK RULING

In 1991, Philip Morris and Rembrandt Group Limited (the latter through its wholly owned subsidiary, Rothmans Holdings, controlled Rothmans International) entered into an agreement under which Philip Morris would acquire a 50% equity stake in, and the right to appoint half of the members of the board of, Rothmans International.⁶⁶ The above was accompanied by the acquisition of 50% of the convertible bonds in Rothmans International held by Rothmans International, reciprocal rights of first refusal in the event of the disposal by the other party of its shareholding in Rothmans Holdings and cooperation agreements between Philip Morris and Rothmans International that contemplated joint R&D, manufacturing and distribution of tobacco products in Europe as well as trade mark licences that gave Philip Morris the right to exploit certain Rothmans' brands in the Americas and South Africa.⁶⁷ Following complaints lodged by competitors,⁶⁸ the Commission issued a statement of objections to Philip Morris and Rembrandt to the effect that the 1981 Agreements infringed both Articles 85 and 86 of the EC Treaty (now known as Article 101 and 102 TFEU).⁶⁹

Following negotiations with the Commission, Philip Morris and Rembrandt restructured the transaction by entering into revised arrangements ("**1984 Agreements**") as follows:

⁶⁶ Rothmans Holdings held 43.8% of the issued share capital of Rothmans International which gave Rothmans Holdings 58.3% of the voting rights in Rothmans International although the Articles of Association of Rothmans International limited the votes to half the votes less one.

⁶⁷ Joined Cases 142 and 156/84 *British American Tobacco and another v Commission of the European Communities* [1987] ECR 1899.

⁶⁸ British American Tobacco Company Ltd. and RJ Reynolds Industries, Inc. among others.

⁶⁹ The Commission took the view that the arrangements breached Article 85 because of the specific contractual and market context and the Commission in particular, had regard to the influence over Rothman International's affairs - and the consequential impact on its own behaviour - to which Philip Morris' presence on the board and right of veto in the holding company gave rise. In effect, the investment and commercial strategies of Rothmans International could only have been determined jointly by Philip Morris and Rembrandt in that neither party could have assumed sole effective control of Rothmans international's strategic decisions without the agreement of the other party. The analysis of the express contractual provisions regarding cooperation and coordination and the oligopolistic structure of the EEC cigarette market enabled the Commission to reach the provisional view in the statement of objections that, in view of all the circumstances, the agreement providing for transfer of equity capital involved in this case fell within the prohibition in Article 85(1). The Commission also considered that the agreements gave rise to an infringement of Article 86 since by "neutralizing" Philip Morris as a significant competitor in a narrowly oligopolistic market, they brought about an abusive strengthening of the dominant positions held by Rembrandt, through Rothmans International, in (i) Belgium and Luxembourg and (ii) the Netherlands, both substantial parts of the common market. The Commission held that Philip Morris and Rembrandt occupied a joint dominant position in the above markets and that Philip Morris abused that position by purchasing shares in Rothmans International.

- (a) A reduction in Philip Morris' stake to 24.9% of the voting rights in Rothmans International (Rembrandt retained a 43.6% voting stake) which according to the Court allowed Rembrandt to continue to determine Rothmans International's commercial policy on the cigarette market because of the widespread distribution of the rest of the votes and in view of Rembrandt's representation in the management of Rothmans International;
- (b) An undertaking that Philip Morris would not be represented in the management of Rothmans International;
- (c) A Chinese Wall type undertaking that information concerning the Rothmans International group which might influence the behaviour of the Philip Morris group in the competitive relationship between the two corporate groups within the Community was not to be made available to Philip Morris;
- (d) The revised agreement did not eliminate the reciprocal rights of first refusal⁷⁰ or Philip Morris' holding of convertible bonds, although Philip Morris undertook to inform the Commission of any increase in its shareholding in Rothmans International or any circumstances in which it would obtain 25% or more of the voting rights in Rothmans International;⁷¹ and
- (e) The parties terminated all cooperation agreements having any effect in the Community.

⁷⁰ Like the 1981 Agreements, the new agreements gave each party a right of first refusal if the other disposed of its shareholding, in the case of a disposal to third parties, a party was required to dispose of the whole of its shareholding and could only transfer it to a single independent purchaser or to 10 or more independent purchasers. If Rembrandt disposed of its shareholding to a single purchaser, that purchaser had to make an identical offer for Philip Morris's shareholding. Finally, where one or other of the parties disposed of its shareholding, the agreements provided for the possibility of an equal division of voting rights in Rothmans International.

⁷¹ In these two cases, the Commission was entitled to require a "hold separate" arrangement with regard to the respective interests of Rothmans International and Philip Morris so as to ensure maintenance of the status quo for a period of three months, during which the Commission could determine what further measures, if any, were appropriate. Philip Morris also undertook to inform the Commission of any amendment to the 1984 Agreements.

The Commission considered that there were no grounds for applying Article 85(1) or Article 86 to the revised arrangements.⁷² The complainants appealed the decision of the Commission to the CJEU.⁷³

⁷² The Commission concluded that Philip Morris' minority shareholding and voting position, together with its withdrawal from the board of the holding company and the abrogation of contractual provisions whereby Philip Morris and Rembrandt undertook to cooperate in regard to Rothmans International, made impossible the conclusion that restriction or distortions of competition were the object or effect of the new agreements or that the agreements gave rise to an abusive strengthening of dominant positions. Philip Morris retained certain first refusal rights in respect of Rembrandt's holdings of equity in Rothmans International and the Commission sought and obtained various undertakings from Philip Morris and Rembrandt which ensured that relations between the Philip Morris and Rothmans groups in the EEC remained competitive and that, should those relations change, the Commission would be able to act promptly. The Commission concluded that, while as a general rule Article 85(1) did not apply to agreements for the sale or purchase of shares, in this case it did because of specific corporate mechanisms and structures in the particular contractual and market contexts. Article 85(1) ceased to be applicable when those circumstances were changed significantly. Control over the affairs of Rothmans International was now exercised by Rembrandt. Philip Morris was no more than a minority shareholder without any means of influencing the management of Rothmans International. Moreover, Article 86 ceased to be applicable because, in the absence of any relationship of control or decisive influence, no dominant position was abused.

⁷³ Joined Cases 142 and 156/84 *British American Tobacco and another v Commission of the European Communities* [1987] ECR 1899. The applicants argued on appeal before the CJEU in substance that where a company acquires a substantial shareholding, albeit a minority one, in a competing company, it must be presumed that there will be a restrictive effect on competition. The acquisition of such a shareholding inevitably has an influence on the commercial behaviour of the companies concerned, particularly in a stagnant and highly oligopolistic market such as that for cigarettes, where any attempt to increase the market share of one company will be at the expense of its competitors. The establishment of links between two of the largest firms on the market for cigarettes would destroy the competitive balance. According to the applicants, the transaction in question not only had the effect of restricting competition but was intended to do so. That was clear from the relationship between the agreements in issue and the original 1981 Agreements which provided for commercial cooperation between the parties. It was by means of the rights which it obtained under the original agreements that Philip Morris was able to acquire a direct shareholding in Rothmans International, and there was no indication that the idea of commercial cooperation was abandoned, especially since the price paid by Philip Morris remained the same. The intention of Philip Morris and Rothmans International to cooperate on the Community market was confirmed, moreover, by the fact that they had agreements to cooperate in Indonesia, Malaysia and the Philippines.

BAT and RJ Reynolds submitted that the anti-competitive effect and intention of the agreements at issue was reinforced by the clauses providing for a right of first refusal in the event that one of the parties should wish to dispose of its shareholding in Rothmans International. Those clauses were intended to preserve for Philip Morris the possibility of acquiring control of Rothmans International, and showed that its acquisition of an equity interest was not a simple passive investment. The fact that the exercise of the rights granted by those clauses would be contrary to Article 85 was sufficient in itself to justify a finding that the object of the agreements is to restrict competition. Finally, the undertakings required by the Commission were, according to BAT and RJ Reynolds, in no way sufficient to rid the agreements of their anti-competitive nature. First of all, the undertakings regarding the existing management of Rothmans International did not prevent Philip Morris from exerting informal influence in its capacity as a substantial shareholder in Rothmans International. Furthermore, the undertakings regarding the separation of the interests of Philip Morris and Rothmans International should Philip Morris exercise its right of first refusal concerned the period following an infringement of Article 85 and would not even apply if Philip Morris gained effective control of Rothmans International on the sale of Rembrandt's shareholding to at least 10 purchasers independent of each other and of Philip Morris. BAT and RJ Reynolds argued that the Commission in the contested decision applied Articles 85 and 86 of the Treaty incorrectly and was guilty of manifest error inasmuch as it considered that the undertakings entered into by Philip Morris and Rembrandt were sufficient in order to avoid an infringement of those Articles.

3.1 The CJEU's Application of Article 85 to Equity interests Generally/The Influence Test Established/The Seminal Passages

The CJEU set out its thinking on the application of Article 85 to the acquisition of an equity interest in a competitor in the following key passages:

- “37 Although the acquisition by one company of an equity interest in a competitor does not in itself constitute conduct restricting competition, such an acquisition may nevertheless serve as an instrument for influencing the commercial conduct of the companies in question so as to restrict or distort competition on the market on which they carry on business.
- 38 That will be true in particular where, by the acquisition of a shareholding or through subsidiary clauses in the agreement, the investing company obtains legal or de facto control of the commercial conduct of the other company or where the agreement provides for commercial cooperation between the companies or creates a structure likely to be used for such cooperation.
- 39 That may also be the case where the agreement gives the investing company the possibility of reinforcing its position at a later stage and taking effective control of the other company. Account must be taken not only of the immediate effects of the agreement but also of its potential effects and of the possibility that the agreement may be part of a long-term plan.
- 40 Finally, every agreement must be assessed in its economic context and in particular in the light of the situation on the relevant market. Moreover, where the companies concerned are multinational corporations which carry on business on a world-wide scale, their relationships outside the community cannot be ignored. It is necessary in particular to consider the possibility that the agreement in question may be part of a policy of global cooperation between the companies which are party to it.”

The Court later in its judgement stated:

- “48 However, it must also be considered whether, in the circumstances of this case, Philip Morris's shareholding in Rothmans International requires the companies involved to take into consideration the other party's interest when determining their commercial policy, as the applicants argue.”

The Court in the above key passages made it clear that the acquisition of a minority interest in a competitor did not of itself restrict competition but that such an acquisition may serve

as an instrument for influencing the commercial conduct of the companies. The Court provided the following non-exhaustive list of examples of where an equity interest may satisfy the latter test:

- 3.1.1 The investing company obtains legal or *de facto* control of the commercial conduct of the other company. Clearly, this aspect of the influence test set out by the Court is no longer applicable given that such acquisitions are governed by Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings ("**2004 EMCR**");
- 3.1.2 The agreement provides for commercial cooperation between the companies or creates a structure likely to be used for such cooperation;
- 3.1.3 The agreement gives the investing company the possibility of reinforcing its position at a later stage and taking effective control of the other company. Similar to 3.1.1 above, this aspect of the test is likely to be subsumed into the mergers regime in the 2004 EMCR;
- 3.1.4 The companies concerned are multinational corporations carrying on business globally and the arrangement is part of a policy of global cooperation between the companies; or
- 3.1.5 The minority shareholding requires the firms to take into consideration each other's interests when determining commercial policy.

3.2 CJEU's Application of Article 85 (now Article 101 TFEU) to the 1984 Agreements

The Court upheld the Commission's findings of fact and conclusions that no anti-competitive object or effect had been established for the purposes of Article 85.⁷⁴ The salient points of the CJEU's decision regarding the application of Article 85 to the revised agreements were as follows:

- 3.2.1 The Court recounted the Commission's description of the Community cigarette market as stagnant, oligopolistic,⁷⁵ the absence of real

⁷⁴ The Court stressed that the decision at issue concerned only the 1984 Agreements and not the 1981 Agreements and that the latter were relevant only in so far as they revealed the original intentions of the parties.

⁷⁵ The market was described as dominated by six corporate groups, with the exception of France and Italy where State monopolies existed.

competition on prices or research, high barriers to entry and that the principal means of increasing market share was through advertising and corporate acquisition. The Court highlighted that in the above market circumstances, any company wishing to increase its market share would be strongly tempted, where the opportunity arose, to take control of a competitor and that any attempted take-over and any agreement likely to promote commercial cooperation between two or more of those dominant companies was liable to result in a restriction of competition.⁷⁶

3.2.2 The CJEU noted that the revised arrangements on the one hand prevented Philip Morris from having any representative on the board of directors or any other management body of Rothmans International and limited its shareholding to less than 25% of the voting rights and that, on the other hand, Rembrandt's shareholding represented 43.6% of the votes, which, because of the widespread distribution of the rest of the votes and in view of Rembrandt's representation in the management of Rothmans International, allowed Rembrandt to continue to determine Rothmans International's commercial policy on the cigarette market.⁷⁷

3.2.3 The Court examined whether Philip Morris's shareholding in Rothmans International required the companies involved to take into consideration the other party's interest when determining their commercial policy. The Commission submitted that Rembrandt retained its interest in deriving the greatest possible profit from its investment in Rothmans International and that through its voting rights and its traditional management links with Rothmans International, it was in practice able to control Rothmans International's commercial policy without taking into account Philip Morris's interests. Although Philip Morris had sufficient votes to block certain special resolutions, that possibility was too hypothetical to amount to a real threat which might have an influence on Rembrandt in the management of Rothmans International. There was no reason to

⁷⁶ The CJEU confirmed that in such a market situation, the Commission had to display "particular vigilance" and to consider in particular whether an agreement which at first sight provides only for a passive investment in a competitor is not in fact intended to result in a take-over of that company, perhaps at a later stage, or to establish cooperation between the companies with a view to sharing the market. The Court emphasised that nevertheless, in order for the Commission to hold that an infringement of Article 85 has been committed, it had to show that the agreement has the object or effect of influencing the competitive behaviour of the companies on the relevant market.

⁷⁷ In effect, the Court was describing Rothmans International as being solely controlled by Rembrandt.

suppose that the management and employees of Rothmans International did not have an interest in making that company as profitable as possible. Although Philip Morris, because of its share in the profits of Rothmans International, had an interest in the success of that company, its first preoccupation must, according to the Commission, remain that of increasing the market share and turnover of its own companies. Philip Morris thus retained a considerable interest in limiting any increase in Rothmans International's market share by its own industrial and commercial efforts. The Commission therefore considered that the acquisition by Philip Morris of a minority shareholding in Rothmans International did not, in itself, result in any change in the competitive position on the Community cigarette market.

As discussed in 3.4 below, significantly, the Court's acceptance of the above position has effectively precluded the application of Article 101 TFEU, and hence Section 4(1) of the 2002 Act, to passive minority non-controlling interests between competitors.

- 3.2.4 The CJEU held that it could not be concluded that the agreements at issue were part of a policy of global cooperation between two multinational corporations on the world market for cigarettes. The Court confirmed that there was no ground for concluding that the acquisition of a shareholding might result in a sharing of the market on the basis that Philip Morris, without itself losing market share, could concentrate on one specific sector of the market, thus allowing Rothmans International to increase its activities in another sector of the market and nor were there sufficient grounds for the conclusion that Philip Morris and Rothmans International cooperated outside the Community market in such a way as to affect their relationship in the Community market.⁷⁸
- 3.2.5 The CJEU held that the fact that the agreements at issue contained provisions on the possible sale of shares in Rothmans International by one or the other party and that those provisions envisaged a possibility which might, if the surrounding circumstances remained unaltered, be

⁷⁸ BAT and RJ Reynolds argued that there was such cooperation on markets in certain parts of the world, and the interveners asserted that that cooperation concerned only agreements on the use of certain brand names belonging to the other party, which in their contention were entirely normal arrangements in the sector in question and were in fact used by BAT and RJ Reynolds.

contrary to Article 85 was not, in itself, sufficient to show that the object of the agreements was to restrict competition. The Court conceded that the 1984 Agreements replaced agreements providing for shared control of Rothmans Holdings, which, in turn, had effective control over Rothmans International's commercial policy, and that their substitution for the revised agreements did not result in any lowering of the price paid by Philip Morris and that Philip Morris retained other benefits, in particular that of being able to prevent any competing company from taking control of Rothmans International, and obtained a "considerable increase" in its share of Rothmans International's profits. Although the background to the agreements at issue showed that Philip Morris contemplated a transaction going much further than a passive investment, the provisions of those agreements referring to a purely hypothetical situation did not permit the conclusion that the acquisition of a minority shareholding was the first stage of a plan intended to give it control of Rothmans International.

- 3.2.6 The Court considered whether the rights of pre-emption gave rise to immediate or potential anti-competitive effects. The Court upheld the Commission's finding that the pre-emption provisions had no present influence on the competitive behaviour of the parties. The CJEU stated that should Rembrandt have in mind the possible disposal at some time of its shareholding in Rothmans International, Rembrandt had every interest in increasing the value of its investment by ensuring that Rothmans International competed effectively. Philip Morris, on the other hand, had an interest in limiting the price which Rembrandt might obtain for its shares in Rothmans International and thus had no reason to restrict its own efforts to obtain additional market share. Moreover, the possibility that employees of Rothmans International might subsequently be employed by Philip Morris was likely to encourage them to display their professional ability. Nor did the Commission think that Philip Morris's ability to place difficulties in the way of any disposal by Rembrandt of its shares in Rothmans International constituted a real threat which might influence the normal management of Rembrandt and Rothmans International. The CJEU stated that there was nothing in the evidence to lead the Court to disagree with the Commission's assessment. Moreover, the fact that the provisions in question created obstacles to the purchase of an interest in Rothmans International by a third company could not be

regarded as a present restriction of competition on the market for cigarettes contrary to Article 85. First of all, provisions of this kind may be justified by the legitimate interest of the contracting parties in protecting their substantial investment. Secondly, in the circumstances of this case the fact that Philip Morris, without itself gaining control of Rothmans International, was now in a position to prevent any other competing company from gaining control could not in itself amount to a restriction of competition.

3.2.7 With regard to the potential effects of the rights of pre-emption, it was clear that the Commission had taken measures in the form of undertakings which were intended to prevent any such effects contrary to Article 85 of the Treaty.⁷⁹

3.3 CJEU's Application of Article 86 (now Article 102 TFEU) to the 1984 Agreements

With regard to Article 86 of the Treaty, the Court stated that it was no longer necessary, in the light of the findings set out above, to consider to what extent Rothmans International occupied a dominant position in a substantial part of the Common Market.

The Court interpreted Article 86 as follows:

“An abuse of such a position can only arise where the shareholding in question results in effective control of the other company or at least in some influence on its commercial policy.”

⁷⁹ Philip Morris undertook to inform the Commission of any amendment, modification or supplement to the 1984 Agreements and to notify the Commission within 48 hours if it should increase its shareholding in Rothmans International or in any way obtain 25% or more of the total voting rights in Rothmans International. Philip Morris also undertook, should the Commission so request following such notification, to put into effect a "hold separate" arrangement regarding the interests of Philip Morris and Rothmans International in the community tobacco market so as to ensure maintenance of the status quo for a period of three months, during which the Commission may examine the new situation from the point of view of Articles 85 and 86 of the Treaty.

The Court stated that it was true, as BAT and RJ Reynolds emphasised, that those undertakings will not apply should Philip Morris obtain effective control of Rothmans International without increasing its voting rights, in particular in the event of the disposal by Rembrandt of its shares to at least 10 independent purchasers. In such a case (which seemed the least likely hypothesis with regard to the disposal of Rembrandt's interest and assumed that Philip Morris would have failed to exercise its rights under those provisions), Philip Morris's control would be extremely tenuous inasmuch as it would not be able to prevent any subsequent concentration of the voting rights in the hands of another company. The CJEU held that it therefore had to be accepted that by means of the undertakings entered into by Philip Morris and Rembrandt, the Commission had reinforced its general powers of surveillance and control in such a manner as to prevent the provisions of the 1984 Agreements concerning the subsequent disposal of the parties' shares in Rothmans International from having effects contrary to Article 85.

The CJEU concluded that as appeared from the discussion concerning the application of Article 85, it has not been established that the 1984 Agreements met the above test and therefore, the submission based on Article 86 was rejected.

3.3.1 ***Philip Morris/Perceived Safe Harbour***

Two commentators⁸⁰ suggested that the Court's analysis in *Philip Morris* appears to indicate the existence of a type of "no-influence" safe harbour if the following conditions are met whether one is applying Article 85 or Article 86:

- (a) The acquisition involves less than 25% of the issued share capital of a competitor even if it includes rights of first refusal or similar pre-emption rights over other shareholder's interests and a substantial holding of the acquired entity's outstanding debt provided that each of the following circumstances exist;
- (b) The acquiring firm obtains no special control (e.g. veto) rights over the acquired entity's commercial or competitive activities, beyond those rights provided to minority shareholders under normal corporate governance provisions;
- (c) The acquiring firm obtains no right to nominate any members of the target's board or management;
- (d) The transaction does not involve agreements providing for post-closing cooperation or coordination of the parties' competing activities in the EU; and
- (e) The parties implement Chinese Wall provisions to minimise the risk of information exchanges or other methods to facilitate collusion between the parties.

3.4 **Critique of *Philip Morris***

3.4.1 **Differing Levels of Influence for Articles 101 and 102?**

In *Philip Morris*, the CJEU clearly indicated that the acquisition of a minority interest in a competitor, including where the target undertaking holds a dominant position, alone would not suffice to attract the prohibitions in Articles 85 and 86. It appears from the judgment of the Court that the acquisition of a minority stake would only trigger Article 85 or 86 if the minority interest gave rise to "influence" on the commercial conduct of the parties (Article 85(1)) or on the commercial policy of the target (Article 86). As a result, the concept of

⁸⁰ Barry E Hawk and Henry L Huser, 'Controlling the Shifting Sands: Minority Shareholdings Under EEC Competition Law (1993) Fordham International Law Journal, Vol 17, Issue 2.

influence is key to an understanding, and for the application, of each of the two provisions. The CJEU did not appear to intend to make a distinction between Article 85 and 86 in regard to the level of influence required. After the Court upheld the decision of the Commission on the application of Article 85, the Court addressed Article 86 by stating that with regard to Article 86, it was no longer necessary, in the light of the findings under Article 85, to consider to what extent Rothmans International occupied a dominant position in a substantial part of the common market. The Court held that an abuse of such a dominant position could only arise where the shareholding in question results in effective control of the other company or “at least in some influence on its commercial policy”. The Court concluded as follows:

“As appears from the discussion concerning the application of Article 85, it had not been established that the 1984 agreements have any such effect. The submission based on Article 86 must therefore also be rejected.”

As a result, it is clear that the Court was not applying different influence standards to Articles 85 and 86 given that it had ruled out the application of Article 86 after concluding that Article 85 had not been breached. The Court found as a matter of fact that the requisite level of influence for the application of Article 85 had not been found and that on that basis, Article 86 could not be applied. The language used by the Court suggested that the corollary of the finding of an absence of the requisite level of influence for a breach of Article 85 was that there was no scope for the application of Article 86. Despite this, the Court did use slightly different and ambiguous language in its characterising of influence for the purposes of Article 85 and 86. The Court referred to “influencing” the commercial conduct of the companies in relation to Article 85 and “at least some influence” on the commercial policy of the target when defining the ambit of Article 86. Although different levels of influence do not appear to have been intended, the language used, to some extent, lacked clarity and, it is suggested, may have led the Commission in its subsequent decision in *Gillette*⁸¹ to formulate different levels of requisite influence depending on whether one is applying Article 85 or 86. Neither the CJEU nor the General Court has since clarified the above jurisdictional issue. Despite the use of slightly different language when referring to Articles 85 and 86, it is submitted that the Court’s analysis of Article 86 makes it clear that the Court was not intending to prescribe differing standards of influence for the prohibitions in Articles 85 and 86 respectively, and that therefore, the Commission’s apparent differentiation in *Gillette* between the two Treaty Articles, was unfounded.

⁸¹ Please see section 4.2 of this Chapter 3.

3.4.2 CJEU's Apparent Exclusion in *Philip Morris* of Passive Minority Interests from Article 85(1) Inconsistent with Established Economic Theory and Precedent in other Jurisdictions

The second significant criticism of *Philip Morris* is the CJEU's apparent insistence on the presence of a particular level or type of influence in order to attract the prohibitions in Articles 101 or 102 which contradicts established economic reasoning and theories of harm and precedent in various jurisdictions. The Court was very clear that the acquisition of an equity interest in a competitor *per se* is insufficient to apply Articles 85 (now Article 101 TFEU); the equity interest has to serve as an "instrument for influencing the commercial conduct of the companies". The uncontested features of the Community cigarette market at the time were that the market was stagnant, oligopolistic, there was no real competition on prices or in research, barriers to entry were high and advertising and corporate acquisition were the principal means of increasing market share. It is abundantly clear that the above market conditions could have supported a finding of unilateral effects or tacit collusion. However, it appears that the Court was of the view that Article 85(1)'s reach did not extend to impugning the acquisition of a passive non-controlling minority interest on the basis of unilateral effects or tacit collusion in circumstances where the share investment is not accompanied by a structure for influence such as contractual arrangements giving rise to a level of cooperation. The Court expressly stated that although Philip Morris, because of its share in the profits of Rothmans International, had an interest in the success of that company, its first preoccupation must, according to the Commission, have remained that of increasing the market share and turnover of its own companies. Philip Morris thus retained a considerable interest in limiting any increase in Rothmans International's market share by its own industrial and commercial efforts. The Commission, therefore, considered that the acquisition by Philip Morris of a minority shareholding in Rothmans International did not, in itself, result in any change in the competitive position on the Community cigarette market. The CJEU at paragraph 45 of its judgment stated that in the market situation described, the Commission had to be particularly vigilant and consider whether or not an agreement which at first sight provides for a "passive" investment in a competitor is not in fact intended to result in a takeover of the company perhaps at a later stage or "to establish cooperation between the companies with a view to sharing the market" but that "[n]evertheless, in order for the Commission to hold that an infringement of Article 85 has been committed, it must be able to show that the agreement has the object or effect of influencing the competitive behaviour of the companies on the relevant market". It is clear that an apparently "passive" interest needed to be accompanied by evidence of an intended takeover or active coordination to attract the prohibition in Article 85(1). Furthermore, the Court at paragraph

55 of its judgment stated that should Philip Morris have in mind the possible disposal at some time of its shareholding in Rothmans International, Rembrandt had every interest in increasing the value of its investment by ensuring that Rothmans International competed effectively. Philip Morris, on the other hand, had an interest in limiting the price which Rembrandt might obtain for its shares in Rothmans International and thus had no reason to restrict its own efforts to obtain additional market share. Again, the above conclusion does not appear to accommodate using Article 101(1) as the platform for objecting to the acquisition of a passive minority interest, applying theories of unilateral or coordinated effects.

It appears that the EU Commission decision in *Gillette*⁸² applying the *Philip Morris* doctrine supports the above narrow construction of the CJEU's judgment in *Philip Morris* in interpreting Article 85(1) of the EC Treaty in the context of passive minority interests. *Ezrachi and Gilo* (2006)⁸³ take the view that on balance, it appears that the EU Commission's analysis "seems to support the narrow approach discussed above, thus leaving unilateral effects outside the realm of Article 81." Similarly, *Corradi and Tzanaki* (2017)⁸⁴, took the view that Article 101 "is unable to capture any unilateral effects of passive investment" citing *Philip Morris* and the subsequent decision in *Gillette*⁸⁵ and that Article 101 "cannot address tacit collusion either".⁸⁶ In contrast, *Elhaug* (2018)⁸⁷ suggests that the language used by the CJEU in *Philip Morris* in formulating the test as requiring the agreement as having the "effect of influencing the competitive behaviour of the companies" was sufficiently wide to cover "any influence that stock might have, including the fact that shareholdings and profit interests might alter the incentives of either company to compete with the other" and that "*Philip Morris* thus allows horizontal shareholdings to be condemned as agreements under TFEU Article 101 whenever those shareholdings have or are likely to have adverse effects on firm competition for any reason." While the author understands the apparent attraction of an expansive interpretation of *Philip Morris* by relying on certain passages of the judgment, it is respectfully submitted that the above interpretation is not supported by the decision as a whole or the facts (including the market conditions) or the

⁸² Please see section 4.1 of this Chapter 3.

⁸³ Ariel Ezrachi and David Gilo, 'EC Competition Law and the Regulation of Passive Investments Among Competitors' (2006) Oxford Journal of Legal Studies, Vol 26, No 2, 327-349.

⁸⁴ Marco Claudio Corradi and Anna Tzanaki, 'Active and Passive Institutional Investors: Is EU Competition Law Ready?' (2017) Competition Policy International.

⁸⁵ Please see section 4 of this Chapter 3.

⁸⁶ Marco Claudio Corradi and Anna Tzanaki cite Francisco Enrique Gonzalez-Diaz, 'Minority Shareholdings and Creeping Acquisitions: The European Union Approach' (2011) Fordham Competition Law Institute.

⁸⁷ Einer Elhaug, 'How Horizontal Shareholding Harms Our Economy and Why Antitrust Law Can Fix It' (2018) 10 Harvest Business Law Review.

Commission's subsequent decisions such as in *Gillette* applying the *Philip Morris* judgment. It appears from the judgement of the CJEU in the *Philip Morris* case that the breadth of Article 101 is insufficient for challenging a passive non-controlling minority interest on the basis of either (I) unilateral effects or (I) tacit coordination/collusion. In other words, it appears that the criterion of influence on the commercial conduct of the parties articulated by the CJEU in *Philip Morris* effectively precludes the use of Article 101(1) in challenging a purely passive minority structural link in a competitor even where the following circumstances are established:

- The market is a highly concentrated oligopoly;
- There are significant barriers to market entry;
- The investor enjoys rights of pre-emption;
- The investor has abandoned previous arrangements which clearly envisaged, and expressly provide for, the acquisition of control;
- The investor has the ability to block special resolutions; and
- The parties are cooperating on the use of brands belonging to the other party in territories outside of the EU.

The CJEU concluded that the above fell outside of Article 85(1) notwithstanding the conventional theories of harm supporting the conclusion that the above circumstances could give rise to unilateral and/or unilateral effects. Although the CJEU gives little guidance as to the precise level of influence required to be established to attract the prohibition in Article 101(1), it appears that the minority interest must be accompanied by other elements giving rise to a relatively high or obvious degree of influence such as contractual arrangements evidencing a likelihood of commercial cooperation between the parties.

The requisite level and type of influence as per the Court's judgment in *Philip Morris* has featured in the debate as to the possible application of Article 101 to common shareholdings by institutional investors. *Elhauge*⁸⁸ has suggested that Article 101 as interpreted by the CJEU in *Philip Morris* could be applied to the common shareholdings stating that the reasoning of the Court at "a minimum indicated that if the voting of the stock were likely to

⁸⁸ Einer Elhauge, 'How Horizontal Shareholding Harms Our Economy and Why Antitrust Law Can Fix It' (2020) 10 Harvard Business Law Review Issue 2 and Einer Elhauge, 'New Evidence, Proofs, and Legal Theories on Horizontal Shareholdings' (2018) Harvard Law School.

have an anticompetitive influence on corporate behaviour, then it would fall within TFEU Article 101.” *Elhauge* has suggested that the influence criterion enunciated by the Court in *Philip Morris* was capable of being extended to any influence attached to shares including the fact that “shareholdings and profit interests might be the incentives of either company to compete with the other”. *Burnside and Kidane*⁸⁹ have strongly criticized *Elhauge*’s interpretation of the Court’s description of the concept of influence in the context of common shareholdings, highlighting that *Elhauge* is taking the word “influence” as used by the CJEU out of context asserting that the “sense and degree of influence” for this purpose needs to be framed by reference to the Court’s preceding sentence and paragraphs which refer to legal and *de facto* control or shareholding that give the acquirer the possibility of reinforcing its position at a later stage and taking effective control of the target. *Burnside and Kidane* assert that it is clear from the key paragraphs of the judgment that the Court did not have in mind a situation such as the acquisition of shares by institutional shareholders since their shareholdings are incapable of conferring sole or joint control, whether on a *de facto* or *de jure* basis and, those shares are not acquired with a view to exercising control at a later stage. *Burnside and Kidane* underline that the CJEU refers to influence in the context of “commercial behaviour”, “commercial conduct” and “commercial policy”, being terms which have carried through into EU merger control practice and used in the EU Consolidated Jurisdictional Notice. *Burnside and Kidane* emphasize that in broad terms, the Court is “effectively referring to the commercial and strategic behaviour of an undertaking” which is highlighted by the significant differences between the 1981 and 1984 agreements in *Philip Morris* and the conclusions drawn regarding those facts in the context of Article 85. *Burnside and Kidane* highlight that institutional investors do not have any meaningful direct influence over commercial and strategic decisions, there is no conclusive evidence that they are able to exert any indirect influence over such decisions and that although institutional investors are able to vote on the composition of the board of directors, elections are largely uncontested and investment funds in practice typically do not nominate directors. They point out that that “it is a remote notion” that the Court would extend the application of Article 101 to multiple institutional investors, when it chose not to do so in *Philip Morris* regarding a single shareholder with an equity interest in excess of 20% in its direct competitor in a highly oligopolistic market. The author agrees with *Burnside and Kidane*’s conclusion that *Elhauge* has failed to establish that the Court’s interpretation of Article 85 in *Philip Morris* regarding the requisite level and type of influence readily allows for the application of Article 101 to common ownership.

⁸⁹ Alec J Burnside and Adam Kidane, ‘Common ownership: an EU perspective’ (November 2020) *Journal of Antitrust Enforcement*, Vol 8, Issue 3, 456–510.

In summary, the CJEU's narrow delineation of the scope of Article 85(1) of the EC Treaty in *Philip Morris* renders the Article 101 toolkit unable to impugn the acquisition of passive cross or common shareholdings, in each case not involving the requisite level of influence. The position taken by the Commission and the CJEU in *Philip Morris* is at variance with what may now be described as established economic theories of harm that were developing even before the delivery of the *Philip Morris* judgement in November 1987. The narrow interpretation applied by the Commission and the CJEU in *Philip Morris* runs counter to the endorsement of the above theories of harm regarding the unilateral and coordinated effects of passive minority shareholdings as follows:

- the Commission in relation to cross shareholdings in SWD 2013 Consultation Annex 1⁹⁰ and in SWD White Paper;⁹¹
- the CCPC regarding its substantive review of cross shareholdings in its determinations under the merger control regime in Part 3 of the 2002 Act;⁹²
- the Competition Authority (now the CCPC) in its Submission to the Department of Enterprise Trade and Employment (now the Department of Jobs Enterprise and Innovation) in relation to the Public Consultation on the Operation and Implementation of the Competition Act 2002 dated December 2007 regarding cross shareholdings;⁹³
- the EU Commission in relation to its treatment of cross and common minority passive shareholdings in its substantive review of mergers under the 2004 EMCR;⁹⁴ and

⁹⁰ Please see Chapter 1.

⁹¹ Please see Chapter 1.

⁹² Please see Chapter 4.

⁹³ Public Consultation on the Operation and Implementation of the Competition Act 2002 (December 2007) S/07/008. The CCPC stated as follows:

"3.49 Partial investments arise when the investing firm shares the profits of the firm in which the investment has been made. In some cases the investment is passive in that the investor exerts no influence over its activities. Among the possible anticompetitive effects that may arise in an oligopolistic market, the following is an example.

3.50 If firm A passively invests in firm B, prices may rise. If it had not invested, firm A would hesitate to raise the price of its brand, out of fear that such an increased price would cause it to lose too many customers to firm B. But if firm A passively invests in firm B, a price rise may become profitable, because even if some of the customers switch, firm A will share some of firm B's profits."

⁹⁴ Please see Chapter 4.

- the US Supreme Court in its decisions interpreting the Clayton Act in the context of cross shareholdings.⁹⁵

3.4.3 Philip Morris Doctrine Confined to Equity Interest in Competitors

The CJEU in *Philip Morris* enunciates the principles surrounding the application of Article 101 and 102 to the acquisition of an equity interest in terms of the acquirer and the target being competitors. The judgment contains no discussion whatsoever of Articles 101 or 102 being applied in other circumstances. As a result, the *Philip Morris* doctrine in its present form would not appear to encompass the acquisition of minority interests arising in circumstances where the relevant parties are active in markets which are vertically related.

As we saw in Chapter 1, the Commission in the 2013 Consultation Paper highlights various scenarios in which non-horizontal cross shareholdings may pose competition issues according to established economic theories of harm. The Commission focuses on the competition implications in vertical situations, where the acquirer of the minority interest and target are operating in markets which are upstream or downstream from each other. The Commission explains that a key factor specific to vertical shareholding is their direction, a forward shareholding arising if an upstream firm owns shares of a downstream firm, and a backward shareholding arising if a downstream firm owns shares of the upstream firm.⁹⁶

The above demonstrates that there is a considerable body of economic theory in support of the proposition that harm can exist in circumstances where a minority cross shareholding

⁹⁵ Please see Chapter 5 for a discussion of the implications of minority interests under US antitrust law. The author acknowledges that the US system contains exemptions which can serve to exclude certain limited minority interests which will be examined in Chapter 5.

⁹⁶ The Commission summarises competition concerns in vertical situations as follows:

- (i) If upstream firms can discriminate among buyers, especially partial backward integration that confers material influence in upstream firms may lead to input foreclosure;
- (ii) Vertical minority shares in a downstream firm that confer far-reaching control rights may be conducive to customer foreclosure;
- (iii) When upstream firms differ in their costs to produce input goods, passive forward vertical minority shares may be used as a commitment device to soften downstream competition;
- (iv) Forward passive shareholdings tend to reduce double marginalization but may to some extent also facilitate partial foreclosure and may help upstream firms to commit to higher prices if contracts with downstream firms are not observable to all downstream customers;
- (v) Backward minority shareholdings that confer control on the downstream firm over the upstream firm tend to significantly facilitate input foreclosure;
- (vi) Passive backward shareholdings may dampen downstream competition and thereby lead to increased consumer prices;
- (vii) Passive backward shareholding can distort competition in tender markets; and
- (viii) The Commission stated that although the literature has focused on input foreclosure so far, it is conceivable that similar considerations hold for customer foreclosure.

involves businesses that are not only operating on the same or a substantially similar product and geographic markets but on markets which are vertically related and this has been accepted by the Commission in the SWD White Paper. However, the above vertical situations appears to fall outside of the *Philip Morris* doctrine given the limitations of the current formulation of the *Philip Morris* principle as it applies to minority interests.

4 POST PHILIP MORRIS AT EU LEVEL

The Commission has applied the *Philip Morris* principle in various cases to date in relation to cross shareholdings although there has been no reported decision of the European Courts since *Philip Morris* of which the author is aware which discusses in detail the application of Articles 101 and 102 to such minority interests. One of the most significant Commission decisions involving the application of the *Philip Morris* principle to minority cross shareholdings is *Gillette*⁹⁷ in which it is clear that the Commission followed the narrow interpretation of Article 85(1) discussed in 3 above and the level of influence required effectively to exclude the acquisition of a passive investment both in terms of unilateral effects and tacit collusion.

4.1 *Gillette*

In this case, the Gillette group, the world leader in wet shaving products, sought to acquire its major competitor, the Wilkinson Sword wet shaving products business, from Stora Kopparbergs Bergslags AB. The transaction was initially structured so that Gillette would acquire Wilkinson's operations in North America and the rest-of-the-world outside the EC, while a management-led investor group, called Eemland Holdings NV, would acquire the business in the EC. The structure of the transaction was modified to take account of objections by the U.S. Department of Justice which resulted in Wilkinson's operations in the United States being included among the operations to be sold to Eemland and the terms of Gillette's participation in Eemland's leveraged buy-out being altered pursuant to a Justice Department consent decree. Gillette acquired no voting stock or other voting interest in Eemland, no board or management representation, and no access to any internal, non-public Eemland information. Gillette acquired a 22% non-voting "loan stock" equity interest that was convertible to voting stock only under limited conditions, it loaned about 13.6% of Eemland's total debt financing at what appeared to be on favourable non-market terms, it acquired certain pre-emption rights that gave Gillette an option to acquire (or force to be

⁹⁷ Cases No IV33.440 and No IV/33.486 *Warner-Lambert/Gillette and Others and BIC/Gillette and Others* Commission Decision OJ L116/21.

sold to a selected third party) any voting stock in Eemland that a shareholder eventually might seek to sell and it accepted a variety of Chinese Wall and standstill provisions including an express obligation not to exercise any influence over Eemland as part of its consent decree with the U.S. Justice Department.⁹⁸ Gillette and Eemland also entered into various other supply and IP arrangements.⁹⁹

The relevant market for wet-shaving products had the following features: the market was concentrated¹⁰⁰ with Gillette holding a market share of 59% (by volume) and 70% (by value) for the Community as a whole, Gillette was the price leader in the Community, there were considerable barriers to market entry¹⁰¹ and no new competitor had entered the market in Western Europe for some 15 years. In a market with these characteristics, it followed that the principal means of increasing market share was advertising, the acquisition of a competitor or substantial research and development leading to a new or improved type of product. Gillette was described by the Commission as occupying a dominant position on the market for wet-shaving products in the Community as a whole and in each Member State.

Following the lodging of complaints,¹⁰² the Commission examined Gillette's investment in Eemland under both Article 85(1) and 86 of the EC Treaty. With regard to abuse of dominance and Article 86, the Commission highlighted that an undertaking in a dominant

⁹⁸ Gillette agreed, for as long as it held any interest in Eemland, not to exchange information regarding prices and other terms of sale in the United States, not to exercise any influence over Eemland and not to do anything to cause Eemland to become insolvent. Gillette further agreed, for a period of ten years, not to acquire any additional interest in any "securities" of Eemland, other than via its limited pre-emption rights, without the Justice Department's prior written consent. Should it exercise those pre-emption rights, Gillette agreed to give an automatic proxy to Eemland to cast Gillette's votes in the same proportion as the votes cast by the other shareholders, thereby effectively negating any ability by Gillette to use these voting powers to affect Eemland's activities. The Justice Department concluded that these provisions, together with the fact that Gillette had no voting interest or board or management representation in Eemland, eliminated the Department's original concerns that the transaction violated section 7 of the Clayton Act and section 1 of the Sherman Act. Please see Chapter 4 for a discussion of the treatment of minority interests under US anti-trust laws.

⁹⁹ A two-year supply agreement, whereby it purchased Wilkinson products manufactured by Eemland for resale by Gillette outside the EC and North America and a "non-Community sale agreement" and an intellectual property agreement, pursuant to which the "rest-of-the-world" Wilkinson operations and trademarks were assigned to Gillette. Each party agreed not to sell products under the Wilkinson trademark outside its respective territories, and the parties agreed to cooperate to resolve any problems that might arise from multinational customers seeking to purchase their requirements for both territories from one or the other supplier.

¹⁰⁰ There were four producers in the Community and worldwide namely, Gillette, Wilkinson Sword (now the trade mark of Eemland), Schick (the trade mark of Warner-Lambert) and BIC.

¹⁰¹ These consisted of significant economies of scale on the production level, the importance of advertising and the considerable resources and expertise of the established manufacturers.

¹⁰² Warner-Lambert Company and La Société Bic SA.

position has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market, and that by participating in the buy-out of the Wilkinson Sword business, Gillette had failed to discharge that special responsibility and abused its dominant position. Gillette was instrumental in arranging the buy-out and notwithstanding the care with which the agreements were drafted, the structure of the wet-shaving market in the Community had been changed by the creation of a link between Gillette and its leading competitor. The Commission cited the CJEU decision in *Hofmann La-Roche v Commission* where it referred to an abuse of a dominant position as:

“relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition”.

The change in the structure of the wet-shaving market brought about by Gillette's participation in the overall arrangement would have an adverse effect on competition in that market, and therefore, Gillette's involvement constituted an abuse of its dominant position. The Commission referred to the CJEU's judgment in the *Philip Morris* case where the Court indicated that an abuse of a dominant position can arise only where a shareholding in another company results in at least “some influence on that company's commercial policy”. The Commission highlighted that Gillette had not only become a major shareholder in Eemland but also its largest creditor and had acquired important pre-emption and conversion rights and options in Eemland and that the position of Gillette was a matter which the management of Eemland would be obliged to take into account and, consequently, it was a factor which would influence the commercial conduct of Eemland. It followed that Gillette would have at least some influence on Eemland's commercial policy.

The Commission highlighted that although the Court did not strike down the agreements in the *Philip Morris* case, it was important to note that in that case, the Court was considering a situation in which the shareholding was acquired in, and not by, the undertaking which was said to occupy a dominant position. The Commission stressed that in *Gillette*, it was a dominant undertaking, Gillette, which had acquired a substantial shareholding in its principal competitor. Despite the similarities between the form of the agreements in the present case and *Philip Morris*, Gillette was taking a minority interest in a competitor in circumstances which were fundamentally different from those underlying the *Philip Morris* case, and in particular the market was dominated by Gillette which made the existing competition more

vulnerable to structural changes. The Commission highlighted that Gillette had acquired 22% of the equity of Eemland, which could not be disregarded simply because of the absence of voting rights and other usual shareholders' rights or because of Gillette's covenant not to exert or attempt to exert any influence over the Board or any member of the Board of Eemland. The Commission referred to Eemland's financial dependence on Gillette,¹⁰³ the Commission stressing that Eemland could not reasonably be expected to ignore this financial dependence on Gillette. Gillette was granted important pre-emption and conversion rights and options in Eemland which ensured that no other competitor on the market such as Warner-Lambert or BIC could improve its competitive position through the acquisition of Eemland and that no other company hostile to Gillette could take over Wilkinson and effectively prevent the management of Eemland from entering into a merger or joint venture with someone of whom Gillette did not approve. Consequently, the medium and long-term commercial fate of Eemland was to some extent in the hands of Gillette which was emphasised by the fact that Eemland, was going to be entirely dependent upon its shaving products business, thereby making it more vulnerable to Gillette. The pre-emption rights could be considered as a new barrier to entry in this market, given that they were held by a dominant undertaking (unlike in the *Philip Morris* case). The Commission underlined that other competitors on the market were adversely affected because they were deprived of one of the most obvious ways of challenging Gillette's market dominance, namely by taking over Eemland. Gillette, which was by far the strongest operator on this market, had entered into a relationship with its strongest competitor and, although, it had not acquired any direct control over Eemland, this relationship enabled Gillette to exercise "some influence" over Eemland's commercial conduct.¹⁰⁴

¹⁰³ Gillette was a major creditor of Eemland, having contributed US\$69 million of mezzanine debt (representing 11.6% of the debt of Eemland) and almost US\$14 million in equity loan stock, had agreed to make payments to Stora of up to US\$11 million and had accepted a loan note from Eemland for the sum of US\$6.4 million in respect of the American business. The Commission stated that the level of Gillette's investment in Eemland needed to be compared with Eemland's estimated worldwide turnover in 1989 of US\$123 million. The continuing availability of the interest-free loan from Stora, which Eemland enjoyed, was dependent upon Gillette's willingness to make the payments of up to US\$11 million to Stora.

¹⁰⁴ The Commission highlighted the potential effects of the arrangements. Gillette was to acquire certain contingent rights and, in particular, would be able to acquire voting rights in Eemland under certain circumstances which was likely to influence Eemland's commercial policy. At the very least, Gillette's conversion rights would influence Eemland's decision-making in respect of those events which may trigger the conversion and this could seriously hamper Eemland's business strategy. The Commission held that the arrangements as a whole could be viewed as a strategy by Gillette to weaken the competitive position of Eemland, and correspondingly to strengthen Gillette's own position. The Commission stated that it was significant that Gillette took a leading role in arranging the transaction and in shaping the arrangements. One of the major consequences of this transaction was that Eemland's scope of action on the Community wet-shaving market had been considerably circumscribed and the options which were open to the company were severely limited by the burden of debt which it carried, by the limited geographical scope of its markets and by the influence which Gillette will be able to exercise through its interests in Eemland. Eemland's ability to engage in an expensive advertising campaign, for example, was severely limited in a market where advertising was an important part of the manufacturer's competitive strategy on this market. Furthermore, because of

With regard to the prohibition against restrictive agreements in Article 85(1) of the EC Treaty, the Commission referred to the judgment of the CJEU in *Philip Morris* where it acknowledged that the acquisition by one company of an equity interest in a competitor may serve as an instrument for influencing the commercial conduct of the companies in question so as to restrict or distort competition on the market on which they carry on business. It is significant to note that the Commission held that even though in the circumstances of this case, Gillette's acquisition of an equity interest in Eemland as such "may not suffice" for a finding of an infringement of Article 85(1), it had to be noted that it was accompanied by a number of agreements which had as their object or effect a restriction of competition between Gillette and Eemland, namely, the non-Community sale agreement, the intellectual property agreement and the supply agreement. The Commission concluded that the above agreements gave rise to cooperation between Gillette and Eemland in breach of Article 85(1) of the EC Treaty.¹⁰⁵ The Commission further concluded that the agreements in question did

the geographic separation of the Wilkinson Sword trade mark, Eemland would not be able to sell outside the Community and the United States of America under the Wilkinson Sword brand name, thereby limiting company's scope for expansion. Eemland has lost those markets in which there was the greatest potential for growth. The Commission concluded that by weakening the competitive position of Eemland, Gillette as the dominant player on this market would benefit from this lessening of competition. Gillette could reasonably be expected to take account of its significant equity holding and creditor relationship with Wilkinson in setting its Community strategy. Outside the Community, it was likely that Wilkinson Sword will be used not as a competing brand but as a strategic one. The Commission stated that this would very probably have an effect on competition within the Community. One possibility would be concentration on different market segments, with Gillette targeting the top end of the market (particularly the systems segment) and obliging Wilkinson to concentrate on the lower-price part of the market. The Commission highlighted that it was noteworthy that Gillette intended to increase its sales of Sensor razors over the following three years while its sales of Contour razors was estimated to drop over the same period from. The Commission stated that the above indicated that Gillette hoped to concentrate on the market segment where it was technologically superior to its rivals, leaving the lower end of the market to Wilkinson Sword products.

The Commission noted that Gillette's access to the existing Wilkinson Sword technology which related to the business taken over by Gillette would strengthen Gillette's competitive position which occurred because Eemland would have no initial competitive advantage over Gillette in that respect: both parties started from the same position. Furthermore, Gillette's access when arranging this transaction to detailed financial projections for Wilkinson Sword wet-shaving products, including margin and sales estimates, would have given Gillette a competitive advantage.

¹⁰⁵ The Commission referred to the following:

(i) The geographical separation of the Wilkinson Sword trade mark between the Community and neighbouring markets resulting from the first two of the above agreements would lead to commercial cooperation between the respective owners of the trade mark, namely Gillette and Eemland. Both Gillette and Eemland would at least, initially, be manufacturing and retailing identical products under the same trade marks (albeit in separate geographic areas) and would, therefore, have a common interest in promoting those products and the value of the trade marks. The parties themselves recognised this, as evidenced by the provision in the intellectual property agreement referring to worldwide goodwill. It followed that there was a strong incentive for the two companies to cooperate and this was particularly obvious in the case of neighbouring markets. There were similar conditions of competition in the European Free Trade Association (EFTA) countries, for example, and the Community. The agreements created an artificial separation of markets. There was no natural border between the Community and non-Community countries for the purposes of trade in shaving products. Advertising and packaging were

not satisfy the conditions for an exemption under Article 85(3). The Commission took into account the final judgment entered in the US courts with the consent of Gillette and Eemland, but noted that the restrictions imposed on the parties may be waived with the agreement of the Department of Justice or the US courts. Furthermore, at least some of the restrictions would automatically expire after 10 years. The restrictions accepted by the parties did not, in any event, remedy the adverse effects of the arrangements within the Community. The Commission required Gillette to withdraw from Eemland, disposing of both its equity interest and its interest as a creditor of Eemland. The Commission separately imposed remedies in relation to the effects of the non-Community sale agreement, the intellectual property agreement and the supply agreement.¹⁰⁶

There appear to be a number of significant flaws in the approach taken by the Commission in *Gillette*. Firstly, it is difficult to reconcile the finding of fact made by the Commission in terms of the influence of Gillette over Eemland and its application of Article 85 to those facts. The Commission, in its prior analysis of the application of Article 86, closely examined the question of Gillette's influence over Eemland. The Commission referred to the fact that Gillette had become a major shareholder in Eemland, its largest creditor and had acquired important pre-emption and conversion rights over Gillette. The Commission highlighted that Gillette's position was a matter which the management of Eemland will be obliged to take

common to both sides of the border. There was an increased tendency for key accounts in the razor business to become part of large buying groups which regarded Europe as one market and did not distinguish between a Community and a non-Community market. Consequently, the trade mark-sharing arrangements did not reflect commercial reality and the parties would be obliged to cooperate at least in relation to these neighbouring markets. This again was recognised in the agreements which stated that the parties would cooperate when problems arose in relation to common customers.

(ii) The Commission referred to Eemland having brought to the attention of the Commission, in its reply to the statement of objections, Gillette's participation in the company had had a negative impact on the perception of Wilkinson Sword products in the Community. This had occurred, according to Eemland, because Eemland's competitors had been able to say to trade customers (albeit wrongly) that there was no difference between Gillette and Wilkinson Sword and that they should therefore purchase an alternative second brand to Gillette, other than Wilkinson Sword. This would obviously have an effect on competition in the wet-shaving market within the Community.

(iii) The supply arrangements between Gillette and Eemland provided for cooperation between the parties given that Gillette was a substantial customer of Eemland and continued to purchase Wilkinson Sword products for sale outside the Community and these factors led to a restriction of competition on the wet-shaving market in the Community since, in a market which was characterized by a small number of competitors and high barriers to entry, a newly created relationship between competitors which resulted in commercial coordination, especially a relationship between the market leader and a leading competitor, would lead to an appreciable restriction of competition. Even though the supply agreement expired on 1 January 1992, Gillette continued to purchase Wilkinson Sword products from Eemland on an ad hoc basis.

¹⁰⁶ The Commission required that the commercial cooperation between Gillette and Eemland arising out of the division of the Wilkinson Sword trade mark between the Community (and the United States of America) and the rest of the world, had to be terminated in order to prevent coordination of commercial conduct in neighbouring geographic markets and that Gillette re-assign to Eemland, the Wilkinson Sword businesses in Czechoslovakia, Hungary, Poland, Turkey, the former Yugoslavia and all the EFTA countries as well as the former German Democratic Republic.

account of, and consequently, was a factor which would “influence the commercial conduct of Eemland”. The Commission concluded:

“It follows that Gillette will have at least some influence on Eemland’s commercial policy”.¹⁰⁷

It is clear that the Commission made a finding of influence by Gillette over Eemland. From the above, it is abundantly clear that the Commission found, as a matter of fact, that Gillette could influence the commercial conduct of Eemland. However, surprisingly, the Commission held that the above did not amount to a breach of the prohibition against restrictive agreements in Article 85(1) (as opposed to the prohibition against abuse of a dominant position). The operative part of the Commission’s decision regarding the findings of a breach of Article 85 as set out in Articles 2 and 3 made no reference whatsoever to the minority interest. The finding of breach related to the non-Community sale agreement and the IP manufacturing and distribution agreement. It appears that the equity interest did not feature in the finding of a breach of Article 85 despite the Commission at paragraph 24 of its decision finding that Gillette would have “some influence” on Eemland’s commercial policy, the Commission stating that although the equity interest in Eemland “may not suffice for the finding of an infringement of Article 85(1)”, it was accompanied by the above restrictive agreements which were restrictive of competition. In other words, it was influence based on the intellectual property and supply arrangements that amounted to a breach of Article 85(1) of the EC Treaty and not the influence stemming from the shareholding and creditor relationship which formed the basis for a finding of abuse. Based on the above and the market conditions such as high concentration levels and significant barriers to entry, it is clear that the Commission was applying Article 85(1) narrowly and on terms consistent with the judgment of the CJEU in *Philip Morris* that Article 85(1) will not apply to the acquisition of a passive minority interest on the basis of unilateral or coordinated effects which is either not accompanied by a certain level of influence for example through rights associated with the investment such as rights of veto (unilateral effects) or by providing a structure for coordination over and above the equity interest itself (coordinated effects).

Secondly, it is clear that the Commission in *Gillette* considered that the levels of influence required to be established varied, depending on whether one is applying Article 85 or 86. With regard to Article 85, the Commission stated that the acquisition by Gillette of the

¹⁰⁷ Cases No IV33.440 and No IV/33.486 *Warner-Lambert/Gillette and Others and BIC/Gillette and Others* Commission Decision OJ L116/21, para 24.

minority interest in Eemland in circumstances of this case “may not suffice for a finding of infringement of Article 85(1)”. The Commission made it clear that the equity interest had to be considered in the context of being accompanied by “a number of agreements which have as their object or effect a restriction of competition between Gillette and Eemland”, the Commission clarifying the relevant agreements were the non-Community Sale Agreement, the IP Agreement and the Supply Agreement. The acquisition of the equity interest by Gillette in Eemland did not, of itself, according to the Commission, breach Article 85(1) presumably on the basis that the equity interest alone did not trigger the requisite level of influence by Gillette in Eemland. The Commission does not, in its analysis of Article 85, discuss the level of influence Gillette, had or was likely to have in Eemland (this was very much discussed in the context of Article 86) and does not provide any guidance as to the level of influence which must be established to attract the prohibition in Article 85. As pointed out above, it is clear from the judgement in *Philip Morris* that the Court did not intend that the requisite level of influence to be lower for a finding of a breach of Article 85 as opposed to Article 86. The Article 86 analysis in *Philip Morris* was very brief consisting of one paragraph containing four sentences. The only possible indication of a different standard of influence was that the expression used by the CJEU in *Philip Morris* was “influencing the commercial conduct” in regard to Article 85 and “at least some influence on its commercial policy” in the context of Article 86. The Court in *Philip Morris* found in any case that the arrangements in that case did not, on the facts, amount to a breach of either Article 85 or 86. The Court in *Philip Morris* first upheld the Commission’s analysis that the 1984 Agreements did not serve as an instrument for influencing the commercial conduct of Rothmans International for the purposes of Article 85. The CJEU held that with regard to Article 86, it was no longer necessary, in the light of the findings in relation to Article 85, to consider the extent to which Rothmans International occupied a dominant position. The Court after pointing out that an abuse can only occur where the shareholding in question results in effective control or at least some influence on commercial policy, it concluded that based on the Article 85 discussion, it had not been established that the revised 1984 agreements had any such effect. There is nothing else in the text of the judgment of the Court in *Philip Morris* which could be taken to endorse differing levels of influence for the purpose of applying Articles 85 and 86.

Despite the above, it is hard to contest, from a policy perspective, the wisdom and plausibility of making the distinction in terms of a lower level of influence for Article 86 (now Article 102) compared to Article 85 (now Article 101) if one were to accept that influence is a pre-requisite for a finding of a breach of Article 101 or 102. Clearly, the distortion of competition caused by the actions of a dominant undertaking militate in favour of a lower

level of influence being sufficient to attract the prohibition in Article 102 in comparison to an agreement, decision or concerted practice for the purposes of Article 101. Despite the plausibility of the distinction from a policy perspective, it would have been helpful had the Commission in *Gillette* clarified that it was making a very visible distinction between the levels of influence required for the purposes of the two prohibitions, notwithstanding the difficulties it may have faced in seeking to reconcile such a manifest distinction with the judgment of the CJEU in *Philip Morris*.

4.2 Difficulty of Proving Effects

In order to fall foul of Article 101(1) of the TFEU or Section 4(1) of the 2002 Act, the agreement must have as its object or effect the prevention, restriction or distortion of competition. In most cases involving the acquisition of a minority interest, there will be no restriction by object. As a result, a breach must be found to exist by effect. In *Société Technique Minière*,¹⁰⁸ the CJEU held that the test for establishing that an agreement has anti-competitive effect is that it must be demonstrated, with a reasonable degree of probability, that the agreement in question has an appreciable effect on competition in the EU. Account needs to be taken of both the actual and potential effects on competition.¹⁰⁹ Proving effects can be difficult.¹¹⁰ In *T-Online International/TUI/C&N Touristic*,¹¹¹ the Commission was notified under the 1989 EUMR of a proposed joint venture, T-Online Travel, between T-Online International AG (**T-Online**), TUI Group GmbH (**TUI**) and C&N Touristic AG (**C&N**). T-Online Travel, the joint venture, was to operate an online travel agency linked to T-Online's Internet portal.¹¹² The Commission held that the transaction raised serious concerns that competing online travel agencies would be foreclosed from the 'must-carry' content provided by the two leading package holiday brands of the joint venture parents namely, TUI and C&N. Such foreclosure could have occurred through preferential access for the joint venture to promotions, price reductions, capacity during peak demand periods, supporting documentation, such as digital pictures and logos, and similar

¹⁰⁸ Case 56/65 *Société Technique Minière v Maschinenbau Ulm* [1966] ECR 235.

¹⁰⁹ Case T-374/94 *European Night Services v Commission* [1988] ECR II-3141.

¹¹⁰ Bellamy and Child, *European Union Law of Competition* (Eighth Edition, Oxford University Press 2019), paras 8.315.

¹¹¹ EC Competition Policy Newsletter, No 2, June 2002.

¹¹² The Commission held that the proposed joint venture raised competition issues. T-Online was controlled by Deutsche Telekom AG, and was the leading Internet Service Provider in Germany and also operated Germany's most visited Internet Portal. TUI and C&N were vertically integrated tour operators with activities in several Member States. In Germany, TUI and C&N were number one and two respectively on most of the relevant travel markets. The Commission found that TUI and C&N had by far the strongest brands in the tour operator market to an extent that independent travel agencies considered them as "must-carry" products, at least one of which they had to be able to offer to their customers.

measures. T-Online's position, by far the most visited portal in Germany, combined with the network economies inherent to the ISP/portal market would have made a strategy of using T-Online Travel, the joint venture, as a preferred, if not exclusive, distribution channel viable for the two tour operators. The parties offered a behavioural remedy whereby TUI and C&N would commit to supply competing online travel agencies with travel content on non-discriminatory conditions. The Commission held that the commitments were too general and complex to implement in order to provide a 'clear-cut' solution to the identified competition problem given the various forms by which discrimination can occur, internal transfer pricing problems, the complex agent compensation structure used in the travel industry and other factors. Following the opening by the Commission of a Phase 2 investigation, the parties restructured the venture resulting in the sole control of T-Online Travel by T-Online. Each of TUI and C&N would take a minority stake of less than 12.5% in T-Online Travel. The Commission came to the conclusion that the restructured transaction did not give rise to a concentration for merger control purposes and the parties therefore withdrew the notification. The parties did not notify the restructured arrangements seeking a negative clearance or exemption and the Commission opened an *ex-officio* investigation into whether or not the revised arrangements gave rise to a breach of Articles 81 or 82 of the EC Treaty. The Commission concluded that from a review of the revised arrangements, no appreciable restriction of competition "could be detected and proven" in the online travel agency market or the portal (advertising) markets. The participating tour operators continued to market their 'must carry' travel content not only via their own websites (direct selling) but also via third portals and/or online travel agents, no exclusivity possibly contrary to Article 81 of the EC Treaty was at issue. In addition, neither the agreements nor T-Online's presumed dominant position on the ISP market gave rise to competition concerns within the meaning of Articles 81 and 82 of the EC Treaty. In particular, there was no exclusivity of access to the travel content offered via T-Online Travel in favour of T-Online ISP subscribers.

Significantly, the Commission stated that the investigation highlighted the differences in the toolkit provided by the system of merger control and Article 81 as follows:

"Finally, C-2's investigation highlighted the existing differences in the functioning of the competition supervision provided by the *ex-ante* control mechanism under the Merger Regulation on the one hand and the mainly *ex-post* control possible under the EC anti-trust provisions on the other hand. Although the foreclosure concerns raised by the MTF [Merger Task Force] had not been completely resolved by the new shareholder regime, the Merger Regulation was no longer applicable because

of the lack of joint control. On the other hand, under Articles 81 and/or 82 of the EC Treaty similar anti-competitive consequences of the parties' future commercial co-operation were difficult to grasp unless clear-cut restrictions of competition in the underlying agreements, such as exclusivity or non-compete clauses, were present. Nonetheless, monitoring of cases like the one at issue under EC anti-trust provisions may prove helpful in order to prevent restrictions of competition resulting from the economic incentive structures created by co-operative joint ventures."

The above is a clear acknowledgment by the Commission that the revised arrangements did not entirely address the foreclosure concerns raised in the context of the original merger review but that the toolkit provided by Article 81 and 82 was in some way insufficient to allow for intervention in the absence of express restrictions in the underlying documents. Although there is no mention of *Philip Morris* in the Competition Policy Newsletter reporting on the case, it appears that Commission on the facts effectively found that the revised arrangements under which TUI and C&N took minority interests in T-Online Travel did not either "serve as an instrument for influencing the commercial conduct of the companies in question so as to restrict or distort competition on the market on which they carry on business" as per the test laid down by the CJEU in *Philip Morris*. The Commission did not detail its reasoning for arriving at the above conclusion. Presumably, the structural link between the competitors, TUI and C&N, through their each taking a minority interest in T-Online Travel and the fact that T-Online and T-Online Travel were operating downstream of TUI and C&N was insufficient to allow the Commission to conclude that the requisite level of likelihood of cooperation between the parties existed in the absence of an express restriction such as exclusivity of access to the travel content offered via T-Online Travel in favour of T-Online ISP subscribers. The above highlights the burden facing competition enforcement agencies and plaintiffs of having to prove that the structural link and related cooperation between the parties gives rise to anti-competitive effects. The Commission was clear that the foreclosure concerns examined in the merger review were not completely resolved by the revised arrangements yet it felt that the structural link and related cooperation was insufficient to justify a finding of a breach, presumably applying the *Philip Morris* line of authority.

4.3 Inconsistency in Applying the *Philip Morris* Influence Test

A number of reported cases involving the application by the Commission of the *Philip Morris* doctrine are examined below. The examination exposes an apparent misunderstanding by the Commission of the decision of the CJEU in *Philip Morris* and a lack of consistency in

the Commission's approach to the application of the *Philip Morris* doctrine. Most of the cases discussed above involved the Commission arriving at a full decision setting out, in relative detail, the basis on which it arrived at its decision in contrast to the cases cited in 4.4 below which were reported only in the Commission's Annual Competition Reports or Competition Policy Newsletters. Among the key factors in assessing the application of Articles 101 and 102 of the TFEU to minority interests is the level of influence required to be established which includes examining whether or not the equity interest is accompanied by a right to appoint nominees to the board of directors, commercial cooperation and whether or not Chinese Walls are in place to prevent the sharing of confidential information giving rise to the coordination of the competitive behaviour of the undertakings concerned. As can be seen from the cases reviewed below such as *BT/MCI*, *Olivetti/Digital* and *Phoenix GlobalOne*, the Commission in applying Articles 101 and 102 of the TFEU to minority interests on the basis of the *Philip Morris* doctrine has lacked consistency in its approach to examining such matters as board representation and Chinese Walls in the context of evaluating whether or not the influence standard has been met. The above lack of consistency together with the limitations of Article 101 requiring the existence of an agreement between persons who are acting as undertakings and the limited scope of the *Philip Morris* doctrine which confines Article 101 to minority interests acquired in a competing undertaking where a certain, albeit unclear, level of influence needs to be established, underlines the number and extent of the shortcomings in the only regulatory framework available at the disposal of the competition enforcement agencies for the regulation of non-controlling minority interests.

*KLM/Transavia*¹¹³ involved KLM, the Dutch flag carrier, purchasing a 40% stake in Transavia, one of the Netherlands' largest charter airlines which had also started some scheduled operations.¹¹⁴ The agreement empowered KLM to appoint two out of five of Transavia's board of directors. KLM had agreed with Transavia's owner that Transavia's scheduled services would not compete with KLM. The Commission raised concerns about the effect of KLM's interest in Transavia on the markets for charter and scheduled services out of Amsterdam.¹¹⁵ Transavia and Martinair, a company in which KLM directly and indirectly held a significant interest, together accounted for about three-quarters of the Dutch charter market. Even though they were rivals at the time, KLM's initial 40% interest in Transavia would, in the context of a highly concentrated Dutch charter industry which had

¹¹³ Commission XXIst Report on Competition Policy, 72.

¹¹⁴ KLM had an option to increase its interest to 80%, which it exercised in 1991.

¹¹⁵ It should be noted that the case was not the subject of a full published decision and the report of the case appears as a short summary in the Commission's annual Competition Policy report for 1991.

“a tradition of technical co-operation”, have created a structure conducive to commercial co-operation contrary to Article 85(1) of the EEC Treaty, the Commission citing the judgement of the CJEU in the *Philip Morris* case. The Commission in its report expressed the view that the agreement also enabled KLM to influence Transavia’s development as a scheduled airline and concluded that it restricted competition on that market too. The Commission expressed concern that the agreement could consolidate KLM’s dominant position on the Dutch market for the sale of air transport to and from the Netherlands. The Commission reported that after it objected to the contested agreement, KLM provided “guarantees” that it would deal with Transavia at arm’s length and that this enabled it to suspend proceedings. KLM also agreed to refrain from acquiring an interest in other Dutch airlines outside its group. The Commission reported that, as was the case in connection with the mergers between British Airways and British Caledonian and between Air France, UTA and Air Inter,¹¹⁶ these assurances ensured market access for new airlines and enabled the Commission to give its “approval”.¹¹⁷

The Commission in *KLM/Transavia* reported its acceptance of “guarantees” from KLM that it would deal with Transavia “at arm’s length”, which enabled the Commission to suspend proceedings. The Commission in its report does not expand or clarify the nature of the arm’s length guarantees. This case appears only to have been reported in the Commission’s annual competition policy report which typically does not provide much detail or analysis of the relevant legal or economic principles. It could well be that the above guarantee to deal with Transavia on an arm’s length basis involved the putting in place of Chinese Walls regarding commercially sensitive information so as to minimise the risk of information exchanges or other methods of collusion. It appears that the Commission did not insist on the removal of KLM’s nominees to the board of Transavia, although this is not absolutely clear given the absence of detail in the Commission’s report. Assuming that the Commission did not require KLM to withdraw from the Transavia board, the position taken by the Commission on board membership is manifestly inconsistent with the approach taken by the Commission regarding board nominees in *Philip Morris* (which has been upheld by the CJEU).

As we saw in 4 above, the Commission in *Gillette* applied a narrow interpretation to the CJEU’s decision in *Philip Morris* which in effect requires influence to be established at a level that excludes the application of the doctrines of unilateral and coordinated effects to

¹¹⁶ Commission XX Report on Competition Policy, 90.

¹¹⁷ It is not absolutely clear what the Commission was referring to in relation to “approval” but it appears that it may have been referring to approval as confirmation that Article 85(1) was not applicable to the revised arrangements.

passive minority cross shareholdings. Gillette had become a major shareholder in Eemland, its largest creditor and had acquired important pre-emption and conversion rights over Gillette which led the Commission to conclude that Gillette's position was a matter which the management of Eemland will be obliged to take account of, and consequently, was a factor which would "influence the commercial conduct of Eemland". Notwithstanding the above unambiguous finding of influence, the Commission concluded that Gillette's acquisition of an equity interest in Eemland "in the circumstances of this case" "may not suffice" for a finding of an infringement of Article 85. It was only because the equity interest was accompanied by the non-Community sale agreement, the intellectual property agreement and the supply agreement that the Commission concluded that an infringement of Article 85(1) had occurred. Furthermore, the Commission in *Gillette* applied a different standard of influence to Articles 85 and 86 respectively, which does not appear to be supported by the CJEU's judgment in *Philip Morris*. The Court in *Philip Morris* approached Article 86 by stating that it was no longer necessary, in the light of the findings in relation to Article 85(1) (the CJEU found that the 1984 Agreements did not infringe Article 85(1)), it was no longer necessary to consider the extent to which Rothmans International occupied a dominant position. In other words, it appears that the CJEU approached Article 86 by taking the position that given that the influence standard had not been met in the context of Article 85(1), there was no scope for applying Article 86. *Philip Morris* contrasts sharply with the Commission's approach in *Gillette* where it made a marked, albeit unclear, distinction between the influence standard, depending on whether one is applying Article 85(1) or 86.

In *BT/MCI*,¹¹⁸ the transaction was originally notified as a concentration pursuant to 1989 EMCR but the Commission concluded that the notified transactions did not constitute a concentration. The parties requested that the notification be converted into a notification for negative clearance and/or exemption pursuant to Regulation 17 and Article 53 of the Agreement on the European Economic Area ("**EEA Agreement**"). The notified operation comprised principally the following two transactions:

- British Telecommunications plc ("**BT**")¹¹⁹ was to take a 20% stake in MCI Communications Corporation ("**MCI**")¹²⁰ to become the largest single shareholder in

¹¹⁸ Case IV/34.857 *BT/MCI* Commission Decision [1994] L223/36.

¹¹⁹ BT was the former UK monopolist telecommunications operator, and supplied telephone exchange lines to homes and businesses; local, trunk and international (to and from the United Kingdom) telephone calls; other telecommunications services and telecommunications equipment for customers' premises.

¹²⁰ MCI was a telecommunications common carrier in the US providing a broad range of US and international voice and data communications services including long-distance telephone, record communications and electronic mail services to and from

MCI, with proportionate board representation and investor protection. Several provisions were included in the relevant agreements to impede BT from controlling or influencing MCI;¹²¹ and

- The creation of a joint-venture company, Newco, for the provision of enhanced and value-added global telecommunications services to multinational (or large regional) companies. The parties agreed to contribute their existing non-correspondent international network facilities, including Syncordia, BT's existing outsourcing business, to Newco.¹²²

BT's representation on the MCI board was to remain in proportion to its shareholding. BT was entitled to three directors.¹²³ Four directors could be executive officers of MCI. There was a similar representation on most MCI board committees. At least eight members of the MCI board had to be fully independent of MCI and BT. BT, as the sole holder of MCI's class

the US. MCI was the second largest long-distance operator in the US after AT&T and the world's fifth largest in terms of traffic.

¹²¹ The transaction documents providing for the acquisition of the 20% stake contained provisions restricting the transfer of shares by BT and limits to the ability of BT to increase its shareholding in MCI, an undertaking by BT not to dispose of its shares in any manner whatsoever for four years from the closing date after which BT was free to sell subject to a right of first refusal to MCI and BT was granted the right to acquire any new shares issued by MCI necessary to maintain the percentage it had in MCI at that time or to increase it assuming that such purchase did not breach any foreign ownership restrictions under US law applicable at the relevant time subject to a cap of 20% until the 10th anniversary of the closing date. Furthermore, during the same period, BT expressly undertook not to seek to control or influence the company. Once the 10 year 'standstill' period expired, BT was free to increase its shareholding up to the level then fixed by the US Communications Act as regards foreign ownership. However, even if those restrictions were completely eliminated, BT would generally only be allowed to exceed a 35% stake in MCI by a tender offer or business combination that had been approved by a majority of the independent directors and by a majority of the shareholders (other than BT).

¹²² The market Newco was to address was the emerging market for value-added and enhanced services to large multinational corporations, extended enterprises and other intensive users of telecommunications services provided over international intelligent networks. This market was to cover a wide range of existing global trans-border services, including virtual network services, high-speed data services and outsourced global telecommunications solutions specially designed for individual customer requirements. Initially, Newco was to focus its development efforts on the biggest multinationals and in this market, Newco was expected to offer a portfolio of global products. Generally speaking, those requirements had not been adequately satisfied under the still existing structure of the global telecommunications market based on national monopolies. This situation began to change because of two elements. The starting up, first in the US, then in the United Kingdom and at the time of the decision in the rest of the Community, of the gradual liberalization process of the global telecommunications market, and, secondly the rapid convergence of telecommunications and information technology. Both elements enabled the introduction of new services and products which vastly improved quality and range. One result was that multinationals and other big companies began to construct their own private networks. However, those private networks were costly because they eliminated scale economies of service and personnel, and because telecommunications was not the core business of those companies. For those reasons, now that the continued evolution of the said two elements had substantially changed the overall situation, those companies could consider turning to telecommunication service providers such as Newco. In addition, as regulation eased and technology advanced, the border between services still under monopoly and liberalized services faded away which added further uncertainty to the market.

¹²³ The MCI board was to be composed of fifteen directors.

A common stock, had been granted substantial consent rights with respect to certain corporate actions of MCI concerning equity issuances, acquisition of core and of non-core business, sales of assets and borrowing above certain specified limits.¹²⁴

It is important to note the Commission's statement in *BT/MCI* of the *Philip Morris* principle where it pointed out that, as a general rule, both the Commission and the CJEU had taken the view in the past that Article 85 (1) does not apply to agreements for the sale or purchase of shares as such and referred to its decision, and that of the CJEU, in *Philip Morris*. The Commission highlighted that however, Article 85(1) might apply to agreements for the sale of shares in the following circumstances:

"...given the specific contractual and market contexts of each case, if the competitive behaviour of the parties is to be coordinated or influenced".

The Commission assessed whether the presence of BT's nominees to the board of MCI could give rise to coordination of the competitive behaviour of the two companies, in particular given the access that BT would have had to MCI's confidential information. In this respect, the Investment Agreement had been drafted in such a way that BT did not have the possibility to seek to control or influence the company. This was particularly so in the case of the obligation not to increase shareholding for 10 years and not to seek to control or influence the company. The Commission highlighted that both American corporate and antitrust laws would impede any misuse of (or even the access to) any piece of confidential information relating to MCI by BT. The Commission concluded that the investment by BT in MCI did not fall within the scope of Article 85 (1) of the EC Treaty or Article 53 (1) of the EEA Agreement.

It is interesting and significant to note that the Commission in *MCI/BT* tolerated BT's representation on MCI's board of directors whereas in *Philip Morris* the restructured 1984 Agreements did not involve any board representation by Philip Morris in Rothmans International on foot of the Commission's objection to such representation. The

¹²⁴ The arrangements included certain loss of rights provisions. In the event that either BT or MCI engaged, directly or indirectly, in the core business of the other (in the Americas in the case of BT and outside the Americas in the case of MCI) or transferred or provided sales and marketing in connection with any person or acquired an interest in any person who was engaged in the core business of the other, then the engaging party would lose certain rights. In the case of BT, its shares in MCI were converted into common stock and it was to lose its voting and consent rights and its board representation in MCI. In the case of MCI, BT would cease to be bound by various obligations concerning future share transfers, voting or the standstill provisions mentioned above. In any event, the loss of rights provisions would not be automatically triggered; there were a number of exceptions (which included without limitation correspondent relationships in the ordinary course of business and any activities in connection with the ownership of Newco) and a procedure to be followed (including arbitration in case of disagreement) before a loss of rights was deemed to exist.

Commission in *BT/MCI* expressly acknowledged the risk that confidential information of MCI could pass to BT by virtue of BT's representation on MCI's board by stating that:

"The Commission consequently assesses whether the presence of BT's nominees to the board of MCI could give rise to coordination of the competitive behaviour of the two companies, in particular given the access that BT will have to MCI's confidential information."

Despite the above risk, it appears that the Commission satisfied itself that there was no breach of Article 85 involved on the basis that the Investment Agreement expressly prohibited BT from controlling or influencing MCI and US corporate and antitrust laws would impede any misuse of (or even the access to) any piece of confidential information relating to MCI by BT.

*Caronna*¹²⁵ explains the difference in treatment between *BT/MCI* and *Philip Morris* as follows:

"It should be noted that the Commission endorsed a somewhat more liberal approach [in *BT/MCI*] than that displayed in the *Philip Morris* judgment where it had imposed an obligation on the acquirer to ensure that the latter not be represented in the management. Though not explicitly affirmed in the judgment, the more relaxed approach of the Court [no doubt the *Caronna* intended to refer to the Commission] is probably the result of the different characteristics of the respective relevant markets, the market in *BT/MCI* being characterised by a high degree of uncertainty, significant growth potential, highly sophisticated customers and the presence of many significant competitors." [Language in square brackets added]

The relevant market in *Philip Morris* was oligopolistic, stagnant and characterised by high barriers to entry. However, as *Caronna* points out, the different market conditions were not referred to by the Commission in *BT/MCI*.

While, as a matter of competition policy, the stricter approach adopted by the Commission in *BT/MCI* to board representation in oligopolistic markets is understandable, it would have been helpful had the Commission articulated the above in its assessment and conclusion that the minority equity interest did not involve a breach of Article 85 in that case. Furthermore, the author would question the Commission's reliance on the application and

¹²⁵ Fausto Caronna, 'Article 81 as a tool for controlling minority cross shareholding between competitors' (2004) *European Law Review*.

implementation of a contractual commitment as to no control or influence and US corporate laws against use and misuse of confidential information as a basis for permitting BT to remain on MCI's board and in concluding that the above board representation, did not violate Article 85. The above was very much in the vein of a behavioural remedy requiring a level of ongoing monitoring and risk of default. It is submitted that the Commission should have, at the very least, imposed a more structural type of remedy in the form of a clear and binding arrangement that BT not be represented on the board of BT. The Commission makes it clear in the context of mergers under the 2004 EMCR, that structural remedies, such as disposal, are as a rule preferable to behavioural remedies inasmuch as they "prevent, durably, the competition concerns that would be raised by the merger as notified, and do not, moreover, require medium or long-term monitoring measures".¹²⁶

The Commission found that the creation of Newco and certain related arrangements such as the appointment of Newco by BT as exclusive distributor, purchase commitments, non-compete and loss of rights provisions were contrary to Article 85(1) of the EC Treaty but satisfied the conditions for an exemption under Article 85(3) of the EC Treaty.¹²⁷

*Digital/Olivetti*¹²⁸ involved a notification by Digital Equipment Corporation and Ing. C. Olivetti & C., SpA of a cooperation agreement in the field of computer systems, for the purpose of obtaining negative clearance or alternatively an exemption pursuant to Article 85 (3).¹²⁹ The technological cooperation was accompanied by the acquisition by Digital of a non-controlling 8% interest in Olivetti and proportional representation on Olivetti's board of directors (for so long as Digital held a minimum number of shares) ¹³⁰ Significantly, the

¹²⁶ Commission Notice on remedies acceptable under council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 [2008] OJ C267/1.

¹²⁷ Similarly, the Commission found that the arrangements were contrary to article 53(1) of the EEA Agreement but satisfied the conditions for an exemption under Article 53(3) of the EEA Agreement.

¹²⁸ Case IV/34.410 *Olivetti/Digital* Commission Decision [1994] OJ I309/24.

¹²⁹ Olivetti of Italy was a worldwide group in the information technology field with a global offering and with focus on personal information devices, notebook computers, laptop computers, personal computers, Intel-based computing platforms, entry-level RISC computers and special and general-purpose impact and non-impact printers. Digital of the US, was a worldwide group which was principally active in the field of design, manufacture, sale and servicing of networked computer systems, associated peripheral equipment and related network, communications and software products. Digital was to make available to Olivetti its Alpha AXP technology based on its new RISC (reduced instruction set computer) microprocessor and Olivetti would commit itself to the Alpha AXP technology for all its computer platform offerings and related software except the line of products based on Intel-type microprocessors. Olivetti would purchase computer system products from Digital including but not limited to Alpha AXP products. Digital, for its part, would continue to purchase from Olivetti personal computers ("PCs") for its European operations on the basis of a pre-existing Purchase Agreement, which had not been notified to the Commission.

¹³⁰ Digital was not allowed to purchase any interest in Olivetti which would have resulted in a holding of more than 10%. Digital was prohibited from entering into voting arrangements with third parties in respect of its Olivetti shares. There were no veto

board of Olivetti had delegated all of its operative functions to Olivetti's Chairman and General Manager. The board met only four times per year to review financial matters¹³¹ or to discuss general issues. With the exception of the Chairman, the Vice-Chairman and the Managing Director of Olivetti, none of the board members had an operational function at Olivetti. According to the parties, Olivetti's board was not involved in decisions on the development of new products or their pricing and that the board was informed of the agreements with Digital only after they had been concluded. There were no operating issues that had to be approved by the whole board of Olivetti. The Commission concluded that as long as the functions and tasks of Olivetti's board of directors were limited to those described above, it was unlikely that Digital's representation on Olivetti's board would have led to a coordination of competitive behaviour or the exchange of competitive information and that therefore the arrangements embodied in the Share Purchase and Shareholders' Agreements did not have as their object or effect the prevention, restriction or distortion of competition within the meaning of Article 85 (1).¹³²

It is interesting to note that the Commission accepted the representation by Digital on Olivetti's board and that this would not lead to a coordination of competitive behaviour or to an exchange of competitive information on the basis that Olivetti's board had limited functions. The report of the case does not refer to any commitment under which the parties were to ensure that the above board structure with limited functions remained in place other than to state that Article 85 did not apply for so long as the structure described by the parties remained in place. As a result, it appears that the parties would have been free to alter the structure and functions of the Olivetti board in such a way that confidential information could have passed and the parties would not have been in breach of the terms of the Commission's decision even though, of course, the parties would have been open to a fresh investigation by the Commission or to an action for breach of Article 85 in the national courts. Furthermore, there is no reference in the *Olivetti/Digital* decision to Chinese walls being put in place in relation to commercially sensitive information. As a result, the Commission was relying on an Olivetti board structure which had developed as a practice which was neither supported either (i) by a clear contractual commitment to maintain the

rights that could have given Digital, immediately or at a later stage, a controlling power over Olivetti. In fact, Olivetti continued to be under the sole control of CIR which still held 31.07%. CIR's right of first refusal with respect to any proposed sale by Digital of its Olivetti shares showed CIR's intention of keeping as much control as possible of the company.

¹³¹ Approval of the balance sheet, of emoluments and of the half-yearly financial statement to be provided to the Italian securities authority.

¹³² The Commission held that the setting up and operation of the committees were neither structures likely to be used for commercial cooperation nor vehicles for the coordination of competitive behaviour. Separately, the Commission concluded that Olivetti's commitment to Digital to purchase Alpha AXP products was in breach of Article 85(1) but satisfied the conditions for the grant of an exemption under Article 85(3).

above board structure in place nor (ii) by an express Chinese Wall mechanism to ensure that confidential information did not pass.

It should be noted that the tasks and functions of the board of directors in *BT/MCI* were not limited in the same way as in *Olivetti/Digital* and yet BT was allowed to maintain nominees on MCI's board without, in the Commission's view, violating Article 85 on the basis of a contractual commitment by BT as to no control or influence of MCI and the application of US corporate laws against use and misuse of confidential information. Indeed, in *Philip Morris*, the revised transaction documents contained provisions regarding the absence of board representation on the Rothmans International board and Chinese Wall provisions preventing the exchange of confidential information. The Commission in *Olivetti/Digital* made no reference to either of the *Philip Morris* or *BT/MCI* cases.

*STET*¹³³ involved the notification of arrangements between the Italian telecommunications group, Societa Finanziaria Telefonicaper Azioni (**STET**)¹³⁴ and the US telecommunications group American Telephone and Telegraph Company (**AT&T**)¹³⁵ to establish technological and commercial cooperation in the field of telecommunications equipment,¹³⁶ with a view to obtaining an individual exemption pursuant to Article 85 (3) of the EEC Treaty. It is important to note that the only available decision is a notice issued by the Commission under Article 19(3) of Regulation 17/62¹³⁷ of its intention to grant an individual exemption under Article 85(3) of the EC Treaty¹³⁸ and inviting interested third parties to submit their views. The notified arrangements included AT&T taking a 20% equity interest in a STET group entity, Societa Italiana Telecomunicazione SpA (**Italtel-SIT**) and STET acquiring a 19.48% equity stake in AT&T Network Systems International BV (**AT&T-NSI**). Each party was represented on the board of the other in proportion to its holding, the Commission

¹³³ Case No IV/33.232 *STET/Italtel/AT&T/AT&T-NSI* [1992] OJ C333/3.

¹³⁴ STET was an Italian entity which oversaw the activities of several companies engaged in the provision of telecommunications services and the manufacture and installation of telecommunications products and systems.

¹³⁵ AT&T from the US was the world leader in telecommunications.

¹³⁶ The technical and commercial cooperation between the parties was implemented by two standing structures i.e. two technical and commercial management boards, one for public network products, the other for private network products. The two were coordinated by an oversight board on which both parties were equally represented and which had the task of monitoring implementation of the agreements and resolving any difficulties in their application. Neither of the parties had a casting vote in the event of parity of votes. Implementation of the cooperation agreements in the markets where neither party had an established presence at the time of conclusion of the agreements was entrusted to two joint ventures, one for public network products and one for private network products.

¹³⁷ Council Regulation 17/62/EEC First Regulation implementing Articles 85 and 86 of the Treaty OJ P 013/204, including the system for the grant of individual exemptions was abolished by Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty OJ 2003 L1/1.

¹³⁸ Now Article 101(3) of the TFEU.

finding that each party “thus has some influence over the other...” but did not give the holder a “decisive say in the daily running of the business” and that one could not consider that the two parties formed “a single economic entity”. The Commission highlighted that some “major decisions” required the approval of the other party including the public sale of shares, plans to merge with other enterprises and a major change in business strategy. If a deadlock occurred regarding the major decisions, it could lead to the termination of the cross-shareholding.¹³⁹

The Commission accepted that the notified agreements satisfied the conditions for an exemption under Article 85(3) after modifications were agreed relating to the territorial protection covering the distribution of public network products and the vertical integration of the notifying parties on their respective markets.¹⁴⁰

The Commission in *STET* expressly refers to each party being represented on the board of the other and, therefore, each having “some influence” over the other. The concept of “some influence” was introduced by the Commission in *Gillette* in the context of Article 86 (now 102 of the TFEU) in what is regarded as a lower influence threshold than that applicable for the purposes of Article 85 (now 101 of the TFEU). Clearly, the above lends further confusion to the question of the level of requisite influence that needs to be established for a minority interest to be caught by the prohibition in Article 101. The

¹³⁹ There was a proviso that the majority holder nevertheless had the right to implement the proposed decision immediately if it considered that the decision was urgent in the interest of the controlled company.

¹⁴⁰ Because AT&T was vertically structured on the United States market, it was in a position, through cross subsidization from one of its activities (network operator) to another (telecommunications equipment manufacturer), to sell components and sub-assemblies for telecommunications equipment to its European subsidiaries (AT&T-NSI) and to Italtel at prices that did not always reflect cost. The implementation of the agreements could therefore have produced an anticompetitive effect liable to distort competition in a substantial part of the common market. During the examination of the case, and at the Commission's request, AT&T supplied sufficient reasons for the Commission to withdraw its objection. AT&T undertook to keep a file showing the cost structure for each type of product and to hold it at the Commission's disposal for any checks for three years from the time the products were placed on the Community market.

The vertical integration of the telecommunications industry in Italy, headed by STET which controlled both the network operators (including SIP) and the principal manufacturer (Italtel), was liable to increase the potentially anti-competitive effects of the notified agreement. The vertical integration and the cooperation could have formed a barrier to the entry of competitors on an important market. During the examination of the case, Italtel and STET had shown that the Italtel position on the Italian market was less strong than that of most of its competitors on their domestic markets. Further, the entry into force on 1 January 1993 of Directive 90/531 /EEC should have limited the risk of discrimination between suppliers by encouraging competition between firms for supply contracts. STET and Italtel gave the Commission an undertaking to sell products only at prices that reflected cost. They also agreed to keep a file showing the cost structure of each product and to hold it at the Commission's disposal for any checks for a three-year period starting from the time such products are marketed in the Community. On the basis of the undertakings given by the parties, the Commission proposed to take a favourable view, pursuant to Article 85 (3) of the EC Treaty, of the notified agreements.

Commission in *Gillette* makes a distinction, albeit if far from clear, between the two prohibitions and underlines that differing levels of influence are involved when one is applying Article 101 and 102 of the TFEU, respectively. Although the basis of the distinction in *Gillette* is questionable and is not entirely supported by the judgment of the CJEU in *Philip Morris*, the Commission in *STET* appears to go one step further and extend the “some influence” test styled in *Gillette* for Article 86 by applying it to Article 85.¹⁴¹ The *STET* case demonstrates the Commission’s tolerance of minority interests in the context of certain cooperation arrangements between competitors when applying the exemption provisions in Article 101(3) of the TFEU. The Commission in *STET* expressly held that the minority stake and board representation enabled the holder to have “some influence” on the target. Each party had a veto right over some “major decisions”. The shareholdings were reciprocal. The agreements were implemented by two technical and commercial management boards. The Commission held that the notified arrangements, as modified by the parties, satisfied the conditions for an exemption under Article 85(3) of the EC Treaty. The case highlights the availability of Article 101(3) of the TFEU where reciprocal minority interests are coupled with cooperation, which taken together, can be viewed as passing through the gateway of Article 101(3).

In *Phoenix/GlobalOne*,¹⁴² the Commission was notified of a proposal involving France Télécom (“FT”) and Deutsche Telekom (“DT”) each taking a 10% stake in the US telecommunications operator, Sprint. The Sprint group of companies was a diversified telecommunications group providing global voice, data and video-conferencing services and related products.¹⁴³ The acquisition by DT and FT of the 20 % stake in Sprint was aimed at consolidating a strategic alliance to enter the global telecommunications markets and extending service into new market segments.¹⁴⁴ FT and DT were granted proportionate board representation provided that at a minimum each had the right to elect at least one director. FT and DT were not permitted to dispose of its shares in Sprint for five years after the closing date.¹⁴⁵ Neither FT nor DT had access to confidential, competitive information

¹⁴¹ Robin A Struijlaart, ‘Minority Share Acquisitions below the Control Threshold of the EC Merger Control Regulation: An Economic and Legal Analysis’ (2002) *World Competition* 25(2), 173-204.

¹⁴² Case No 435.617 *Phoenix/GlobalOne* Commission Decision [1996] OJ L239/57.

¹⁴³ Sprint’s main subsidiaries provided local (United States) exchange, cellular wireless as well as domestic (United States) and international long-distance telecommunications services Other Sprint subsidiaries engaged in wholesale distribution of telecommunications products and the publishing and marketing of white and yellow page telephone directories.

¹⁴⁴ The Commission expressly referred to its decision in *BT/MCI* and pointed out that as the alliance in *BT/MCI* showed, investment in a United States carrier offered one efficient way of targeting the largest customer group for global non-reserved corporate telecommunications services.

¹⁴⁵ Thereafter, restrictions applied to large transfers, which would in most circumstances gave Sprint the right of first refusal. Pursuant to the standstill agreement, FT and DT each had the right to acquire additional Sprint shares to reach and maintain

on Sprint's activities in the EEA through their representation on Sprint's board and the representatives could not provide Sprint with confidential information that FT or DT may have obtained from US competitors through correspondent relationships. FT and DT were granted substantial consensual or veto rights with respect to certain corporate actions of Sprint,¹⁴⁶ which the Commission described as nevertheless falling considerably short of control.

The Commission confirmed, citing the *BT/MCI* decision, that neither it nor the CJEU considered Article 85 (1) of the EC Treaty applicable to agreements for the sale or purchase of shares unless these agreements affected the competitive behaviour of the parties to the transaction. The Commission analysed whether the appointment of DT and FT representatives to Sprint's board and access to confidential business data could give rise to coordination of the competitive behaviour of all three undertakings and concluded as follows:

- The investment agreement did not afford DT and FT the possibility of exercising a "controlling influence" over Sprint; and
- United States corporate and antitrust laws were designed to prevent access to, and misuse of, Sprint's confidential information by DT and FT. The parties had agreed an additional prohibition against the misuse of such information in two investor confidentiality agreements.

The Commission concluded that DT and FT's investment in Sprint fell outside the scope of Articles 85 (1) of the EC Treaty and 53 (1) of the EEA Agreement.

The Commission's decision in *Phoenix/GlobalOne* is unclear as to what test it is applying in the context of the prohibition in Article 85. The Commission at the outset of its decision refers to the confidentiality and Chinese Wall provisions of the investment agreement as designed "to prevent DT and/or FT, either separately or jointly, from controlling or influencing Sprint". The above is a clear finding of no control or influence by DT or FT over Sprint. Later in the decision, where the Commission arrives at its conclusion as to the

a 10% shareholding, but could not for 15 years after the closing date acquire additional shares that would increase their aggregate voting rights to more than 20%. Once the initial standstill period expired, FT and DT were permitted to acquire additional shares, but could not increase their aggregate voting rights above 30% nor conduct certain activities intended at taking control of Sprint.

¹⁴⁶ These actions included major equity issuances, disapproval of investments in Sprint by major competitors, participation rights in transactions involving change of control, and other bilateral corporate transactions.

absence of a breach of Article 85 in relation to the equity stake and associated board representation, the Commission refers to the investment agreement as not affording DT or FT having a “controlling influence” on Sprint. The concept of a controlling influence would appear significantly higher than the standard of influence contemplated by the CJEU in *Philip Morris*, although the significance of the Commission’s use of the expression “controlling influence” is arguably tempered by the initial finding as to the absence of any influence.

It is clear that the Commission in *Phoenix/GlobalOne* did not appear to be concerned about FT and DT’s representation on the board of Sprint, the Commission satisfying itself as to the existence and application of US corporate and antitrust laws similar to the approach it took in *BT/MCI*. The Commission did not insist on the structural remedy of no board representation as it did in *Philip Morris*. No doubt the same logic could be applied to explain the difference of treatment as was used by *Caronna* in comparing *Philip Morris* and *BT/MCI*¹⁴⁷ in terms of *Philip Morris* involving a stagnant oligopolistic market and *Phoenix/GlobalOne* being concerned with a growing, competitively dynamic global market which of course is to some extent understandable from a policy perspective. It would have been helpful had the Commission articulated the above in its assessment and conclusion that the minority equity interest did not involve a breach of Article 85 in that case with a view to establishing consistency in its approach. Again, the author would question the Commission’s reliance on the application and implementation of a contractual commitment as to no control or influence and US corporate laws against use and misuse of confidential information as a basis for permitting DT and FT to remain on Sprint’s board and concluding that the above board representation did not violate Article 85. The above is very much in the vein of a behavioural remedy requiring a level of ongoing monitoring and risk of default.

The judgment of the CJEU in *Philip Morris* and subsequent Commission decisions applying Articles 101/102 (or their predecessors) underlines the limited scope of Article 101, in particular by requiring a certain level of influence, which appears to exclude passive minority interests not accompanied by a certain or obvious level of influence such as contractual arrangements providing for cooperation. There is little apparent consistency in the approach adopted by the Commission both in terms of the legal formula for prescribing the standard or level of influence required or the application of the relevant influence standard on the facts to determine the circumstances where an equity interest and related rights such as board representation and Chinese walls will give rise to a breach of Article 101/102 of the

¹⁴⁷ Case IV/34.857 *BT/MCI* Commission Decision [1994] L223/36.

TFEU. The *Mecaniver/PPG*, *Philip Morris*, *KLM/Transavia*, *Gillette*, *BT/MCI*, *Olivetti/Digital*, *STET* and *Phoenix GlobalOne* cases involved different outcomes in terms of what the Commission considered as breaching Article 101/102, board representation and the requirement for Chinese walls. The Commission has made no attempt of which the author is aware to rationalize its approach in the cases to date. The table below contains a summary the approach taken by the Commission in each of the above cases in terms of the conclusion made as to whether or not a breach existed, board representation and the requirement for Chinese walls which highlights the different outcomes.

	Whether or not Breach arising from Acquisition of Minority Interest and Related Arrangements	Board Representation	Chinese Walls
<i>Mecaniver/PPG</i>	No breach of Article 85(1) on the basis that holder of interest could not influence the competitive behaviour of the target given that full and effective (i.e. sole) control was vested in the majority shareholder; (ii) the majority shareholder had an option to acquire the minority interest; and (iii) the Commission was of the view that minority interest was temporary on the basis that minority shareholder had announced its	Yes	No

	intent to withdraw from the relevant industry		
<i>Philip Morris</i>	No breach of Article 85(1) or 86 for equity interest in context of revised arrangements/absence of requisite influence	No	Yes
<i>KLM/Transavia</i>	No breach of Article 85(1) or 86 in context of revised arrangements/absence of requisite influence	Yes it appears that the Commission did not insist on removal of KLM nominees to Transavia board.	Not clear from report although it may have formed part of arm's length guarantee
<i>Gillette</i>	Breach of Article 86 for equity interest in revised arrangements/no breach of Article 85(1) on basis equity interest alone/breach of Article 85(1) based on cooperation through intellectual property and supply arrangements	No	Yes
<i>BT/MCI</i>	No breach of Article 85(1) for equity interest and related board representation on the basis of (i) a contractual commitment as to no control or influence and (ii) US corporate laws prohibiting use/misuse	Yes	It appears no contractual Chinese Wall/US law imposed Chinese Wall

	of confidential information/the creation of a JV and related arrangements were found to breach Article 85(1) but satisfied the conditions for an exemption		
<i>Olivetti/Digital</i>	No breach of Article 85(1)/absence of requisite influence/purchase commitment found to breach Article 85(1) but satisfied the conditions for an exemption	Yes but not regarded as a breach of Article 85(1) on the basis that in practice board had very limited functions	No
<i>STET</i>	Revised arrangements including minority interest granted exemption under Article 101(3)	Yes	Sharing of information expressly provided for
<i>Phoenix/GlobalOne</i>	No breach of Article 85(1) in regard to revised arrangements on the basis that the investors did not have “controlling influence” of the target, confidentiality agreements put in place and US corporate and antitrust laws prohibiting the use of confidential information	Yes	Yes

There are various cases reported in the Commission's annual Competition reports where the Commission has objected to the acquisition of cross minority interests in the context of the predecessors to Articles 101/102 of the TFEU but it should be noted that the reports of these cases are short and often provide little or no detailed analysis of the legal or economic issues surrounding the application of Articles 101 and 102.¹⁴⁸ In most of the cases where

¹⁴⁸ For example, on page 59 in *Hudson's Bay/Finnish Fur Sales* Commission XIXth Report on Competition Policy, the Commission objected to Finnish Fur Sales Co. agreeing "in principle" to sell 50% of its shareholding in Hudson's Bay and Annings Ltd to three competitors including 35% to its largest competitor in the Community, Danish Fur Sales ("FFS"). The agreement in principle by Finnish Fur Sales to sell 35% of its shares to its main competitor Danish Fur Sales appeared to the Commission to be such as to exclude FFS as an active competitor from the market. The Commission sent a Statement of Objections and the parties did not proceed with the sale. On page 80 of *Iberica del Cobre/Outokumpu* Commission XIXth Report on Competition Policy the Commission terminated, without any formal decision, proceedings which it had initiated in respect of a set of co-operation agreements concluded between Outokumpu and Iberica del Cobre. Outokumpu was the only Finnish producer of semi-manufactured copper and copper alloy products and controlled two of the three other largest producers in Scandinavia. Iberica del Cobre was the largest Spanish producer of such products. The co-operation agreements provided for Outokumpu to acquire a minority interest in Iberica del Cobre as well as production rationalization plans, marketing agreements and the setting up of a joint venture to distribute Outokumpu's products in Spain. The agreement also provided for Outokumpu to acquire subsequent control of Iberica del Cobre through options on Ibercobre's remaining stock. The Commission in its report stated that it wanted to make sure that the minority interest, together with the agreements in question, was not in fact a means of allowing the two competitors to concert their investment policies and business activities, an arrangement which could become long-term or indeed permanent in the event of the initial concentration project being delayed or abandoned. Outokumpu announced its decision to exercise the option and raise its stake in Iberica de Cobre to 51% with the intention of subsequently raising it to 80.4%. On the basis of the above, the Commission decided to close the case, having concluded that the transaction was unlikely to prevent the maintenance of effective competition on the market. The Commission noted that the relevant market concerned products which were standard intermediate products and concluded that there were no real barriers either to entry into the EEC of products from third countries, or to trade between Member States. Furthermore, producers had long since ceased to enjoy patent protection, and brand loyalty was weak. On the Community market, competition was sufficiently guaranteed by the presence of other large producers and by opportunities for consumers to obtain supplies outside the Community. It is clear that the Commission wanted to avoid Outokumpu holding a minority interest in its competitor Iberica del Cobre, preferring (in the context of the predecessor to Article 101 of the TFEU), for Outokumpu to acquire sole control of Iberica del Cobre. It is clear that the Commission viewed the original agreement as giving rise to a significant level of *Philip Morris* type influence through cooperation to attract the prohibition in Article 85(1) of the EC Treaty. On page 67 of *Carnaud/Sofreb* Commission XVIIth Report on Competition Policy the French metal can manufacturer, Carnaud SA, had agreed with the Sacilor group to acquire its 66.6% shareholding in another French can maker, Sofreb. The German subsidiary of Continental Can Corp., Schmalbach-Lubeca GmbH, which owned the remaining 33.4% of Sofreb, complained to the Commission about the deal, claiming that it would breach the Community competition rules. Schmalbach-Lubeca obtained an injunction from a French court against the sale of the Sofreb shares to Carnaud until the Commission had adjudicated on its competition complaint. The Commission's view of the proposed arrangement, based on an analysis of Continental Can's and Carnaud's positions on the relevant market and on the CJEU's judgment in the *Philip Morris* case was that the joint ownership of Sofreb by two direct competitors was "liable to lead to cooperation between them that would be incompatible with the competition rules". Carnaud responded to the Commission's competition concerns by offering to buy Schmalbach-Lubeca's 33.5% minority stake. Schmalbach-Lubeca accepted the offer and withdrew its complaint. The Commission saw no objection to a full takeover of Sofreb as the acquisition only marginally increased Carnaud's share of the relevant market. In *Dresser/Ingersoll/General Electric/Nuovo Pignone*, Commission XXV Annual Report on Competition Policy page 116 the Commission received a notification of the proposed acquisition by each of Dresser and Ingersoll-Rand of a 12% minority interest in Nuovo Pignone. The Commission highlighted that both Dresser and Ingersoll-Rand, through their joint ventures Ingersoll-Dresser Pump and Dresser-Rand, were "direct competitors" of Nuovo Pignone.

the Commission raised objections, the acquisition of the cross minority interest was abandoned or the transaction restructured to the satisfaction of the Commission.

5 ENDORSEMENT OF PHILIP MORRIS IN IRELAND

The principles enunciated by the CJEU in *Philip Morris* relating to the acquisition of cross minority interests were endorsed in various decisions of the CCPC under the predecessor to the 2002 Act, namely, the Competition Act 1991 (as amended) (the “**1991 Act**”). The 1991 Act provided for a notification system under which the parties to an agreement could apply to the Authority and seek a certificate that the agreement did not infringe the prohibition in Section 4(1), or alternatively, that the agreement satisfied the conditions for the grant of an individual exemption by way of the issue of a license by the Authority.¹⁴⁹ Helpfully, the above notifications resulted in the issue of published decisions by the Authority. The Authority first endorsed the *Philip Morris* decision regarding the possible application of the prohibition on restrictive practices to minority interests in *Woodchester Bank Ltd/UDT Bank Ltd*¹⁵⁰ where it cited with approval paragraph 37 of the judgment of the CJEU in the context of interpreting Section 4(1) of the 1991 Act.¹⁵¹ The *Woodchester* case concerned the purchase of 100% of the issued share capital of the target and, therefore, did not involve the acquisition of a minority interest. Despite this, the Authority reviewed various aspects of the decision of the CJEU in *Philip Morris* in determining the scope of Section 4(1) of the 1991 Act to share transactions involving the full and partial acquisition of the target. The Authority cited the following passage from the Commission’s Seventeenth Annual Report on Competition Policy:

“The judgment has far-reaching implications. It underlines the need for an economic approach in interpreting and applying Articles 85 and 86. Conduct cannot cease to be anti-competitive merely by reference to the legal form in which it is presented.

The Commission pointed out that the production of Dresser-Rand and Nuovo Pignone overlapped in the field of process gas compressors. The Commission stated that they were leaders in compressor technology worldwide and cooperation in this field might have led to an unacceptably strong position in some fields of application such as natural gas transmission and distribution. Following the Commission’s intervention, Dresser and Ingersoll-Rand, withdrew their plans to take minority interests in Nuovo Pignone.

¹⁴⁹ The above notification system was modelled on the equivalent regime at EU level that applied until the entry into force on 1 January 2003 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty OJ 2003 L1/1.

¹⁵⁰ *Woodchester Bank Ltd/UDT Bank Ltd* (Decision No 6) Decision of the Competition Authority 4 August 1992.

¹⁵¹ Please see 3.1 of this Chapter 3.

Even purchases of blocks of shares in a company may in particular circumstances infringe the competition rules.”¹⁵²

The Authority in *Scully Tyrell & Company and Edberg Limited*¹⁵³ endorsed the approach it had taken in *Woodchester*. Again, *Scully Tyrell* did not involve the acquisition of a minority interest although the Authority cited with approval the principle enunciated by the CJEU in *Philip Morris* in relation to minority interests. In *Cambridge-ACT/Imari*,¹⁵⁴ the Authority considered the acquisition by Cambridge Investments Limited¹⁵⁵/Cambridge Equity Fund of a 19% interest in Imari Limited. ACT was also a shareholder in Imari Limited and provided venture and development capital and was majority owned by AIB. The Authority pointed out that the parties submitted that neither Cambridge Investments Limited nor ACT or their respective groups had interests that competed with the Imari group. The Authority examined the *Philip Morris* principle and concluded that the investment by Cambridge did not offend against Section 4(1) of the 1991 Act¹⁵⁶ as follows:

“The acquisition of a minority shareholding in an undertaking of itself cannot be viewed as preventing, restricting or distorting competition. This view is consistent with the European Court of Justice decision in the Philip Morris case. The primary object of venture capitalists in acquiring shares in small and medium sized businesses is investment, while the object of the business is to obtain additional funding to enable it to expand further. While such an arrangement is not akin to a partnership, it nevertheless represents an arrangement by two or more parties to participate together in a business venture, with one providing the necessary capital, and the other the entrepreneurial skills and business knowledge. Thus the object of such an arrangement is not, in the Authority's view, to prevent, restrict or distort competition. In the absence of indications to the contrary the Authority also believes that such arrangements generally do not have the effect of preventing, restricting or distorting competition. Indeed to the extent that they assist the development of small and medium sized businesses, their long term effect may be pro-competitive. The investment by Cambridge Investments in Imari by means of the acquisition of a minority

¹⁵² Commission's Seventeenth Annual Report on Competition Policy, para 101.

¹⁵³ *Scully Tyrell & Company and Edberg Limited* (Decision No 12) Decision of the Competition Authority 29 January 1993.

¹⁵⁴ *Cambridge-ACT/Imari* (Decision No 24) Decision of the Competition Authority 21 June 1993.

¹⁵⁵ Cambridge Investments Limited was in the business of fund management and was the manager of the Cambridge Equity Fund and a member of the Cambridge Group Plc, whose core business was asset financing (leasing and hire) and confirming (financing the working capital requirements of small to medium sized companies) and corporate finance and international financing activities.

¹⁵⁶ The text is almost identical to Section 4(1) of the 2002 Act.

shareholding in the Imari Group, does not therefore, in the Authority's opinion, offend against Section 4(1)."

The Competition Authority in 1995 adopted an "*Interim Report of Study on the Newspaper Industry*"¹⁵⁷ in which it examined, *inter alia*, the implications of the acquisition by Independent Newspapers Plc of a 24.9% interest in Irish Press Newspapers Limited together with the making of a loan for IR£2m in the context of the prohibition against restrictive agreements and practices and abuse of a dominant position in the 1991 Act. The Authority concluded that the above arrangements offended the prohibition in Section 4(1) of the 1991 Act on the basis that the arrangements were:

"designed to prevent the Press newspapers being acquired by an undertaking which would provide greater competition to Independent Newspapers plc and because this has been its effect to date and is likely to continue to be its effect for so long as Independent Newspapers plc continues to hold such a shareholding. The European Court of Justice decisions in Philip Morris and the EU Commission decision in Gillette/Wilkinson Sword would lend support to this view".

The Authority noted that Independent Newspapers plc also had a 29.9% interest in the Sunday Tribune and also held convertible loan notes in the Sunday Tribune. The Authority highlighted that as a result, Independent owned or had a shareholding in three out of five morning newspapers, both Dublin evening newspapers and four out of five Irish Sunday newspapers. A situation in which only two newspaper groupings remained in which Independent Newspapers did not have an interest was clearly undesirable from a competition perspective.

Regarding Section 5(1) and abuse of a dominant position, the Authority concluded that Independent occupied a dominant position in various newspaper markets in the State and that the purchase by independent Newspapers of the 24.9% shareholding in the Irish Press would "further strengthen" its dominant position in the various markets for newspapers and newspapers advertising, leaving it "in a position to exercise influence over the commercial behaviour of a competing newspaper group which they could not otherwise do". The Authority noted that in this context it was relevant that, Independent, in its submission referred to its minority shareholding in a number of papers worldwide, and stated that in all such cases the specialist management skills of Independent Newspapers had assisted in improving the profitability of the relevant publications. The Authority stated that "such

¹⁵⁷ Competition Authority, *Interim Report of the Study on the Newspaper Industry* (1995).

influence will lessen the degree of competition in the various markets in which the two undertakings' newspaper titles compete. Actions by a dominant firm to lessen competition, including the acquisition of shares in one or more competing undertakings, have been found to constitute an abuse of dominance under Article 86 of the Treaty of Rome. Similarly, in the Authority's opinion, such behaviour constitutes an abuse of a dominant position by Independent Newspapers which is contrary to section 5 of the Competition Act.” The Authority highlighted that the purchase by Independent Newspapers of a minority shareholding in the Irish Press was designed to prevent a rival of Independent Newspapers acquiring control of the Press Newspapers, since such a buyer would clearly increase the degree of competition which those newspapers would represent to Independent. Mr Liam Healy, Chief Executive of the Independent, admitted that the purchase of such a shareholding in Irish Press was in Independent's interests since it prevented foreign rivals acquiring control of the Press newspapers. A revitalised Irish Press, which was in a position to compete strongly with Independent, would have a significant adverse impact on the latter group's revenue and profitability. The purchase of shares and provision of loans had already enabled Irish Press pic to reject a rival bid for its newspapers from a consortium involving the Sunday Business Post and the UK Telegraph group and that it represented a strong deterrent to other investors interested in acquiring outright or substantial control of those newspapers in order to compete head-on with Independent Newspapers.

The object and the effect of the arrangements was to restrict competition by preventing the acquisition of Irish Press newspapers by another undertaking which might be expected to compete more vigorously in the market for newspapers and newspaper advertising. The Authority in its interim report concluded that the arrangements at issue constituted “very serious breaches” of Section 4(1)¹⁵⁸ and 5(1) of the 1991 Act and “strongly” recommended that the Minister exercise his power under Section 6 of the 1991 Act to take an action seeking an injunction or declaration. It appears that the Minister for Enterprise and Employment¹⁵⁹ did not take the recommended action at the time and according to an Irish Times opinion letter dated 2 August 1996 entitled “Report on Newspapers”¹⁶⁰, it appears that the Minister initially accepted the findings of the Competition Authority in its Interim

¹⁵⁸ This contrasts with the Commission's approach in *Gillette* where a breach of Article 85(1) of the EC Treaty (now Article 101(1) TFEU) was not found to exist.

¹⁵⁹ Now the Minister for Business Enterprise and Innovation.

¹⁶⁰ Letter, ‘Report on Newspapers’ *Irish Times* (Dublin, 2 August 1996).

<<https://www.irishtimes.com/opinion/letters/report-on-news-papers-1.73189>>

Report, but the opinion letter questions whether he had “second thoughts” when by August 1996, no action appears to have been taken.¹⁶¹

6 THE REGULATORY GAP

It is clear from an analysis of the constituent elements of Section 4/Article 101 and Section 5/Article 102 as they apply to the acquisition of cross shareholding minority interests as carried out in Section 2 above and the case law to date on the application of the above TFEU provisions to minority interests as reviewed in Sections 3 to 5 above, the above machinery is inadequate for the purpose of properly regulating the acquisition of minority interests from a competition law perspective. This Chapter exposes a significant regulatory gap in terms of the substantive provisions contained in the non-merger control toolkit available to Commission and CCPC for regulating the acquisition of minority interests. Furthermore, there are material regulatory gaps in terms of the enforcement of Articles 101 and 102 and the Irish law equivalent set out in Sections 4 and 5 of the 2002 Act.¹⁶² The above issues are compounded by an apparent inconsistency, and lack of coherence, in the approach taken by the Commission in applying the *Philip Morris* doctrine in various reported decisions to date and the evidential difficulties in supporting a claim of a breach of Articles 101/102 of the TFEU and Section 4 and 5 of the 2002 Act.

It should be noted that the issues with applying Sections 4/Articles 101 and 5/102 are much wider than just the limitations stemming from the narrowly defined formulation of the principle enunciated by the CJEU in *Philip Morris*. In other words, if the CJEU were to revisit or set aside the *ratio decidendi* in *Philip Morris* and broaden or replace it by introducing more flexibility in the test to be applied so as to capture more situations such as passive no

¹⁶¹ In *Donnelly Doyle Flynn Hanlon & Brannelly/Eastcastle/JWT/WPP Holdings* (Decision No 518) Decision of the Competition Authority 17 July 1998, the Authority examined a shareholders and related agreements that arose out of the acquisition by J Walter Thompson Group Limited (**JWT**) of a 20% interest in Donnelly Doyle Flynn Hanlon and Eastcastle Limited. The target companies were in the business of providing advertising agency services and TV production, respectively. The investor taking the 20% minority interest, JWT, was a competitor advertising agency and part of the WPP group. The Authority described the market for the supply of advertising and marketing services by advertising agencies as highly competitive, with significant competition from abroad. Events in the market demonstrated that the trend in the advertising market was towards international alignments and networks. Many international brands preferred to channel their advertising revenues through the same agency worldwide. The Competition Authority concluded that various rights granted to JWT gave a “strong protection, vis-a-vis the future internal management and operation of the company, to the minority shareholder, JWT” and that JWT had a “strong degree of corporate control” over the target companies. Applying *Philip Morris*, the Authority concluded that JWT has a “strong degree of corporate control” but that given the market conditions including the number of competitors, there was on the facts no restriction of competition contrary to Section 4(1) of the 1991 Act. This case involved a finding of control and therefore has been superseded by Part 3 of the 2002 Act (similarly, the *Philip Morris* control principle enunciated by the CJEU has, at EU level, been superseded by 2004 EMCR).

¹⁶² See 6.3 to 6.5 of this Chapter 3.

influence investments or circumstances where the investing company and the target are not competitors, such a development would not address the various other jurisdictional issues identified in this Chapter such as the absence of *ex ante* control or the enforcement gap.¹⁶³

As pointed out in Chapter 2, Part 3 of the 2002 Act and the 2004 EMCR are confined to transactions giving rise to the acquisition of decisive influence and do not cover non-controlling minority interests. The shortcomings in the ambit of Part 3 of the 2002 Act and the 2004 EMCR, when viewed together with the limitations inherent in Sections 4 and 5 of the 2002 Act and the EU law equivalent in Articles 101 and 102, serve to highlight substantial *lacunae* in the machinery available to the competition agencies for regulating the acquisition of minority interests which are potentially anticompetitive according to established economic theories of harm.

6.1 Support for the Status Quo from Certain Commentators

The Commission has published the submissions made by interested parties in response to the 2013 Consultation Paper¹⁶⁴ in which the Commission invited interested parties to submit their views on extending the 2004 EMCR to minority interests falling short of control. Some of the submissions made as part of the 2013 Consultation Paper expressed the view that the suggested reforms of the 2004 EMCR were not warranted for various reasons including that the machinery in Articles 101 and 102 was adequate. The above views were typically repeated as part of the 2014 Consultation made on foot of the publication of the White Paper which were also published by the Commission.¹⁶⁵ For example, the International Bar Association (“**IBA**”) stated that the Commission’s analysis of Article 101/102 in the 2013 Consultation Paper was not convincing and that Article 101 “catches all types of anticompetitive conduct including agreements, concerted practices and decisions of associations of undertakings.” The IBA elaborated that Article 101 “has been applied in the area of pure information sharing, and the Horizontal Guidelines for cooperation between competing undertakings contain a specific section providing guidance in this area. The EU Courts’ case law allows for Article 101 TFEU to be applied in most, if not all, situations of Structural Links.” The IBA stressed that there is nothing to prevent the Commission from issuing guidelines to clarify the application of Article 101 to structural links, that the lack of enforcement under Article 101 in this area over the last 25 years was “noteworthy” and that using Article 101 to address structural links was “a more appropriate and streamlined way

¹⁶³ Please see 6.3 to 6.5 of this Chapter 3.

¹⁶⁴ <http://ec.europa.eu/competition/consultations/2013_merger_control/>

¹⁶⁵ <http://ec.europa.eu/competition/consultations/2014_merger_control/index_en.html>

of dealing with the issue than amending EUMR.” The IBA states that situations in which Articles 101/102 would not apply would be “rare in practice” and that the national merger control systems of a number of Member States regulate minority interests “reducing any enforcement gap further”. The IBA reiterates its position in its submission responding to the 2014 White Paper.

*Bas*¹⁶⁶ argues that the non-merger TFEU prohibitions in Articles 101 and 102 suffice, and in this context suggests that the statutory contract created by the constitutional documents of legal persons addresses both the issue of the existence of an agreement and the requirement that the agreement be between undertakings. *Levy*¹⁶⁷ refers to the CJEU’s decision in *Philip Morris* as having “therefore established a clear legal basis for applying Articles 101 and 102 to the acquisition of non-controlling minority shareholdings”. He then acknowledges the issue regarding the existence of an agreement confirming the “putative” limitations of Articles 101 and 102, but seems to dismiss them by asserting that 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 anticompetitive agreement or concerted practice”. The latter assertion regarding the scope of the tools in Article 101 and 102 in terms of expressing satisfaction with the present system under Articles 101 and 102 and, therefore, advocating against widening of the scope of the 2004 EMCR to encompass minority non-controlling interests, is made at the same time as acknowledging the inherent jurisdictional weaknesses limiting the usefulness of the machinery available under Articles 101 and 102.

It is submitted that the case against reform is inherently flawed and appears to be borne out of a desire of not burdening business with the time and expense of further regulation. The principal arguments expressed for maintaining the status quo can be summarised as follows:

- 6.1.1 The adequacy of the existing machinery in Articles 101/102 of the TFEU. For the reasons set out in this Chapter, this is simply not the case;
- 6.1.2 The relatively few cases involving problematic minority interests. The author is not aware of cogent evidence having been offered to support this contention. In fact, the evidence examined in Chapter 1 suggests the

¹⁶⁶ Kadir Bas, ‘Reforming the Treatment of Minority Shareholdings in the EU: Making the Problem Worse Instead of Better?’ (2015) *World Competition* 38 No 1, 77-106.

¹⁶⁷ Nicholas Levy, ‘EU Merger Control and Non-Controlling Minority Shareholdings: The Case Against Change’ (December 2013) *European Competition Journal* DOI: 10.5235/17441056.9.3.721.

contrary. Furthermore, the evidence in Germany shows that minority interest cases notified under the competitively significant interests provisions result in a disproportionately high number of prohibition decisions.¹⁶⁸ Furthermore, the *Ryanair/Aer Lingus* case and its escape from regulation at EU level, both under Article 101 and the 2004 EMCR, is more than sufficient reason to ensure that properly functioning legal machinery is put in place. The Commission in the Green Paper on the Review of Council Regulation (EEC) No 4064/89 adopted on 11 December 2001¹⁶⁹ admitted that at “this stage the Commission is not in the possession of comprehensive data as to the prevalence of minority shareholdings and interlocking directorships.” Despite this, the Commission continued by stating that “However, based on current experience, it appears that only a limited number of such transactions would be liable to raise competition concerns that could not be satisfactorily addressed under Articles 81 and 82 EC. Under this assumption it would appear disproportionate to subject all acquisitions of minority shareholdings to the ex ante control of the Merger Regulation.” Clearly, the Commission substantially revised its position on the above and made it clear in the White Paper that it favoured reforming the system of EU merger control by extending the 2004 EMCR to the acquisition of minority interests in certain cases. Furthermore, the argument that there are few cases involving problematic minority interests does not appear to arise in the context of common shareholdings, where the Commission and other competition/anti-trust agencies around the world have focused their attention in recent years¹⁷⁰; and

- 6.1.3 The national merger control systems of certain Member States such as Germany and the UK cover situations not caught at EU level. The fallacy in the latter argument lies in the fact that it necessarily acknowledges the shortcomings of the position at EU level and underlines the disparity in the national laws of the different Member States and runs counter to one of the central tenets of EU law namely, to ensure a level playing field throughout the EU.

¹⁶⁸ Please see section 3.1 in Chapter 5.

¹⁶⁹ Green Paper on the Review of Council Regulation (EEC) No 4064/89.

<<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52001DC0745&from=EN>>

¹⁷⁰ Please see Chapters 1 and 6.

6.2 Acknowledgement of Regulatory Gap

Despite the arguments made in various submissions as part of the 2013 Consultation and in response to the White Paper in 2014 and by other commentators dismissing or minimising the jurisdictional question marks raised by the Commission, it is clear that a significant enforcement gap very much exists in terms of the machinery available under Irish and competition EU law given the jurisdictional and substantive hurdles that need to be overcome in relation to the application of Sections 4 and 5 of the 2002 Act, Articles 101/102 of the TFEU and the 2004 EMCR. The Commission in the White Paper under the heading *“Articles 101 and 102 may not be suitable to deal effectively with anti-competitive minority shareholdings”* rejects the arguments put forward by the respondents to the 2013 Consultation Paper who had suggested that Articles 101/102 were adequate by highlighting the issue concerning the requirement that an “agreement” be found to exist for Article 101 to apply and the fact that Article 102 requires dominance and abuse, the Commission concluding as follows:

“The circumstances under which the Commission can intervene against competitive harm arising from acquisitions of minority shareholdings are therefore quite narrow.”

The *Aer Lingus/Ryanair* saga underlines just how powerless the Commission was to intervene in that case which highlighted the shortcomings in its toolkit, the Commission having to leave it to the UK Office of Fair Trading to take action under domestic (as opposed to EU) competition rules. The Commission in the White Paper underlined the gap exposed by the *Aer Lingus/Ryanair* case as follows:

“56. In the *Ryanair/Aer Lingus* case, the UK Competition Authorities had no jurisdiction to assess cross-border effects of the transaction resulting from overlaps between the parties for flights between Dublin and European destinations other than those in the UK. The European Commission could have assessed those if the Merger Regulation had covered acquisitions of non-controlling minority stakes. Since this is not the case, those effects remained unscrutinised. This illustrates that there are cases with dimensions beyond a single Member State for which the Commission would be better situated to investigate the impacts on competition.”

The CCPC in its Submission to the Department of Enterprise Trade and Employment (now the Department of Jobs Enterprise and Innovation) in relation to the Public Consultation on

the Operation and Implementation of the Competition Act 2002 dated December 2007¹⁷¹ clearly and succinctly summarised the regulatory gap in relation to minority interests as follows:

“3.55 At the moment the only way that the Competition Authority can deal with partial investments that may pose SLC concerns is via Section 4 of the Act, which is less than ideal. At best Section 4 is awkward; at worst, it does not apply at all.”

The former Competition Commissioner, *Joaquín Almunia*, acknowledged the regulatory gap in various speeches during his tenure as Competition Commissioner.¹⁷²

The CCPC in its submission¹⁷³ as part of the 2013 Consultation highlighted the regulatory gap by stating that it was “of the opinion that there is currently an enforcement gap and that there are situations where non-controlling minority shareholdings can harm competition.” The CCPC elsewhere in the above submission states as follows:

“The Authority recognises that although in certain circumstances it may be possible to pursue a case involving the acquisition of a non-controlling minority shareholding or the creation of structural links under Article 101 or Article 102 of the Treaty of European Union (‘TEU’), such cases would be fraught with pitfalls and difficulties.”

The CCPC continues by citing the example of the requirement that an agreement be found to exist in order to establish jurisdiction to intervene under Article 101 of the TFEU and in this context cites the example of “where shares are built up in a company based on the acquisition of shares traded freely on a stock exchange” where an agreement would not be

¹⁷¹ Public Consultation on the Operation and Implementation of the Competition Act 2002 (December 2007) S/07/008.

¹⁷² See for example:

Joaquín 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, 10 March 2011, Brussels).

<https://ec.europa.eu/commission/presscorner/api/files/document/print/en/speech_11_166/SPEECH_11_166_EN.pdf>

Joaquín Almunia, Speech at Conference on Competition Policy, Law and Economics, ‘Merger review: Past evolution and future prospects’ (Cernobbio, Italy, 2 November 2012).

<https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_12_773>

Joaquín Almunia, Speech at 29th Annual AmCham EU Competition Policy Conference, ‘The role of competition policy in times of crisis’ (Brussels, 6 December 2012).

<https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_12_917>

Joaquín Almunia, Speech to ECON Committee, European Parliament, ‘Presenting the Annual Competition Report for 2012’ (Strasbourg, 28 May 2013).

<https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_13_474>

¹⁷³ CCPC Submission of 2013 Consultation.

present as opposed to “private share purchase agreement for shares in a private company [which] may constitute an ‘agreement’ for the purposes of Article 101” (text in square brackets added). The CCPC also refers to the limitations of applying Article 102 on abuse of a dominant position to minority interests as follows:

“With respect to Article 102, the requirement, at the outset to prove the existence of a dominant position and then to prove that this dominant position has been abused through the acquisition of structural links can make challenging a partial acquisition difficult...”

Tzanaki,¹⁷⁴ after examining the limitations of Articles 101 and 102 concludes that the above provisions are “inadequate to cover all potentially harmful cases of non-controlling minority shareholdings that escape scrutiny under the EUMR.” *Gabrielsen Hjelmeng and Sørgard*¹⁷⁵ refer to the “various shortcomings” in the *Philip Morris* doctrine and point out that EU competition law “does not address the question of establishment of minority shareholdings or specific rights associated with such positions in a coherent way” and that “EU law struggles with a “dormant” *Philip Morris* doctrine, which upon closer examination does not seem well suited for a “coherent treatment” of minority interests. *Gabrielsen Hjelmenga and Sorgard* summarise the “several shortcomings associated with the *Philip Morris* doctrine” as follows:

- “intervention is only possible against an agreement between undertakings;
- the restrictive agreement is not necessarily entered into between the parties between which the anti-competitive effects occur;
- it may prove difficult to predict the effects of the acquisition.”

*Caronna*¹⁷⁶ after examining the gaps in Articles 101 and 102 in terms of the requirement to find an agreement between undertakings, concludes that a “systematic review of the

¹⁷⁴Anna Tzanaki, ‘The Legal Treatment of Minority Shareholdings Under EU Competition Law: Present and Future’ (April 2015) University of Piraeus - Essays in Honour of Professor Panayiotis I Kanellopoulos, Sakkoulas Publications, Athens 2015, 861-886.

¹⁷⁵ Magnus Gabrielsen, Erling Hjelmeng and Lars Sørgard, ‘Rethinking Minority Share Ownership and Interlocking Directorships: The Scope for Competition Law Intervention’ (December 2011) European Law Review.

¹⁷⁶ Fausto Caronna, ‘Article 81 as a tool for controlling minority cross shareholding between competitors’ (2004) European Law Review.

substantive principles for the assessment of the restrictive nature of minority share transactions appears necessary.”

6.3 Absence of Ex-Ante Control/Enforcement Gap

One of the fundamental limitations of the regulatory machinery in Articles 101/102, and their Irish equivalent in Sections 4(1) and 5(1) of the 2002 Act, is that they do not contain any mechanism for prior notification of proposed transactions, and corresponding ex-ante control. As a result, the efficacy of the enforcement system is largely a function of the initiatives, resources and efforts of complainants and the regulatory agencies. A breach under the above general competition rules will only be exposed by the following enforcement activities:

- 6.3.1 The lodging of complaints by third parties to the Commission or the CCPC;
- 6.3.2 The vigilance of competition enforcement agencies;
- 6.3.3 The initiation of proceedings by third parties before the courts;
- 6.3.4 Whether, and to what extent, pursuing the category of infringement falls within the then policy objective of the Commission or the CCPC; or
- 6.3.5 Whether or not the particular case is in line with the Commission's or CCPC's priorities at the time.

The former Competition Commissioner, *Joaquín Almunia*, acknowledged the regulatory gap in speeches throughout his tenure as Competition Commissioner.¹⁷⁷ *Struijlaart*¹⁷⁸ comments that a “problematic point in applying Article 81(1) or Article 82 to non-control minority share acquisitions is the *ex post* application of these two Articles” and that any assessment of the competition implications of a non-controlling minority interest can only properly be carried out “after a thorough market analysis”. *Tzanaki*¹⁷⁹ stresses that “neither

¹⁷⁷ Joaquín Almunia served as Competition Commissioner from 9 February 2010 to 1 November 2014. Joaquín Almunia, Speech at Conference on Competition Policy, Law and Economics, ‘Merger review: Past evolution and future prospects’ (Cernobbio, Italy, 2 November 2012).

¹⁷⁸ Robin A Struijlaart, ‘Minority Share Acquisitions below the Control Threshold of the EC Merger Control Regulation: An Economic and Legal Analysis’ (2002) *World Competition* 25(2), 173-204.

¹⁷⁹ Anna Tzanaki, ‘The Legal Treatment of Minority Shareholdings Under EU Competition Law: Present and Future’ (April 2015) University of Piraeus - Essays in Honour of Professor Panayiotis I Kanellopoulos, Sakkoulas Publications, Athens 2015, 861-886.

art. 101 nor art. 102 is adapted to ex ante control of structural transactions.” *Rusu*¹⁸⁰ highlights, among the inadequacies of Articles 101 and 102, “the procedures used for the application of this Article [101] are lengthy and somewhat inflexible” and that they “unfold *ex-post*, which is neither an ideal, nor a realistic approach to market realities.”

The most significant reported decisions on minority interests have arisen out of complaints made by sophisticated multinational third party complainants. It may well be that in the absence of complaints lodged by such well-resourced corporates, the Commission would not have learned of the existence of the contested and harmful minority interests and related arrangements, and therefore, led to the Commission’s findings of infringement and intervention. For example, *Philip Morris*, the landmark case on the implications of minority interests in the context of Article 85 and 86 of the EC Treaty (now Articles 101 and 102 of the TFEU), arose out of a complaint by a third party. The original contested arrangements providing for the acquisition of an equity stake by Philip Morris in Rothmans International were concluded in April/May 1981. The first complainant, R.J. Reynolds Industries Inc., filed its complaint on 4 May 1981. The arrangements were notified to the Commission by Philip Morris and Rembrandt 22 days later on 26 May 1981, the parties requesting a negative clearance/exemption under the old notification system.¹⁸¹ On 19 May 1982, the Commission issued a Statement of Objections which set out the Commission’s view that the arrangements infringed Articles 85 and 86 of the EC Treaty. Obviously, the complaint prompted notification of the arrangements to the Commission and intervention by the Commission. The above led the parties substantially to revise the arrangements which addressed the Commission’s concerns and to the eventual rejection of the complaints lodged by R.J. Reynolds Industries Inc. and British American Tobacco Company Ltd.¹⁸² The rejection of the complaints was followed by the appeal to the CJEU and the landmark ruling which set out the CJEU’s views on the implications under Article 85 of the EC Treaty (now Article 101 of the TFEU) of the acquisition of a minority equity interest in a competitor. In *Gillette*, the Commission found that the acquisition by Gillette of an equity stake in Eemland amounted to a breach of the prohibition against abuse of a dominant position. The transaction documents were signed in December 1989. The complaint by Warner Lambert

¹⁸⁰ Catalin S Rusu, ‘EU Merger Control and Acquisitions of (Non-Controlling) Minority Shareholdings - The State of Play’ (1 February 2014) CLaSF WP Series No 10.

¹⁸¹ Regulation 17/62 allowed the parties to request the Commission to grant a negative clearance that an arrangement did not breach Article 85 or 86 or to grant a specific exemption from the prohibition in Article 85. The above system was abolished as of 1 January 2003 so that there is no facility for notifying an arrangement seeking a negative clearance and individual exemptions are available on a self-assessment basis. The Competition Act 1991 in Ireland contained a similar notification system where the Irish equivalent of a negative clearance and exemption was a certificate and licence, respectively.

¹⁸² British American Tobacco Company Ltd. filed a complaint on 20 January 1982.

was lodged with the Commission in February 1990. Gillette notified the acquisition 11 days after the Warner Lambert complaint, Gillette seeking a negative clearance/exemption under the notification system in place prior to 1 January 2003.¹⁸³ Clearly, Warner Lambert's complaint prompted the notification by Gillette, which would otherwise not have been made, and which ultimately resulted in the published findings of infringement.

6.4 Difficulty of Proving Effects Based Breach of Article 101/102

The author refers to 4.2 above where it is shown that it can be difficult to prove the anti-competitive effects arising out of the acquisition of the minority interest. In *T-Online International/TUI/C&N Touristic*,¹⁸⁴ the Commission acknowledged in the context of Article 101 and 102 that the revised arrangements did not entirely address the foreclosure concerns raised in the context of the original merger review. Despite the above acknowledgment, it is clear that the Commission was stymied by the lack of sufficient evidence before it to arrive at the conclusion that the revised arrangements under which TUI and C&N took minority interests in T-Online Travel did not either “serve as an instrument for influencing the commercial conduct of the companies in question so as to restrict or distort competition on the market on which they carry on business” or provided for “commercial cooperation between the companies or create a structure likely to be used for such cooperation” as per the test laid down by the CJEU in *Philip Morris*. The Commission felt that the toolkit provided by Articles 101 and 102 was insufficient to allow for intervention in the absence of express restrictions in the underlying documents. The Commission was clear that the foreclosure concerns examined in the merger review were not completely resolved by the revised arrangements, yet it felt that the structural link was insufficient to justify a finding of a breach based on Articles 101/102 of the TFEU.

6.5 Mechanisms to Avoid Disclosure of Minority Interests/Enforcement Gap

The holding of a minority stake in a company formed under Irish law can, with relative ease, be concealed, thereby adding to the enforcement gap. Irish law recognises the concept of a trust under which the legal and beneficial ownership of property, including shares, can be separated.¹⁸⁵ One person, being the registered legal shareholder, can hold the beneficial interest in shares in an Irish entity, on trust for another person through the creation of an

¹⁸³ n 142.

¹⁸⁴ EC Competition Policy Newsletter, No 2, June 2002.

¹⁸⁵ Please see Hilary Biehler, *The Law of Trusts in Ireland* (Seventh Edition, Round Hall 2020), for a comprehensive discussion of trusts under Irish law.

express trust.¹⁸⁶ Section 170 of the Companies Act 2014 provides that no notice of any trust, express, implied or constructive, shall be entered on the register of members or any register kept by the Registrar of Companies. The disclosure requirements regarding beneficial interests in shares has to a limited extent been changed by The European Union (Anti-Money Laundering: Beneficial Ownership of Corporate Entities) Regulations 2019 (“**Beneficial Ownership Regulations**”) which implement into Irish law the provisions of Directive (EU) 2015/849¹⁸⁷ (“**Directive 2015/849**”) and Directive (EU) 2018/843¹⁸⁸ (“**Directive 2018/843**”) and provide for the creation by a “relevant entity” of a beneficial ownership register. A relevant entity is defined as a corporate or other legal entity incorporated in the State. The above Directive and Beneficial Ownership Regulations exclude a company or other body corporate listed on a regulated market that is subject to disclosure requirements consistent with the law of the European Union or subject to equivalent international standards which ensure adequate transparency of ownership information. The Beneficial Ownership Regulations define a “beneficial owner” by referring to Article 3 (6) (a) of Directive 2015/849, which defines the term, in the case of corporate entities, as the natural person(s) who ultimately own or control the entity through direct or indirect ownership of a sufficient percentage of the shares or voting rights in that entity or through control by other means as referred to in Article 3 (6) (a). A percentage of 25% plus one share held by a natural person is stated to be evidence of direct ownership, and a shareholding of over 25% held by a corporate entity under the control of a natural person(s), or by multiple corporate entities which are under the control of the same natural person(s), is stated to be an indication of indirect ownership.

The Beneficial Ownership Regulations implement the creation of a central register as envisaged in Directive 2018/843 which is open to public inspection and assigns the above function to the Companies Registration Office.

There are a number of significant shortcomings of the above regime. The scope of the regime is significantly limited in a number of material respects. Firstly, the above regime only applies to natural persons. Secondly, as stated above, the regime only applies to

¹⁸⁶ Hilary Biehler, *The Law of Trusts in Ireland* (Seventh Edition, Round Hall 2020), ch 2.

¹⁸⁷ Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015, on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC [2015] L141/73.

¹⁸⁸ Directive (EU) 2018/843 of The European Parliament and of The Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU [2018] L156/43.

significant minority stakes where the natural person directly or indirectly holds in excess of 25%. Therefore, there are many situations which escape the above regime. Consequently, the facility afforded by the use of an express trust under Irish law under which to hold shares in an Irish company continues to provide an obvious opportunity to conceal the interest from detection, and therefore, competition scrutiny.

7 SUMMARY

As can be seen from this Chapter, the existing machinery in Articles 101/102 of the TFEU and Sections 4 and 5 of the 2002 Act for the regulation of minority interests suffer from significant defects in terms of the following:

- 7.1 Jurisdictional issues in terms of having to find the existence of an “agreement” between “undertakings” for the purposes of Section 4/Article 101 which do not relate to the underlying substantive competition issues arising from the existence of the minority interest;
- 7.2 The limitations inherent in Section 5/Article 102 given that they are confined to situations where a dominant position is found to exist;
- 7.3 The absence of any form of *ex-ante* control in terms of the machinery for applying Sections 4/5 of the 2002 Act and Articles 101 and 102 TFEU;
- 7.4 The difficulties in proving that a minority stake has anti-competitive effects for the purposes of Sections 4/5 of the 2002 Act and Article 101/102 of the TFEU;
- 7.5 The lack of enforcement activity in Ireland or at EU level by the CCPC and the Commission;
- 7.6 The dearth of private enforcement activity in this area in terms of proceedings initiated by private litigants. The author is aware of no reported decisions of the Irish courts in which the Irish or EU competition law implications of minority interests are examined and it appears that the *Philip Morris* case is the only reported decision of the European Courts in which there is any substantive analysis of the competition law implications of minority interests in the context of the prohibitions in Articles 101 or 102 of the TFEU;
- 7.7 The limited scope of the above provisions by virtue of the decision of the CJEU in *Philip Morris* which requires that the minority interest confer the ability to influence commercial conduct of the target thereby excluding passive no-influence type

minority interests which, according to accepted economic theories of harm endorsed by the Commission, can give rise to competition issues;

- 7.8 The limited scope of the *Philip Morris* doctrine in that it is confined to the acquisition of a minority interest in a competitor and, therefore, does not extend to situations where the parties are operating in markets upstream or downstream of each other and, therefore, does not appear to address transactions which may be anti-competitive according to established economic theories of harm;
- 7.9 The likelihood that Section 4/5 and Articles 101/102 do not apply to the acquisition of common shareholdings;
- 7.10 The absence of any cases in which the *Philip Morris* doctrine has been applied to common, as opposed to cross, minority shareholding;
- 7.11 The apparent inconsistency in the approach of the Commission to issues related to minority interests such as board representation and confidentiality and the standard of influence that is applicable for attracting the prohibitions in Articles 101 and 102 of the TFEU;
- 7.12 The absence of a Commission or CCPC notice or guidelines to provide clarity on the application of the non-merger toolkit to cross or common minority interests and related arrangements; and
- 7.13 The Beneficial Ownership Regulations, which are designed to introduce more transparency regarding the identity of the beneficial owners of shares, are limited in scope in a number of material respects and, therefore, will fail, in various situations, to require disclosure of minority interests.

COMPETITION LAW AND THE REGULATION OF NON CONTROLLING MINORITY INTERESTS: THE REGULATORY GAP

CHAPTER 4

THE APPLICATION OF MERGER CONTROL TO PRE-EXISTING STRUCTURAL LINKS

1 INTRODUCTION

As we saw in Chapter 2, the scope of the jurisdictional criteria for the application of the Irish and EU merger control systems excludes the acquisition of a non-controlling minority interest. The General Court in *Aer Lingus Plc v European Commission*¹ clarified that the acquisition of a minority interest that does not give rise to decisive influence/control for EU merger control purposes falls outside the definition of a concentration, and consequently, is not subject to the *ex-ante* system of EU merger control. The Irish CCPC has expressed the view that Irish merger control is similarly limited, and the author believes that it is highly likely that an Irish court would follow the above approach when interpreting the concept of merger and acquisition for Irish merger control purposes.

Although it appears that the acquisition of a non-controlling minority interest of itself does not amount to a concentration or merger or acquisition for Irish merger or EU control purposes respectively, the Competition and Consumer Protection Commission (“**CCPC**”) and the EU Commission have in various cases to date substantively reviewed the competitive effects of a pre-existing minority cross shareholding as part of a merger review of a separate subsequent transaction under Part 3 of the Competition Act 2002 (“**2002 Act**”) and Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings² (“**2004 EMCR**”), respectively. The CCPC’s Guidelines for Merger Analysis³ (“**Merger Guidelines**”) expressly provide⁴ as follows:

“1.11 The Commission’s analysis of a notified merger will also consider competitive effects that may arise where any one or more of the merging parties have non-controlling minority shareholdings in third parties prior to the merger.”

¹ Case T-411/07 *Aer Lingus Group Plc v European Commission* Case [2010] ECLI:EU:T:2010:281.

² Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ 24/1.

³ Adopted by the CCPC on 31 October 2014.

⁴ Para 1.11.

The Commission Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings⁵ ("**EU Horizontal Merger Guidelines**") state⁶ as follows in relation to coordinated effects of horizontal mergers:

"Structural links such as cross-shareholding or participation in joint ventures may also help in aligning incentives among the coordinating firms"

The Commission Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings⁷ ("**EU Non-Horizontal Merger Guidelines**") states that it "will not extensively investigate" vertical mergers "except where special circumstances such as, for instance one or more of the following factors are present":

"(b) there are significant cross-shareholdings or cross-directorships among the market participants;"

The CCPC has insisted on the divestiture or waiver of rights of non-controlling minority cross shareholding interests following a merger review under Part 3 of the 2002 Act on the basis that the minority interest gave rise to competition concerns which would result in a substantial lessening of competition ("**SLC**"). The commitment given by the relevant party to divest or neutralise the minority interest enabled the CCPC to grant approval for the notified transaction on a conditional basis. It must be stressed that the jurisdiction of the CCPC to accept minority interest divestiture/waiver proposals and impose corresponding conditions arose in cases which involved the notification of a separate transaction which itself amounted to a merger or acquisition for the purposes of Section 16(1) of the 2002 Act which was independent and separate from the pre-existing minority interest concerned. In other words, the trigger event for the review of the competition implications of the existing minority interest was the notification of the subsequent transaction and not the acquisition of the minority interest itself which pre-dated the notified transaction. It is noteworthy that in each case, the CCPC found that the notified transaction, of itself, did not give rise to a substantial lessening of competition (SLC) but that the pre-existing minority equity interest raised significant competition issues and, therefore, the notified transaction could only be

⁵ Commission Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings.

<[http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0205\(02\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0205(02)&from=EN)>

⁶ Para 48.

⁷ Commission Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings.

<[http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0205\(02\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0205(02)&from=EN)>

approved by the offer of a remedy in which the structural link (together with certain other arrangements in some cases) was to be divested or at least severely controlled.

The above position, in which a merger review encompasses the examination of existing cross minority interests, underlines the regulatory gap exposed by the judgment of the General Court in *Aer Lingus Plc v European Commission*.⁸ The Irish and EU merger review cases examined below involved situations where the most significant competition issue that needed to be addressed was the minority interest held by the parties, and not the notified merger itself. The notified merger did not raise substantive issues giving rise to a substantial lessening of competition except for the pre-existing minority interest. However, the substantive review of the cross minority interest took place solely because the subsequent merger exposed the relevant interests held by the parties in the relevant markets, failing which, the review would not have occurred.

2 IRISH MERGER CONTROL CASES EXAMINING NON-CONTROLLING PRE-EXISTING CROSS SHAREHOLDING LINKS

In *Scottish Radio Holdings Plc/Capital Radio Productions Limited*,⁹ the CCPC was notified of the proposed acquisition by Scottish Radio Holdings Plc of the entire issued share capital of Capital Radio Productions Limited. The purchaser owned and controlled Radio Ireland Limited which broadcast Today FM. The target traded as FM 104 and also owned 8.89 % of the issued share capital of News 106 Limited (trading as Newstalk 106FM). The CCPC found that there was an overlap in the market for radio advertising nationally and in Dublin City and County. The CCPC concluded after a Phase 2 investigation that the transaction did not, of itself, give rise to unilateral or coordinated effects. However, significantly, the CCPC identified the potential for co-ordinated effects arising from the existence of structural links which could lead to “co-ordinated behaviour with adverse effects for consumers”¹⁰ which included the equity interest held by the target in News 106 Limited t/a Newstalk 106. The CCPC pointed out that although this equity interest did not give the purchaser board membership, it raised a concern in that it facilitated the exchange of competitively sensitive business information between FM 104 and Newstalk 106 “potentially thereby reducing competition”.¹¹ The CCPC highlighted that the owners of 98FM were also the primary shareholders in News 106 Limited and that allowing the equity interest to be maintained

⁸ Case T-411/07 *Aer Lingus Group Plc v European Commission* Case [2010] ECLI:EU:T:2010:281.

⁹ *Scottish Radio Holdings Plc/Capital Radio Productions Limited* (M/03/033) Determination of the Competition Authority 23 February 2004.

¹⁰ Para 54 of the Determination.

¹¹ Para 55 of the Determination.

“could facilitate information sharing between two of the largest firms in the Dublin radio market”.¹² The Authority concluded that “effective relief” was best served by divestiture¹³ and that this was “in line with best international practice”.¹⁴ Similarly, in *Scottish Radio Holdings Plc/Donegal Highland Radio Limited*,¹⁵ the CCPC was notified of a proposal whereby Scottish Radio Holdings Plc would acquire the entire issued share capital of Donegal Highland Radio Limited. The CCPC confirmed that there was an overlap in the sale of national advertising and in local advertising. The CCPC concluded that the notified transaction, of itself, would not give rise to unilateral effects concerns. However, the CCPC identified the potential for co-ordinated effects which arose from the existence of structural links between the parties as a result of Highland Radio’s interest in, and board membership of, Independent Radio Sales (“IRS”) and its participation in IRS national advertising packages.¹⁶ The CCPC pointed out that the potential for exchange of competitor and/or strategic information and the commonality of interest, could lead to co-ordinated effects with adverse effects for consumers. The CCPC underlined that Scottish Radio Holdings Plc, through its ownership of Highland Radio, would have a presence on the board, and in the operations, of its competitor, IRS. The CCPC held that the continuation of the arrangement post-merger would give SRH an insight into the operations of one of its few national competitors and could thus facilitate co-ordinated behaviour which may be harmful to consumers. SRH submitted a proposal under which Scottish Radio Holdings Plc and Donegal Highland Radio Limited would cease any and all forms of participation in the

¹² Para 55 of the Determination.

¹³ The CCPC in its Determination incorporated the following proposals in its Determination to approve the merger:

- The parties were to divest all ownership interests in News 106 Limited on or before 31 December 2004 to a buyer which was to be subject to the approval of the Authority;
- The parties were not to participate on the board of News 106 Limited;
- The parties were not to vote in respect of or participate in the operations of the business of News 106 Limited; and

If the ownership interests of the parties were not divested or transferred as summarised above, the ownership interest held by the parties were to be transferred to a trustee nominated by the parties and subject to the approval of the Authority at the party’s expense. The nominated trustee was to dispose of the entirety of the party’s ownership interest forthwith to a buyer which was to be subject to the approval of the Authority.

¹⁴ Para 55 of the Determination. The CCPC in its Determination cited Dr Ulf Boge, President of the Bundeskartellamt, ‘Antitrust Enforcement in Europe: the new challenges (Merger Control) with a particular focus on the examination of minority interests under the German Merger Control Regime’, speech on the occasion of the Italian Competition Day, 9 December 2003, Rome; Deborah Platt Majoras, Deputy Assistant Attorney General at the US Department of Justice and address before the Houston Bar Association ‘Houston, we have a competition problem; How can we remedy it?’.

<<http://www.usdoj.gov/atr/public/speeches/11112.pdf>.

¹⁵ *Scottish Radio Holdings Plc/Donegal Highland Radio Limited* (M/05/025) Determination of the Competition Authority 12 August 2005.

¹⁶ IRS was described in the CCPC’s Determination as a central sales office for and set up by independent local stations across the country. IRS sold advertising (either local or national) on behalf of its members and to a lesser extent, its non-member independent local radio stations.

advertising sales of IRS within a given timeframe.¹⁷ The proposals involved a commitment by the parties to relinquish any shareholding in IRS and to cease any involvement in the management of IRS and to remove themselves from the board of IRS.¹⁸ The CCPC held that on the basis of the proposal submitted by SRH, the CCPC was satisfied that the transaction would not lead to an SLC and cleared the transaction at the end of the Phase 1 review.

The most extensive analysis of the competition implications of minority cross shareholding interests carried out by the CCPC to date in the context of a merger review was in *UGC(Chorus)/Ntl*,¹⁹ where the CCPC reviewed the proposed acquisition by UPC Ireland B.V. of sole control of MS Irish Cable Holdings B.V.²⁰ The CCPC's analysis of minority cross shareholdings in *Ntl/Chorus* is far more extensive than any analysis of such interests carried out by the EU Commission in any reported decision taken under the EU merger control regime of which the author is aware. Untypically, the CCPC in *Ntl/Chorus*, cited passages which reflect a statement of the basic theory underlying unilateral effects and a body of both EU and US cases in formulating the applicable principles. Given its significance, the CCPC's determination is examined in detail below. The acquirer was part of the Liberty Global group arising from the merger in June 2015 of UnitedGlobalCom, Inc ("UGC")²¹ and Liberty Media International, Inc. ("LMI")²². In Ireland, the acquirer's group included Chorus Communications Limited ("**Chorus**"). The target, MS Irish Cable Holdings B.V., was a wholly owned subsidiary of Morgan Stanley Dean Witter Equity Funding Inc. ("**Morgan Stanley**") which at the time of the acquisition owned Ntl Irish Holdings Limited and Ntl (Chichester) Limited and certain assets from Ntl UK plus the assets comprised what was Ntl's Irish business ("**Ntl**"). The CCPC considered that the business activities of the undertakings involved, through Chorus and Ntl respectively, overlapped in various product markets.²³ The CCPC's investigation found no direct competitive overlap between the

¹⁷ On or before six months from the date of completion of the proposed acquisition.

¹⁸ The proposal specifically provided that the commitment was not to have the effect of preventing IRS from purchasing air time from Highland Radio for resale to advertisers on an arm's length basis subject to Highland Radio not participating in any way in the profits accruing to IRS or in the resale of its air time by IRS.

¹⁹ *UGC(Chorus)/Ntl* (M/05/024) Determination of the Competition Authority 4 November 2005.

²⁰ The proposal was a media merger within the meaning of Section 23 of the 2002 Act.

²¹ UGC was described by the CCPC as an international broadband communications provider of video, voice and Internet services, with operations in 14 countries.

²² LMI was described by the CCPC as an international broadband distribution company.

²³

- The procurement of content (channels) for multi-channel pay-TV services;
- the provision of multi-channel pay-TV services;
- the provision of telephony and related internet services;

merging parties since both Chorus and Ntl served discrete and different geographical regions and there was only a minor overlap. The proposed acquisition did not, of itself, give rise to a substantial lessening of competition in the markets for: (i) the wholesale procurement of content (channels) or (ii) the retail provision of multi-channel pay-TV services. Although the emergence of a national two player market in and of itself raised competition concerns, there was no structural change in the market resulting from the proposed acquisition. The CCPC concluded that in essence the proposed acquisition was transforming two separate regional two player markets to a single national two player market. There was, therefore, no structural change in the market. Furthermore, there was no indirect competitive constraint exercised by Ntl on Chorus.²⁴

The issue of most concern to the CCPC was the cross shareholding of the Chairman and controlling shareholder of Liberty Global, John Malone, and the cross management of persons on the boards of Liberty Global and Liberty Media Corporation ("**LMC**"). The concern arose from the fact that LMC was the second largest shareholder in News Corporation ("**NewsCorp**"), which in turn was the largest shareholder of Chorus' supplier of 'must have' premium content and their principal retail competitor, namely BSkyB.²⁵

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- the premium content market comprising sports and movies content: BSkyB was the principal supplier of premium content to retailers in the Irish-pay-TV market;
 - the non-premium content market comprising all the 'must-carry' national free-to-air terrestrial channels; and
 - the non-premium content market comprising the UK terrestrial channels and other channels offered by BSkyB and other Channel providers.

²⁴ The CCPC considered whether the proposed acquisition could eliminate benchmark competition by reducing the number of pay-TV operators from three to two. The CCPC, together with its external expert adviser, concluded that Ntl did not impose a competitive constraint on BSkyB which translated into a competitive constraint on Chorus. The CCPC attempted to carry out an economic analysis to determine whether Ntl imposed a competitive constraint on BSkyB which translated into a competitive constraint on Chorus. A formal econometric study was not possible due to a lack of sufficient variability in prices over time. In addition, the economic expert retained by the CCPC concluded, with the evidence that was available (i.e. that BSkyB's process were determined primarily with respect to the UK market) that there was insufficient reason to undertake further analysis in this respect. The investigation of pricing decisions revealed that BSkyB prices were determined, to a large extent, independently of the market situation in Ireland. Therefore, while Ntl and Chorus did track each other's prices, there was insufficient evidence to support a finding of benchmark competition in the retail pay-TV market.

²⁵ John Malone was the largest shareholder (he owned 21.7% of its voting stock) and Chairman of Liberty Global (the ultimate parent of the acquirer) and was also the Chairman, CEO and largest shareholder (he held 29.7% of its voting stock) of LMC. LMC was a holding company which had interests in a broad range of communications and entertainment businesses including NewsCorp which was active in all areas of media, including television, film and print media. LMC's shareholding in NewsCorp represented circa 18% of the voting interest in NewsCorp and NewsCorp in turn had a 37% stake in BSkyB, the only Direct-to-the-Home/satellite pay-TV service provider in the State, the principal competitor to both Chorus and Ntl Ireland and the principal supplier of premium content to providers of pay-TV services in Ireland. In other words, BSkyB was a direct competitor of Ntl and operating upstream of Ntl by being a supplier of premium content to Ntl. There also existed four common board

The CCPC confirmed that both economic reasoning and precedent suggested that a firm that owned a financial interest in another was likely to have had weakened incentives to compete. The CCPC unequivocally endorsed the principle that passive no influence minority interests can raise competition issues. It will be recalled from Chapter 3 that the European Court of Justice²⁶ in *Philip Morris* interpreted the only basis for intervention to control minority interests from a competition perspective other than merger control, namely, Articles 101 and 102 of the Treaty on the Functioning of the European Union (“TFEU”), narrowly, requiring that the minority stake confer the ability to influence the commercial conduct of the target, thereby excluding the acquisition of passive no-influence stakes. The above underlines the significance of the CCPC in *Ntl/Chorus* embracing the concept of no influence passive equity interests potentially giving rise to competition issues. The CCPC in *Ntl/Chorus* stated that for example, if firm A acquired a 20 per cent interest in firm B, its competitor, then firm A, in setting prices, would be aware that profits lost to it, by increasing price, would be gained by its competitor. As a stakeholder in its competitor, A would effectively gain some of the profits “lost” to B. The CCPC cited with approval passages from the submissions made by the Department of Justice in *United States v Northwest Airlines Corp., Continental Airlines, Inc.*,²⁷ a case which involved the acquisition by Northwest of a

members on the Liberty Global and LMC boards. The three directors on the LMC board who were not on the Liberty Global board were on either the UGC or LMI boards immediately prior to the merger of these companies to form Liberty Global. The Executive Committee of LMC comprised four individuals two of which were also directors of Liberty Global. The Executive Committee of Liberty Global included John Malone who was on the Executive Committee of LMC. The executive committees could exercise the power of the boards (save where the board had retained a particular matter solely to itself), by simple majority in the case of LMC or by unanimity in the case of Liberty Global. LMC did not have a representative on the board of NewsCorp and according to LMC’s counsel, LMC’s shareholding did not, at that time, give it that right. In 2004, in response to LMC’s increased shareholding in NewsCorp, the latter implemented a “poison pill” to curtail additional purchases by LMC. The CCPC pointed out that there remained a considerable degree of uncertainty among market commentators with respect to the future of LMC’s shareholding in NewsCorp, and whether it would increase or decrease, or whether it would be traded in return for some other NewsCorp assets. This cloud of uncertainty was also casting a shadow over the implications of the cross ownership/management on competition in the market post acquisition. The impact of the cross ownership and cross management on the incentives of the merged entity to compete with BSkyB was the “primary concern” of the CCPC. The notifying parties asserted that tacit collusion was unlikely because BSkyB was an aggressive competitor to cable and the magnitude of the cross shareholding was too small to impact on the incentives to coordinate the behaviour of the merged entity and BSkyB. While the CCPC agreed that there was a low level of cross shareholding between the merged entity and BSkyB, it disagreed that the parties would not have the capability and incentives to coordinate their activities. For example, to the extent that Mr Malone and the four common board members acted as an information conduit between the two firms, any difficulties the firms may have had in coordinating tacitly on a collusive price could be bypassed by direct communication between the boards.

²⁶ Now the Court of Justice of the European Union (“CJEU”).

²⁷ *US v Northwest Airlines Corp. and Continental Airlines, Inc.* It is interesting to note that the CCPC in *ntl/Chorus* refers to a decision of the Court using the citation D.D.C. 2000 but there is no Court decision in this case.

stake in its competitor Continental. Under this arrangement, Northwest would have had a claim to approximately 14% of the profits Continental generated. The CCPC described the above as “[i]n other words, Northwest would effectively lose fourteen cents for every dollar of profit it may cause Continental to lose due to competition.” The CCPC pointed out that although the facts of this case differed from *Ntl/Chorus* given that there was no third party involved, it was of interest in that the Department of Justice²⁸ set out that there were at least four ways that partial equity acquisitions, even those involving much smaller ownership percentages than the 51% at issue in that case, can significantly lessen competition: (1) “The acquiring firm gains a unilateral incentive to compete less vigorously with the acquired firm.”²⁹ (2) “The acquired firm has a corresponding incentive to compete less vigorously against the acquiring firm”. (3) “The acquisition weakens the acquired firm's ability to compete”. (4) The acquisition makes collusion or cooperation between the two firms more likely”.

The CCPC's view was that the merged entity would have less incentive to lower prices, since profits gained by the merged entity through switching would be offset by loss of profits experienced by its chief competitor BSKYB (in which the primary stockholder of the merged entity had an indirect stockholding). The CCPC underlined that partial equity interests and cross-management may raise competition concerns. Such links may influence companies' competitive behaviour and affect their incentives to compete. If one firm holds a significant share in its competitor, it is likely to take that firm's business interests into account and adopt behaviour more conducive to joint profit maximisation.³⁰ The CCPC made it clear that it is not necessary that the acquired shareholding conferred sole or joint control, in order for competition concerns to have arisen. Partial equity interests may come about in a number of ways. In this case, the partial equity interests

<https://www.justice.gov/atr/case-document/plaintiff-united-states-america-memorandum-opposition-defendant-northwest-airlines>

²⁸ The CCPC refers to citations from the Court in this case but in fact the citations are from submissions made by the Department of Justice in its Memorandum in Opposition to the Defendant Northwest Airlines' Motion for Summary Judgment <https://www.justice.gov/atr/case-document/plaintiff-united-states-america-memorandum-opposition-defendant-northwest-airlines>

²⁹ The Department of Justice cited the Hovenkamp Antitrust Treatise § 12.9, at 497 as follows:

"Competition can be threatened even if the acquiring firm's interest is so small that it has no influence at all over the acquired firm's decisions. Suppose that firms A and B are competitors and A acquires 15% of the shares of B. Clearly the competitive game has acquired a new twist. Under the rules of competition, A would like nothing better than to force B out of the market through A's greater efficiency. As a result of the partial acquisition, however, A suddenly has a strong financial interest in B's welfare."

³⁰ The CCPC referred to minority shareholdings, interlocking directorships and Enzo Moavero-Milanesi and Alexander Winterstein, 'Minority shareholdings interlocking directorships and the EC Competition Rules – Recent Commission practice' (February 2022) Competition Policy Newsletter, No 1 and also to *US v Northwest Airlines Corp., Continental Airlines, Inc.* (DOJ, 2000), which highlighted succinctly the competition concerns raised by partial equity acquisitions.

arose since the principal shareholder in the acquirer owned an indirect stake in a third party competitor and this in turn provided for the possibility that influence could be exerted through the right or possibility of holding a position on the board of that company.³¹ The CCPC clarified that even without having this entitlement, the holder of the shareholding interest derived profit from the company in which he held the interest, which may have affected the incentives of the other company to compete. The above is a clear endorsement by the CCPC that unilateral effects can arise even where the minority stake is not coupled with rights conferring influence.

The CCPC stated that both the European Commission³² and the US antitrust authorities had recognised that cross-ownership and management links could give rise to concerns. The CCPC cited the submission made by US Department of Justice in *US v Northwest Airlines Corp., Continental Airlines, Inc.*, as follows:

“...stock acquisition effects some sharing of profits, reduces incentives for “cheating”, makes departures from agreed behaviour harder to conceal, and thus seals the bargain of express collaboration. These forces might also make tacit understandings more attractive to parties”.

Northwest's competitive incentives towards Continental have changed simply because Northwest has a claim to approximately 14% of the profits Continental generates. In other words, Northwest will effectively lose fourteen cents for every dollar of profit it may cause Continental to lose due to competition. Northwest will naturally be less likely to compete vigorously with Continental, and will tend toward actions that benefit Northwest's and Continental's combined interests. As Dr.

³¹ The CCPC referred to *Generali/INA* (Case COMP/M.1712) Commission Decision 12 January 2000. In order to obtain clearance from the European Commission, the parties in this case undertook not to establish interlocking directorships with competitors in Italy. In addition, certain existing interlocks were severed, or announced to be severed.

³² The CCPC pointed out that the EU Commission has been clear in its assessment of the impact of cross shareholdings on competition citing a 2002 Competition Policy Newsletter where it was stated:

“If X holds a significant share in competitor Y, their profit maximization calculus may change as they take each other's business interests into account. As a result, the economic incentives to compete are modified in that X and Y may compete less vigorously and adopt behaviour more conducive to joint profit maximisation (‘non-aggression understanding’). This effect will be even stronger in case of cross-shareholdings”. The Commission further stated that “interlocking directorships may act as a conduit for anti—competitive transfer of price and strategic information.”

The CCPC referred to Enzo Moavero-Milanesi and Alexander Winterstein, ‘Minority shareholdings interlocking directorships and the EC Competition Rules – Recent Commission practice’ (February 2022) Competition Policy Newsletter, No 1.

Baker stated, "Northwest's incentive to compete with Continental will now be muted."³³

Significantly, the CCPC noted that the Department of Justice in that case argued that the central issue was not the level of direct control or influence but the possible harm to consumers caused by the cross shareholding. The CCPC cited the following extract from the Department of Justice submission:

"The Second Circuit reiterated the point in *Gulf & Western Indus.*, 476 F.2d 687. There the acquiring company made the argument that Northwest makes here — that because it did not attain control over the acquired company, Section 7 did not apply. The Second Circuit rebuffed that argument, stating that the critical issue is harm, not control. "As a matter of law, we are not aware of any decision that requires numerical control in order to establish an antitrust violation. Several cases have held to the contrary. Rather, the critical question is whether the probable future effect of the transaction will be substantially to lessen competition."³⁴

The CCPC highlighted that a number of cases in the US raised concerns with regard to the acquisition of minority interests which did not confer control. For example, in the merger of Time Warner and Turner Broadcasting,³⁵ the FTC was concerned about Liberty Global's predecessor, Telecommunications Inc. (TCI) owning circa 24% of Turner stock in circumstances where both Time Warner and TCI's subsidiary LMC were engaged in the sale of cable TV programming services to cable infrastructure and TCI was also a cable infrastructure provider. The FTC ruled that TCI and LMC would divest TCI's and LMC's interest in the merged entity to a separate company. No member of the board of directors of the separate company was permitted to be an officer, director or employee of TCI or to have under his or her control greater than 0.1% of the voting power of ownership interest in TCI or LMC.³⁶

³³ The CCPC refers to the Court when citing the above passages but in fact the passages are contained in the Department of Justice's Memorandum in Opposition to the Defendant Northwest Airlines' Motion for Summary Judgment.

<<https://www.justice.gov/atr/case-document/plaintiff-united-states-america-memorandum-opposition-defendant-northwest-airlines>>

³⁴ The Department of Justice's Memorandum in Opposition to the Defendant Northwest Airlines' Motion for Summary Judgment.

<<https://www.justice.gov/atr/case-document/plaintiff-united-states-america-memorandum-opposition-defendant-northwest-airlines>>

³⁵ In the Matter of Time Warner Inc, Turner Broadcasting System, Inc., Tele-Communications, Inc., Liberty Media Corporation.

³⁶ The competitive concerns raised by the cross-ownership of shares were subject to remedy, thus allowing the merger to proceed. The CCPC cited the following other US cases where such cross-ownership concerns were subject to remedy: *US*

The CCPC in *Ntl/Chorus* cited various decisions of the EU Commission under the EU merger control regime in which cross-ownership concerns were raised and remedies were offered to address the highlighted concerns.³⁷ It is noteworthy that in all cases cited by the CCPC the remedy approved involved a divestiture of the equity interest at issue as opposed to the equity stake being maintained on terms that it was to be entirely passive.³⁸ The CCPC in *Ntl/chorus* emphasised that the size of the share concerned in these cases varied, but again, like the US cases, it was possible to remedy the competitive concerns, through divestments of the common shareholding and/or a ban on cross management. In the case of the proposed acquisition, the CCPC's view was that the cross ownership/management which then existed in the Chorus franchise region

v AT&T Corp. (DOJ 2000), *US v Univision Communications Inc. and Hispanic Broadcasting Corporation* (DOJ 2003), *US v Northwest Airlines Corp., Continental Airlines, Inc.* (DOJ 2000) and *US v AT&T Corp. and MediaOne Group, Inc.* (DOJ 2000).

³⁷ *Nordbanken/Postgirot* (Case COMP/M.2567) Commission Decision 8 November 2001, where Nordbanken would acquire sole control of Postgirot in circumstances where the purchaser had a pre-existing 27% interest in the target's competitor, Bankgirot. Nordbanken undertook (1) to cease to exercise any rights it derived from this shareholding, except that it would remain entitled to exercise rights under Swedish law for a 10% minority shareholding and to receive dividends therefrom; (2) to see that all representatives of Nordbanken on the board of Bankgirot resigned and that all representatives of Nordbanken and Postgirot on any Bankgirot working groups or other fora resigned; (iii) no commercial information available to the Board, working groups or other Bankgirot fora was to be made available to Nordbanken; and (4) to divest itself of any of its shareholding in Bankgirot in excess of 10% to one or more purchasers to be approved by the Commission; *Carrefour/Promodes* (Case COMP/M.1684) Commission Decision 25 October 2000 in which Carrefour undertook to divest a non-controlling 42% minority shareholding in one of its competitors (Cora) as a condition for obtaining clearance during the Phase I merger review; *Volvo/Renault* (Case COMP/M.1980) Commission Decision 1 September 2000, in which Volvo was to acquire sole control of Renault Vehicule Industriels where Volvo held a pre-existing 30% voting interest in its competitor Scania which it undertook to divest; *Bombardier/Adtranz* (Case COMP/M.2139) Commission Decision 3 April 2001, where Bombardier was taking sole control of the target Adtranz in circumstances where Adtranz held minority stakes in two joint ventures competing with the acquirer giving rise to joint control, whose divestment formed part of a suite of remedies agreed with the Commission; *Konica/Minolta* (Case COMP/M.3091) Commission Decision 7 July 2003) case where Konica was to take sole control of Minolta where Konica held a 37.9% shareholding in Sekonic which it agreed to divest. The Commission held that Konica had *de facto* sole control of Sekonic; *AOL/Time Warner* (Case COMP/M.1845) Commission Decision 11 October 2000, in which the Commission considered the merger of AOL and Time Warner where AOL agreed to sever its existing structural links in the form of its shareholding in two joint ventures with the German media group Bertelsmann; *Polestar/Prisa/Inversiones* (Case COMP/M.3322) Commission Decision 12 December 2003, which involved the creation of a joint venture between Polestar, Prisa and Inversiones where Prisa had a 10% interest in a competitor to Polestar. Prisa agreed to divest its 10% shareholding and the merged entity undertook not to acquire a direct or indirect influence of the third party competitor for a certain period; and *Vivendi/Canal+ /Seagram* (Case COMP/M.2050) Commission Decision 13 October 2000, in which Vivendi was to take sole control of Seagram. Vivendi controlled Canal+ and held a 25% interest in BSKyB, which in turn controlled Fox, which was linked to Fox studios. The target Seagram owned the Universal group, another studio. Vivendi submitted an undertaking which involved cutting the link between Universal and Fox through the divestiture of Vivendi's participation in BSKyB.

³⁸ In *Nordbanken/Postgirot* (Case COMP/M.256) Commission Decision 8 November 2001, the Commission accepted a proviso to the commitment that Nordbanken cease to exercise any rights it derived from its shareholding in so far as Nordbanken was permitted to remain entitled to exercise rights under Swedish law for a 10% minority shareholding and to receive dividends therefrom.

would be extended into the Ntl region and this had a number of implications for competitive incentives:

- The wholesale provision of content from BSkyB was a key input for Ntl and Chorus. There existed the potential for rent sharing between the merged entity and its primary wholesale supplier with a pass through of increased wholesale costs to consumers;
- In the past, in the Ntl franchise area, vigorous competition between Ntl and BSkyB prevented this. In its evidence to the CCPC, Ntl explained that it would be willing to absorb the increase in wholesale prices to maintain competitiveness. This, however, was unlikely where the owners of Ntl also had an indirect equity interest in its competitor BSkyB.
- The cross ownership/management would heighten the incentives for co-ordination in the concentrated two player market at the retail pay-TV level. The conditions for co-ordination were facilitated by the cross ownership/management in a market where³⁹ concentration was very high, retail prices were transparent, products were relatively homogeneous (at least for must have pay-TV content), one competitor (BSkyB) controlled the supply and pricing of key content for the other and retaliation was possible through margin squeeze on the merged entity by BSkyB on key content.

The CCPC granted approval of the transaction in Phase 2 subject to a number of extensive conditions which included the establishment of an Irish holding company to supervise the day to day business of LGI's interests in Ireland and to have responsibility for the final decision and approval of the terms and conditions negotiated with BSkyB for the provision/distribution of content, as well as retail pricing for video services on the Irish cable platforms. It was further stipulated that no individual who was, or who became, a member of the boards of both LGI and LMC was to be a member of the holding company. All current and future common directors of LGI and LMC were to sign an undertaking that they would not vote in relation to any decision to be taken by the board of LGI which specifically

³⁹ The economist's report submitted by the parties outlined a number of market characteristics which were indicative of co-ordinated effects and concluded that these did not exist in the current market sufficient to warrant concern that co-ordinated effects might exist post consummation. The CCPC pointed out that the discussion presented in the economist's report, however, did not address the cross shareholding issues and the impact of this on the market characteristics outlined therein.

concerned LGI's business in Ireland.⁴⁰ The CCPC conditions included a requirement that for so long as Mr. John Malone was a member of the LGI board, the votes attributable to his LGI shares were to be voted in the same proportion for and against approval on any specific matter to the Irish activities of LGI that was submitted for approval at the shareholders meeting of LGI as the votes cast in person or by proxy for or against such matter by the other shareholders of LGI. LGI was required to inform the CCPC of any changes in its shareholding/ownership interest and/or participation in LMC or News Corporation and of any change.⁴¹

It will be recalled that the remedy offered and accepted by the CCPC in *Scottish Radio Holdings Plc/Capital Radio Productions Limited* and *Scottish Radio Holdings Plc/Donegal Highland Radio Limited* was the divestiture of the minority interest concerned. Presumably, the CCPC had insisted on divestiture as opposed to a remedy short of divestiture such as one designed to ensure that the holder of the minority interest enjoyed no rights or influence over the investee. It is noteworthy that the CCPC in *Ntl/Chorus* accepted a proposed remedy short of divestiture, which to some extent is understandable given the indirect nature of the interest concerned and the fact that the interests involved corporate groups with global businesses. The author suspects that had the facts of the case practically lent themselves to obtaining a divestiture (e.g. if the interests were more directly held and the businesses largely domestic), the CCPC would have insisted on divestiture as opposed to the remedy accepted, particularly given the precedent in *Scottish Radio Holdings Plc/Capital Radio Productions Limited* and *Scottish Radio Holdings Plc/Donegal Highland Radio Limited* and the principles enunciated in *Ntl/Chorus*, citing *United States v Northwest Airlines Corp.*, *Continental Airlines, Inc.*, which underlined that a non-controlling no influence minority interest held by a player in its competitor can give rise to competition issues. Indeed, as mentioned above, the Authority in *Scottish Radio Holdings Plc/Capital Radio Productions Limited* concluded that "effective relief" was best served by divestiture⁴² and that this was "in line with best international practice".

⁴⁰ The board of the holding company was to include an external and independent director who was to monitor compliance with conditions imposed by the Authority and who was to submit periodical reports to the Authority. The independent director was obliged to report to the CCPC any breach of the undertaking.

⁴¹ The conditions were to apply for so long as:

- Mr Malone or any other individual(s) were Common Directors and Mr John Malone directly or indirectly held more than 5 per cent of the voting rights in LGI and LMC;
- LMC had more than 5 per cent of the voting rights in NewsCorp; and
- NewsCorp had more than 5 per cent of the voting rights in BSkyB.

⁴² The CCPC in its Determination incorporated the following proposals in its Determination to approve the merger:

- The parties were to divest all ownership interests in News 106 Limited on or before 31 December 2004 to a buyer which was to be subject to the approval of the Authority;

The *Ntl/Chorus* determination is a very thorough analysis of the competition law implications of minority cross shareholdings at the time involving a review of the theories of harm underlying competition policy in this area, and setting out the expansive reach of situations that are potentially attracted by applying the theories of harm concerned. The CCPC carried out the above analysis as a matter of competition policy, free from any discussions surrounding the jurisdictional limitations of either the narrow confines of EU and Irish merger control exposed by General Court in *Aer Lingus Plc v European Commission* discussed in Chapter 2 or the limitations inherent in the machinery available under Articles 101 and 102 of the TFEU (and the equivalent provisions in Part 2 of the 2002 Act) discussed in Chapter 3. The CCPC ably set the scene by describing the theories of harm regarding unilateral and coordinated effects followed by their application to the facts and an analysis of how the proposed remedies addressed the issues raised. Among the noteworthy aspects of the CCPC's determination in *Ntl/Chorus* is the endorsement that so called passive non-controlling cross shareholdings can pose significant competition issues that warrant and require proper scrutiny and intervention. It is surprising that the *Ntl/Chorus* determination has not received more attention in academic discussion to date.

3 EU MERGER CONTROL CASES EXAMINING NON-CONTROLLING PRE-EXISTING CROSS SHAREHOLDING LINKS

As can be seen from the *Ntl/Chorus* decision referred to in 1 above, the Commission has in various cases to date examined structural links in the context of transactions under the EU Merger Control Regulation. The Commission has found that cross shareholding structural links harmed competition across the whole range of unilateral⁴³, coordinated⁴⁴ and foreclosure effects⁴⁵ and in some cases raised concerns about potential entry.⁴⁶ The Commission in such cases found that remedies (typically consisting in the divestiture of

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- The parties were not to participate on the board of News 106 Limited;
 - The parties were not to vote in respect of or participate in the operations of the business of News 106 Limited; and
- If the ownership interests of the parties were not divested or transferred as summarised above, the ownership interest held by the parties were to be transferred to a trustee nominated by the parties and subject to the approval of the Authority at the party's expense. The nominated trustee was to dispose of the entirety of the party's ownership interest forthwith to a buyer which was to be subject to the approval of the Authority.

⁴³ *Siemens/VA Tech* (Case COMP/M.3653) Commission Decision 13 July 2005 and *Volvo/Renault* (Case COMP/M.1980) Commission Decision 1 September 2000.

⁴⁴ *Exxon/Mobil* (Case COMP/M.1383) Commission Decision 29 September 1999 and *VEBA/VIAG* (Case COMP/M.1673) Commission Decision 13 June 2000.

⁴⁵ *Vivendi/Canal+/Seagram* (Case COMP/M.2050) Commission Decision 13 October 2000 and *IPIC/Man Ferrostaal* (Case COMP/M.5406) Commission Decision 13 March 2009.

⁴⁶ *Toshiba/Westinghouse* (Case COMP/M.4153) Commission Decision 19 September 2006.

shareholding and in some cases relinquishment of board representation and/or other rights) were necessary to restore effective competition in the markets at stake. The Commission commenced examining potentially harmful cross shareholding links under the EU system of merger control shortly after the introduction of the 1989 EU merger control regulation ⁴⁷ in the *Alcatel/Telettra*⁴⁸ case. The Commission Staff Working Document Towards more effective EU merger control dated 25 June 2013 (the “**2013 Consultation Paper**”)⁴⁹ reported that since *Alcatel/Telettra*, in at least 53 merger cases scrutinised by the Commission, structural links were relevant for the assessment of the competitive effects of the transaction, of which 20⁵⁰ involved structural links held by either party to the transaction which led to or strengthened competition problems.

The Commission in *Vivendi/Telecom Italia*⁵¹ summarised the principles governing unilateral effects and minority interests as follows:

“Minority shareholdings, including non-controlling ones, can potentially weaken competition between operators active in the same market by leading to non-coordinated anticompetitive effects. The minority interest held in a competitor can increase the minority shareholder’s incentive and ability to unilaterally raise its own prices or restrict output. If a firm has a financial interest in its competitor’s profits, it may decide to “internalize” the increase in those profits, resulting from a reduction in its own output or an increase in its own prices. This anti-competitive effect may materialize whether the minority shareholding is passive (giving it no influence in the

⁴⁷ Council Regulation (EC) 4064/89 on the control of concentrations between undertakings [1989] OJ L395/1.

⁴⁸ *Alcatel/Telettra* (Case COMP/M.42) Commission Decision 4 December 1991.

⁴⁹ The consultation period was from 20 June 2013 to 12 October 2013.

<http://ec.europa.eu/competition/consultations/2013_merger_control/merger_control_en.pdf>

⁵⁰ *Alcatel/Telettra* (Case COMP/M.42) Commission Decision 4 December 1991; *Coca Cola/Carlsberg* (Case COMP/M.833) Commission Decision 11 September 1997; *Bank Austria/Creditanstalt* (Case COMP/M.873) Commission Decision 11 March 1997; *Thyssen/Krupp* (Case COMP/M.1080) Commission Decision 2 June 1998; *Exxon/Mobil* (Case COMP/M.1383) Commission Decision 29 September 1990; *AXA/GRE* (Case COMP/M.1453) Commission Decision 8 April 1999; *VEBA/VIAG* (Case COMP/M.1673) Commission Decision 13 June 2000; *Carrefour/Promodes* (Case COMP/M.1684) Commission Decision 25 January 2000; *Generali/INA* (Case COMP/M.1712) Commission Decision 12 January 2000; *Siemens/Framatome/Cogéma* (Case COMP/M.1940) Commission Decision 6 December 2000; *Volvo/Renault* Commission Decision (Case COMP/M.1980) Decision 1 September 2000; *Vivendi/Canal+/Seagram* (Case COMP/M.2050) Commission Decision 13 October 2000; *Allianz/Dresdner* (Case COMP/M.2431) Commission Decision 19 July 2001; *Nordbanken/Postgirot* (Case COMP/M.2567) Commission Decision 8 November 2001; *Siemens/VA Tech* (Case COMP/M.3653) Commission Decision 13 July 2005; *E.ON/MOL* (Case COMP/M.3696) Commission Decision 21 December 2005; *Abbot/Guidant* (Case COMP/M.4150) Commission Decision 11 April 2006; *Toshiba/Westinghouse* (Case COMP/M.4153) Commission Decision 19 September 2006; *RCA/MAV CARGO* (Case COMP/M.5096) Commission Decision 25 November 2008 and *IPIC/MAN Ferrostaal* (Case COMP/M.5406) Commission Decision 13 March 2009.

⁵¹ *Vivendi/Telecom Italia* (Case COMP/M.8465) Commission Decision 30 May 2017.

company's decisions) or active (giving some influence over the company's decisions)."

In *Vivendi/Telecom Italia*, Vivendi S.A acquired *de facto* sole control of Telecom Italia S.p.A. in circumstances where Vivendi had a 29.94% voting interest in Mediaset S.p.A. Vivendi (through Persidera, part of the target business) and Mediaset would compete in the market for wholesale access to digital terrestrial networks for the broadcast of TV channels. The Commission referred to the Italian Competition Authority ("**ICA**") expressing the view that the transaction would give rise to anticompetitive horizontal (unilateral and coordinated) and vertical effects through Vivendi's minority interest in Mediaset. The ICA referred to the transaction creating a structural link between horizontal competitors holding 50% of the available transmission capacity in digital terrestrial television, but also vertical links between an independent non-vertical integrated operator and its competitor active in downstream markets. The above led to Vivendi committing to divest its shares in Persidera.⁵²

In *Glencore/Xstrata*,⁵³ the notified transaction concerned the acquisition of Xstrata, the world's fifth largest metals and mining group, by Glencore, the world's leading metals and thermal coal trader. Glencore was the largest supplier of zinc metal in the EEA on the basis of an exclusive off-take agreement with Nyrstar, the world's largest zinc metal producer, in which Glencore also had a 7.79% minority shareholding. The Commission's investigation found that the merger, as initially notified, gave rise to competition concerns through unilateral effects, increasing the merged entity's ability and incentive to control the level of zinc metal supplies in the EEA. In order to remove these concerns, Glencore committed, *inter alia*, to divest its minority shareholding in Nyrstar and to terminate its exclusive long-term off-take agreement with Nyrstar, in so far as the agreement related to commodity zinc products produced by Nyrstar in the EEA, thereby maintaining Nyrstar as an independent supplier of zinc. Post transaction, Nyrstar was the largest competitor to the merged business. The divestment of Glencore's 7.79% minority stake in Nyrstar was described as contributing to eliminate the serious doubts identified in the commodity grade zinc market, as it would allow Nyrstar to be fully independent from the merged entity. The divestment of the minority stake would remove the structural link between Nyrstar and Glencore, thereby taking away the ability of Glencore to appoint an observer to the board of Nyrstar and remove the potential for Glencore to obtain any access to competitively-sensitive

⁵² The Commission examined the horizontal unilateral effects and concluded that its concerns were substantiated and that there was no need to determine whether the coordinated and vertical effects were substantiated given the commitments offered.

⁵³ *Glencore/Xstrata* (Case COMP/M.6541) Commission Decision 22 November 2012.

information. In order to maintain the structural effect of Glencore's commitment to divest its minority stake in Nyrstar, Glencore was required, for a period of ten years, not either to acquire any stake in Nyrstar or to acquire direct or indirect influence over Nyrstar. The Commission stated that in itself, the divestiture removed a limitation on Nyrstar's incentives to compete with the merged entity in the EEA.

*Andritz/Schuler*⁵⁴ concerned the acquisition of the German press manufacturer Schuler by the Austrian plants and equipment manufacturer Andritz. Prior to the notification, Andritz already held a 24.99% shareholding in Schuler. Although the Commission ultimately cleared the merger in Phase I on the basis that the market structure would not be significantly altered, it carried out a thorough investigation into the effects of the merger before concluding that there were no relevant competition concerns. The Commission in the 2013 Consultation Paper underlined the regulatory gap by highlighting that such a competition analysis of the minority interest carried out by the Commission was, however, only possible once Andritz notified the acquisition of control and not at the time when the initial structural link of 24.99% was created, although the latter might have raised very similar competition issues.

In *Siemens/VA Tech*,⁵⁵ Siemens proposed to acquire the Austrian engineering group VA Tech. There was a horizontal overlap between SMS Demag, a company in which Siemens held a 28% (non-controlling) minority shareholding, and one of VA Tech's subsidiaries. Certain information, consultation and voting rights were granted to Siemens by SMS Demag's shareholders' agreement. Although Siemens had at the time of the Commission decision already exercised a put option to sell its stake in SMS Demag to the latter's main shareholder, that sale had not yet been put into effect due to on-going litigation about the purchase price. As a result, the Commission found that, given Siemens' 28% share in SMS Demag, the merger would reduce competition in the metal plant-building market. In order to resolve the concerns identified by the Commission, Siemens proposed to appoint an independent trustee as Siemens' representative in SMS Demag's shareholders' committee, to do its utmost that Siemens' seats in SMS Demag's Supervisory Board were to be assumed by two independent trustees and to ensure that only the trustees would receive confidential information from SMS Demag. The Commission considered these commitments as sufficient to remove the competition concern identified, since they ensured

⁵⁴ *Andritz IV/Schuler* (Case COMP/M.6662) Commission Decision 15 October 2012.

⁵⁵ *Siemens/VA Tech* (Case COMP/M.3653) Commission Decision 13 July 2005.

that Siemens could no longer use its position as a minority shareholder in SMS Demag to obtain any strategic knowledge on the latter's business policy.

VEBA/VIAG⁵⁶ concerned the merger between German energy operators VEBA and VIAG, which was examined by the Commission in parallel to the merger between RWE and VEW (assessed by the German Bundeskartellamt). Both mergers together would have resulted in creating a dominant duopoly on the German wholesale electricity market. In this context, the Commission examined the complex web of interconnected (controlling and non-controlling) minority shareholdings that VEBA/VIAG and RWE/VEW held.⁵⁷ These various controlling and non-controlling shareholdings between the duopoly and virtually all other wholesale supply companies, could - in combination with high market shares - increase the duopoly's market power and lead to coordinated behaviour. To remedy the situation, the parties *inter alia* committed to divest several of their controlling and non-controlling minority shareholdings.⁵⁸

⁵⁶ VEBA/VIAG (Case COMP/M.1673) Commission Decision 13 July 2000.

⁵⁷ The minority shareholding were as follows:

- LAUBAG, the largest lignite producer in eastern Germany and VEAG's supplier, which was owned by VEBA (30%), VIAG (15%) and BBS (55%), a subsidiary of RWE;
- Rhenag, a regional supplier of gas and electricity and holder of numerous minority shareholdings in local utilities, was owned at 54.1% by RWE and 41.3% by Thiiga, a majority-held subsidiary of VEBA. Given also VEBA's representation on Rhenag's supervisory board and, thus, the possibility of acquiring inside knowledge of its corporate strategy, the Commission acknowledged that VEBA had a "substantial interest in the success of this RWE subsidiary";
- BEWAG, the Berlin electricity company jointly controlled by VIAG (26%) and US-based Southern Company (26%), and in which VEBA had 20% of the voting rights;
- VEAG, the east German wholesale electricity supplier controlled jointly by VEBA (26.25%), VIAG (22.5%) and RWE (26.25%);
- STEAG, a generator of electricity that sold most of its output to RWE and VEW, was owned by 26% by a joint venture of RWE (49.7%) and VEBA (50.3%); and
- Envia, a member of the RWE group, held several minority shareholdings in municipal electricity undertakings in Saxony in which Thiiga, a member of the VEBA group, also had a minority shareholding.

⁵⁸ In particular the following:

- VEBA's and VIAG's controlling minority shareholdings in VEAG;
- VEBA's and VIAG's shareholdings in LAUBAG, and transfer their rights in LAUBAG to the same acquirer of the shares in VEAG;
- VEBA's non-controlling shareholding and VIAG's controlling shareholding in BEWAG, thus rendering the company into an independent supplier and reducing VIAG's competitive potential that would post-merger pass to VEBA;
- VIAG's shares held directly and indirectly in VEW (and RWE should the RWE/VEW merger be completed before the divestment); and
- VEBA's direct shareholding in HEW, thus strengthening the (independent) position of the company.

In *Exxon/Mobil*⁵⁹ the notified transaction concerned the merger of the worldwide activities of US oil companies Exxon and Mobil. The merger combined the parties' activities in the German gas market, which was already prone to coordination through a complex network of controlling or non-controlling stakes among the major wholesale suppliers of gas in Germany. The merger would have further reduced the already weak competition between Ruhrgas, BEB, EGM and Thyssengas and others by bringing together Exxon's and Mobil's respective pre-existing (controlling and non-controlling) links in some of these competing gas suppliers. The merger between the parties would have led to the strengthening of individual dominant positions in some regional markets and coordinated effects in others. The Commission referred to the equity links between Exxon/Mobil and Shell with Ruhrgas being further reinforced by the transaction given that Exxon and Shell's interests in European gas production and in gas wholesaling in the Netherlands and Germany were all held in common and therefore, their economic interests were parallel and were a sound basis for a commonality of interest and implied that, following the merger, only BP needed to be convinced to align itself with common Exxon/Shell interests, compared to BP and Mobil before the merger. This therefore substantially increased the scope of the merged entity to increase its de facto influence on Ruhrgas and increased the possibility for the use of market power. In order to appreciate the level of concentration in this market pre-merger and the impact of the merger, the Commission estimated HHI indices that took into account the existence of cross shareholdings among most of the players in that market and in this context the Commission expressly mentioned that the calculation was based on the work of *Bresnahan and Salop (1986)*. The assumption was made that BEB was to be identified with its owners, Exxon and Shell. Under this assumption the HHI would rise 139 points from 4243 to 4382., which at this level of concentration was described as a sign of the scope for a material increase of market power. The concerns were addressed through remedies by which the parties had to divest a number of their pre-existing controlling and non-controlling links to create independent gas supply players.

In *AXA/GRE*⁶⁰ the notified transaction concerned the acquisition by insurance group AXA of UK-based insurer Guardian Royal Exchange ("**GRE**"). The Commission raised concerns in relation to the market for non-life insurance products in Luxembourg and segments thereof, in which AXA was present alongside Le Foyer, a leading Luxembourg insurer in which GRE held a 34.8% interest. "Groupe L", a bloc consisting of several individuals, held 34.8% of Le Foyer and 14.4% by Luxempart, another company in which le Foyer held a 33% interest. The Commission ultimately left open the question of control, as it was evident

⁵⁹ *Exxon/Mobil* (Case COMP/M.1383) Commission Decision 29 September 1999.

⁶⁰ *AXA/GRE* (COMP/M.1453) 8 April 1999 Case.

that the take-over of GRE's shares and voting rights in Le Foyer by AXA would produce important structural links between the competitors. AXA would have had an important financial interest in Le Foyer. In addition, AXA would have been represented on the management bodies of its rival, and thus involved in the strategic business decisions of the latter. The Commission found that this link between GRE and Le Foyer would result in anticompetitive effects in the wider non-life insurance market in Luxembourg and any sub-segments thereof, as the transaction would result in a situation where two of the three largest competitors (AXA and Le Foyer) would have been closely linked in a highly concentrated market (AXA, Le Foyer and La Luxembourgeoise held on average 70-80% of the total non-life insurance market). The Commission found that there would be a risk that these players would have a strong interest to refrain from competing against each other, thereby reducing competition between the three leading companies. In order to remedy the concern identified, the parties put forward two alternative remedies, by which either GRE would sell a part of its minority shareholding in Le Foyer or AXA would divest certain of its portfolios.

The Commission has raised foreclosure risks in relation to cross shareholding structural links. In *IPIC/MAN Ferrostaal*,⁶¹ the notified transaction involved the acquisition of MAN Ferrostaal (a subsidiary of MAN) by International Petroleum Investment Company ("**IPIC**"). The Commission found that the transaction gave rise to a foreclosure risk regarding the only existing non-proprietary technology for melamine production in the world. IPIC's subsidiary, AMI, was together with DSM the major producer of melamine, whereas MAN Ferrostaal had a 30% minority shareholding in Eurotecnica, the supplier of the said input technology. Although a minority stake, this participation of 30% gave MAN Ferrostaal significant influence on the decision making concerning Eurotecnica's melamine licensing and engineering business, since the shareholders agreement foresaw a number of decisions to be taken by super-majority and gave all shareholders broad information rights. The Commission found that this was likely to have a substantial deterrent effect on the licensing practice for current and future customers of Eurotecnica, given the voluminous information exchanged between a prospective client and Eurotecnica which might end up in the hands of a competitor of these clients, namely AMI. In addition, a foreclosure strategy towards DSM or potential new entrants for the production of melamine, could be expected. Furthermore, the Commission found that due to the high concentration of the melamine market (two main producers with symmetric market shares - AMI and DSM) and its transparent nature (published contract prices, well-known costs), there was an increased

⁶¹ *IPIC/Man Ferrostaal AG*(Case COMP/M.5406) Commission Decision 13 March 2009.

risk of coordination between the two market leaders, AMI and DSM. In order to remedy the situation, MAN Ferrostaal committed to divest its entire minority shareholding in Eurotecnica.

In *E.ON/ MOL*⁶² the notified transaction concerned the acquisition of MOL WMT and MOL Storage, two subsidiaries of MOL, the incumbent oil and gas company in Hungary, by E.ON Ruhrgas ("**E.ON**"), a large integrated German energy supplier. Under the agreements concluded, E.ON would acquire an interest of circa 75 % in both MOL WMT and MOL Storage. The agreements provided for a 5-year put option under which MOL could sell its remaining non-controlling circa 25 % interests in MOL, WMT and MOL Storage to E.ON. Furthermore, MOL would also be granted a 2-year put option under which it could require E.ON to purchase either a minority or a majority interest in another MOL subsidiary, MOL Transmission. After an in-depth inquiry, the Commission found that the deal would have given rise to vertical foreclosure effects in the gas and electricity wholesale and retail markets in Hungary. The minority stakes which MOL would have retained in MOL WMT and MOL Storage and the existence of MOL's put option to sell the shareholding of MOL Transmission to E.ON would create structural links between E.ON and MOL, providing the ability and the incentive for MOL to discriminate against the parties' competitors for access to domestic gas, gas transmission services and new gas storage facilities. Furthermore, because of MOL's remaining shareholding in MOL WMT, the transaction would also maintain structural links between MOL's domestic gas production and MOL WMT, giving MOL an incentive to discriminate against MOL WMT's downstream competitors when granting access to the transmission network. MOL agreed to divest its remaining shareholdings in MOL Storage and MOL WMT. MOL also agreed not to acquire direct or indirect minority stakes in MOL WMT and MOL Storage for a period of 10 years as long as E.ON was a majority shareholder of those companies. Furthermore, MOL committed not to exercise the put option to require E.ON to buy a minority stake in MOL Transmission in order to alleviate the concerns that could stem from E.ON's further integration in the gas transmission market.

The Commission has found that the likely impact of cross shareholdings on potential entry can give rise to a significant competition concerns. In *Alcatel/Telettra*,⁶³ the Commission found, the minority participations of Telefonica in the capital of Telettra and a subsidiary of Alcatel constituted a barrier for other competitors, given the merging parties' strong position on the Spanish transmission markets. In order to remedy the situation, Alcatel committed

⁶² *E.ON/MOL* (Case COMP/M.3696) Commission Decision 21 December 2005.

⁶³ *Alcatel/Telettra* (Case COMP/M.42) Commission Decision 4 December 1991.

to acquire Telefonica's minority shareholdings in its subsidiary and to enter into good faith negotiations to acquire Telefonica's minority shareholdings in Telettra.

*Toshiba/Westinghouse*⁶⁴ involved the acquisition by Toshiba of Westinghouse, active in the nuclear sector in circumstances where Toshiba had a pre-existing minority shareholding in Global Nuclear Fuels ("**GNF**"), a joint venture active in the market for nuclear fuel assemblies. Therefore, the notified transaction would have led to an overlap between Westinghouse's activities and Toshiba's non-controlling shareholding in the joint venture. Toshiba held 24.5% of the voting rights in GNF, which was one of the two most important competitors to Westinghouse (alongside French company Areva) in both the EEA and world-wide markets for the design and manufacture of nuclear fuel assemblies. Toshiba had a number of veto rights that it could use to prevent GNF from expansions into fields in which they would compete with Toshiba/Westinghouse, as well as certain information rights and representation in various boards of GNF and its subsidiaries. The Commission found that the transaction could lead to a possible elimination of competition and in particular Toshiba could use its veto rights in GNF and its subsidiaries to prevent GNF from expansions into fields in which they would compete with Toshiba/Westinghouse. Furthermore, through its information rights and its representation in various Boards of GNF and its subsidiaries, Toshiba also would have the opportunity to obtain sensitive confidential information which would help Toshiba to make GE's expansion more difficult. The concern was addressed through remedies in the joint venture, in particular by relinquishing of all of Toshiba board and management representation in GNF, of its veto rights under the joint venture agreement and by relinquishing of all rights to obtain any confidential information, without however being prevented from receiving strictly limited information.

The EU Commission in the Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004⁶⁵ ("**EU Remedies Notice**") points out that divestiture commitments may be used for removing links between the parties and competitors in cases where these links contribute to the competition concerns raised by the merger.⁶⁶ The divestiture of a minority shareholding in a joint venture may be necessary in order to sever a structural link with a major competitor,⁶⁷

⁶⁴ *Toshiba/Westinghouse* (Case COMP/M.4153) Commission Decision 19 September 2006.

⁶⁵ OJ 2008 C267/1. Please refer to Chapter 1.

⁶⁶ EU Remedies Notice, para 58.

⁶⁷ EU Remedies Notice, para 58. The Commission referred to *VEBA/Degussa* (Case COMP/M.942) Commission Decision 3 December 1997.

or, similarly, the divestiture of a minority shareholding in a competitor.⁶⁸ The Commission clarifies that although the divestiture of such stakes is the preferable solution, the Commission may exceptionally accept the waiving of rights linked to minority stakes in a competitor where it can be excluded, given the specific circumstances of the case, that the financial gains derived from a minority shareholding in a competitor would in themselves raise competition concerns.⁶⁹ In such circumstances, the parties have to waive all the rights linked to such a shareholding which were relevant for behaviour in terms of competition, such as representations on the board, veto rights and information rights.⁷⁰ The Commission may only be able to accept such a severing of the link with a competitor if those rights are waived comprehensively and in a permanent way.⁷¹

Although the terms of merger control remedies involving minority interests is beyond the scope of the present thesis, it is interesting to note that the Commission has in a limited number of cases accepted a waiver of rights as opposed to outright divestiture. It is not clear when the Commission considers that, exceptionally, a waiver as opposed to divestiture, is warranted on the basis it can be excluded that “financial gains derived from a minority shareholding in a competitor would in themselves raise competition concerns”.⁷² *Nordbanken/Postgirot*⁷³ involved the acquisition of sole control by Nordbanken of Postgirot in circumstances where the target had a 27% interest in Bankgirot, a competitor of the target in the market for payment services, and the buyer had a minority interest⁷⁴ in Privatgiro which was specialised in the provision of technical services to banks. The Commission held that the minority interest in each case gave rise to the serious risk of the creation of a joint dominant position. The remedy accepted was the cessation of the exercise of rights regarding the above minority interests and the divestiture of the interest in Bankgirot in excess of 10% but expressly permitted its retention up to 10% including the payment of dividends. The Commission did not offer specific reasoning for its approach. In *Banco*

⁶⁸ EU Remedies Notice, para 58. The Commission referred to *Siemens/VA Tech* (Case COMP/M.3653) Commission Decision 13 July 2005.

⁶⁹ EU Remedies Notice, para 58. The Commission referred to Decision of the *Siemens/VA Tech* (Case COMP/M.3653) Commission Decision 13 July 2005 where effects from the minority stake in financial respect could be excluded as a put option for the sale of this stake had already been exercised and the remedy included a commitment that Siemens would not contest, cancel or revoke the exercise of the put-option.

⁷⁰ EU Remedies Notice, para 58. The Commission referred to *Toshiba/Westinghouse* (Case COMP/M.4153) Commission Decision 19 September 2006.

⁷¹ EU Remedies Notice, para 58. The Commission referred to *ENI/EDP/GDP* (Case COMP/M.3440) Commission Decision 9 December 2004.

⁷² EU Remedies Notice, para 58.

⁷³ *Nordbanken/Postgirot* (Case COMP/M.2567) Commission Decision 8 November 2001 cited by the CCPC in *UGC(Chorus)/Ntl* (M/05/024) Determination of the Competition Authority 4 November 2005.

⁷⁴ The size of the minority interest was redacted from the public version of the decision.

*Santander/Abbey National*⁷⁵, the Commission reviewed the acquisition by Banco Santander of sole control of Abbey National. Banco Santander held 2.54% of the ordinary shares in Royal Bank of Scotland Plc (“RBS”) and RBS held a 2.83% interest in Banco Santander. The Commission found that these shareholdings would not entitle either of RBS or Banco Santander to exercise “any substantial influence over the commercial activities of the other.” The Commission appears to have equated or limited the competitive effects analysis to the influence arising from the shareholding links as opposed to asking itself whether a competitive effect arose from the fact that RBS and Banco Santander each had financial interest in the profits of the other as per paragraph 59 of the EU Remedies Notice or its later merger decision in *Vivendi/Telecom Italia*⁷⁶ referred to on page 14 above.

4 MERGER CONTROL AND COMMON SHAREHOLDINGS

As noted in Chapter 1, the Commission has in recent years examined the presence of common shareholdings in relevant overlap markets in a number of merger review decisions under the 2004 EMCR. *Dow/DuPont*⁷⁷ involved the global merger of the Dow and DuPont groups, which following a Phase 2 merger review, resulted in a divestiture remedy to dispose of significant parts of DuPont's global pesticide business, including its related global R&D organisation. The Commission noted the presence of common shareholdings in the agrichemical industry and in this context referred to the economic theories of harm on common ownership espoused by Azar, Schmalz and Tecu (2016),⁷⁸ Anton, Ederer, Gine and Schmalz (2016),⁷⁹ Elhauge (2016)⁸⁰ and Posner, Scott Morton and Weyl (2016),⁸¹ acknowledging that they were based on the theories of harm developed for cross shareholdings, and applied them to the facts as part of its merger review. In summary, the Commission concluded the following:

⁷⁵ *Banco Santander/Abbey National* (Case No COMP/M.3547) Commission Decision 15 December 2004.

⁷⁶ *Vivendi/Telecom Italia* (Case COMP/M.8465) Commission Decision 30 May 2017.

⁷⁷ *Dow/DuPont* (Case COMP/M.7932) Commission Decision 27 March 2017.

⁷⁸ José Azar, Martin C Schmalz and Isabel Tecu, ‘Anti-Competitive Effects of Common Ownership’ (15 March 2017) *Journal of Finance*.

⁷⁹ Miguel Anton, Florian Ederer, Mireia Gine and Martin C Schmalz, ‘Common ownership, competition, and top management incentives’ (2016) *Ross School of Business Working Paper* 1328.

<<https://ssrn.com/abstract=2802332>> accessed 31 October 2016.

⁸⁰ Einer R Elhauge, ‘Horizontal Shareholding’ (10 March 2016) 109 *Harvard Law Review* 1267 (2016) *Harvard Public Law Working Paper* No 16-17.

<<https://ssrn.com/abstract=2632024>> or <<http://dx.doi.org/10.2139/ssrn.2632024>>

⁸¹ Eric A Posner, Fiona M Scott Morton and E Glen Weyl, ‘A proposal to limit the anti-competitive power of institutional investors’ (2016) *Working Paper*.

<<https://ssrn.com/abstract=2872754>>

- 4.1 Common shareholding was a reality in the agrochemical industry and that in particular, a small number of common shareholders, 17, collectively owned around 21% of BASF, Bayer and Syngenta and around 29%-36% of Dow, DuPont and Monsanto.
- 4.2 In general, market shares used by the Commission for the purpose of the assessment of the transaction tended to underestimate the concentration of the market structure and, thus, the market power of the parties, and that common shareholding in the agrochemical industry was to be taken as an element of context in the appreciation of any significant impediment to effective competition.
- 4.3 The economic literature on cross-shareholding, which extends to common shareholding, tended to show that common shareholding of competitors reduced incentives to compete as the benefits of competing aggressively to one firm come at the expense of firms that belong to the same investors' portfolio.
- 4.4 While, to the best of the Commission's knowledge, the economic literature had, focused on the effects of cross shareholding and common shareholding on price competition, the economic rationale of such effects applied to innovation competition and in increasing its efforts in R&D, a firm incurs a cost that decreases its current profits in expectation of future benefits brought by the resulting products of its innovation. Such future benefits would necessarily materialise through price competition in respect of future products which, given the specificities of the agrochemical industry, in particular the fact that the total size of the crop protection industry is typically not related to innovation, is likely to be mainly at the expense of its competitors. This, in turn, will negatively affect the value of the portfolio of shareholders who hold positions in this firm and in its competitors.
- 4.5 Therefore, as for current price competition, the presence of significant common shareholdings was likely negatively to affect the benefits of innovation competition for firms subject to this common shareholding. The Commission concluded that a number of large agrochemical companies have a significant level of common shareholding, and that in the context of innovation competition, such findings provide indications that innovation competition in crop protection should be less intense as compared with an industry with no common shareholding.

The Commission in *Bayer/Monsanto*⁸² approved the acquisition of Monsanto by Bayer conditional on a divestiture package which was designed to address overlaps in seeds, pesticides and digital agriculture. The Commission examined common shareholdings both in the context of arriving at the conclusion that the proposed transaction gave rise to an SLC and in examining the remedy package offered. The Commission's investigation focused on the main players active in the seed and traits and crop protection industry and revealed that 29 equity holders collectively accounted for a significant portion of the equity share of each of BASF, Bayer, DowDuPont and Monsanto.⁸³ The most important shareholders⁸⁴ were described to the Commission as being so-called "passive" shareholders which the Commission explained were often large "passive" mutual funds holdings, in the sense that these shareholders tend to construct well-diversified portfolios of individual stocks, most often based on index funds, with long investment horizons and infrequent selling, and tend not to buy and sell shares for the purpose of influencing managerial decisions. Nevertheless, "passive" investors acknowledged that they exert influence on individual firms with an industry-wide perspective.⁸⁵ On the basis of the reported equity holders, DowDuPont and Monsanto seemed to be the most "consanguine" agrochemical firms, as they shared a significant number of equity holders with, overall, large positions in both firms.⁸⁶ The Commission held that the evidence showed that the level of attendance at shareholders' meetings allowed for a limited group of common shareholders to collectively influence several players. Similar to *Dow/DuPont*, the Commission stated the following regarding the presence of common shareholdings: (i) concentration measures, such as market shares or the HHI, were likely to underestimate the level of concentration of the market structure and, thus, the market power of the parties; (ii) common shareholding was a reality in the biotech and agrochemical industry, both in terms of the number of common

⁸² *Bayer/Monsanto* (Case M.8084) Commission Decision 21 March 2018.

⁸³ 26% of the equity shares of BASF, 27% of Bayer, 39% of DowDuPont and 37% of Monsanto.

⁸⁴ BlackRock, The Vanguard Group, State Street Global Advisors and Norges Bank Investment Management.

⁸⁵ For example, in a letter sent in February 2015 to board members of the Vanguard funds' largest portfolio holdings, Vanguard's chairman and chief executive F William McNabb III stated that Vanguard, one of the largest mutual funds holdings that manages approximately USD\$3.6 trillion in assets, will seek active interactions with firms they invest in:

"[I]n the past, some have mistakenly assumed that our predominantly passive management style suggests a passive attitude with respect to corporate governance. Nothing could be further from the truth." Glenn H Booraem, controller of the Vanguard Group's funds and a Vanguard principal, complemented that view: *"[w]e believe that engagement is where the action is. We have found through hundreds of direct discussions every year that we are frequently able to accomplish as much—or more—through dialogue as we are through voting. Importantly, through engagement, we are able to put issues on the table for discussion that aren't on the proxy ballot. We believe that our active engagement on all manner of issues demonstrates that passive investors don't need to be passive owners. [...] The bottom line is that we believe that the vast majority of boards and management teams are appropriately focused on the same long-term value objectives as we are."*

⁸⁶ DowDuPont's reported equity holders owned 62% of Monsanto, while they owned 24%-32% of BASF and Bayer. Monsanto's reported holders represented 61% of DowDuPont, and 29%-34% of BASF and Bayer.

shareholders as well as with respect to the level of shares possessed by these common shareholders; and, thus, (iii) common shareholding in these industries were to be taken as an element of context in the appreciation of any significant impediment to effective competition that is raised.

The present author questions whether the Commission's conclusions in the above cases related to the common ownership theory of harm were premature insofar as it is questionable whether or not the Commission has met the requisite evidential standard of proof enunciated by the EU courts for application in merger control cases. Although it is beyond the scope of this thesis to explore the above in any great detail, below is a summary of the applicable standard and its application to the *Dow/DuPont* and *Bayer/Monsanto* cases.

5 DOES COMMON OWNERSHIP THEORY OF HARM MEET THE REQUISITE STANDARD OF PROOF FOR MERGER CONTROL?

There are a number of academic works in which the authors posit that the Commission might not have met the applicable legal standard.⁸⁷ In *Tetra Laval v Commission*,⁸⁸ the CJEU confirmed the scope of judicial review in EU merger decisions and the standard of proof that must be met by the Commission, and in this regard, the Court held that Commission must be able to demonstrate that “[t]he evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it”. The former President of the General Court has stated that the above *Tetra Laval* test means that the economic evidence that is relied on by the Commission to assess a proposed merger needs to be factually accurate, reliable, consistent, and exhaustive.⁸⁹ Judge Nils Wahl expressed the view that the *Tetra Laval* condition stipulating that the economic evidence must contain “all the information which must be taken into account” should be interpreted as imposing an obligation on the Commission to consider “all relevant information” and not only information in the possession

⁸⁷ Alec J Burnside and Adam Kidane, ‘Common ownership: an EU perspective’ (2020) *Journal of Antitrust Enforcement* 1 and Jacques Buhart and David Henry, ‘Common Ownership Under the EUMR – Sailing a Bit Too Close to the Wind’ (February 2020) *Concurrences* No 1-2020, Art No 92534.

⁸⁸ Case C-12/03 *P Commission v Tetra Laval* [2005] ECLI:EU:C:2005:8.

⁸⁹ Marc Jaeger, ‘The Standard of Review in Competition Cases Involving Complex Economic Assessments: Towards the Marginalisation of the Marginal Review?’ (2011) 2(4) *Journal of European Competition Law & Practice* 300.

of the Commission.⁹⁰ Furthermore, the General Court in *Impala*⁹¹ held that the reasoning of the Commission had to be “logical and must not disclose any internal contradictions”.⁹² The test in *Tetra Laval* applies to economic evidence in general and although *Tetra Laval* and *Impala* refer to the accuracy, correctness, completeness, and reliability of “the facts” on which a decision is based, the test is not confined to economic data and extends to information of an economic nature which includes economic theories, analyses, and models applied in merger control reviews.⁹³ The General Court in *General Electric*⁹⁴ annulled the Commission’s decision on the basis that the conglomerate effects theory of harm that the merged entity would have the ability and incentive to foreclose competitors by engaging in mixed bundling⁹⁵ relied on by the Commission was “a matter of controversy” since several underlying assumptions of the model were the subject of considerable criticism. The Court held that the Commission’s conclusion that the merged entity would have an incentive to engage in mixed bundling was “thus certainly not a direct and automatic consequence of the economic theory of Cournot effect.” The author wonders whether or not the common ownership theory of harm enunciated by the Commission in *Dow/DuPont* and *Bayer/Monsanto* would survive the application of the tests laid down by the CJEU and the

⁹⁰ Nils Wahl, ‘Standard of Review – Comprehensive or Limited?’ in Claus-Dieter Ehlermann and Mel Marquis (eds), *European Competition Law Annual 2009: The Evaluation of Evidence and its Judicial Review in Competition Cases* (Bloomsbury 2011) 291.

⁹¹ Case C-413/06 *P Bertelsmann and Sony Corp of America v Independent Music Publishers and Labels Association* [2008] ECLI:EU:C:2008:392 (“*Impala*”).

⁹² Tony Reeves and Ninette Dodoo, ‘Standards of Proof and Standards of Judicial Review in European Merger Law’ (2005) *Fordham International Law Journal* 29, Issue 5, 1034–1067, 1064, list the following elements: accuracy, reliability, consistency, probative value and completeness of evidence.
<<https://ir.lawnet.fordham.edu/ilj/vol29/iss5/5/>>

The test is summarised by Jacques Buhart and David Henry, ‘Common ownership under the EUMR – Sailing a bit too close to the wind’ (February 2020) *Concurrences* No 1-2020, Article No 92534, 233-240 as follows:

“In sum, therefore, the economic evidence relied upon by the Commission to substantiate its findings must be (i) accurate, (ii) reliable, (iii) consistent, (iv) complete—i.e., the Commission is required to consider not only “*information in its possession*” but “*all relevant information*”—and (v) logical. These criteria obtain regardless of whether the evidence is in the form of data, economic methods, theories or models that are applied in a merger control review.”

<<https://ssrn.com/abstract=3859945>>

⁹³ Alec J Burnside and Adam Kidane, ‘Common ownership: an EU perspective’ (November 2020) *Journal of Antitrust Enforcement*, Vol 8, Issue 3, 456–510.

Nicolas Petit, ‘Innovation Competition, Unilateral Effects and Merger Control Policy’ (29 January 2018) ICLE Antitrust & Consumer Protection Research Program, White Paper 2018.03.

<<https://laweconcenter.org/wp-content/uploads/2018/06/ICLE-Petit-Innovation-Competition-Merger-Control-Policy-ICLE-2018.pdf>>

⁹⁴ Case T-210/01 *General Electric v Commission* [2005] ECLI:EU:T:2005:456.

⁹⁵ Mixed bundling refers to a practice where two products are available separately but stand-alone prices for the individual products are higher than the bundled price. The making of rebates dependent on the purchase of other goods may also be considered a form of mixed bundling.

General Court in cases such as *Alfa Laval*, *Impala* and *General Electric* in the event of a challenge before the EU courts.

There are various significant and far reaching assertions and conclusions made by the Commission in *Dow/DuPont* regarding the role of institutional investors in portfolio companies and concerning the extension of established theories of harm on cross shareholdings to common shareholdings which appear to be unsupported including the following:

- 5.1 It is somewhat surprising that the Commission in *Dow/DuPont* appears to fully endorse the common ownership theory of harm, the decision containing various broad statements that the presence of common ownership in a sector is likely to soften competition.⁹⁶ It should be noted that, at the time of the decision, *Elhaunge*⁹⁷ was the only paper cited by the Commission supportive of the theory that had been published in a peer-reviewed journal⁹⁸ and the Commission in *Dow/Dupont* does not mention the literature that disputes the validity of the common ownership theory of harm.⁹⁹
- 5.2 The Commission simply asserts that large shareholders have privileged access to companies' management and therefore have the "opportunity to shape the companies' management incentives accordingly." As highlighted by *Burnside and Kidane*¹⁰⁰, there is no discussion or evidence as to how that access translates into influence over management incentives in practice, let alone influence over R&D/innovation incentives.
- 5.3 The Commission does not properly examine the type of influence mutual fund managers exert on portfolio companies. Shareholder engagement by mutual fund

⁹⁶ Please see paras 2348 ('[t]he economic literature on cross-shareholding, which extends to common shareholding, tends to show that common shareholding of competitors reduces incentives to compete'), 2349 ('recent empirical studies provide indications that the presence of significant common shareholding in an industry is likely to have material consequences on the behaviour of the firms') and 2352 ('innovation competition in crop protection should be less intense as compared with an industry with no common shareholding').

⁹⁷ Einer R Elhaunge, 'Horizontal Shareholding' (10 March 2016) 109 Harvard Law Review 1267, Harvard Public Law Working Paper No 16-17.

<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2632024>

⁹⁸ Alec J Burnside and Adam Kidane, 'Common ownership: an EU perspective' (November 2020) Journal of Antitrust Enforcement, Vol 8, Issue 3, 456–510.

⁹⁹ Please see Chapter 1.

¹⁰⁰ Alec J Burnside and Adam Kidane, 'Common ownership: an EU perspective' (November 2020) Journal of Antitrust Enforcement, Vol 8, Issue 3, 456–510.

managers through the observance of their stewardship codes and principles, is fundamentally different and distinct from exercising influence over the commercial and strategic behaviour of an undertaking, including R&D programmes. The author has reviewed the stewardship codes of each of the three institutional giants, Vanguard,¹⁰¹ State Street¹⁰² and BlackRock¹⁰³ which reveals that they do not generally get involved in commercial strategy.¹⁰⁴

¹⁰¹ Annex 5 of *Dow/DuPont* (Case COMP/M.7932) Commission Decision 27 March 2017 makes no mention of Vanguard's principles and policies of investment stewardship which cover the following: (i) board composition and independence; (ii) engagement in relation to oversight of material risks that have the potential to negatively impact long-term shareholder value ranging from business and operational to environmental, and social risks; (iii) advocating for performance-linked executive compensation that "incentivizes outperformance relative to a company's peers and competitors"; and (iv) ensuring companies have governance structures that guarantee board accountability. It is important to note that Vanguard expressly states in its principles and policies of investment stewardship that "[i]mportantly, we do not seek to influence company strategy. A board that truly understands a company's long-term strategy serves as an assurance to investors that the company is less likely to veer off course." The Commission instead cites general statements from Vanguard's Chairman and Chief Executive and its controller of group funds and principal regarding Vanguard's engagement with portfolio companies that passive investors do not need to be passive owners.

<https://about.vanguard.com/investment-stewardship/principles-policies/> accessed 3 January 2021.

¹⁰² The Commission makes no mention of State Street Global Advisors principles of asset stewardship which is entirely focussed on environmental, social and governance ("ESG") matters as opposed to commercial strategy. The Commission instead cites general statements of active shareholder engagement made by the head of corporate governance of State Street Global Advisors (The Commission also cites a general statement by the head of corporate governance of TIAA-CREF which again does not specify the principles of stewardship) and by its President and CEO, none of which articulate the principles and policies of engagement and stewardship.

https://www.ssga.com/ie/en_gb/institutional/ic/capabilities/esg/asset-stewardship accessed 3 January 2021.

¹⁰³ The Commission fails to cite BlackRock's stewardship principles of: (i) board quality; (ii) environmental risks and opportunities; (iii) corporate strategy and capital allocation (this is very much focussed on long term planning and business relevant business sustainability risks and opportunities); (iv) compensation that promotes long-termism; and (v) human capital management. The Commission instead cites vague statements of shareholder activism by BlackRock's Chairman and Chief Executive and by BlackRock's head of Asia Pacific corporate governance and responsible investment. It is worth noting that BlackRock in its letter of 15 January 2019 to the Federal Trade Commission in the context of its hearings on Competition and Consumer Protection in the 21st Century clarified as follows:

"In the normal course of business, most traditional asset managers such as BlackRock do not meet with boards of directors and management teams of public companies to provide direction on how to manage their business. This is especially true for diversified portfolios, such as index funds or actively managed funds whose performance is benchmarked relative to a diversified index. Rather, engagement provides asset managers with an opportunity to improve their understanding of portfolio companies and their governance structures to better inform proxy voting decisions. Notably, shareholders are not given the opportunity to vote on competitive strategy, nor is there evidence that directors run on a "platform" that promises to promote a competitive strategy. Furthermore, engagement by asset managers who disclose their >5% holdings on Schedule 13G is limited in both content and context by SEC regulations, the breach of which could lead to civil and criminal penalties."

<https://www.blackrock.com/corporate/about-us/investment-stewardship> accessed 3 January 2021.

¹⁰⁴ As Alec J Burnside and Adam Kidane, 'Common ownership: an EU perspective' (November 2020) *Journal of Antitrust Enforcement*, Vol 8, Issue 3, 456–510 point out, the stewardship role of institutional investors entails promoting long-term value creation through a commitment to sustainable corporate governance principles. Mutual fund managers do not seek to influence the commercial and strategic behaviour of undertakings through asset stewardship; and the proposition that investor engagement amounts to "some form of behind-the-scenes conniving between investors and competing companies" has been

As highlighted by *Burnside and Kidane*¹⁰⁵, the only passage in Annex 5 that could be considered to address commercial strategy is a citation from the *Azar, Schmaltz and Tecu* paper on the airline industry paper that “frequent and active communication, explicitly also about product market strategy, does take place between the largest investors and their portfolio firms.” However, as pointed out by *Burnside and Kidane*¹⁰⁶, the evidence in that paper is purely anecdotal and does not demonstrate that institutional investors systematically engage in discussions, let alone exercise any influence over product market strategy. Indeed, the paper itself admits that “knowledge about the level of detail at which product market strategy is discussed remains limited”. It is interesting to note that the above passage about product market strategy no longer features in the version of the paper downloaded by the author in January 2021.

5.4 The Commission in Annex 5 cites the Consolidated Jurisdictional Notice and its decisional practice as recognising that minority shareholders “can have more control than their equity share suggests”, the Commission citing the notice and cases

derided by the International Corporate Governance Network as absurd (International Corporate Governance Network ('ICGN'), 'Common Ownership: Do Institutional Investors Really Promote Anti-Competitive Behaviour?' (October 2018) ICGN Viewpoint).

<<https://www.icgn.org/sites/default/files/2021-05/6.%20ICGN%20Viewpoint%20Common%20Ownership.pdf>> accessed 11 September 2019.

The Commission does not examine the broader principles underlying investor stewardship, notwithstanding the fact that the topic is widely written about, or seek to develop an understanding of the substance of mutual fund managers' stewardship programmes. The Commission in Annex 5 of the *Dow/DuPont* (Case COMP/M.7932) Commission Decision 27 March 2017 cites the following somewhat vague statement by the former head of corporate governance at the world's largest pension fund, TIAA-CREE:

“[h]aving a passive investment strategy has nothing to do with your behaviour as an owner. It is clear from stewardship codes around the world that there are ownership responsibilities to owning shares, no matter how you got there”.

The above statement is simply used as evidence that index-led investors acknowledge exert 'influence' over their portfolio companies. Annex 5 provides no explanation as to what a stewardship code is or indeed how stewardship codes are capable of influencing the commercial and strategic behaviour of undertakings.

Ian R Appel, Todd A Gormley and Donald B Keim, 'Passive investors, not passive owners' (2016) *Journal of Financial Economics*, 121(1), 111-141. The Commission cited this paper in support of its proposition that passive investors are active owners only discusses engagement by passive owners with respect to broader corporate governance issues, as opposed to product market competition. The Appel, Gomley and Keym paper states that the three common themes of the historical proxy-voting policies of index fund managers were '(1) to support greater board independence, (2) oppose anti-takeover provisions, and (3) oppose unequal voting rights'. The Appel, Gomley and Keym paper does not in any way suggest that index fund managers have an influence on the commercial and strategic behaviour of undertakings.

¹⁰⁵ Alec J Burnside and Adam Kidane, 'Common ownership: an EU perspective' (November 2020) *Journal of Antitrust Enforcement*, Vol 8, Issue 3.

¹⁰⁶ Alec J Burnside and Adam Kidane, 'Common ownership: an EU perspective' (November 2020) *Journal of Antitrust Enforcement*, Vol 8, Issue 3, 456–510.

regarding sole control being acquired on a de facto basis.¹⁰⁷ It is respectfully submitted that this is of no relevance to institutional investors. In particular, the Commission recalls that the Consolidated Jurisdictional Notice states that minority shareholders are capable of exercising de facto sole control where the shareholder base is fragmented, and cites a number of merger decisions where minority shareholders have been found to exercise such control. The cases cited involved minority industrial shareholders with strategic interests of 25.96%, 34% and 39% respectively. The Commission also cites Saint Gobain/Poliet¹⁰⁸ which is of no relevance to institutional investors given that Saint Gobain's 4.7% interest in Poliet was accompanied by the right to appoint the majority of the supervisory board thereby unsurprisingly supporting a finding of de facto sole control. Institutional investors typically hold shares in a portfolio company significantly below the 10% level and are highly unlikely to be regarded as capable of exercising control within the meaning of the 2004 EMCR.¹⁰⁹

- 5.5 The Commission's decision seems to place significant reliance on the level of influence exerted by the institutional investors, Vanguard, State Street and BlackRock, in regard to the attempt by Trian Fund Management ("Trian") to obtain representation on the board of DuPont. The Commission examined the case study of the influence of the above funds in the context of a dispute that occurred in 2015 between a shareholder of DuPont namely, Trian, and DuPont's management. Trian presented a proposal to split up the company and requested a seat on the board, both of which were rejected. Trian subsequently initiated a proxy contest¹¹⁰ and

¹⁰⁷ Please see Chapter 2.

¹⁰⁸ *Saint Gobain/Poliet* (Case IV/M.764) Commission Decision [1996] 4 July 1996.

¹⁰⁹ There is no suggestion in *Dow/DuPont* (Case COMP/M.7932) Commission Decision March 27 2017 of there being joint control. The Commission itself noted the fragmented nature of the shareholdings in the agrichemical industry. It should be noted that the Commission itself recognises in the Consolidated Jurisdictional Notice¹⁰⁹ that "[v]ery exceptionally collective action can occur on a *de facto* basis where strong common interests exist between the minority shareholders to the effect that they would not act against each other in exercising their rights in relation to the joint venture. The greater the number of parent companies involved in such a joint venture, however, the more remote is the likelihood of this situation occurring". As pointed out by Alec J Burnside and Adam Kidane, 'Common ownership: an EU perspective' (November 2020) *Journal of Antitrust Enforcement*, Vol 8, Issue 3, 456–510, the likelihood of those shareholders collectively exerting any meaningful influence over the commercial and strategic behaviour of an undertaking is remote and that this is explicitly recognised by the Consolidated Jurisdictional Notice.

¹¹⁰ Jacob Bunge and David Benoit, "DuPont defeats Peltz, Trian in board fight" *The Wall Street Journal* (New York, 13 May 2015). Trian sought DuPont to achieve "best in class revenue growth", critically highlighting DuPont's performance in comparison to its competitors (in particular Monsanto), DuPont lack of aggressiveness in R&D and other measures to gain market share and DuPont agreement with Monsanto over a patent dispute, agreeing to pay US\$750m more than required in a settlement.

<<http://www.wsj.com/articles/dupont-appears-poised-to-win-over-peltz-1431521564>> accessed 10 November 2016.

Trian lost the proxy vote. The Commission concluded that “[i]t appears that the influence of large “passive” mutual funds had been instrumental in this result” and referred to Reuters reporting that “DuPont won the backing of three of its largest shareholders, Vanguard Group, State Street Global and BlackRock Institutional Trust, which are index funds, according to a source close to the matter. Trian won the majority of non-index institutions and would have prevailed had one of those three index funds voted differently, the source said.”¹¹¹ The Commission fantastically concluded that it understood the proxy fight between Trian and DuPont “could be interpreted as an illustration of the diverging incentives between large shareholders specific to a firm, which focus on the profitability of this firm, and large shareholders common to several competing firms, which have lower incentives to enhance competition between these firms.” It should be noted that the Bank of New York Mellon Corp. and most retail investors also voted against the proposed board representation. Indeed, the Commission itself acknowledged that “some commentators have explained that the negative vote resulted from issues in Trian’s campaign or other elements” before proceeding unquestioningly to accept Schmaltz and Elhauge’s anti-competitive conclusions as to the outcome of the Trian/DuPont saga. The Commission does not cite any of the above commentators with opposing views.

¹¹¹ Tom Hals, “DuPont wins board proxy fight against activist investor Peltz”, *Reuters* (London, 13 May 2015).

<<http://www.reuters.com/article/us-dupont-trian-idUSKBN0NY1JI20150513>> accessed 10 November 2016.

The Commission noted that while some commentators have explained that the negative vote resulted from issues in Trian’s campaign or other elements, others such as Martin C Schmalz, ‘How Passive Funds Prevent Competition (18 May 2015) www.EricPosner.com noted that: “a dispassionate look at different shareholders’ economic incentives supplies a rather simple rationale for why the passive funds did not themselves enforce relative performance evaluation, protest the weakening of DuPont’s CEO’s incentives, encourage more R&D and gains in market share, and so forth. Doing so simply isn’t in their economic interest.” Indeed, increased competition amongst agrochemical companies would in the first place hurt those having interests across the industry: “the common shareholders of the two firms [referring to Monsanto and DuPont, which were discussed in Trian’s criticisms] would suffer from increased competition [from DuPont against Monsanto]. Because prices would be lower, so would be the combined revenue and profits of DuPont and Monsanto. That outcome is in strict discord with the economic interests of Vanguard, BlackRock, and State Street. That is the second – and socially important – source of disagreement between the economic interests of Trian and the mighty mutual funds.”

<<https://ericposner.com/martin-schmalz-how-passive-funds-prevent-competition/>> accessed 10 November 2016.

The Commission cited Einer R Elhauge, Horizontal Shareholding (10 March 2016) 109 Harvard Law Review 1267, Harvard Public Law Working Paper No 16-17 as pointing to the same direction: “complaints [such as Trian’s complaint] are much less likely to persuade horizontal shareholders because they instead benefit from maximizing their returns from the joint profits of DuPont and Monsanto. It was thus unsurprising that Trian’s proxy contest was not supported by the four top shareholders of DuPont, given that their 19.8% share of Monsanto slightly exceeded their 19.4% share in DuPont and that Monsanto has nearly double the market capitalization of DuPont.”

<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2632024>

5.6 The Commission appears to take a giant leap by asserting that the economic literature and principles underpinning the analysis of cross shareholdings were readily applicable to common ownership. The Commission asserts that the analysis of the theoretical unilateral impact of common shareholders could be directly derived from the model developed by O'Brien and Salop (2000), the Commission clarifying that as explained in detail in Azar, Schmalz and Tecu (2016),¹¹² O'Brien and Salop (2000) developed a model of oligopoly in which firms maximize a weighted sum of the portfolio profits accruing to their shareholders, where a shareholder's weight in a firm's objective function is proportional to the fraction of the control of the firm held by that shareholder. However, the Commission made no mention of the fact that O'Brien in *O'Brien and Waehrer* highlighted that applying the O'Brien and Salop model of oligopoly to assume or hypothesise proportional control "is not firmly grounded in theory and does not as yet have empirical support" even though the above paper appears to have been published at the time of the Commission's decision.¹¹³

The Commission concluded that as a consequence, the theoretical framework, the methodology and the conclusions of *O'Brien and Salop* (2000) apply to common shareholdings. The Commission states that the economic literature on cross-shareholding "which extends to common shareholding, *tends to* show that common shareholding of competitors reduces incentives to compete as the benefits of competing aggressively to one firm come at the expense of firms that belong to the same investors' portfolio" and that "some empirical studies *tend to* confirm that the presence of significant common shareholding in an industry have material consequences on the behaviour of the firms in such industries, in particular that prices are higher and that common shareholders tend to shape the monetary incentives of firms' executives in order to align them with industry performance, and not only their firm's specific performance."(italics added by the author). The Commission makes no reference to the economic literature challenging and controverting the common ownership theory of harm. At the time of the *Dow/DuPont* decision, there was no consensus on this subject and even the use of the language "tends to" suggests that the Commission might have been aware of the absence of consensus.

¹¹² José Azar, Martin C Schmalz and Isabel Tecu, 'Anti-competitive effects of common ownership' (2016) Ross School of Business Working Paper, 1235.

<<https://media.iese.edu/research/pdfs/WP-1169-E.pdf>>

¹¹³ Daniel P O'Brien and Keith Waehrer, 'The Competitive Effects of Common Ownership: We Know Less Than We Think' (2017) 81(3) Antitrust Law Journal, 729.

5.7 The Commission specifically concedes that “[w]hile the economic literature has, to the best of the Commission's knowledge, focused on the effects of cross shareholding and common shareholding on price competition”, the Commission in the same paragraph proceeds to conclude that “the economic rationale of such effects applies to innovation competition” and that “[t]herefore, as for current price competition, the presence of significant common shareholding is likely to negatively affect the benefits of innovation competition for firms subject to this common shareholding.” The Commission adduces no evidence to support the above conclusions.

The Commission does not, in either of the *Dow/DuPont* or *Bayer/Monsanto* decisions, attempt to formulate a stand-alone unilateral or coordinated effects theory of harm with regard to common ownership. It would, given the state of the debate, and as rightly highlighted by *Wilson*,¹¹⁴ be unclear as to exactly what that theory of harm would be. Furthermore, it is not at all clear the degree to which the common ownership theory of harm actually played in the Commission's arrival at the conclusion that the notified transaction in each case would give rise to an SLC. The author wishes to emphasize that he is not in principle opposed to the application of a common ownership theory of harm. However, the parameters of the theory must first be properly formulated pursuant to a sufficient degree of consensus and weight of opinion in circumstances where the standard of proof enunciated by the EU courts in cases such as *Alfa Laval*, *Impala* and *General Electric* are met. At the time of writing, the above is lacking suggesting that the Commission's position on common ownership was premature. As *Tzanaki*¹¹⁵ points out, further empirical research “will assist shedding light on the nebulous landscape surrounding common ownership, in particular the extent of potential or actual effects and precise mechanisms at play” and that “[s]mart merger control design would need to steadily adjust its analytical and jurisdictional tools to capture the newly revealed dynamics”.

6 SUMMARY/THE REGULATORY GAP EXPOSED

Below I summarise the principal points highlighted in this Chapter as follows:

¹¹⁴ Thomas Wilson, ‘Common Ownership – Where do we Stand?’ (15 April 2019) Kluwer Competition Blog. <<http://competitionlawblog.kluwercompetitionlaw.com/2019/04/15/common-ownership-where-do-we-stand/>>

¹¹⁵ Anna Tzanaki, ‘Varieties and Mechanisms of Common Ownership: A Calibration Exercise for Competition Policy’ (March 2022) *Journal of Competition Law & Economics*, Vol 18, Issue 1, 168–254.

- 6.1 The jurisdictional criteria for the ex-ante control of mergers under Irish and EU merger control laws exclude the acquisition of a non-controlling minority interest. The General Court in *Aer Lingus Plc v European Commission* confirmed the above in relation to the 2004 EMCR and the Irish CCPC expressed a similar view in regard to Part 3 of the 2002 Act in its Submission to the Department of Enterprise Trade and Employment (now the Department of Jobs Enterprise and Innovation) in relation to the Public Consultation on the Operation and Implementation of the Competition Act 2002 dated December 2007¹¹⁶ and its written submissions in the context of the OECD Policy Roundtables Minority Shareholdings 2008¹¹⁷ where it stated that “situations of minority control that fall short of decisive control do not fall within the remit of the Act”.
- 6.2 Irish and EU merger control only allow for the examination of structural links in the context of a separate and subsequent notifiable merger or acquisition or concentration. In other words, the review of a harmful minority interest under the Irish and EU systems of merger control is entirely dependent on the investor entering into an unrelated subsequent transaction that amounts to a notifiable merger or acquisition or concentration.
- 6.3 There are various examples of merger reviews in which the CCPC and the Commission came to the conclusion that a cross shareholding structural link raised significant competition concerns leading to the divestment or neutralisation of the interest concerned.
- 6.4 The CCPC and the EU Commission have unequivocally endorsed in merger review cases such as *Ntl/Chorus* and *Vivendi/Telecom Italia*, respectively, that passive no influence cross shareholdings can present competition issues. It will be recalled from Chapter 3 that the CJEU in *Philip Morris* interpreted the only basis for intervention to control minority interests from a competition perspective other than merger control, namely, Articles 101 and 102 of the TFEU, narrowly, requiring that the minority stake confer the ability to influence the commercial conduct of the target thereby excluding passive no-influence stakes from their reach. Therefore, the acquisition of a non-controlling passive no-influence minority stake falls outside both the regimes for merger control and the general competition rules in Sections 4/5 of the Irish 2002 Act and Articles 101/102 of

¹¹⁶ Public Consultation on the Operation and Implementation of the Competition Act 2002 (December 2007) S/07/008.

¹¹⁷ OECD Policy Roundtables, *Minority Shareholdings* (OECD, 2008).

<<http://www.oecd.org/competition/mergers/41774055.pdf>>

the TFEU. It is abundantly clear that the entire machinery available to the CCPC and the Commission for regulating cross shareholding minority interests from a competition perspective suffers from significant jurisdictional deficiencies and obstacles that render it unfit for purpose. The above bar to intervention is particularly stark against a background of the CCPC and the Commission unequivocally endorsing the theories of harm concerned.

- 6.5 With regard to common shareholdings, the EU Commission recently in *Dow/DuPont* and *Bayer/Monsanto* confirmed a number of general principles regarding markets where common shareholdings are present: (i) concentration measures, such as market shares or the HHI, are likely to underestimate the level of concentration of the market structure and, thus, the market power of the parties; (ii) common shareholding is a reality in certain industries such as the biotech and agrochemical industry, both in terms of the number of common shareholders as well as with respect to the level of shares possessed by these common shareholders; and (iii) common shareholding in these industries are, in the context of a merger review, to be taken as an element of context in the appreciation of any significant impediment to effective competition. The Commission in the above cases acknowledged that such shareholders are often large “passive” mutual funds holdings, in the sense that they tend to construct well-diversified portfolios of individual stocks, most often based on index funds, with long investment horizons and infrequent selling, and tend not to buy and sell shares for the purpose of influencing managerial decisions, but that nevertheless, these “passive” investors acknowledge that they exert influence on individual firms from an industry-wide perspective. The Commission referred to evidence as to the level of attendance at shareholders’ meetings which showed that it allowed for a limited group of common shareholders collectively to influence several players. Similar to minority cross shareholdings, it is abundantly clear that the entire machinery available to the CCPC and the Commission for regulating common minority interests from a competition perspective suffers from significant jurisdictional drawbacks that render it unfit for purpose. The above impediment is particularly acute when one considers the Commission’s unequivocal endorsement of the theories of harm concerned.
- 6.6 It is doubtful whether, at this time, the common ownership theory of harm endorsed and applied by the Commission in *Dow/DuPont* and *Bayer/Monsanto* would meet the test set by the EU courts for application in merger review cases.

The Commission in the opening paragraphs of the 2013 Consultation Paper succinctly summarised the regulatory gap in terms of merger control and cross shareholdings as follows:

“Under the Merger Regulation, the Commission has currently only the possibility to take pre-existing minority shareholdings into account in the context of a notified merger where the Commission is competent to analyse a separate acquisition of control. The Commission has intervened in such scenarios in a significant number of past cases and authorised such cases on the basis of remedies, often entailing a divestiture of a (pre-existing) minority shareholding.”

The Commission further clarified as follows:

“If, however, the minority stake had been acquired after the Commission examined the acquisition of control over another undertaking, the Commission would have had no competence under the Merger Regulation to deal with possible competition concerns even though the competition concerns would have been exactly the same. Therefore when the subsequent acquisition of a minority stake is unrelated to an acquisition of control, the Commission cannot investigate and possibly intervene against such acquisition. This situation seems rather unsatisfactory.”

The cases reviewed in this Chapter clearly show that the CCPC and the EU Commission have carried out detailed examinations of the implications of cross shareholdings in given situations and concluded that they gave rise to significant competition concerns amounting to an SLC which necessitated the application of appropriate remedies. Similarly, regarding common shareholdings, the Commission in the context of EU merger control has concluded that the existence of common shareholdings in a sector was an element of context in the appreciation/assessment of a transaction and that their presence underestimated the level of concentration in the industry concerned. However, the gateway to carrying out the substantive review of a cross or common minority shareholding was opened by the notification of a separate and subsequent transaction which amounted to a merger or acquisition for Irish law purposes or concentration at EU level, and not the acquisition of the equity stake itself. With respect to common shareholdings, the Commission is powerless to insist on divestiture of minority interests not held by the parties to the transaction, leaving the parties/Commission with no option other than to offer/accept an alternative remedy within the procurement of the notifying parties failing which, the proposed transaction would be prohibited. Clearly, it is open to the parties to a transaction to implement a merger or

concentration and, once the transaction is approved, the parties can subsequently, and separately, acquire a harmful cross shareholding structural link thereby avoiding the automatic regulatory scrutiny of the *ex-ante* system of Irish or EU merger control. Furthermore, the parties can also avoid the application of Article 101(1) of the TFEU by ensuring that the non-controlling equity interest remains outside the narrow confines of the decision of the CJEU in *Philip Morris*, namely that it does not afford the ability to influence the commercial conduct of the target. In this way, it appears that both the mergers and general competition regimes are avoided, notwithstanding the considerable body of economic theory and evidence supporting the existence of harm as explored in Chapter 1 and endorsed by the Irish CCPC and the EU Commission, including in merger control decisions reviewed in this Chapter such as *Ntl/Chorus* and *Vivendi/Telecom Italia*.

The regulatory gap under Irish and EU competition laws was emphatically exposed by the Irish *Ryanair/Aer Lingus* case. The jurisdictional scope of the *ex-ante* merger control systems, both in Ireland and at EU level, did not capture the acquisition of a non-controlling equity structural link.¹¹⁸ Furthermore, neither the Irish CCPC nor the EU Commission had jurisdiction to intervene using Section 4(1) of the 2002 Act or Article 101(1) of the TFEU given the absence of an “agreement” necessary for the application of those provisions.¹¹⁹ The contested minority stake in *Ryanair/Aer Lingus* would have given rise to harm according to well established economic theories summarised in Chapter 1 and endorsed by the CCPC and the Commission in different contexts, including in merger review cases such as *Ntl/Chorus* and *Vivendi/Telecom Italia*, respectively, discussed in the present Chapter. As we saw in Chapters 2 and 3, the *lacunae* in the Irish and EU merger control systems and the absence of an agreement for the purposes of Section 4(1) of the Irish 2002 Act and Article 101(1) of the TFEU, respectively, left the Commission in Brussels in the embarrassing and powerless position of being unable to intervene when called upon to do so in a situation that clearly involved a significant impact on trade between EU Member States, the Commission having to step aside to leave it to the UK competition authorities to intervene and take enforcement action to remedy the situation using domestic powers that had their origins in national legislation enacted at the time of the UK’s admission to the European Economic Community on 1 January 1973.¹²⁰ It is interesting to note that if the *Ryanair/Aer Lingus* equity interest scenario were to present itself today, the position would

¹¹⁸ Please see Chapter 2.

¹¹⁹ Please see Chapter 3.

¹²⁰ The UK Enterprise Act 2002 re-enacted many of the merger control provisions that existed under the Fair Trading Act 1973.

be no different in terms of the inability of the Irish CCPC or EU Commission to intervene, and the UK's Competition and Markets Authority¹²¹ would have clear jurisdiction to intervene using domestic powers¹²² emanating from the competition law of a former Member State. Post Brexit, such a situation would be exclusively governed by the national competition laws of the UK, which has become a non- EU third country.

The above emphatically underlines the disconnect between the apparent clarity of the Commission's policy on the substantive issues surrounding the acquisition of non-controlling minority interests on the one hand, and the jurisdictional impediment to intervention on the other. Each of the only two pieces of machinery in place for intervention under Irish and EU competition law (merger control and the general competition rules) suffer from significant structural faults in terms of the jurisdictional gateway for taking action that render the competition agencies powerless to intervene except in limited circumstances that clearly exclude situations that can give rise to significant competition issues by virtue of the application of established theories of harm.

¹²¹ Formerly the Office of Fair Trading.

¹²² Enterprise Act 2002 (as amended). Please see Chapter 5 for a summary of UK merger control laws.

COMPETITION LAW AND THE REGULATION OF NON CONTROLLING MINORITY INTERESTS: THE REGULATORY GAP

CHAPTER 5

REGULATION OF NON-CONTROLLING MINORITY INTERESTS IN CERTAIN JURISDICTIONS

1 INTRODUCTION

This Chapter examines the national merger control regimes of certain jurisdictions, including those of various EU Member States, whose thresholds for merger review extend to controlling the acquisition of minority interests beyond situations involving control/decisive influence as per the Irish Competition Act 2002 (“**2002 Act**”) and Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings¹ (“**2004 EMCR**”). The above national merger control systems highlight both the regulatory gap that exists at EU level and the significant disparity in the treatment of minority interests across the EU consequent on the lack of consistency in the jurisdictional thresholds for merger review. The *Ryanair/Aer Lingus* saga, and in particular the decision of the General Court in *Aer Lingus v European Commission*,² underlined the above regulatory gap at EU level and the different regulatory positions in various jurisdictions within the EU. The General Court in *Aer Lingus v European Commission* upheld the Commission’s finding that Ryanair’s 29.82% holding in Aer Lingus did not amount to the acquisition of control/decisive influence for the purposes of the 2004 EMCR and, therefore, fell outside the EU system of merger control which starkly contrasts with the decision of the UK Competition Commission in which the Competition Commission, adjudicating on the same set of facts, was satisfied that the above minority shareholding conferred on Ryanair the ability to exercise material influence over Aer Lingus for the purposes of UK merger control and that, consequently, the UK competition authorities had jurisdiction to intervene. The Irish CCPC appears to have taken the view that it too was powerless to intervene under Part 3 of the 2002 Act given that the scope of the regime was defined by reference to mergers under EU merger control legislation.³ The General Court in *Aer Lingus v Commission* explained the jurisdictional issue in the following terms:

¹ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] L24/1.

² Case T-411/07 *Aer Lingus Group Plc v European Commission* Case [2010] ECLI:EU:T:2010:281.

³ Please see sections 9 and 10 of Chapter 2 on the likelihood that an Irish court would follow the decision of the General Court in Case T-411/07 *Aer Lingus Group Plc v European Commission* Case [2010] ECLI:EU:T:2010:281.

“...the acquisition of a shareholding which does not, as such, confer control as defined in Article 3 of the merger regulation does not constitute a concentration which is deemed to have arisen for the purposes of that regulation. On that point, European Union law differs from the law of some of the Member States, in which the national authorities are authorised under provisions of national law on the control of concentrations to take action in connection with minority shareholdings in the broader sense....”⁴

Microsoft/Telewest,⁵ is an earlier example of a case involving the acquisition of a minority interest which was the subject of a finding that no control/decisive influence existed at EU level and which was subsequently found to amount to the acquisition of the possibility of exercising material influence for the purposes of UK merger control law. Microsoft Corporation had originally acquired a shareholding in Telewest Communications Plc in October 1999 which resulted in Microsoft and Liberty Media exercising joint control over Telewest. The transaction fell under the jurisdiction of the European Commission under the predecessor to the 2004 EMCR, Council Regulation 4064/89 of 21 December 1989 on the control of concentrations between undertakings (**‘1989 EMCR’**). Before the Commission arrived at an actual decision, Microsoft relinquished most of its veto rights in relation to Telewest and reduced its shareholding from 29% to 23.6% leading the Commission to conclude that Microsoft would no longer have joint control of Telewest for the purposes of the 1989 EMCR and that on this basis, the transaction fell outside merger control at EU level. The UK Director General of the Office of Fair Trading (**“OFT”**)⁶ subsequently examined the acquisition by Microsoft of 23.6% of Telewest's issued share capital from MediaOne under the provisions of the UK Fair Trading Act 1973⁷ and concluded that the minority interest gave rise to the ability to exercise material influence, in contrast to the conclusion as to jurisdiction arrived at under the 1989 EMCR. Similarly, in *Centrica/Lake Acquisitions*,⁸ the OFT found that the acquisition of a 20% stake by Centrica plc in Lake Acquisition Limited and in turn British Energy plc did not result in control or decisive influence under the 2004 EMCR but found that it gave rise to material influence for UK merger control purposes.

⁴ Case T-411/07 *Aer Lingus Group Plc v European Commission* Case [2010] ECLI:EU:T:2010:281, para 64.

⁵ Office of Fair Trading, *The completed acquisition by Microsoft Corporation of 23.6% interest in Telewest Communication plc* (OFT, July 2000).

<http://webarchive.nationalarchives.gov.uk/20140525130048/http://www.offt.gov.uk/OFTwork/mergers/mergers_fta/mergers_fta_advice/microsoft>

⁶ Now the Competition and Markets Authority.

⁷ Now replaced by the Enterprise Act 2002 (as amended).

⁸ Office of Fair Trading, *Anticipated Acquisition by Centrica of 20 per cent of Lake Acquisition* (OFT, 25 August 2009) ME/4133/09.

The above underlines in the clearest terms the regulatory *lacunae* at EU level, and necessarily under Irish law given that the Irish jurisdictional thresholds are very much modelled on the 2004 EMCR, the Commission having to conclude in each case that the acquisition of the minority interest was outside of its merger control jurisdiction, and the UK competition authorities subsequently intervening to investigate on the basis of the UK's wider material influence test, thereby leaving the substantive regulatory analysis of the implications of the minority interest to be carried within a narrow domestic, as opposed to pan EU, regime notwithstanding that there was a significant inter-Member State trade impacted by the minority interest. For example, in *Ryanair/Aer Lingus*, Aer Lingus and Ryanair were found by the UK Competition Commission to carry a very high percentage of passengers in certain corridors between two Member States (Ireland and the UK) including the following: London-Dublin (81.9%), London-Cork (100%), London-Shannon (100%), London-Knock (100%), North West England-Dublin (98.3%) and Birmingham/East Midlands-Dublin (99.5%).

Below in Section 2 I examine recommendations made by international organisations on the factors to be used in formulating the jurisdictional criteria for merger review.

2 RECOMMENDATIONS OF INTERNATIONAL BODIES

The International Competition Network (“**ICN**”), whose members comprise the competition agencies of most jurisdictions around the world,⁹ adopted Recommended Practices for Merger Notification and Review Procedures which were last updated in April 2018¹⁰ and specify the following recommendation in the context of the definition of a merger transaction:

“Jurisdictions should consider carefully the types of transactions that are included within the scope of their merger laws and seek to include in the scope of their merger laws only transactions that result in a durable combination of previously independent entities or assets and are likely to materially change market structure.”

The Merger Working Group of the ICN comments on the above as follows in relation to minority interests:

⁹ International Competition Network.

<<https://www.internationalcompetitionnetwork.org/members/?location=europe>>

¹⁰ ICN Recommended Practices for Merger Notification And Review Procedures.

<https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/MWG_NPRecPractices2018.pdf>

“Comment 3: Acquisitions of a minority interest should not be included in the scope of merger review if they are unlikely to be competitively significant.”¹¹

The ICN has not provided any guidance as to the meaning of the above concept of “competitively significant” although it is interesting to note that the term “competitively significant influence” is the test applied in German merger control.¹²

The ICN’s Recommended Practices for Merger Notification and Review Procedures set out recommended practices and procedures for many aspects of merger control including the following

- (a) Jurisdiction should be asserted only over transactions that have a material nexus to the reviewing jurisdiction;
- (b) Notification thresholds should be clear, understandable and easily administrable; and
- (c) Mandatory notification criteria should be based exclusively on objectively quantifiable criteria. The ICN specifies assets and sales (or turnover) as examples of objectively quantifiable criteria. The ICN expressly clarifies that examples of criteria that are not objectively quantifiable are market share and potential transaction-related effects. The ICN states that market share-based tests and other criteria that are inherently subjective and fact-intensive may be appropriate for later stages of the merger control process (e.g., determining the scope of information requests or the ultimate legality of the transaction), but such tests are not appropriate for use in making the initial determination as to whether a transaction requires notification.

The OECD in its Policy Roundtable “Definition of Transaction for the Purpose of Merger Control Review” 2013¹³ examined jurisdiction and minority interests. The Business and Industry Advisory Committee (“**BIAC**”) to the OECD concluded:

¹¹ Comment 3 of May 2017 reflected in the ICN’s Recommended Practices for Merger Notification and Review Procedures.
<https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/MWG_NPRecPractices2018.pdf>

¹² Please see section 3 below.

¹³ OECD Policy Roundtables, *Definition of Transaction for the Purpose of Merger Control Review* (OECD, 2013).

“Acquisitions of shares (including acquisitions of minority interests and interlocking directorates) – It is appropriate in some instances that competition authorities may investigate and regulate potential anticompetitive effects of minority shareholdings and interlocking directorates. However, BIAC’s concerns in this respect are that (i) notification processes and agencies’ investigations should be limited to those circumstances where legitimate concerns about impacts on competition are likely to occur as a result of such transactions, (ii) the applicable rules should be sufficiently clear to provide maximum legal certainty and (iii) the rules should be reasonably consistent across jurisdictions. This is an area where agencies need to work towards convergence of their criteria, with a view to clearly defining notions such as “control”, and where guidelines, designed in a coordinated fashion between agencies, are a welcome supporting tool. BIAC submits that any such convergence should be aimed at reducing the regulatory burden of international merger controls and, at all costs, avoid regulatory creep increasing the burden on business.”

The above reference to limiting jurisdiction regarding minority interests to situations giving rise to “legitimate concerns” is inherently vague.

The OECD’s governing Council in 2005 adopted its “Recommendation of the Council on Merger Review”¹⁴ which includes the following:

“...Member countries should in particular:

1. assert jurisdiction only over those mergers that have an appropriate nexus with their jurisdiction;
2. use clear and objective criteria to determine whether and when a merger must be notified or, in countries without mandatory notification requirements, whether and when a merger will qualify for review;”

The above recommendations make no mention of minority interests.

<<https://www.oecd.org/daf/competition/Merger-control-review-2013.pdf>>

¹⁴ OECD Legal Instruments, *Recommendation of the Council on Merger Review* (OECD, adopted 23 March 2005).

<<https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0333>>

The text of the United Nations Conference on Trade and Development (“UNCTAD”)’s “Model Law on Competition (2018): Revised chapter VI”¹⁵ is silent on minority shareholdings and the accompanying discussion limits mention of minority interests to identifying certain jurisdictions such as the US that define mergers to include such interests. Similarly, UNCTAD’s document titled “Challenges in the design of a merger control regime for young and small competition authorities”¹⁶ which highlights the “essential elements to be taken into consideration in the design of a merger control regime by young and small competition authorities” simply states in relation to the definition of mergers that minority interests “may also require attention”.

The BIAAC of the OECD in its report on the above Policy Roundtable on Definition of Transaction for the Purpose of Merger Control Review 2013¹⁷ summarises the thresholds applicable in various jurisdictions around the world. The above report categorises jurisdictions that capture minority interests in the scope of their jurisdictional thresholds for merger review as follows:

- Those systems that apply a “control/decisive influence” test. As discussed in Chapter 2, it is clear that Ireland and the EU fall into this category;
- Merger control regimes that use a “material/significant influence” type concept of jurisdiction. The UK and Germany discussed below¹⁸ are examples that fall into this category of jurisdiction;
- Merger control regimes that cast a wide net subject to certain exemptions. The US, discussed below,¹⁹ is an example of this; and
- Merger regimes with fixed percentage thresholds. Brazil²⁰ is an example of such a jurisdiction.

In the sections below, we examine the tests applied in a number of jurisdictions for the notification and review of transactions which are broader than the criterion of control as

¹⁵ United Nations Conference on Trade and Development, *Model Law on Competition (2018): Revised Chapter VI* (United Nations, 25 May 2018).

<https://unctad.org/system/files/official-document/ciclpL10_en.pdf>

¹⁶ United Nations Conference on Trade and Development, *Challenges in the design of a merger control regime for young and small competition authorities* (United Nations, 26 April 2017).

<https://unctad.org/meetings/en/SessionalDocuments/ciclpd45_en.pdf>

¹⁷ OECD Policy Roundtables, *Definition of Transaction for the Purpose of Merger Control Review* (OECD, 2013).

<<https://www.oecd.org/daf/competition/Merger-control-review-2013.pdf>>

¹⁸ Please see sections 3 and 4 below of this Chapter for a discussion on the UK and Germany, respectively.

¹⁹ Please see section 5 below of this Chapter for a discussion on US.

²⁰ Please see section 6 below of this Chapter for a discussion on Brazil.

understood in Irish and EU merger control. The selected jurisdictions discussed below, which apply a more expansive jurisdictional test to include non-controlling minority interests, are the UK, Germany, the US and Brazil.²¹ As we shall see below, none of these jurisdictions serves as an ideal model to inspire the formulation of jurisdictional thresholds to address cross or common shareholdings. The following and final chapter of the thesis contains a suggested framework prepared by the author which to some extent is informed by the jurisdictional limitations of the national systems discussed below.

3 THE UK

3.1 UK Merger Control Law

The control of mergers under UK law is set out in the Enterprise Act 2002 ("**EA 2002**") which specifies that the Competition and Markets Authority ("**CMA**") is obliged to refer completed and anticipated mergers for an in-depth Phase 2 investigation if it believes that it is or may be the case that "a relevant merger situation" has been created or arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation, and the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets for goods or services in the UK²². The CMA has issued guidance on jurisdictional issues concerning relevant merger situations in the form of *Mergers: Guidance on the CMA's jurisdiction and procedure*²³ ("**UK Jurisdictional Merger Guidelines**").

It should be noted at the outset that UK merger control does not entail an ex-ante compulsory notification of mergers and acquisitions. Prior notification to the CMA is provided for on a voluntary basis. There is no provision prohibiting the consummation

²¹ Please note that it is beyond the scope of the present thesis to examine the substantive review of minority interests in the selected jurisdictions.

²² Section 22(1) and 33(1) of the EA 2002. Under Section 22(2) and 33(2) of the EA 2002, the CMA may, however, decide not to make a reference for a Phase 2 investigation if it believes that:

- the market concerned is not, or the markets concerned are not, of sufficient importance to justify the making of a reference any relevant customer benefits in relation to the creation of the relevant merger situation outweigh the substantial lessening of competition concerned and any adverse effects of that substantial lessening of competition, or
- in the case of an anticipated merger, the arrangements concerned are not sufficiently far advanced, or are not sufficiently likely to proceed, to justify the making of a reference

²³ *Mergers: Guidance on the CMA's jurisdiction and procedure* CMA2revised (as amended on 4 January 2022). These were last revised in January 2022.

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1044636/CMA2_guidance.pdf>

of a merger and acquisition even where it gives rise to a relevant merger situation, although, of course, completing such a transaction involves a risk of intervention by the CMA.

To date, it appears that in terms of minority interests, the CMA and its predecessor, the OFT, have only applied UK mergers legislation to cross shareholdings and not to common shareholdings as such. The UK government made a submission to the Directorate for Financial and Enterprise Affairs Competition Committee of the Organisation for Economic Co-operation and Development (“**OECD**”) entitled *Common ownership by institutional investors and its impact on competition - Note by the United Kingdom*²⁴ in which it explored the potential effects on competition that may arise from common ownership. The above submission concluded that the studies of common ownership by institutional investors and the impact on competition raised “interesting questions for competition authorities” and that they had “identified limitations of the studies and areas that may merit further work.” The submission refers to data collected on the UK retail banking and insurance sectors providing evidence of common ownership, albeit to a lesser extent to that found in the studies from the US.

The discussion below focuses on the UK experience of applying its merger control regime to cross shareholdings.

As will be seen below, the EA 2002 covers minority interests falling short of control. It is interesting to note that acquisitions of non-controlling minority interests account for approximately 5% of all mergers notified in the UK.²⁵ *Meadowcroft and Thompson* carried out a study of minority interests in the UK for the period 1980 to 1984 and noted that the sectors involving the highest levels of activity in 1984 in this context were mechanical engineering, textiles, leisure and overseas traders.²⁶ Furthermore, the EA does not require the existence of an agreement or practice as stipulated by Article 101 of the TFEU or Section 4(1) of the 2002 Act.

²⁴ Directorate for Financial and Enterprise Affairs Competition Committee, *Common ownership by institutional investors and its impact on competition - Note by the United Kingdom* (OECD, 23 November 2017).

<[https://one.oecd.org/document/DAF/COMP/WD\(2017\)92/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2017)92/en/pdf)>

²⁵ European Commission, ‘Minority Power – EU Merger Control and the acquisition of Minority Shareholdings’ (October 2014), Competition Policy Brief (occasional discussion papers by the Competition DG) , Issue 15.

<http://ec.europa.eu/competition/publications/cpb/2014/015_en.pdf>

²⁶ Shirley Meadowcroft and David Thompson, ‘Minority Share Acquisition: The Impact Upon Competition’ (1986) Luxembourg, Office for Official Publications of the European Communities.

3.1.1 A Relevant Merger Situation

A merger must meet three criteria to constitute a relevant merger situation for the purposes of the EA 2002²⁷ which include as a first condition that either two or more enterprises cease to be distinct or there must be arrangements in progress or in contemplation which, if carried into effect, will lead to enterprises ceasing to be distinct.²⁸ Two enterprises will “cease to be distinct” if they are brought under common ownership or control.²⁹ With regard to control, Section 26(3) and (4) of the EA 2002 distinguish between the following three levels of control of an enterprise(in ascending order):

- (A) material influence over policy;
- (B) control of policy (often referred to as *de facto* control); and
- (C) a controlling interest (often referred to as “*de jure*”, or “legal” control).

The ability to exercise material influence is the lowest level of control that may give rise to a relevant merger situation³⁰ and is the one that is typically used to provide the jurisdictional basis to examine the acquisition of a minority interest. When making its assessment, the CMA focuses on the acquirer’s ability materially to influence policy relevant to the behaviour of the target entity in the marketplace.³¹ The policy of the target in this context means the management of its business, and thus includes the strategic direction of a company and its ability to define and achieve its commercial objectives.³² The CMA clarifies that it does not consider that material influence is likely to arise in situations where a shareholder has no more than the rights normally accorded to minority shareholders, such as rights in the

²⁷ Section 23 of the EA 2002.

²⁸ The second condition is that either: (a) the UK turnover associated with the enterprise which is being acquired exceeds £70 million (“**UK turnover test**”), or (b) the enterprises which cease to be distinct supply or acquire goods or services of any description and, after the merger, together supply or acquire at least 25% of all those particular goods or services of that kind supplied in the UK or in a substantial part of it. The merger must also result in an increment to the share of supply or acquisition. (This test is referred to as the “**UK share of supply test**”)

The third condition is that either (a) the merger must not yet have taken place, or (b) it must have taken place not more than four months before the day the reference is made, unless the merger took place without having been made public and without the CMA being informed of it (in which case the four-month period starts from the earlier of the time the merger was made public or the time the CMA was told about it). The four-month deadline may be extended in certain circumstances.

²⁹ EA 2002, s 26.

³⁰ UK Jurisdictional Merger Guidelines, para 4.17.

³¹ UK Jurisdictional Merger Guidelines, para 4.17.

³² UK Jurisdictional Merger Guidelines, para 4.17.

context of a liquidation.³³ The CMA states that the assessment of material influence requires a case-by-case analysis of the overall relationship between the acquirer and the target.³⁴ A finding of material influence may be based on the acquirer's ability to influence the target's policy through exercising votes at shareholders' meetings, together with, in some cases, any additional supporting factors.³⁵ However, material influence may also arise as a result of the ability to influence the board of the target, and/or through other arrangements, without the acquirer necessarily being able to block votes at shareholders' meetings.³⁶

The CMA in the UK Jurisdictional Guidelines states that it is of the view that the following matters may be "of particular relevance", although it warns that this list is by no means exhaustive.³⁷

3.1.2 Shareholdings³⁸

The size of the acquirer's minority shareholding in the target company will typically have a direct bearing on the extent of the acquirer's voting power at a shareholders' meeting, and thus on the acquirer's influence on the corporate and strategic decisions of the target company. The CMA highlights for example, a shareholding conferring on the holder more than 25% of the voting rights in a company which generally enables the holder to block special resolutions³⁹ given that under UK company law, the passing of a special resolution requires the holders of 75% or more of the voting shareholders attending a general meeting of shareholders to vote in favour of the proposed resolution.⁴⁰ Given the nature of the decisions that typically will require a special resolution – and which the holder could therefore block – a share of voting rights of over 25% is likely to be seen as conferring the ability materially to influence policy – even when all the remaining shares are held by only one person.⁴¹

The CMA states that shareholdings below 25% will typically be less likely to confer material influence,⁴² however, the CMA may examine any shareholding of 15% or more in order to

³³ UK Jurisdictional Merger Guidelines, footnote 43.

³⁴ UK Jurisdictional Merger Guidelines, para 4.18.

³⁵ UK Jurisdictional Merger Guidelines, para 4.19.

³⁶ UK Jurisdictional Merger Guidelines, para 4.19.

³⁷ UK Jurisdictional Merger Guidelines, para 4.20.

³⁸ UK Jurisdictional Merger Guidelines, paras 4.21 to 4.27.

³⁹ UK Jurisdictional Merger Guidelines, para 4.21.

⁴⁰ Companies Act 2006, s 283(1).

⁴¹ UK Jurisdictional Merger Guidelines, para 4.22.

⁴² UK Jurisdictional Merger Guidelines, para 4.23.

see whether the holder might be able materially to influence the company's policy.⁴³ The CMA states that a shareholding of less than 15% might attract scrutiny where other factors indicating the ability to exercise material influence over policy are present⁴⁴ and in this context states that it will consider not only whether the acquiring party has the right to block special resolutions but also whether, given other factors, it is able to do so as a practical matter.⁴⁵ This gives effect to the general principle that the purpose of UK merger control is to enable the CMA to consider the commercial realities and results of transactions and that the focus should be on substance and not legal form.⁴⁶ As such, other factors relevant to an assessment of a particular shareholding may include:

- the distribution and holders of the remaining shares, for example whether the acquiring entity's shareholding makes it the largest shareholder of the target;
- patterns of attendance and voting at recent shareholders' meetings based on recent shareholder returns, and, in particular, whether voter attendance is such that a shareholder holding 25% of the voting rights or less would be able in practice to block special resolutions. In making this determination, the CMA may have regard to the votes of other shareholders that it considers may be expected to be voted with the acquirer against a special resolution;
- the existence of any special voting or veto rights attached to the shareholding under consideration;
- the status and expertise of the acquirer, and its corresponding influence with other shareholders, and may consider whether, given the identity and corporate policy of the target company, the acquirer may be able materially to influence policy formulation through, for example, meetings with other shareholders; and⁴⁷
- Where a company's appetite for pursuing certain strategies would be reduced because of a perception that these strategies would be likely to cause conflict with the acquirer.⁴⁸

The long running saga of Ryanair Holdings plc's repeated attempts to acquire control of Aer Lingus Group plc included an examination carried out by the CMA of whether or not the 29.82% stake held by Ryanair in Aer Lingus amounted to material influence for this

⁴³ UK Jurisdictional Merger Guidelines, para 4.23.

⁴⁴ UK Jurisdictional Merger Guidelines, para 4.23.

⁴⁵ UK Jurisdictional Merger Guidelines, para 4.24.

⁴⁶ UK Jurisdictional Merger Guidelines, para 4.24.

⁴⁷ UK Jurisdictional Merger Guidelines, para 4.26.

⁴⁸ UK Jurisdictional Merger Guidelines, para 4.27.

purpose.⁴⁹ The CMA in the first instance, and the UK Competition Commission on appeal, carried out the above analysis under the UK EA 2002 after the EU Commission had prohibited the second bid by Ryanair to acquire control of Aer Lingus under the 2004 EMCR. As can be seen from Chapter 2, separately from the Commission's prohibition order, the General Court ruled in *Aer Lingus Group Plc v European Commission* that the Commission in the circumstances was not empowered by the 2004 EMCR to order a divestiture of Ryanair's minority interest.⁵⁰ The above ruling paved the way for the UK competition authorities to intervene using UK domestic competition law.

The Competition Commission, after concluding that Ryanair had not acquired *de jure* or *de facto* control, examined whether or not the 29.82% interest held by Ryanair in Aer Lingus gave Ryanair material influence over Aer Lingus which involved taking into account the extent to which Ryanair had in fact exercised material influence over Aer Lingus in the six and a half years since Ryanair acquired its first shareholding in Aer Lingus. The Competition Commission made it clear however, the jurisdictional question it had to decide was not whether Ryanair had in fact exercised material influence; but whether, on all the evidence available, Ryanair had the ability to exercise material influence. The Competition Commission clarified that under Irish company law and the Articles of Association of Aer Lingus, the board of directors had a fiduciary duty to act in the best interests of the company. They referred to the board of directors running the company on a day-to-day basis and taking the majority of decisions concerning the company's commercial policy and strategy. It stated that some issues, however, had to be put to a shareholders' vote in a general meeting and that many such resolutions were ordinary resolutions and required a simple majority of those present or a majority of the votes cast in a ballot covering the day-to-day business of the company, including, for example, the appointment of directors, the appointment of auditors, and approval of a dividend.⁵¹

In *Ryanair/Aer Lingus*, the UK Competition Commission highlighted that under Irish company law certain matters could only be passed by special resolution which required the support of at least 75% of the members who voted at a general meeting. Furthermore, Aer Lingus's Articles of Association contained specific provisions requiring an EGM to be held

⁴⁹ 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* (Competition Commission, 2 August 2013).

<https://assets.digital.cabinet-office.gov.uk/media/5329ddc8ed915d0e60000189/130828_ryanair_final_report.pdf>

⁵⁰ Case T-411/07 *Aer Lingus Group Plc v European Commission* Case [2010] ECLI:EU:T:2010:281. Please see Chapter 1 for a discussion of the above case.

⁵¹ Furthermore, under the Irish stock exchange listing rules, certain transactions which were material relative to the size of the company had to be passed by ordinary resolution.

and a resolution with particular majority requirements to be passed if the company proposed to enter into certain transactions in respect of its slots at Heathrow Airport.⁵²

The Competition Commission considered the voting history at Aer Lingus shareholders meetings and explained that during the period 2007 to 2013, Aer Lingus's shareholders considered 33 special resolutions of which Ryanair opposed 13, including in relation to dis-applying pre-emption rights in each of the years 2007 to 2013 and special resolutions aimed at changing the Articles of Association, particularly relating to the rights of shareholders in proposing resolutions at an EGM. In all instances, Ryanair had been successful in preventing the adoption of the special resolution.⁵³ The Competition Commission noted that Ryanair's ability to block a special resolution gave it the ability in particular to influence possible combinations of Aer Lingus with other airlines through, for example, its ability to prevent a merger with another airline via a scheme of arrangement or under the Cross Border Merger Regulations or from issuing new shares to a strategic partner via a private placement (for example, in relation to a minority investment in the region of 3 to 5% of Aer Lingus).⁵⁴

⁵² The issue regarding Heathrow slots is discussed in greater detail below on pages 11 and 12 in relation to rights of veto.

⁵³ In 10 of these, the special resolutions were blocked in the ballot (due to Ryanair's vote) while the remaining three resolutions were withdrawn by the board after Ryanair's declaration of its intention to oppose. Ryanair explained that it had blocked all special resolutions concerning the dis-application of pre-emption rights in order to prevent its investment in Aer Lingus being diluted by the issuance of new shares. It noted, however, that it would be willing to subscribe for shares if there was a rights issue. Ryanair noted that Aer Lingus was able to dis-apply pre-emption rights outside the EU, which would remove any concerns about the cost or timing of a pre-emptive rights issue in non-EU countries. Ryanair asserted that Aer Lingus, in its view, had no need to raise additional capital, as it had close to €1 billion in cash reserves and claimed to have a business that was "robust and profitable with...a strong balance sheet". Ryanair stated that, in any event, a rights issue could raise a maximum of around €37 million, which was insignificant for any potential commercial plans of Aer Lingus, including financing any combination transaction. In relation to possible combinations with other airlines, Ryanair argued that only a limited number of means of entering into a combination would require a special resolution: (a) a scheme of arrangement; (b) a transaction under the European Communities (Cross-Border Mergers) Regulations 2008 (SI No 157/2008) ("**Cross-Border Merger Regulations**"); or (c) issuance of shares to a new partner. It said that a combination would not have to be implemented by one of these methods.

Aer Lingus argued that, if normal pre-emption rights were not waived, it would be impossible to offer a rights issue to its shareholders who were resident in certain jurisdictions (e.g. the USA, Canada, Japan, South Africa and Australia) except at great expense and delay. Aer Lingus also contended that to the best of its knowledge, all listed Irish companies, including Ryanair, regularly passed similar resolutions waiving pre-emption rights on up to 5% of issued shares and in respect of rights issues, up to 33% of issued shares.

⁵⁴ With regard to ordinary, as opposed to special, resolutions, the Competition Commission considered whether Ryanair would be likely to have the ability to achieve a simple majority in Aer Lingus shareholder meetings, taking into account information provided by Aer Lingus on voter turnout and voting patterns for all general meetings since 2007. During the period 2007 to 2013, Aer Lingus's shareholders had considered 76 ordinary resolutions of which Ryanair opposed 4, but Ryanair was not successful in any of these challenges. However, the ballot came within 4.2 percentage points of a majority in 2012 and 5.5 percentage points in 2013, both of which concerned the appointment of a board member. Ryanair also opposed two ordinary

Ryanair/Aer Lingus highlights the significant difference in the evaluation of the ability to block special resolutions in terms of the application of the jurisdictional criteria for intervention under the EU and UK merger control regimes, respectively. The General Court, in *Ryanair/Aer Lingus*, concluded that Ryanair's ability to block special resolutions did not amount to control for the purposes of the 2004 EMCR. The General Court rejected the argument that Ryanair voting against a special resolution disapplying rights of pre-emption amounted to control stating that it was apparent from the comments of Aer Lingus' CEO, reported in an article in *The Irish Times*⁵⁵ and cited by the Commission without being disputed by Ryanair, that "the failure of that resolution did not have a significant impact on the company." The General Court rejected the argument that Ryanair requisitioning of two extraordinary general meetings in order to reverse strategic decisions adopted by Aer Lingus amounted to control, and referred to the Commission having stated, without being contradicted by Aer Lingus, that the board of directors of Aer Lingus rejected those two requests and that the planned decisions were implemented in spite of Ryanair's opposition. The General Court held that it was satisfied that the above example illustrated the fact that, contrary to the Ryanair claims, Ryanair was "not in a position to be able to impose its will".

It is clear that a shareholding of less than 25%, based on historical voting patterns, can allow a shareholder to defeat proposed special resolutions which can support a finding of material influence. A good example of this is *British Sky Broadcasting Group Plc/ITV Plc*⁵⁶ which involved the preliminary jurisdictional question of whether or not the acquisition by British Sky Broadcasting Group plc of 17.9% of the issued share capital of ITV plc gave BSKyB the ability to exercise material influence over ITV.⁵⁷ The acquisition of the above minority stake was widely reported in the press to have been motivated by a desire by BSKyB to block pre-emptively any takeover offer for ITV by Virgin Media Inc. The Competition Commission noted that at 17.9%, BSKyB's shareholding was at the low end of the levels of holding which have, in the past, been found to confer material influence.

resolutions at an EGM in 2008 and proposed two ordinary resolutions at the 2009 AGM and attempted to give a proxy to the Minister for Transport, which was not accepted.

⁵⁵ Ciarán Hancock, 'Ryanair blocks Aer Lingus bid to reduce holding' *Irish Times* (Dublin, 7 July 2007).

⁵⁶ Competition Commission, *Acquisition by British Sky Broadcasting Group Plc of 17.9 per cent of the Shares in ITV Plc: a report sent to Secretary of State (BERR)* (14 December 2007)

<<https://webarchive.nationalarchives.gov.uk/ukgwa/20140402192942/http://www.competition-commission.org.uk/our-work/directory-of-all-inquiries/bskyb-itv/final-report-and-appendices-glossary>>

⁵⁷ Competition Commission, *Acquisition by British Sky Broadcasting Group Plc of 17.9 per cent of the Shares in ITV Plc: a report sent to Secretary of State (BERR)* (14 December 2007).

<<https://webarchive.nationalarchives.gov.uk/ukgwa/20140402192942/http://www.competition-commission.org.uk/our-work/directory-of-all-inquiries/bskyb-itv/final-report-and-appendices-glossary>>

However, BSkyB's holding made it the largest shareholder in ITV by some margin.⁵⁸ The Competition Commission assessed whether BSkyB had acquired the ability to block special resolutions, proposed by ITV's management, by referring to its own previous decisions (and those of its predecessor the Mergers and Monopolies Commission) and the OFT in cases where the ability to block special resolutions had been regarded as a very strong indicator of material influence.⁵⁹ Special resolutions were required to make changes to a company's constitution and to carry out certain procedures which affect shareholder rights, including the buyback of shares and waiver of pre-emption rights. The Competition Commission explained that the ability to block a waiver of pre-emption rights may be particularly important if for example the company was looking to raise funds quickly to finance a strategic acquisition.⁶⁰

The Competition Commission concluded that ITV would be likely to need equity funding in order to pursue certain major strategic options in the next two to three years ahead.⁶¹ Although BSkyB did not have the automatic ability to block special resolutions, the Competition Commission analysed evidence of past voting behaviour at ITV general meetings, the behaviour of shareholders which it replaced and the share of votes which BSkyB would have represented based on voting records of ITV which indicated that BSkyB alone would have been able to block a special resolution at all but one of the five general meetings held since the creation of ITV and would have been able to block a special resolution by voting with the other shareholders who voted against a special resolution at the remaining meeting. In addition, the analysis indicated that since BSkyB replaced shareholders who typically exercised their voting rights, its voting power in future general

⁵⁸ As at the end of October 2007, BSkyB's holding was more than twice that of the next largest shareholder, Brandes. Brandes had more than 5% and three other shareholders held shareholdings of more than 3%.

⁵⁹ The Competition Commission stated that there had often been other factors (such as the presence or ability to appoint a board representative) in addition to the ability to block special resolutions (for example, see *The Government of Kuwait and The British Petroleum Company plc: a report on the merger situation*, October 1988 (Cm 477), and *General Utilities PLC and The Mid Kent Water Company: a report on the merger situation* (Cm 1125)). In at least one case (see *Southern Water plc and Mid-Sussex Water Company: a report on the merger situation*, July 1990 (Cm 1126)), the existence of the ability to block special resolutions had been held of itself to be sufficient to determine the existence of influence. The Competition Commission noted however that in that case, Southern had a 25.1% share of the voting share capital in Mid-Sussex, and so had the ability to block a special resolution regardless of the level of turnout.

⁶⁰ The Competition Commission further noted that a scheme of arrangement, which was one means of implementing a merger, required the approval of a majority in number representing 75% in value of those who vote at a meeting convened by the court for the purpose of considering the scheme.

⁶¹ BSkyB provided the Competition Commission with a list of occasions on which ITV (and previously Carlton or Granada) had raised debt and equity over a ten year period. BSkyB said that none of these occasions had been for the express purpose of investment in content. The Competition Commission considered this evidence but it did not alter its view of ITV's likely need for equity funding in the future.

meetings was likely to be similar to the historical pattern. The Competition Commission stated that in practice, BSkyB would have the opportunity to shape ITV's thinking by influencing policy formulation at an earlier stage through, for example, meetings between shareholders and ITV. Furthermore, the Competition Commission felt that ITV's appetite for pursuing certain strategies at all would be reduced if it was aware that these strategies were likely to cause conflict with BSkyB. If ITV perceived BSkyB to be likely to have 25% of the vote, the Competition Commission stated that it would expect ITV to take into account any expected opposition from BSkyB in formulating its policy and in deciding whether to bring it forward. The Competition Commission concluded that BSkyB's shareholding would give it the ability to block a special resolution and that this would enable BSkyB materially to influence the policy of ITV where that policy would require a special resolution. The finding of material influence was upheld by the Competition Appeal Tribunal⁶² and the UK Court of Appeal (Civil Division).⁶³

Material influence can also arise from the ability to veto particular decisions requiring a specified percentage separate from the 25% threshold for special resolutions. In *Ryanair/Aer Lingus*, the Competition Commission considered the arrangements regarding the approval of the sale of Aer Lingus' Heathrow slots which were regarded as valuable, both in themselves and because of the ability they afforded to Aer Lingus to fly its customers to a global hub airport. The Irish Government considered that Heathrow slots provided a benefit to the Irish economy⁶⁴ and its desire to protect this connectivity at Heathrow led to special provisions being included in Aer Lingus's Articles of Association at the time of its IPO which provided that (with certain exceptions) no slots at Heathrow Airport could be disposed of without prior notification of shareholders holding in excess of 10% of the issued share capital⁶⁵ and if shareholders with at least 20% of Aer Lingus's share capital so required, the company was obliged to call an EGM to vote on the transaction. To proceed, the vote in favour of the sale had to be greater than a level calculated by reference to a particular formula⁶⁶ which at the time of the decision meant that more than 69.9% of votes

⁶² *British Sky Broadcasting Group Plc v The Competition Commission*, The Secretary of State for Business, Enterprise and Regulatory Reform, [2008] CAT 25.

⁶³ *British Sky Broadcasting Group plc v The Competition Commission and The Secretary of State for Business Enterprise and Regulatory Reform* [2010] EWCA Civ 2.

⁶⁴ In a statement issued on 2 October 2006, the Minister for Transport said that: "Heathrow Airport, London serves a unique role in ensuring connectivity to/from Ireland. This connectivity is fundamental both to provide connections to and from Dublin as well as to and from the regions."

⁶⁵ While a short-term lease of a maximum of 36 months in duration was excluded from the above, the Articles provided that only one such short-term lease may be in place at any one time.

⁶⁶ 100% minus the Minister of Finance's (Irish Government's) holding in percentage terms, minus 5%, subject to a maximum of 75%.

had to be in favour of the motion and given that Ryanair's shareholding was 29.82%, and 30.1% was needed to block the relevant resolution, Ryanair would be in a position both to call an EGM and block the resolution (based on historical shareholder turnout and likely future turnout).⁶⁷

The grant of limited rights of veto in favour of the holder of the minority interest may be sufficient for a finding of material influence, and therefore jurisdiction to intervene, under UK merger control law. In *Microsoft/Telewest*,⁶⁸ a case discussed in the introduction to this chapter, the Director General of the OFT examined the acquisition by Microsoft Corporation of 23.6% of Telewest Communications Plc's issued share capital from MediaOne under the provisions of the Fair Trading Act 1973 in circumstances where 24.6% of the issued shares remained with Liberty Media, an international media company based in the US, and 51.8% with public shareholders. Microsoft had representation on the board of directors of Telewest and certain veto rights. However, Microsoft covenanted that, with the exception of the rights listed below, it would not exercise these veto rights and also covenanted that its board representatives would vote either in accordance with the recommendations of Telewest's independent directors or, if those recommendations conflicted with the views of Liberty Media's nominated directors, in accordance with the latter's recommendations where this was likely to preserve the status quo. The veto rights which were not affected by the covenants referred to above related to:

- any acquisition or disposal by Telewest which represented more than 20% of the total value of Telewest's assets at the time of the acquisition or disposal;
- the issue and allotment of shares by Telewest (other than to Microsoft or Liberty Media); and
- any proposal to change Telewest's business activities.

⁶⁷ The Competition Commission highlighted that until recently, no attempt to sell Heathrow slots had been made by Aer Lingus since Ryanair acquired its shareholding, although Aer Lingus submitted evidence that, on one occasion, a particular transaction with another airline to exchange Heathrow slots was not progressed when the other airline realized that it would be subject to the approval mechanism set out above and Ryanair would have an effective veto. Aer Lingus recently notified the Irish Government and Ryanair under its Articles of Association about a proposed slot transaction with British Airways; neither Ryanair nor the Irish Government opposed the transaction.

⁶⁸ Office of Fair Trading, *The completed acquisition by Microsoft Corporation of 23.6% interest in Telewest Communication plc* (OFT, July 2000).

<http://webarchive.nationalarchives.gov.uk/20140525130048/http://www.offt.gov.uk/OFTwork/mergers/mergers_fta/mergers_fta_advice/microsoft>

As a result, the effective remaining veto rights were very limited indeed, being of the type that were designed to provide a minimum level of protection to Microsoft in relation to its financial interest in Telewest. The Director General of the OFT in his report to the Secretary of State described the above veto rights as enabling Microsoft to constrain Telewest's ability to raise money by share issues, to expand or contract its business by making significant acquisitions or disposals or to change the direction of its business. The Director General concluded that he was satisfied that, at the very least, the transaction enabled Microsoft to exercise material influence over the policy of Telewest within the meaning of section 65(3) of the Fair Trading Act 1973.

Similarly, in *Centrica/Lake Acquisitions*,⁶⁹ the taking of a 20% stake by Centrica plc in Lake Acquisition Limited and in turn British Energy plc was found by the OFT to give rise to material influence on the basis of contractual veto rights over important decisions taken by Lake Acquisitions including those broadly consistent with key matters requiring special resolution under UK law⁷⁰, and the incurring of debt or the making of certain acquisitions and its representation on the board of Lake Acquisitions and British Energy.

The industry knowledge and standing of a shareholder can impact on whether or not material influence exists. In *Scottish Radio Holdings plc/Kingdom FM Radio Limited*,⁷¹ the Secretary of State advised that the acquisition by Scottish Radio Holdings of 22.5% of the issued share capital of Kingdom FM gave rise to material influence as SRH was a leading radio operator in Scotland and may be well placed through its knowledge and expertise to convince other shareholders to follow a certain strategy when voting their shares and that therefore it seemed unlikely that Kingdom FM would conduct business without regard to SRH's views. The Secretary of State stated that it was possible that the parties could become more closely involved in the future through SRH seeking a directorship or Kingdom FM deciding to use SRH's sales house for the sale of airtime.⁷² In *First Milk/Robert*

⁶⁹ Office of Fair Trading, *Anticipated Acquisition by Centrica of 20 per cent of Lake Acquisition* (OFT, 25 August 2009) ME/4133/09.

⁷⁰ Such as changes to constitutional documents, winding up, reductions or changes to allotment of shares and the creation of encumbrances over shares.

⁷¹ Office of Fair Trading, *Completed acquisition by Scottish Radio Holdings plc of 22.5% shareholding in Kingdom FM Radio Limited* (OFT, 19 March 2002) ME/1651/01.

⁷² https://webarchive.nationalarchives.gov.uk/ukgwa/20090509052200/http://www.offt.gov.uk/advice_and_resources/resource_base/Mergers_home/mergers_fta/2002/scottish-radio

⁷² At the time, SRH had no entitlement to appoint a director to the board nor to any special voting rights. SRH has stated that it is not involved in the day-to-day running of Kingdom FM and was not at the time selling any radio airtime on its behalf.

Wiseman.⁷³ the OFT concluded that the acquisition by First Milk Limited of a 15% stake in Robert Wiseman Dairies plc and the appointment of a non-executive director with considerable experience in raw milk procurement and whose views were expected to be accorded particular weight in circumstances where the two companies were to continue a milk supply arrangement where Wiseman accounted for a substantial proportion of First Milk's total raw milk sales⁷⁴ amounted to material influence. In *BSkyB/ITV*, a case also adverted to earlier, the Competition Commission placed great reliance on BSKyB's industry knowledge and standing in arriving at the conclusion that its minority interest in ITV gave it the ability to exercise a material influence over ITV. BSKyB was described as a highly successful player in the audio-visual services sector and had pioneered many important innovations. The Competition Commission referred to previous decisions of the Mergers and Monopolies Commission and Competition Commission which had identified the additional weight which a shareholder active in the same market can carry.⁷⁵ The Competition Commission highlighted that many of the other large shareholders in ITV were sophisticated financial institutions with in-house expertise in the media sector, but nevertheless, the Competition Commission expected BSKyB's views to be of particular interest to these other shareholders particularly in areas such as HDTV where BSKyB had played an innovative role. If BSKyB chose to oppose a course of action favoured by ITV's board, it would be likely to have the ability to influence other shareholders due to the size of its shareholding combined with its industry knowledge and standing, thus enabling it to block a special resolution with others.⁷⁶

⁷³ Office of Fair Trading, *Completed Acquisition by First Milk Limited of a 15 per cent stake in Robert Wiseman Dairies PLC* (OFT, 14 April 2005).

<<https://assets.publishing.service.gov.uk/media/555de427ed915d7ae2000107/firstmilk.pdf>>

⁷⁴ Referred to as between 10 to 20% in para 5 of the public redacted version of the decision.

⁷⁵ The Competition Commission referred to *The Peninsular and Oriental Steam Navigation Company and European Ferries Group PLC*: a report on the merger situation, December 1986 (Cmnd 31); *Stagecoach Holdings plc and Mainline Partnership Limited*: a report on the merger situation, March 1995 (Cm 2782); *Anticipated acquisition by Robert Wiseman Dairies plc of the fresh milk business of Scottish Milk Dairies Limited* (OFT advice); *Vivendi SA & British Sky Broadcasting Group plc*: a report on the merger situation, April 2000 (Cm 4691); and *Stora Kopparbergs AB/Swedish Match NV and Stora Kopparbergs Bergslags AB/The Gillette Company*: a report on the merger situations, March 1991 (Cm 1473).

⁷⁶ In *BSkyB*, the Competition Commission, after concluding that the ability to exercise material influence did exist, examined the following countervailing factors relevant to such influence but concluded that none of them, individually or collectively, altered its conclusion that BSKyB's minority interest gave it the ability to exercise material influence over ITV. The Competition Commission referred to the cross-media ownership rules set out in the Communications Act 2003 under which BSKyB was precluded from owning more than 20 per cent of ITV. BSKyB contended that this placed it in a less strong position than a shareholder with a 17.9% stake would normally have because it could not buy more shares to increase its leverage over ITV. The Competition Commission noted that the ability of BSKyB to further strengthen its position in ITV was restricted but it did not find that this reduced the impact of the existing shareholding. BSKyB argued that based on shareholdings at the end of October 2007, BSKyB could be outvoted by a coalition of as few as four of these acting together. The Competition Commission

Similarly, in *RWE AG/E.On SE*,⁷⁷ the CMA concluded that RWE's taking of a 16.67% stake in E.On SE gave rise to the ability to exercise material influence by virtue of both RWE's level of shareholding compared with other shareholders, and RWE's ability, given its status and industry expertise, to influence other shareholders and/or affect policy formulation. RWE was described as a consolidated and well respected player with significant expertise in the energy sector and that it may be able to use this status and expertise to influence other shareholders and, therefore, to materially affect a policy that may be expected to require a special resolution at an early stage through, for instance, meetings and discussions with other shareholders. When RWE had a view in relation to any decision favoured by E.On's board, it may have the ability to influence the voting of other shareholders due to the size of its shareholding combined with its industry knowledge and standing. The CMA noted that although other E.On shareholders were sophisticated institutional investors with investments in utility firms, they did not have the same level of expertise and active involvement in the industry as a former competitor such as RWE. In *Amazon/Deliveroo*,⁷⁸ the CMA reviewed the acquisition by Amazon of a 16% interest in Deliveroo and concluded that although Amazon did not have the ability to block special resolutions at a general meeting, the investment gave rise to material influence on the basis that, in addition to the size of Amazon's investment (in both absolute terms and relative to other shareholders) and its associated rights, there was a strong body of evidence that

recognised that there were a number of financial investors with significant shareholdings in ITV and a history of active engagement with the company. Nevertheless, the Competition Commission concluded that there would be circumstances in which the other major shareholders would not, for example, be able to ensure that the board could secure a special resolution in the face of opposition from BSKyB. BSKyB contended that there was no evidence of actual influence. It argued that there had been no example to date of BSKyB seeking to exert influence noting that it had not sought or been offered a shareholder meeting by ITV (although the Chief Executives of the two companies had met and spoken on other matters). The Competition Commission did not place weight on it stating that it would not expect to see evidence of influence being exerted whilst a transaction was under investigation. In any event, the Competition Commission stated that the test that the Competition Commission had to apply in deciding whether a relevant merger situation had been created was whether the ability to exert material influence has arisen, not whether, in practice, that ability has been exploited. The Competition Commission found that the size of BSKyB's holding both in absolute and relative terms was such that on the basis of past voting patterns, it would be able to block special resolutions proposed by ITV's management. BSKyB's ability to block a special resolution would limit some of ITV's strategic options, for example its ability to raise funds. BSKyB's importance and stature as an industry player, together with its position as the largest shareholder, would give additional weight to its views, increasing its ability to influence other ITV shareholders. The Competition Commission did not find that any of the countervailing factors above offset BSKyB's ability to exercise material influence.

⁷⁷Eleni Gouliou, 'Anticipated acquisition by RWE AG of a 16.67% minority stake in E.On SE' (8 April 2019) The Competition and Markets Authority, ME/6800/19.

<https://assets.publishing.service.gov.uk/media/5cb5a3d0ed915d3f51602d34/Non-Confidential_RWE_EON_Minority_Stake.pdf>

⁷⁸ The Competition and Markets Authority, *Final Report: Anticipated acquisition by Amazon of a minority shareholding and certain rights in Deliveroo* (CMA, 4 August 2020).

<https://assets.publishing.service.gov.uk/media/5f297aa18fa8f57ac287c118/Final_report_pdf_a_version_-----.pdf>

Deliveroo's management, its other shareholders and its commercial/operations teams perceived that Amazon: (i) had a special status as a significant 'strategic' investor, with various additional rights, and was a credible potential future acquirer of Deliveroo (or source of funding); (ii) had commercial and operational expertise from running an online business in directly relevant sectors to Deliveroo; and (iii) was a current and potential future strategic/commercial partner of Deliveroo. The CMA considered that these factors meant Amazon's views were likely to be given material weight by both management and other shareholders (and their appointed directors), such that the transaction would give Amazon the ability materially to influence decisions related to the policy of Deliveroo, including the management of its business, the strategic direction of the company and/or its ability to define and achieve its commercial objectives. Furthermore, the CMA concluded that there was clear evidence that, in practice, there were ample opportunities and avenues through which Amazon might actually exert material influence over Deliveroo's commercial strategy – including through its participation in shareholder and board meetings, regular catch-ups with Deliveroo senior management (between shareholder/board meetings), as well as additional contacts between senior members of Amazon and Deliveroo's commercial/operational teams.

3.1.3 Board Representation⁷⁹

The CMA in its UK Jurisdictional Merger Guidelines clarifies that its determination on material influence may turn on whether the acquirer is able materially to influence the policy of the target entity through board representation.⁸⁰ The CMA highlights that indeed, board representation alone, may confer material influence and that whether as a free-standing basis for material influence or as a supporting factor in the context of a shareholding, the CMA will review a range of factors in relation to such board representation, including, for example, the corporate/industry expertise, experience or incentives of the various members of the board.⁸¹ The CMA states that where a party acquires the right or ability to obtain board representation, the CMA considers it appropriate to take this right or ability into account in its jurisdictional assessment even where it has not yet been exercised and/or there is no certainty about when it will be exercised in the future.⁸² The industry knowledge and experience of a director nominated by the minority stakeholder can play a significant role in concluding that material influence is present. In *First Milk/Robert Wiseman*,⁸³ the OFT

⁷⁹ UK Jurisdictional Merger Guidelines, para 4.28.

⁸⁰ UK Jurisdictional Merger Guidelines, para 4.28.

⁸¹ UK Jurisdictional Merger Guidelines, para 4.29.

⁸² UK Jurisdictional Merger Guidelines, para 4.30.

referred to the appointment of a non-executive director with considerable experience in raw milk procurement and whose views were expected to be accorded particular weight in concluding that material influence was present. In *Amazon/Deliveroo*, the CMA stated that the combination of the Amazon director/appointee's knowledge (including Amazon's broader relevant knowledge), their role as a voting director, and the fact that they were Amazon's representative on the board, would mean that their contributions would carry weight among Deliveroo's voting directors, in terms of influencing the outcome of board resolutions and earlier stage discussions relating to Deliveroo policy and that this was a relevant contributing factor to its overall assessment of material influence.

It is clear from the case law that the right to appoint a director to the target or the likelihood that the minority shareholder will exercise such a right is not a prerequisite to a finding of material influence. In *Ryanair/Aer Lingus*, the Competition Commission highlighted that Ryanair did not appoint any directors to the board of Aer Lingus and had no power to do so unless it was able to achieve a simple majority at a general meeting. Ryanair informed the Competition Commission that it had not sought, and would not seek, to appoint any directors but it had unsuccessfully opposed the election of one of the non-executive directors, David Begg. Notwithstanding the above, the UK Competition Commission concluded that Ryanair did have the ability materially to influence Aer Lingus based primarily on its ability to block special resolutions and the sale of slots at Heathrow airport. In *Scottish Radio Holdings plc/Kingdom As pointed FM Radio Limited*, the Secretary of State advised that material influence existed notwithstanding the absence of a board appointment.⁸³ The Secretary of State stated that closer future involvement between the two was possible through SRH seeking a directorship or Kingdom FM deciding to use SRH's sales house for the sale of airtime. In *British Sky Broadcasting Group Plc/ITV Plc*, it was argued by some third parties that BSkyB was likely to be able to secure board representation with its level of shareholding. The Competition Commission stated that it was clear that BSkyB did not have the ability to secure the appointment of a director by the exercise of its voting rights. BSkyB also said that it did not intend to seek board representation or accept it, if offered. ITV commented publicly that it would be very difficult to appoint a BSkyB director, given the potential conflicts of interest that would arise. However, ITV stated that a request from BSkyB for board representation could not be ruled out and that, in the event of a request, ITV would come under pressure to accede to any such request. The Competition Commission pointed out that it was conceivable that ITV would come under pressure to

⁸³ As pointed out on page 13, material influence was found to exist on the basis of SRH's knowledge and expertise to convince other shareholders to follow a certain strategy when voting their shares and that it seemed unlikely that Kingdom FM would conduct business without regard to SRH's views.

appoint a BSkyB director to the board, but noted that any such director would risk being subject to conflicts of interest or a breach of competition rules arising through access to commercially sensitive information. The Competition Commission stated that it did not expect a BSkyB director to be appointed to the ITV board and, therefore did not take the possibility of such an appointment into account in assessing material influence. The Competition Commission on the facts found that the size of BSkyB's holding both in absolute and relative terms was such that on the basis of past voting patterns, it would be able to block special resolutions proposed by ITV's management and therefore had the ability to exercise material influence on ITV independently of the absence of a right to appoint a director.

3.1.4 **Other Sources of Material Influence**⁸⁴

The CMA in the UK Jurisdictional Guidelines states that the CMA may consider whether any other factors, such as agreements with the company, enable the acquirer materially to influence policy.⁸⁵ These might include the provision of consultancy services to the target and other relevant supplier/customer relationships. The CMA states that financial arrangements may in certain circumstances confer material influence where the conditions are such that one party becomes so dependent on the other that the latter gains material influence over the company's commercial policy (for example, where a lender could threaten to withdraw loan facilities if a particular policy is not pursued, or where the loan conditions confer on the lender an ability to exercise rights over and above those necessary to protect its investment, say, by options to take control of the company or veto rights over certain strategic decisions).⁸⁶

The UK competition authorities do not appear to accord much significance to the argument that constraint on management time imposed by a disruptive shareholder will result in material influence for UK merger control purposes. Aer Lingus argued that Ryanair had sought to use its position as a shareholder to challenge Aer Lingus's management in various ways, including making complaints to regulators, issuing public statements on issues regarding pensions, initiating judicial review proceedings and seeking undertakings on commercially sensitive information. The Competition Commission noted that none of the complaints to regulators or judicial review proceedings was upheld, and none of the attempts to seek undertakings was successful and no commercial information was supplied to Ryanair. Aer Lingus asserted that Ryanair's minority shareholding, combined with its

⁸⁴ UK Jurisdictional Merger Guidelines, para 4.31 and 4.32.

⁸⁵ UK Jurisdictional Merger Guidelines, para 4.31.

⁸⁶ UK Jurisdictional Merger Guidelines, para 4.32.

repeated attempts to acquire the whole company, had generated a significant constraint on Aer Lingus's management time. None of the above arguments were upheld. Similarly, in *BSkyB/ITV*, the Competition Commission made it clear that it would not place weight on the argument that BSKyB's ability to act as a disruptive shareholder in ITV conferred the ability to exercise material influence. ITV had contended that, in addition to the ability to block special resolutions, it anticipated that BSKyB would have material influence as a result of its ability to act as a 'disruptive shareholder'. The incentives of most of ITV's shareholders would be to maximize their returns from their shareholding in ITV. BSKyB, on the other hand, as a major competitor to ITV, might in some cases find that ITV management were pursuing a course of action which was not in BSKyB's best interests. ITV informed the Competition Commission that in addition to blocking special resolutions, whether or not related to the funding of a particular strategic action, a shareholder with a holding of the size of BSKyB's could cause considerable disruption to the management of a company's affairs by using its voting power to vote against ordinary resolutions, opposing the declared strategy of the ITV board in the press, within the media sector and in possible alliance with other shareholders.⁸⁷ None of the above arguments were upheld.

3.2 Substantive Analysis following Material Influence Conclusion on Jurisdiction

Although it is beyond the scope of the present thesis to explore in detail the substantive analysis carried out by the UK competition agencies following the preliminary conclusion that they had jurisdiction to investigate the acquisition of a minority interest on the basis that the material influence test had been met, it is noteworthy that in some of the cases concerned, the minority interest was found, following the substantive analysis, to give rise to a substantial lessening of competition resulting in the making of a divestiture order regarding the equity concerned.⁸⁸ In *BSkyB*, the Competition Commission examined the impact of the acquisition by British Sky Broadcasting Group Plc of a 17.9% interest in ITC Plc on various relevant markets including the market for all-TV (including both pay-TV and free to air) in the UK and concluded that the transaction gave rise to a substantial lessening of competition arising from the loss of rivalry between ITV and BSKyB. The Competition

⁸⁷ Virgin Media supported the above view pointing out that, in the Competition Commission's provisional findings, the Competition Commission had understated the degree to which BSKyB could use its importance and stature as an industry player, together with its position as the largest shareholder, to influence the overall strategy and commercial direction of ITV. Virgin Media provided the Competition Commission with recent examples of activist minority shareholders having had a material impact on the strategy and direction of major companies, although the Competition Commission noted that these were examples of activist financial investors who would have been in a somewhat different position as an investor to a competitor such as BSKyB.

⁸⁸ It should be noted that the CMA in both *RWE AG/E.ON SE* and *Amazon/Deliveroo* concluded that, despite the presence of jurisdiction based on material influence, the minority interest did not give rise to an SLC.

Commission concluded that the only effective remedies to address the SLC was either the divestiture of the whole of BSkyB's shareholding in ITV or its reduction to less than 7.5% of ITV's issued ordinary share capital combined with an undertaking not to seek or accept representation on the ITV board. The Competition Appeals Tribunal on appeal dismissed entirely the challenge by BSkyB to the Competition Commission's decision, the Competition Appeal Tribunal holding that BSkyB had not identified any defect in the Competition Commission's findings.⁸⁹ In *Ryanair/Aer Lingus*,⁹⁰ the UK Competition Commission concluded that the acquisition by Ryanair of a 29.82% interest in Aer Lingus had led or may be expected to lead to an SLC in the markets for air passenger services between Great Britain and Ireland. The Competition Commission referred to the fact that in 2012, Ryanair and Aer Lingus together carried 82% of airline passengers (a total of 3.8 million outbound passengers) travelling between Great Britain and the Republic of Ireland. Given the closeness of competition between the two airlines on routes across the Irish Sea, it found that Ryanair would have an incentive to use its influence over Aer Lingus derived from its minority shareholding to weaken its rival's effectiveness as a competitor. Given the large number of passengers travelling between Great Britain and Ireland, any reduction in competition between the airlines would result in significant customer detriment. It identified various mechanisms through which Ryanair's minority shareholding might impede competition in the relevant markets by influencing Aer Lingus's commercial policy and strategy relative to the counterfactual including the potential for Ryanair's minority shareholding to impede or prevent Aer Lingus from being acquired by, merging with, entering into a joint venture with or acquiring another airline. It identified a number of ways in which the minority shareholding might impede or prevent Aer Lingus from combining with another airline, including by acting as a deterrent to other airlines considering combining with Aer Lingus, or by allowing Ryanair to block a special resolution, restricting Aer Lingus's ability to issue shares (which might be required for a corporate transaction or to optimize its capital structure). The Competition Commission also found that Ryanair's minority shareholding could impede Aer Lingus's ability to manage effectively its portfolio of

⁸⁹ The Competition Appeal Tribunal upheld the challenge by Virgin Media Inc. to the Competition Commission's finding that BSkyB's acquisition would not operate against the public interest in addition to raising competition concerns. The Competition Appeal Tribunal found that the Competition Commission had misdirected itself in its interpretation of s 58 and 58A of the EA which deal with the media plurality considerations. Having set aside the Competition Commission's conclusion on media plurality together with the corresponding Secretary of State decision, the Competition Appeal Tribunal was required to examine the impact of the ruling on the remedy proposed by the Competition Commission. The Competition Appeal Tribunal concluded that the remedy remained valid and BSkyB would, therefore, be required to reduce its shareholding in ITV Plc to 7.5%.

⁹⁰ Competition Commission, *A report on the completed acquisition by Ryanair Holdings plc of a minority shareholding in Aer Lingus Group plc* (Competition Commission, 28 August 2013).

<https://assets.publishing.service.gov.uk/media/5329ddc8ed915d0e60000189/130828_ryanair_final_report.pdf>

Heathrow slots, restricting it from optimizing its route network and timetable across London airports. The Competition Commission ordered Ryanair to reduce its shareholding in Aer Lingus to 5% of Aer Lingus's issued ordinary shares and that Ryanair be required not to seek or accept board representation or acquire further shares in Aer Lingus. The decision of the UK Competition Commission was upheld by the Competition Appeal Tribunal⁹¹ and by the UK Court of Appeal (Civil Division).⁹² Ryanair's application for permission to appeal the Court of Appeal's judgment to the Supreme Court was refused on 13 July 2015. The above contrasts sharply with the position at EU level under the 2004 EMCR where it will be recalled that the General Court in *Aer Lingus v European Commission*⁹³ upheld the Commission's finding that it lacked jurisdiction under the 2004 EMCR on the basis that Ryanair's 29.82% holding in Aer Lingus did not amount to the acquisition of control/decisive influence and that the 2004 EMCR did not empower the Commission to order a divestiture of the minority interest in circumstances where the notified transaction did not take place. The *Ryanair/Aer Lingus* case emphatically underlines the jurisdictional gap at EU level (and necessarily under the mergers provisions in Part 3 of the Irish 2002 Act) where the same set of facts give rise to very different jurisdictional outcomes under EU and UK merger control laws, respectively.

3.3 Critique of the UK Merger Control Thresholds and Minority Interests

As can be seen from the above cases, the UK competition authorities have been most active in terms of the enforcement of the merger control regime in respect of minority interests and their decisions entail, and benefit from, a most extensive analysis of both the jurisdictional and substantive issues involved. Furthermore, it is clear that the lowest tier of the jurisdictional trigger events for intervention under UK merger control is the acquisition of material influence which can capture the acquisition of non-controlling minority interests unlike under Irish and EU merger control. A good example of this is *Ryanair/Aer Lingus*, where the EU Commission in the context of the 2004 EMCR⁹⁴ held that Ryanair's 29.82% minority stake in Aer Lingus involving the ability to block special resolutions did not in that case confer control for EU merger control purposes whereas the UK Competition Commission concluded that Ryanair's minority stake did give it the ability to exercise material influence over Aer Lingus for UK merger control purposes based on various factors in particular its ability to block special resolutions and the sale of slots at Heathrow airport.

⁹¹ *Ryanair Holdings Plc v Competition Commission and Aer Lingus Group Plc* [2014] CAT 3.

⁹² *Ryanair Holdings v Competition Commission and Aer Lingus Group Plc* [2015] EWCA Civ 83.

⁹³ Case T-411/07.

⁹⁴ The Commission's decision was upheld on appeal by the General Court.

Despite the above, the UK system of merger control has a number of significant drawbacks that do not make it an ideal model to put forward in addressing the jurisdictional gap at EU level and in Ireland. UK merger control does not entail a system of mandatory notification. The decision to notify the CMA is entirely voluntary. Therefore, the CMA will only become aware of the acquisition of a minority interest where a notification has been made on a voluntary basis or where it learns of a proposal otherwise of its own initiative or from a complaint by a third party. As a result, there is a risk that minority interests involving substantive competition issues escape the attention of the CMA and therefore, avoid being reviewed from a competition perspective.

It appears that passive minority interests involving no board representation and where the holder cannot block the passing of special resolutions⁹⁵ are highly unlikely to satisfy the material influence test for UK competition law purposes and, therefore are not amenable to review under the mergers provisions of EA 2002. An example of the above is the OFT's decision in *Sports Direct International Plc/Blacks Leisure Group Plc*⁹⁶ in which the OFT examined the acquisition by Sports Direct of a 14.5% interest in its competitor Blacks where Sports Direct had no representation on the board of Blacks. The OFT cited from its 2009 jurisdictional guidelines "exceptionally, a shareholding of less than 15 per cent might attract scrutiny where other factors indicating the ability to exercise material influence over policy are present. In practice, the OFT is likely to investigate such low levels of shareholding only where they concern one business taking a stake in a direct competitor". The OFT was of the view that Sports Direct's 14.5% shareholding in Blacks was not sufficient to allow it as a practical matter to block any ordinary or special resolutions. At the time of commencement of the OFT's investigation, the level of Sports Direct's shareholding in Blacks was slightly less than 30% but since then it had fallen to below 15% as a result of it declining to acquire further shares from a Placing and Open Offer by Blacks. As Sports Direct (through Field and Trek) was a competitor to Blacks, the OFT considered whether Sports Direct's lower shareholding might be such as to allow it to influence policy at the formulation stage. However, the OFT noted that even with a shareholding significantly higher than 14.5%, Sports Direct was not in fact successful in opposing Blacks' Placing and Open Offer, which Blacks stated would be used to allow the opening of new stores, to accelerate the refurbishment of existing stores and to cancel the group's seasonal peak working capital

⁹⁵ In *British Sky Broadcasting Group Plc/ITV Plc* and *Ryanair/Aer Lingus* the minority shareholder was found to be able to block special resolutions.

⁹⁶ Office of Fair Trading, *Completed acquisition by Sports Direct International plc of a minority shareholding in Blacks Leisure Group plc ME/4540/10* (OFT, 23 June 2010).

<<https://assets.publishing.service.gov.uk/media/555de32fed915d7ae500006a/Sports-Direct.pdf>>

facility of £7.5 million. On the basis of the above, the OFT concluded that the minority shareholding did not give rise to material influence.

The OFT (now the CMA) in the report prepared by the Organisation for Economic Co-operation and Development (OECD) “Antitrust Issues Involving Minority Shareholdings and Interlocking Directorates” stated as follows: ⁹⁷

“In practice, a true passive financial investment would militate against – but would not in principle preclude – a finding of material influence under the UK’s case-specific approach. As noted above, because in practice the UK regime is voluntary and the OFT would not pursue such cases *ex officio*, merger review of such cases is rare. The UK authorities have, however, rejected claims that investments in significant horizontal competitors are passive, most recently in *BSkyB/ITV*.”

The above position taken by the UK Competition Commission and the OFT means that under the EA 2002, the UK competition authorities do not appear to have jurisdiction to intervene in cases involving passive minority interests even though such interests can, according to established economic theory, as accepted by the Commission in 2014 in the Commission Staff Working Document accompanying the White Paper Towards more effective EU merger control dated 9 July 2014⁹⁸ (“**SWD White Paper**”), cause competition concerns.⁹⁹ Therefore, the jurisdictional position of the CMA in applying EA 2002 is similar to the position of the Competition and Consumer Protection Commission (“**CCPC**”) and the EU Commission in applying Sections 4 of the Irish Competition Act 2002 and Article 101 of the Treaty on the Functioning of the European Union (“**TFEU**”) respectively, in that each of the above appear to not to apply to passive, no influence, minority type interests.

As we saw above,¹⁰⁰ the present UK system of merger control does not address common shareholdings, the UK government stating in December 2017 in its submission to the Directorate for Financial and Enterprise Affairs Competition Committee of the OECD that common shareholdings raised “interesting questions for competition authorities” and that they had “identified limitations of the studies and areas that may merit further work.”.

⁹⁷ OECD Policy Roundtables, *Minority Shareholdings* (OECD, 2008).

<<http://www.oecd.org/competition/mergers/41774055.pdf>>

⁹⁸ Commission staff working document which provided a more detailed analysis of the considerations underlying the White Paper and its policy proposals.

<http://ec.europa.eu/competition/consultations/2014_merger_control/staff_working_document_en.pdf>

⁹⁹ Please see Chapter 1.

¹⁰⁰ Please see section 2.1 above.

4 GERMANY

4.1 German Merger Control Law

The German merger control regime is set out in Gesetz gegen Wettbewerbsbeschränkungen in der Fassung der Bekanntmachung ("**GWB**").¹⁰¹ Section 37(1) of the GWB sets out the definition of "concentration" for the purposes of determining the categories of transaction subject to the system of *ex-ante* merger control and it is divided into four paragraphs, the first two capturing controlling interests and the third and fourth covering non-controlling interests. The English translation of paragraphs 3 and 4 is as follows:

"3. acquisition of shares in another undertaking if the shares, either separately or together with other shares already held by the undertaking, reach:

(a) 50 percent; or

(b) 25 percent

of the capital or the voting rights of the other undertaking. The shares held by the undertaking shall include and the shares held by another for the account of this undertaking and, if the owner of the undertaking is a sole proprietor, also any other shares held by him. If several undertakings simultaneously or successively acquire shares in another undertaking within the parameters mentioned above, this shall be deemed to also constitute a concentration among the acquiring undertakings with respect to those markets on which the other undertaking operates;

4. any other combination of undertakings enabling one or several undertakings to directly or indirectly exercise a competitively significant influence on another undertaking."¹⁰²

From the above, it is clear that a concentration arises if an acquisition of shares reaches 25% of the target's capital (paragraph 3) or any other "combination of undertakings" is found to exercise a competitively significant influence on another undertaking (paragraph 4). The catch-all provision in paragraph 4 was introduced into the GWB¹⁰³ to address the practice

¹⁰¹ 15 July 2005, BGBl. I.S. 2115:2009 I.S. 3850.

¹⁰² GWB, s 37(1)(s) and (4).

¹⁰³ 1 January 1990.

of undertakings seeking to circumvent merger control by structuring acquisitions so that less than 25% of the issued share capital of the target's shares were acquired in circumstances where the equity was coupled with special rights with respect to the target undertaking thereby enabling the parties to avoid the conclusion that a concentration had arisen.¹⁰⁴ As a result, non-controlling minority interests can be caught under either of the tests set out in paragraph 3 or 4 of Section 37(1) of the GWB.

The OECD in its 2008 report on "Antitrust Issues Involving Minority Shareholdings and Interlocking Directorates"¹⁰⁵ explained the above test under the fourth paragraph of Section 37(1) of the GWB as follows:

"7. A competitively significant influence on another undertaking may exist due to any kind of link between two or more undertakings that allows the acquiring party to influence the competitive behaviour of the target in such a way that it is likely to reduce competition between the undertakings, to the degree that they will no longer act independently on the market. For a competitively significant influence it may also suffice for the target to adapt its competitive behaviour to the interests of the acquirer. A competitively significant influence may also arise from agreements on pre-emption rights, sales strategies and financial structures, as well as from legal possibilities to exert influence, such as the right to be consulted, information and disclosure rights, and not least the right to appoint representatives to the management bodies of the target. Personal interlocks in the form of having the same persons on the management boards of both companies may also lead to a competitively significant influence where these persons are entitled to exercise influence. A further possibility is the transfer of entrepreneurial responsibility for certain subdivisions of the company. Decisive in all cases is the factual possibility to exercise influence that is granted to the acquirer."

¹⁰⁴ Directorate for Financial and Enterprise Affairs Competition Committee, *Working Party No 3 on Co-operation and Enforcement - Antitrust Issues Involving Minority Shareholding and Interlocking Directorates, Germany* (OECD, 19 February 2008).

<http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Diskussions_Hintergrundpapiere/OECD_2008.02.12-Antitrust_Issues_Involving_Minority_Shareholding_Interlocking_Directorates.pdf?__blob=publicationFile&v=4>

¹⁰⁵ Directorate for Financial and Enterprise Affairs Competition Committee, *Working Party No 3 on Co-operation and Enforcement - Antitrust Issues Involving Minority Shareholding and Interlocking Directorates, Germany* (OECD, 19 February 2008).

<http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Diskussions_Hintergrundpapiere/OECD_2008.02.12-Antitrust_Issues_Involving_Minority_Shareholding_Interlocking_Directorates.pdf?__blob=publicationFile&v=4>

It should be noted that to date, the relevant merger control cases in Germany principally concern cross shareholdings as opposed to common shareholdings. German competition law does not contain specific legal provisions on the acquisition of non-controlling minority shareholdings by institutional investors and it is only the general merger control rules mentioned above that apply. The German Monopolies Commission prepared a report in 2016 which, as part of its conclusions, articulated its concerns regarding common shareholdings as follows:

“687. The Monopolies Commission sees considerable potential for competition distortion by indirect horizontal shareholdings between portfolio companies within the same economic sector through institutional investors. In theory, the same applies to shareholdings in portfolio companies located along a value-creation chain. This potential is given despite the low level of shares held and the limited possibilities for institutional investors to influence strategic decisions of their portfolio companies. The competition-distorting potential of indirect horizontal cross-holdings is exacerbated by additional factors such as the presence of shared interests among various different institutional investors and institutionalised voting advice.”

The German Monopolies Commission was clear in its view that it saw common ownership as requiring more urgent attention under the EU system of merger control than cross shareholdings as follows:

“689. Regardless of whether minority shareholdings exist directly between companies that are linked horizontally or vertically on a value-creation chain, or indirectly through institutional investors, the theories of harm essentially follow the same mechanisms. The Monopolies Commission agrees with the conclusion of the European Commission that an urgent expansion of the scope of application of the Merger Control Regulation to non-controlling minority shareholdings between companies linked horizontally and vertically along a value-creation chain does not, for the time being, appear proportionate. ⁸⁹ This assessment cannot, in the view of the Monopolies Commission, be transferred to the phenomenon of indirect minority shareholdings by institutional investors, which due to its omnipresence is of greater competition-policy relevance. Accordingly, it would be welcome if indirect minority shareholdings through institutional investors received more attention at the European level, not least in the framework of a possible further development of the European Merger Control Regulation.”

The German Monopolies Commission in its 2018 Biennial Report¹⁰⁶ again reiterated that it was at this stage premature to “take either competition law or regulatory measures” and that before doing so “the academic community needs to deliver further insights and empirical evidence needs to be gathered of the link between common ownership and anticompetitive effects. In Europe in particular these links have not yet been systematically investigated. That is why the Monopolies Commission welcomes the announcement of the Directorate-General for Competition of the European Commission to address this issue in more detail.”

The German Monopolies Commission referred to merger reviews of planned mergers between companies active in markets characterised by a high level of common ownership as presenting “a different picture” and in this context made reference to the decisions of the Commission in the *Dow/DuPont* and *Bayer/Monsanto* cases as follows:

“When reaching its decision on the proposed merger between Dow and DuPont the European Commission for the first time took account of relevant considerations. The Monopolies Commission welcomes the fact that the European Commission plans to take account of common shareholdings in its future decision-making as well. It would like to encourage the Federal Cartel Office (Bundeskartellamt) to likewise give consideration to common shareholdings of institutional investors in relevant cases.”

The German government in December 2017 made a submission to the Directorate for Financial and Enterprise Affairs Competition Committee of the OECD entitled “Common ownership by institutional investors and its impact on competition - Note by Germany”¹⁰⁷ in which it concluded as follows:

“21. The current literature on common ownership by institutional investors also calls for new control mechanisms. Strict transparency requirements could be introduced, as well as a systematic merger control enforcement that takes into account investments in portfolio companies. Since investors could be presumed as having equal interests up to a certain degree and since there could be ties between diversified investors, the Monopolies Commission suggests, for example, to aggregate the shares of all institutional investors involved in a company that are equally diversified within the industry, if such equal interest can be assumed. This

¹⁰⁶ Chapter II of the XXII Biennial Report of the Monopolies Commission (“**Competition 2018**”) in accordance with Section 44, para 1, sentence 1 of the German Act against Restraints of Competition.

<<http://www.monopolkommission.de>>

¹⁰⁷ Directorate for Financial and Enterprise Affairs Competition Committee, *Common ownership by institutional investors and its impact on competition - Note by Germany* (OECD, 29 November 2017).

<[https://one.oecd.org/document/DAF/COMP/WD\(2017\)87/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2017)87/en/pdf)>

would be similar to an actual form of minority control, in which several minority shareholders effectively control a company through joint action. From a merger control perspective, common ownership by institutional investors could be regarded as a passive form of strategic influence, where even small shares could allow investors to have a decisive impact on their portfolio companies' decisions."

The Monopolies Commission and the German government in their reports and submission, respectively, concluded that further work was required in this area. The following discussion focuses on the German experience of applying the merger control regime to cross shareholdings.

Transactions involving minority interests represent a significant proportion of notified transactions in Germany. In the period 1990 to 2010, approximately 10% of all transactions notified in Germany concerned the acquisition of non-controlling minority shareholdings. 12.5% of all merger prohibitions imposed by the German Bundeskartellamt in the period 2005 to 2012 concerned cases involving minority interests¹⁰⁸ and in the period 1990 to 2009, minority interest cases accounted for 11% of the total number of prohibitions.

Separately, the number of transactions notified under the "competitively significant influence" test in the fourth paragraph of Section 37(1) of the GWB is only about 15 per annum. *Bardong*¹⁰⁹ and the Commission in the Staff Working Document Towards more effective EU merger control dated 25 June 2013 at Annex II ("**SWD 2013 Consultation Annex II**")¹¹⁰ highlighted that transactions notified under the "competitively significant influence" criterion (§ 37(1) no 4 GWB) account for only circa 0.6% of all notified cases but of about 11% of all mergers prohibited.

At first sight, it appears that the scope of paragraph 4 of Section 37(1) of the GWB is potentially far reaching. However, it should be noted that there appear to be a number of significant limitations to the application of paragraph 4 of Section 37(1) of the GWB. Firstly, it appears that it may be difficult to apply the competitively significant test in paragraph 4 of Section 37(1) to purely passive investments not involving voting rights, board representation

¹⁰⁸ 4 out of 32 prohibitions.

¹⁰⁹ Andreas Bardong, 'Merger control and minority shareholdings: Time for a change?' (September 2011) Concurrences No 3-2011.

¹¹⁰ Staff Working Document Towards more effective EU merger control dated 25 June 2013 at Annex II at Section 3.2.1 SWD (2013) 239 final Part 3/3. The consultation period was from 20 June 2013 to 12 October 2013.

or access to commercially sensitive information.¹¹¹ *Leupold and Haans*¹¹² clarify that the competitively significant influence test “will generally arise if the acquisition of a minority shareholding of below 25 per cent confers, by virtue of company law, influence on the decision-making process and the market behaviour of the target company in a way that allows the acquirer to bring into effect its own commercial interests when taking part in decisions regarding the use of the target company's resources. In other words: an acquirer of a minority shareholding of below 25 per cent will have competitively significant influence over the target company if its minority shareholding in fact brings about the same rights as a 25 per cent shareholding--which under German company law generally gives rise to a blocking minority”. As can be seen in Chapter 1, there is a considerable body of economic theory which has evolved which confirms that even purely passive minority investments can, in certain circumstances, have anti-competitive effects. Secondly, Section 40(3) of the GWB excludes the possibility to subject the clearance of an acquisition to conditions and obligations requiring behavioural commitments. In other words, the above provision only permits structural remedies such as divestiture.

4.2 Examples of Cross Shareholding Minority Interest Cases where the Competitively Significant Influence Jurisdiction Test Found to be Satisfied

Some examples of merger control cases involving the application of Section 37(1)(4) of the GMB to the acquisition of cross minority shareholdings are examined below. Although it is beyond the scope of the present thesis to explore the substantive analysis carried out by the German competition agencies following the preliminary conclusion that they had jurisdiction to investigate the acquisition of a minority interest on the basis that the competitively significant influence jurisdictional criterion had been met, it is instructive to note that in many of the reported cases concerned, it appears that the minority interest was found, following the substantive analysis, to give rise to a substantial impediment to effective competition resulting in the making of a divestiture order. Furthermore, it appears that the jurisdictional analysis made by the German Bundeskartellamt in determining whether or not a transaction meets the test of competitively significant influence is often much more extensive than its substantive examination of whether the proposal gives rise to a significant impediment to effective competition.

¹¹¹ Gian Diego Pini, ‘Passive-Aggressive Investments: Minority Shareholdings and Competition Law’ (2012) European Business Law Review, Vol 23, No 5.

¹¹² Henning Leupold and Joost Haans, ‘Minority shareholdings and merger control after Ryanair/Aer Lingus - no worries, mate?’ (2008) ECLR.

The German energy and media sectors in particular have been the subject of considerable scrutiny by the Bundeskartellamt as they are characterised by a high degree of cross-ownership in the form of both controlling and non-controlling minority shareholdings.¹¹³ The EU Commission in the 2013 Consultation Paper highlights that 34% of cases notified under paragraph 4 of Section 37(1) of the GWB affect the energy sector and 19% the media sector. A good example of a case where the acquisition of a minority interest was found by the German Bundeskartellamt to amount to competitively significant influence under Section 37(1)(4) of the GWB in circumstances where the acquisition fell short of control for the purposes of the 2004 EMCR was *RWE AG/E.ON SE*,¹¹⁴ where RWE proposed to acquire a 16.67% interest in E.ON. The above minority interest acquisition was part of a wider transaction involving an extensive exchange of business activities and participations between RWE and E.ON which were separately examined by the EU Commission under the 2004 EMCR.¹¹⁵ RWE's acquisition of a 16.67% minority shareholding in E.ON was found to fall within the Bundeskartellamt's area of competence as this did not give RWE control over E.ON and therefore did not constitute a concentration for the purposes of the 2004 EMCR. The 16.67% minority shareholding, in combination with the right to propose the appointment of a member of the supervisory board of E.ON, provided a basis under corporate law for RWE to exert influence on E.ON. The above corporate link between E.ON and RWE was regarded as having a competitive aspect because both companies would be active on most levels of the gas and electricity sector post transaction, even if with markedly different areas of focus in the energy industry. In view of the shareholder presence at E.ON annual general meetings, the size of the shareholding, without any effective restriction of voting rights, would provide RWE with *de facto* more than 25% of the votes at the annual general meeting. This meant that decisions, especially on capital measures and planned investments, which required a qualified majority could be blocked. RWE would become E.ON's largest single shareholder. Furthermore, two of the three next largest shareholders held substantial shares both in RWE as well as E.ON. RWE was also the only larger shareholder whose operations focused on the network-based energy sector. Furthermore,

¹¹³ Energy sector: including, but not limited to, in EnBW / EWE, EnBW / VNG, E.ON / Stadtwerke Lübeck, E.ON / Stadtwerke Eschwege, RWE / Wuppertaler Stadtwerke, Stadtwerke Straubing / E.ON Bayern AG, E.ON / Ruhrgas, Stadtwerke Viersen, Neckarwerke Stuttgart AG / Fair Energie, Contigas / Stadtwerke Heide, Stadtwerke Neuss and Stadtwerke Bremen. Media sector: including, but not limited to, in DuMont Schauberg/Bonner Zeitungsdruckerei and Springer/Stilke.

¹¹⁴ *RWE AG/E.ON SE* - Acquisition by RWE AG of a 16.67 per cent minority stake in *RWE AG/E.ON S* Competition and Markets Authority 31 May 2019.

<https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Fusionskontrolle/2019/B8-28-19.pdf?__blob=publicationFile&v=2>

¹¹⁵ *RWE/E.ON* (Case No Comp/M8871) Commission Decision 26 February 2019 and *E.ON/Innogy* (Case No M.8870) Decision of the Commission 20 October 2020.

the acquisition was an integral part of the agreements on the overall transaction that, taken as a whole, aimed at the vertical specialisation of RWE's and E.ON's activities. Ultimately, RWE was to focus on conventional and renewable (EEG) electricity generation, gas storage and gas and electricity wholesale trading and E.ON was to concentrate on the retail supply of electricity and gas to end customers and the operation of distribution networks. The Bundeskartellamt separately concluded that, substantively on the facts, the minority position did not significantly impede effective competition.

In *A-Tec Industries/Norddeutsche Affinerie*,¹¹⁶ the Bundeskartellamt concluded that the acquisition of a 13.75% interest by A-Tec Industries AG in Norddeutsche Affinerie, a copper producer, would have granted A-Tec a competitively significant influence over Norddeutsche Affinerie. Given the low presence in Norddeutsche Affinerie's shareholders meetings, it was held that A-Tec's 13.75% share would have granted it a *de facto* blocking minority under corporate law comparable with the legal position granted by an acquisition of a 25% stake. Furthermore, no other shareholder had any know-how in the copper industry sector, or had any strategic long-term objectives directed at the competitive behaviour of Norddeutsche Affinerie. A-Tec, itself was active in all of Norddeutsche Affinerie's essential business segments.¹¹⁷ The Bundeskartellamt then found that the transaction gave rise to a significant impediment to effective competition. It is noteworthy that the Bundeskartellamt allocates nine pages¹¹⁸ of its decision to the analysis as to whether the proposed transaction meets the jurisdictional test of competitively significant interest whereas the substantive analysis is covered in three paragraphs.¹¹⁹

The case of *DuMont Schauberg/Bonner Zeitungsdruckerei*¹²⁰ concerned a minority interest of only 9.015% in the newspaper sector that was initially prohibited by the Bundeskartellamt that was later annulled on appeal by the competent court. The original transaction notified by DuMont Schauberg ("DMS"), a publisher of local daily newspapers in Cologne (such as "Kölnische Rundschau", "Kölner Stadtanzeiger", "Express"), in 2003 consisted primarily in the acquisition of 18.03% of the shares in Bonner Zeitungsdruckerei, the publisher of the

¹¹⁶ B5-198/07 - *A-Tec Industries AG / Norddeutsche Affinerie AG*.

¹¹⁷ The Bundeskartellamt came to the conclusion that the transaction would have led to the creation of a dominant position on the market for oxygen-free copper billets. A-Tec and Norddeutsche Affinerie were the largest competitors in the manufacture and distribution of oxygen-free copper billets in the EEA with a combined market share of well over 85%. Prior to the concentration, buyers of oxygen-free copper billets could choose between two equal suppliers independent of one another. Post-merger, the Bundeskartellamt expected the two parties to co-ordinate their behaviour in the market place as a result of the transaction, with customers having no real alternatives to switch to another supplier.

¹¹⁸ B5-198/07 - *A-Tec Industries AG / Norddeutsche Affinerie AG*, p 16 to 24.

¹¹⁹ B5-198/07 - *A-Tec Industries AG / Norddeutsche Affinerie AG*, paras 43 to 45.

¹²⁰ B6- 27/04 – *M. DuMont Schauberg/Bonner Zeitungsdruckerei*.

leading daily newspaper in neighbouring Bonn ("Bonner General-Anzeiger") and a 100% subsidiary of H. Neusser Besitz- und Verwaltungs GmbH & Co. KG, Bonn ("HN KG"). In addition, the parties agreed through "silent partnerships" to grant DMS an 18% share in the profits of HN KG's subsidiaries and in return to grant HN KG a 1.5455% share in the profits of DMS's business in Cologne. Furthermore, DMS was granted pre-emption rights regarding all remaining participations of HN KG. The proposed transaction included advertising placement agreements between Bonner Zeitungsdruckerei and DMS. The parties subsequently reduced the planned capital increase to 9.015%, cancelled DMS's pre-emption rights and set up a mechanism to limit DMS's access to business information of HN KG. The Bundeskartellamt considered that despite these modifications, the transaction still conferred a competitively significant influence within the meaning of the fourth paragraph of Section 37(1) of the GWB on the basis of the economic and competitive interests of the parties, the shareholder's new rights to information and the various economic links between the participants, such as the jointly controlled Bonner Anzeigenblatt GmbH & Co. KG, Bonn, which published advertising papers in the "General-Anzeiger"'s main distribution area.¹²¹ DMS and Bonner Zeitungsdruckerei appealed the prohibition decision to the Oberlandesgericht (Court of Appeal) of Düsseldorf. The Court¹²² considered that a competitively significant influence did not result from the 9.015% shareholding or any other factual circumstances and, as a result, annulled the Bundeskartellamt's prohibition decision. The Court held that the minority shareholding did not *per se* enable the new minority shareholder to influence the overall strategy or the competitive conduct of HN KG. The shareholders agreement including the new minority shareholding did not put DMS in a position to understand or influence the commercial and strategic decision-making of HN KG. Any further pre-emption rights of DMS to acquire additional shares in HN Group or in "Bonner General-Anzeiger" had already been cancelled during the review process with Bundeskartellamt. The commercial and strategic decisions of HN KG would be supported and supervised through a newly created "Beirat" (an advisory council) the composition of which was controlled by HN KG. The Bundeskartellamt did not consider that those measures would alter the assessment and the measures had only been introduced in order to circumvent the rules under the GWB. The Court arrived at a different conclusion and held that there were no tangible indications that DMS would be able to have competitively

¹²¹ The Bundeskartellamt prohibited the transaction as modified, as it considered that the transaction would reinforce the dominant position of Bonner Zeitungsdruckerei both on the regional reader and advertising markets. With regard to the reader market, it identified DMS as the only credible potential competitor and stated that the transaction would have further reduced the probability of DMS extending its activity, for instance, by way of putting in place local editorial teams in the neighbouring areas covered by Bonner Zeitungsdruckerei.

¹²² OLG Düsseldorf in its decision of 6 July 2005 – case: VI-Kart 26/04 (V).

significant influence over the activities of HN KG and that therefore the transaction did not amount to a concentration within the meaning of § 37 GWB and consequently could not be prohibited under § 36 GWB

In *Mainova/Aschaffenburg*,¹²³ the Bundeskartellamt found that German regional gas supplier Mainova AG's planned acquisition of a 17.5% stake in Aschaffenburg Versorgungs GmbH ("AVG"), a local gas retailer (previously wholly municipally owned), would have led to (1) vertical foreclosure of upstream suppliers (customer foreclosure), and (2) stifled potential competition in regional and local gas supply markets. As E.ON – a wholesale supplier of a much larger scale than the parties – indirectly held a 24.4% stake in Mainova, the vertical foreclosure effects would be further reinforced through the risk of favouring supply through the E.ON group to the detriment of other suppliers. It was held that the minority participation would have conferred *de facto* influence reinforcing Mainova's existing supplier position towards AVG and increasing its chances to conclude new supply contracts with AVG. AVG's incentives to give Mainova a privileged supplier position would have discouraged potential upstream competitors of Mainova, especially given the latter's information advantage and its possibility to compensate losses (for charging lower prices to AVG) through participation in AVG's profits. The moderate level of the shareholding at 17.5% did not preclude this finding, in particular given Mainova's superior knowledge of the energy sector (AVG's majority shareholder, the City of Aschaffenburg, lacked any sector-specific know-how). It was held that the link with Mainova would also have reinforced AVG's already dominant position in the local retail gas market by reducing Mainova's incentive to enter the downstream market. In the absence of suitable remedies, the transaction was prohibited.

In *Springer/Stilke*,¹²⁴ the well known publisher Axel Springer Verlag ("ASV"), intended to acquire a 24% participation combined with extensive information rights in the Hamburg newsagent, Stilke, an owner of numerous bookshops located in train stations. The remaining 76% was to be acquired by Valora, an undertaking active in the Swiss kiosk business. The Bundeskartellamt found that that the transaction would result in competitively significant influence by ASV over Stilke and prohibited the acquisition of the 24% stake by ASV in Stilke. The Bundesgerichtshof (Federal Court of Justice) confirmed the

¹²³ B8-27/04 –Mainova AG / Aschaffenburg Versorgungs AG.

¹²⁴ *Springer/Stilke* - BGH, judgment of 21 November 2000 - KVR 16/99.

Bundeskartellamt's finding that the transaction would have reinforced the dominant position of ASV on the Hamburg newspaper and newspaper advertisements markets.¹²⁵

4.3 Critique of the German Merger Control Thresholds and Minority Interests

It is clear that the mandatory system of *ex-ante* review of mergers in Germany covers the acquisition of non-controlling interests. The trigger event for mandatory notification of transactions involving less than 25% of the capital or voting rights, in the fourth paragraph of Section 37(1) of the GWB is the acquisition of "competitively significant influence" which is broader than the concept of sole or joint control used in Irish and EU merger control. However, it appears that passive minority investments are most unlikely to satisfy the competitively significant influence test in the fourth paragraph of Section 37(1) of the GWB. *Pini*¹²⁶ confirmed the above by stating that competitively "significant influence generally arises if the minority shareholding confers the possibility to influence the decision-making process and the market behaviour of the target, allowing the acquiring firm to bring into effect its own commercial interests." He continued by saying that in "other words, the acquisition of a minority shareholding below 25% will fall within the competitively significant influence threshold if it entails de facto similar rights to a 25% shareholding." *Pini* concludes as follows:

"It is thus very difficult for a purely passive investment (i.e. without any voting right, board representation or even access to sensitive information) to meet this test."

The apparent exclusion of passive minority interests means that minority interests which have been recognised by the Commission in the SWD White Paper as being potentially harmful, based on established theories of economic theory, fall outside of the German

¹²⁵ In this regard, the Court highlighted that newspaper publishers were currently not involved in the press retail business, guaranteeing a certain neutrality of the retail side towards the publishers. The entry of ASV into the press retail level would have changed competitive conditions to the disadvantage of ASV's competitors. The Court found that there were sufficiently strong indications that ASV and Valora pursued similar interests which could be combined to the detriment of ASV's competitors. The Court reached its decision on the basis of the economic and competitive interests of the parties. One of the elements that the Court identified as an indication of their interests was the fact that Valora, while acquiring the remaining 76% stake in Stilke, agreed to the acquisition of the shares on the condition of a right to withdraw from the acquisition in the event that ASV's acquisition of its stake in Stilke would not materialise. Furthermore, the Court found that Valora was interested in benefitting from ASV's understanding and market intelligence of the local practices as a publisher and as a wholesale actor in the publishing business in the Hamburg region. ASV, on the other hand, was pursuing its interest in entering the press retail business on the basis of its acquisition of the 25% stake in Stilke.

¹²⁶ Gian Diego Pini, 'Passive-Aggressive Investments: Minority Shareholdings and Competition Law' (2012) European Business Law Review, Vol 23, No 5.

merger control system. The above represents a significant gap in the machinery available under German law to control the acquisition of minority interests similar to that existing in UK merger control. In a sense, the requirement for active influence is not dissimilar to that applied under the general competition rules set out in Sections 4 and 5 of the 2002 Act in Ireland and Article 101 and 102 of the TFEU as interpreted by the ECJ in *Philip Morris* and discussed extensively in Chapter 3.

As we saw above, the present German system of merger control does not address common shareholdings even though each of the Monopolies Commission and the German government has expressed its concerns regarding such interests in recent years.

5 THE UNITED STATES

5.1 US Merger Control Laws

The US system of merger control is set out in the Clayton Antitrust Act.¹²⁷ Section 7A of the Clayton Antitrust Act,¹²⁸ as added by the Hart-Scott-Rodino Antitrust Improvements Act 1976 Act,¹²⁹ requires certain transactions which meet given thresholds to be notified both to the Federal Trade Commission (“**FTC**”) and the Department of Justice (“**DoJ**”). The jurisdictional scope of the US system of merger control is very wide indeed. More particularly, the requirement to notify applies where any person acquires “directly or indirectly, any voting securities or assets of any other person” which exceed specified thresholds. The thresholds are based on the size of the parties in terms of assets and sales and the value of the transaction, each expressed in US\$, and are reviewed annually.¹³⁰ The Clayton Antitrust Act requires that the parties not consummate the transaction until a 30 day waiting period (or 15-days in the case of a cash tender offer or a transfer in bankruptcy) has expired.¹³¹ If the agencies take no action regarding a notified transaction within the prescribed waiting period, the transaction may be consummated.¹³² It should be noted that enforcement powers of the DoJ and FTC extend to any transaction within Section 7 of the Clayton Antitrust Act (please see below) and are not confined to those falling within the thresholds for mandatory notification under Section 7A.

¹²⁷ Clayton Antitrust Act 1914, 15 USC This was introduced by the Hart-Scott-Rodino Antitrust Improvements Act 1976.

¹²⁸ Clayton Antitrust Act 1914, 15 USC Section 18a.

¹²⁹ Public Law 94-435, 90 Stat. 1390.

¹³⁰ For the current thresholds, please see notice from the FTC of 23 February 2022 Revised Jurisdictional Thresholds for the Clayton Antitrust Act 1914, s 7A.

<https://www.federalregister.gov/documents/2022/01/24/2022-01214/revised-jurisdictional-thresholds-for-section-7a-of-the-clayton-act>

¹³¹ Clayton Antitrust Act 1914, s 7B(1).

¹³² In any case, the agencies do not issue a formal decision clearing a transaction.

Section 7 of the Clayton Antitrust Act, which sets out both the jurisdictional parameters for intervention independently of the threshold for mandatory filing and prescribes the substantive test, provides as follows:

“No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

No person shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more persons engaged in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.”

As can be seen from the express language of Section 7 of the Clayton Antitrust Act, the prohibition covers the direct or indirect acquisition not only of the whole but also of “any part” of the stock or other share capital of the target. Section 7 extends to the acquisition of any stock or share capital and is not confined to voting stock unlike Section 7A. The application of the mandatory notification regime in Section 7A and the prohibition in Section 7 is not dependent on satisfying a jurisdictional test such as a finding of the acquisition of control,¹³³ unlike the position under the 2004 EMCR or Parts 3 and 3A of the Irish Competition Act 2002. Similarly, the application of Section 7A or Section 7 of the Clayton Antitrust Act is not dependent on meeting a material influence or competitively significant influence jurisdictional test similar to that applicable under UK and German merger control laws respectively. Neither Section 7A nor Section 7 of the Clayton Antitrust Act prescribes any minimum ownership threshold for jurisdiction purposes (except for the solely for investment exception referred to in 4.2 below). The breadth of the prohibition in Section 7

¹³³ OECD, *Antitrust Issues Involving Minority Shareholding and Interlocking Directorates* (OECD, 23 June 2009) DAF/COMP(2008)30, 41.

has been confirmed by the US Supreme Court in various cases such as *Denver & Rio Grande W. RR. Co v. U.S.*¹³⁴ where the court stated that a “company need not acquire control of another company in order to violate” and in *U.S. v. E.I. du Pont de Nemours & Co.*¹³⁵ where the Court ruled that any “acquisition of all or any part of the stock of another corporation, competitor or not, is within the reach of [Section 7] whenever the reasonable likelihood appears that the acquisition will result in a restraint of commerce or in the creation of a monopoly of any line of commerce.” The United States Court of Appeals (Sixth Circuit) in *United States v Dairy Farmers of America*¹³⁶ examined the question of passive minority interests under Section 7 of the Clayton Antitrust Act and held, relying on the decision of the Supreme Court in *du Pont*¹³⁷, that “even without control or influence, an acquisition may still lessen competition.” The Court stated that the “key inquiry is the effect on competition, regardless of cause.” The United States Court of Appeals (Sixth Circuit) agreed with the District court that control or influence may be the mechanism through which an acquirer causes competitive harm, but the Court “[did] not agree with the district court’s conclusion that a lack of control or influence precludes a Section 7 violation.” Similarly, the Horizontal Merger Guidelines of the US Department of Justice and the Federal Trade Commission¹³⁸ (“**US Horizontal Merger Guidelines**”) expressly acknowledge, in the context of partial acquisitions, that the reduction in the incentive to compete “arises even if [it] cannot influence the conduct of the target firm”.¹³⁹ However, as we shall see below, an exemption

¹³⁴ *Denver & Rio Grande W. RR. Co v United States* 387 US 485 (1967).

¹³⁵ *United States v E.I. du Pont de Nemours & Co.* 353 US 586, 592 (1957).

¹³⁶ *United States v Dairy Farmers of America* 426 F.3d 850 (6th Circuit).

¹³⁷ *United States v E.I. du Pont de Nemours & Co.* 353 US 586, 592 (1957).

¹³⁸ Horizontal Merger Guidelines of the United States Department of Justice and the Federal Trade Commission.

<https://www.ftc.gov/system/files/documents/public_statements/804291/100819hmg.pdf>

¹³⁹ The DoJ and the FTC in the Horizontal Merger Guidelines at page 13 (s 13) clarify that while the agencies will consider any way in which a partial acquisition may affect competition, they generally focus on the following three principal effects:

“First, a partial acquisition can lessen competition by giving the acquiring firm the ability to influence the competitive conduct of the target firm. A voting interest in the target firm or specific governance rights, such as the right to appoint members to the board of directors, can permit such influence. Such influence can lessen competition because the acquiring firm can use its influence to induce the target firm to compete less aggressively or to coordinate its conduct with that of the acquiring firm. Second, a partial acquisition can lessen competition by reducing the incentive of the acquiring firm to compete. Acquiring a minority position in a rival might significantly blunt the incentive of the acquiring firm to compete aggressively because it shares in the losses thereby inflicted on that rival. This reduction in the incentive of the acquiring firm to compete arises even if [it]¹³⁹ cannot influence the conduct of the target firm. As compared with the unilateral competitive effect of a full merger, this effect is likely attenuated by the fact that the ownership is only partial.

Third, a partial acquisition can lessen competition by giving the acquiring firm access to non-public, competitively sensitive information from the target firm. Even absent any ability to influence the conduct of the target firm, access to competitively sensitive information can lead to adverse unilateral or coordinated effects. For example, it can enhance the ability of the two firms to coordinate their behaviour, and make other accommodating responses faster and more targeted. The risk of coordinated effects is greater if the transaction also facilitates the flow of competitively sensitive information from the acquiring firm to the target firm.”

exists from the prohibition for acquisitions made solely for investment purposes which arguably in effect significantly limits the ability to control the acquisition of certain passive investments.

Similarly, the application of Section 7 of the Clayton Antitrust Act does not require the existence of an agreement or concerted practice as stipulated by Article 101 of the TFEU or Section 4(1) of the 2002 Act. *Pini*¹⁴⁰ highlights that the absence of a requirement to find an acquisition of control or an agreement or practice “ensures the applicability of Section 7 of the Clayton Antitrust Act to virtually all the acquisitions of minority shareholdings having anticompetitive effects (the only exception being the shareholdings falling within the “solely for investment” exemption discussed below). The substantive test identifies the minority shareholdings prohibited as the ones whose effect “may be substantially to lessen competition”.

In applying Section 7 of the Clayton Antitrust Act, the effects of a minority share acquisition are analysed in light of the incipency doctrine. On the basis of the incipency doctrine, it was held by the US Supreme Court in *Cargill, Inc. v Monfort of Colorado, Inc.*¹⁴¹ that Section 7 “was designed to cope with monopolistic tendencies in their incipency and well before they have attained such effects as would justify a Sherman Act proceeding”. The DOJ and the FTC must show with reasonable probability only that an anti-competitive effect “may” occur, not that it already has nor that it certainly will occur. The US Supreme Court in *FTC v Procter and Gamble Co.*¹⁴² stated that Section 7 of the Clayton Antitrust Act “can deal only with probabilities, not with certainties. And there is certainly no requirement that the anticompetitive power manifest itself in anticompetitive action before [Section] 7 can be called into play. If enforcement of [Section] 7 turned on the existence of actual competitive practices, the congressional policy of thwarting such practices in their incipency would be frustrated.”

The US Horizontal Merger Guidelines acknowledge the incipency standard for the application of Section 7 by stating that “these Guidelines reflect the congressional intent that merger enforcement should interdict competitive problems in their incipency and that

The DoJ and FTC in the above guidelines concludes that partial acquisitions, like mergers, vary greatly in their potential for anticompetitive effects. Accordingly, the specific facts of each case must be examined to assess the likelihood of harm to competition. While partial acquisitions usually do not enable many of the types of efficiencies associated with mergers, the FTC and DoJ consider whether a partial acquisition “is likely to create cognizable efficiencies”.

¹⁴⁰ Gian Diego Pini, ‘Passive-Aggressive Investments: Minority Shareholdings and Competition Law’ (2012) European Business Law Review, Vol 23, No 5.

¹⁴¹ *Cargill, Inc. v Monfort of Colorado, Inc.* 479 US 104, 124 (1986).

¹⁴² *FTC v Procter and Gamble Co.* 386 US 568 (1967) at 577.

certainty about anticompetitive effect is seldom possible and not required for a merger to be illegal.”¹⁴³ The US Horizontal Merger Guidelines also provide that “pursuant “to the Clayton Antitrust Act’s incipency standard, the Agencies may challenge a merger that in their judgment poses a real danger of harm through coordinated effects, even without specific evidence showing precisely how the coordination likely would take place.”¹⁴⁴

The US courts have interpreted Section 7 of the Clayton Antitrust Act in a way that the potential effects of a particular transaction are usually determined at the time it occurs, but they may be determined also at the time of the suit challenging it. The US Supreme Court in *United States v E.I. DuPont de Nemours & Co.*¹⁴⁵ stated that the legality of an acquisition under Section 7 can be determined at “any time when the acquisition threatens to ripen into a prohibited effect.” In *DuPont*, the suit was brought approximately 30 years after the acquisition by DuPont of a stake in General Motors. The Court held that “the Government may proceed at any time that an acquisition may be said with reasonable probability to contain a threat that it may lead to a restraint of commerce or tend to create a monopoly of a line of commerce.”

It is abundantly clear that US merger control does not suffer some of the significant jurisdictional limitations present in Irish and EU merger control. The antitrust focus is very much on the substantive issues presented by a particular transaction. *Cuomo*¹⁴⁶ states that there “are no bright line rules as to when a partial acquisition does (or does not) violate the U.S. antitrust laws and the analysis of any particular partial acquisitions is highly dependent upon the specific facts of each proposed transaction.” The above is described by *Panagiotis Fotis, Nikolaos Zevgolis*¹⁴⁷ as “(inevitably) a great opportunity for US judges.”

The Commission in the Commission in Staff Working Document Towards more effective EU merger control dated 25 June 2013 at Annex II (“**SWD 2013 Consultation Annex II**”)¹⁴⁸ highlights that between 1996 and June 2011, the DoJ raised concerns in 18 cases involving minority acquisitions. Out of the total number of cases that were found to violate section 7 of the Clayton Antitrust Act, cases involving minority shareholdings accounted for at least

¹⁴³ Section 1 of the US Horizontal Merger Guidelines.

¹⁴⁴ Section 25 of the US Horizontal Merger Guidelines.

¹⁴⁵ *United States v E.I. DuPont de Nemours & Co.* 353 US 586 (1957).

¹⁴⁶ Paul Cuomo, Charles Malaise, Changrong Xu, ‘Partial Acquisitions: Recent MOFCOM Action Suggests Possible Divergence with US Standards’ (10 January 2012) CPI Competition Policy International, 2.

¹⁴⁷ Panagiotis Fotis, Nikolaos Zevgolis, *The Competitive Effects of Minority Shareholdings: Legal and Economic Issues* (Bloomsbury 2016).

¹⁴⁸ Staff Working Document Towards more effective EU merger control dated 25 June 2013 at Annex II SWD(2013) 239 final Part 3/3 at s 3.2.1 .

15 per cent.¹⁴⁹ In some of these cases, the minority acquisition was considered as having the effect of "transforming" a strong competitor into an investor, and consequently eliminating either potential or actual competitors, to the detriment of competition.

It should be noted that US merger control does not contain any provisions specific to common ownership. The US made a submission to the Directorate for Financial and Enterprise Affairs Competition Committee of the OECD entitled Hearing on Common Ownership by institutional investors and its impact on competition - Note by the United States¹⁵⁰ which points out that the US antitrust agencies have not litigated a case involving a single institutional investor. It highlighted:

"[i]nstitutional investors hold trillions of dollars in assets. Given the size of these holdings, requiring institutional investors to divest holdings could have a significant effect on capital markets. Accordingly, any antitrust enforcement or policy effort in this area should be pursued only if an inquiry reveals compelling evidence of the anticompetitive effects of common ownership by institutional investors in concentrated industries. Consistent with long-standing agency practice and legal precedent, any such enforcement by the U.S. antitrust agencies would address actual or predicted harm to competition from a particular transaction, would not be predicated on general relationships suggested by academic papers, and would seek to avoid outcomes that would unnecessarily chill procompetitive investment."

The FTC in December 2018 held public hearings on common ownership as part of its series of hearings on Competition and Consumer Protection in the 21st century¹⁵¹ and it is clear from the views expressed by the US antitrust agencies that they remain, for the time being, unconvinced that common ownership standing alone constitutes an antitrust violation and that a shift in policy or enforcement is not on the immediate horizon. Bruce Hoffman, director of the FTC Bureau of Competition, referring to common ownership, recently said that the "one thing I can say with some relative certainty here is that we're very uncertain about it" and "I don't know exactly where this is going."¹⁵² Barry Nigro, Deputy Assistant Attorney

¹⁴⁹ Panagiotis Fotis, Nikolaos Zevgolios, *The Competitive Effects of Minority Shareholdings: Legal and Economic Issues* (Bloomsbury 2016), 234.

¹⁵⁰ Paul Cuomo, Charles Malaise, Changrong Xu, 'Partial Acquisitions: Recent MOFCOM Action Suggests Possible Divergence with US Standards' (10 January 2012) CPI Competition Policy International.

¹⁵¹ FTC Hearing #8: Common Ownership, Hearings on Competition and Consumer Protection in the 21st Century, 6 December 2018.

<<https://www.ftc.gov/news-events/events-calendar/ftc-hearing-8-competition-consumer-protection-21st-century>>

¹⁵² Conference, 'Antitrust in the Financial Sector: Hot Issues & Global Perspectives' (2 May 2018), Fordham Law School.

General for the DOJ Antitrust Division previously stated that an antitrust case against common ownership “is likely to encounter scepticism in the courts.”¹⁵³

It is interesting to note that the US government in its submission to the Directorate for Financial and Enterprise Affairs Competition Committee of the OECD in December 2017¹⁵⁴ stated that although the above section of the US Horizontal Merger Guidelines are “concerned more directly with cross-ownership, it has some relevance to acquisitions resulting in common ownership.” The US government did not expand on the above.

The discussion below focuses principally on US merger control and how it applies to cross shareholdings as opposed to common shareholdings.

A number of examples of cases where it was confirmed that acquisitions of passive cross minority shareholdings could violate Section 7 of the Clayton Antitrust Act are examined below, as well as examples where a breach was found where the interest acquired was less than 25% of the total issued share capital of the target. As noted above, unlike the UK and German merger control systems that apply the jurisdictional tests of material influence and competitively significant influence respectively, the Clayton Antitrust Act effectively does not impose a jurisdictional threshold of control or influence and it is expressed to apply to any purchase of shares or assets.

5.2 Examples of US Cases involving No Influence Cross Minority Shareholdings and Cross Minority Shareholdings less than 25%

In *United States v E.I. du Pont de Nemours & Co.*,¹⁵⁵ the US Supreme Court ruled that the acquisition by du Pont's of a 23% interest in General Motors violated Section 7 of the Clayton Antitrust Act in that du Pont purposely purchased the interest so that it would “entrench itself as the primary supplier of General Motors' requirements for automotive finishes and fabrics”. The Supreme Court left it to the District Court to fashion an appropriate remedy for the purposes of addressing the above violation and, in this context, the District Court approved a remedy whereby: (i) du Pont would retain ownership of the stock in General Motors but the stock would have no voting rights; (ii) the votes would be distributed *pro rata* to the shareholders of du Pont; and (iii) officers and directors of du Pont

¹⁵³ Barry A Nigro, Jr, 'Cross-Ownership by Institutional Investors' (31 March 2016) Harvard Law School on Corporate Governance.

¹⁵⁴ Directorate for Financial and Enterprise Affairs Competition Committee, *Hearing on Common Ownership by institutional investors and its impact on competition - Note by the United States* (OECD, 28 November 2017).

<[https://one.oecd.org/document/DAF/COMP/WD\(2017\)86/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2017)86/en/pdf)>

¹⁵⁵ *United States v E.I. du Pont de Nemours & Co.* 353 US 316 (1957).

would be prevented from serving as officers or directors of General Motors. The Supreme Court on appeal¹⁵⁶ held that the above remedy was inadequate. The Supreme Court emphasised that in cases where a Section 7 violation had been found to exist, divestiture, as opposed to voting restrictions, was the “natural remedy”. The Supreme Court reasoned that that du Pont’s shareholders, the group now vested with significant voting power in the affairs of General Motors, would gain if du Pont continued its anticompetitive relationship with General Motors. In other words, even though du Pont no longer had voting control of the stock in General Motors, the group that did have such control, namely the shareholders in du Pont, had the same interests as du Pont itself, thus preserving the concern about the lessening of competition. The Supreme Court found that the mere fact that du Pont maintained ownership of a significant portion of stock, albeit non-voting, could be enough to deter du Pont’s competitors from seeking to do business with General Motors. The Court also found that that even in the absence of voting control, General Motors may have become accustomed to the “special relationship” with du Pont, such that General Motors would “act accordingly”. Furthermore, du Pont’s ability to sell the stock, and therefore reunite the ownership right with the voting rights, could “conceivably” be used as leverage against General Motors.

In *Dairy Farmers*,¹⁵⁷ the DoJ filed a lawsuit challenging Dairy Farmers of America’s (DFA’s) partial ownership interests in two rival dairies, namely, Flav-O-Rich and Southern Belle Dairy. The DFA was a milk marketing organisation and the largest dairy farmer cooperative in the U.S. In order to fulfil its mission of securing a steady sale of raw milk for its members at the highest price, DFA began vertically integrating and investing in various dairies. According to the DoJ, DFA preferred not to wholly acquire and manage the dairies itself, but rather to acquire 50% ownership interests and then leave the day-to-day operations to its business partners, given their greater experience. Before the acquisition of the interest in Southern Belle which was the transaction at issue, the DFA held a 50% equity stake in the company that owned and operated the Flav-O-Rich dairy, and also had financial interests in several other dairies that sold milk to schools in Kentucky and Tennessee. The DFA acquired 50% of the voting stock of Southern Belle, Flav-O-Rich’s largest rival in the sale of school milk. Indeed, for many school districts, the two dairies were the only two milk competitors. The revised agreements for Southern Belle eliminated the DFAs voting and board representation rights. The DoJ alleged that, as a result of the acquisition of the stake in Southern Belle, the DFA’s ownership interests in both dairies gave it an incentive to reduce competition. The District Court at first instance reasoned that the transaction did not

¹⁵⁶ *United States v E.I. du Pont de Nemours & Co.* 353 US 316 (1957).

¹⁵⁷ *United States v Dairy Farmers* 426 F.3d 850 (6th Circuit 2005).

“increase the percentage of the market that DFA ‘controls’ or even enhance DFA’s ability to influence the market because DFA’s non-voting interest in Southern Belle does not give it any control over the business decisions made by Southern Belle.”¹⁵⁸ The Court then considered whether anticompetitive effects were likely, and again found that DFA’s lack of control meant that they were not. The Court stated that anticompetitive effects were “less likely when the company who has acquired stock in both subject companies does not have the ability to be at all involved in the decision-making that forms the basis of the alleged anticompetitive effects.” On appeal, the Sixth Circuit reversed the decision of the District Court and held that the District Court should have considered the DoJ’s claim with respect to the original agreement, which provided DFA with some level of control over Southern Belle and went on to apply the District Court’s reasoning to that agreement. The Sixth Circuit agreed with the District Court that control or influence may be the mechanism through which an acquirer causes competitive harm, but “[did] not agree with the District Court’s conclusion that a lack of control or influence precludes a Section 7 violation.” The Sixth Circuit found that the original agreement’s provision of voting rights to DFA provided a mechanism for it to exercise some control over Southern Belle and that in the light of that control, the acquisition resulted in a significant increase in market concentration and provided DFA with an “undue” percentage of the market. But the court found that “control” was not the only way that a partial ownership could violate Section 7. The Sixth Circuit in *Dairy Farmers* cited the *Du Pont* case as authority for the proposition that “even without control or influence, an acquisition may still lessen competition.” The Sixth Circuit found that the District Court had focused too heavily on control and, in doing so, had “ignore[d] the possibility that there may be a mechanism that causes anticompetitive behavior other than control.” Citing *Du Pont*, the Sixth Circuit noted that the DFA and its partner in Southern Belle, which would retain all voting rights under the revised agreement, had “closely aligned interests to maximize profits via anticompetitive behavior.”

In *Rio Grande W. RR. Cov.*,¹⁵⁹ Greyhound Corporation, a bus operator, purchased a 20% interest in Railway Express Agency, Inc. (REA) which provided air and rail services. It was clear that the 20% interest was part of a much wider collaboration between the parties. The Supreme Court held that REA and Greyhound contemplated major changes in their operation which could have a significant impact upon competition for express and other types of transport which they sought to carry. The parties had entered into a Memorandum of Understanding shortly prior to the 20% stock acquisition which contemplated efficiencies and savings through consolidation of facilities for terminal service, garages,

¹⁵⁸ *Dairy Farmers*, 2004 WL 2186215 at page 3.

¹⁵⁹ *Rio Grande W. RR. Cov. US*, 387 US at 501.

communications, advertising and sales forces which could realise large savings for both REA and Greyhound, and significantly strengthen their competitive position.

In *American Crystal Sugar Co v. Cuban--American Sugar Co.*,¹⁶⁰ the United States Court of Appeals, Second Circuit, upheld a decision of the District Court finding a violation of Section 7 of the Clayton Antitrust Act arising out of the purchase by Cuban-American Sugar Company, which was a corporate group that refined and sold cane sugar, of a 23% stake in American Crystal Sugar Company, a processor and seller of beet sugar.¹⁶¹ It was held that Cuban was seeking not merely to obtain a minority investment in, but actual control of, one of the leading beet processors. In view of the underlying conflict of interest in the industry between Cuban cane interests, of which the defendant Cuban-American was “a protagonist”, and the beet interests, of which the plaintiff American Crystal was “an aggressive protagonist”, and the competitive positions and policies of the acquirer and target as against each other, it was held that it was not unreasonable to infer that the defendant's objective was to bring about some change in the plaintiff's conduct and policies to the advantage of the defendant at the expense of the plaintiff.

In *Primestar/ASkyB satellite services*,¹⁶² Primestar wished to acquire the high-power broadcast satellite services of ASkyB, a joint venture owned by News Corp and MCI. In exchange News Corp/MCI would receive a 20% non-voting equity share in Primestar. The DoJ alleged that this would transform ASkyB from a possible entrant to the relevant market to an investor to the detriment of competition.

The *Du Pont* and *Dairy Farmers* cases are clear authority for the proposition that a violation of Section 7 of the Clayton Antitrust Act can be found to exist even in the absence of control or influence. In other words, the US courts have deliberately chosen not to confine the ambit of Section 7 of the Clayton Antitrust Act by reference to the jurisdictional limitations that have severely restricted the scope of application of Irish and EU merger control and the general competition rules prohibiting restrictive agreements and abuse of a dominant position as they apply to cross minority interests. However, despite the above support for having jurisdiction to control passive minority interests under Section 7 of the Clayton Antitrust Act, it appears that the breadth of the prohibition in the context of minority interests

¹⁶⁰ *American Crystal Sugar Co v Cuban - American Sugar Co.* 259 F.2d 524 (2nd Circuit 1958).

¹⁶¹ Cuban-American had demanded, unsuccessfully, representation on Crystal's board of directors.

¹⁶² In the United States District Court for the District of Columbia.

<<https://www.justice.gov/atr/case-document/file/507741/download>>

has been severely thwarted by the application and interpretation of the “solely for investment” exemption examined below.

5.3 Solely for Investment Exception

The Clayton Antitrust Act contains a carve-out for the purchase of stock solely for investment as follows¹⁶³

“This section shall not apply to persons purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition.”

As we shall see below, the above solely for investment exception is very significant in the context of examining the US antitrust law implications of minority interests. The US Courts have interpreted the above “solely for investment” exemption as a two pronged test.¹⁶⁴ The first prong consists of establishing that the stock acquisition was made solely for “investment”.¹⁶⁵ If the first prong is satisfied, and it is determined that the acquisition was made “solely for investment”, it appears that the acquisition will not be examined according to the main effects clause of Section 7 of the Clayton Antitrust Act (which asks whether the acquisition “may substantially lessen competition”) but instead by asking whether the acquirer is using the [stock] by voting or otherwise to bring about or in attempting to bring about, the substantial lessening of competition. The Court in *Anaconda Co. v Crane Co*¹⁶⁶ stated that “In cases where the “solely for investment” exemption does not apply, a plaintiff need only to show a reasonable probability of a lessening of competition [...] Thus, the anticompetitive effects may be attacked in their incipiency. The statutory exemption, however, conspicuously omits this language. Once it is established to the satisfaction of the Court that the acquisition is “solely for investment,” the statute requires a showing that the defendant is “using the [stock] by voting or otherwise to bring about or in attempting to bring about, the substantial lessening of competition.” *Pini* points out that although the meaning of the second limb is vague, “it is nonetheless clear that it involves a more lenient test, from the defendant’s perspective, than the section 7 main effects clause. Otherwise, this exemption would be completely superfluous.”

¹⁶³ Clayton Antitrust Act, s 7(3).

¹⁶⁴ *United States v Tracinda Inv. Corp.*, 477 F Supp 1093 (CD Cal 1979) and *Anaconda Co. v Crane Co.*, 411 Supp 1210 (SDNY 1975).

¹⁶⁵ The expression “investment” is not defined.

¹⁶⁶ *Anaconda Co. v Crane Co.*, 411 Supp 1210 (SDNY 1975).

In *United States v Tracinda Inv. Corp.*¹⁶⁷, the Court stated as follows:

"In the substantive provisions of the first two paragraphs of Section 7, Congress showed concern for the probable future consequences of the acquisition by utilizing the language 'may be substantially to lessen competition'. On the other hand, with the investment exemption, Congress exhibited a concern for the past and present effect of the acquisition by utilizing the language 'and not using the same [...] to bring about [...] the substantial lessening of competition'."

Pini explains that the "second prong, therefore, deals only with actual effects and intentions, not with probabilities."

It appears that a significant drawback of the application of the first "solely for investment" limb of the test, is that it in some cases it has been interpreted as equating with the investment being passive where the acquirer has no influence over the target. In *United States v. Gillette Co*¹⁶⁸, the DoJ decided not to attack Gillette's passive investment in Wilkinson Sword, implying that the investment, due to its passive nature, enjoyed the "solely for investment" exemption. Conversely, as *Pini* points out, an acquisition of stock will not be considered "solely for investment" if the acquisition has the intent or confers the capacity to obtain active control or at least gain some influence over the actions of the firm in which the investment was made. The Courts have looked to the following factors in evaluating the intent to influence the behaviour of the target: direct evidence from the particular transaction,¹⁶⁹ the historical behaviour of the acquiring company,¹⁷⁰ and the commercial circumstances surrounding the transaction.¹⁷¹ With regard to the ability to influence the actions of the target firm, similar to the approach taken by the ECJ in interpreting Article 101 of the TFEU, the US Courts have considered representation rights, allowing the acquirer to appoint a member of the target's board,¹⁷² and access to sensitive information regarding the activities of the target company.¹⁷³ Therefore, it appears that the "solely for investment" defence may succeed if direct influence over the operations of the acquired company are

¹⁶⁷ *United States v Tracinda Inv. Corp.*, 477 F Supp 1093 (CD Cal 1979).

¹⁶⁸ *United States v Gillette Co.*, at 28, 322-23.

¹⁶⁹ *United States v E.I. du Pont de Nemours & Co.* 353 US 316 (1957), 602.

¹⁷⁰ For example: *Gulf & Western Indus., Inc. v Great A. & P. Tea Co., Inc.*, 356 F. Supp 1066 (SDNY 1973), 696; *Texasgulf v Canada Dev. Corp.* 366 F Supp 374 (SD Tex 1973), 407.

¹⁷¹ For example: *Golden Grain Macaroni Company v F.T.C.*, 472 F.2d 882 (9th Circuit 1972). Among the more significant indicators that an acquisition is not solely for investment are excessive haste in purchases, payment of a substantial premium over the market price, and borrowing to finance the purchase. As cited in ABA, Antitrust Law Developments, Chapter 3.

¹⁷² *United States v E.I. du Pont de Nemours & Co.* 353 US 316 (1957).

¹⁷³ US District Court for the Southern District of New York - 476 F Supp 203 (S.D.N.Y. 1979).

prevented by a consent order¹⁷⁴ or a shareholders' agreement.¹⁷⁵ *Pini* states that "in practical terms, the constant application of this test to passive stock acquisitions would result in a *de facto* exemption from scrutiny".¹⁷⁶

Similar to the position at EU level and examined in Chapter 3, the DoJ, the antitrust enforcement agency in the US, has expressly acknowledged and documented that competition issues can arise with passive minority interests but the legislative framework for their control appears to exclude passive investments, in this case by the interpretation of the solely for investment defence as providing a *de facto* exemption for passive interests. Clearly, it is very hard to reconcile the acknowledgment of a theory of harm with the *de facto* exemption for passive interests. It appears that support for the interpretation that the solely for investment purposes exemption is limited to influence or active minority investments exists in the mandatory notification provisions set out in the Hart-Scott-Rodino Antitrust Improvements Act 1976 ("**HSR Act**") and the implementing regulation adopted by the FTC.¹⁷⁷ Under Section 7A of the Clayton Antitrust Act,¹⁷⁸ certain transactions which meet given thresholds must be notified to the FTC and the DoJ. The requirement to notify applies where any person acquires "directly or indirectly, any voting securities or assets of any other person" which exceed specified thresholds. There are a number of exemptions from the above, one of which is for acquisitions of 10 per cent or less of a company's share capital solely for the purpose of investment. More specifically, the above exemption applies in the following circumstances:

"acquisitions, solely for the purpose of investment, of voting securities, if, as a result of such acquisition, the securities acquired or held do not exceed 10 per cent of the outstanding voting securities of the issuer".¹⁷⁹

Certain institutional investors can acquire 15 per cent or less of an issuer's voting securities, if solely for investment, without filing premerger notification.¹⁸⁰ The US in its Statement of

¹⁷⁴ *Anaconda Co. v Crane Co.*, 411 Supp. 1210 (S.D.N.Y. 1975).

¹⁷⁵ *United States v Tracinda Inv. Corp.*, 477 F Supp 1093 (CD Cal. 1979).

¹⁷⁶ The anti-competitive effects of passive investment are similar to those of a full-blown merger. It was precisely the probabilistic nature of these effects that caused Courts to rule that section 7 of the Clayton Antitrust Act "can deal only with probabilities, not with certainties"; *FTC v Procter and Gamble Co.* 386 US 568 (1967). Please see *Gilo D., The Anticompetitive Effect of Passive Investment* (Vol 99, Michigan Law Review 2000), pp. 1-47.

¹⁷⁷ FTC Statement of Basis and Purpose for the Hart-Scott-Rodino Regulations, 43 Federal Register 33450, at 33465 (Federal Trade Commission, 31 July 1978).

¹⁷⁸ This was introduced by the Hart-Scott-Rodino Antitrust Improvements Act 1976.

¹⁷⁹ Clayton Antitrust Act 1914, 15 USC, s 7C(9).

¹⁸⁰ Rule 802.64 (16 CFR 802.64) lists the types of institutional investors subject to this exemption: (1) A bank within the meaning of 15 USC 80b-2(a)(2); (2) Savings bank; (3) Savings and loan or building and loan company or association; (4) Trust company; (5) Insurance company; (6) Investment company registered with the US Securities and Exchange Commission

Basis and Purpose for the Hart-Scott-Rodino Regulations explains that the agencies adopted a higher threshold for investments by institutional investors because, for a variety of reasons applicable at the time, it was understood that most of these entities did not participate in or affect the management of the companies whose stock they bought.¹⁸¹

The implementing regulation adopted by the FTC¹⁸² interprets the acquisition of voting securities “solely for the purpose of investment” in the HSR Act if the person holding or acquiring such voting securities “has no intention of participating in the formulation, determination, or direction of the basic business decisions of the issuer”.¹⁸³

*Salop and O'Brien*¹⁸⁴ suggest that the terms of the above mandatory notification requirement might support the proposition that Section 7 does not cover purely passive investments. They point out that as a matter of statutory construction, the exemption from Section 7 turns largely on the interpretation of an undefined, ambiguous term “investment.” They stress that with this limited statutory guidance, the courts have struggled to evaluate partial stock acquisitions and have not set forth any clear guidelines or parameters. They suggest that one could look for guidance in the HSR Act, which exempts from reporting requirements acquisitions solely for purposes of investment, when the securities acquired or held do not exceed 10 percent of the outstanding voting securities of the issuer. They point out that this is a notification provision and “does not bear directly on substantive antitrust analysis but nevertheless, the HSR statutory exemption arguably speaks to the

under the Investment Company Act of 1940 (15 USC 80a-1 et seq.); (7) Finance company; (8) Brokerdealer within the meaning of 15 USC 78c(a)(4) or (a)(5); (9) Small Business Investment Company or Minority Enterprise Small Business Investment Company regulated by the US Small Business Administration pursuant to 15 USC 662; (10) A stock bonus, pension, or profit-sharing trust qualified under section 401 of the Internal Revenue Code; (11) Bank holding company within the meaning of 12 USC 1841; (12) An entity which is controlled directly or indirectly by an institutional investor and the activities of which are in the ordinary course of business of the institutional investor; (13) An entity which may supply incidental services to entities which it controls directly or indirectly but which performs no operating functions, and which is otherwise engaged only in holding controlling interests in institutional investors; or (14) A non-profit entity within the meaning of sections 501(c) (1) through (4), (6) through (15), (17) through (20), or (d) of the Internal Revenue Code.

¹⁸¹ FTC Statement of Basis and Purpose for the Hart-Scott-Rodino Regulations, 43 Federal Register 33450 at 33465 (Federal Trade Commission, 31 July 1978): “Some of these investors, such as non-profit entities, are constrained by law or by their charters from participating in the management of most business corporations. Pension trusts, insurance companies and others are limited by their fiduciary duty to the ultimate beneficiaries of their investment. Entities such as broker-dealers and investment companies frequently engage in acquisitions that may meet the criteria of the act, but they generally have no interest in affecting the management of the companies whose stock they buy. The rule thus attempts to reduce the disruption that could result from requiring them to report and observe a waiting period before such acquisitions.”

<https://www.ftc.gov/sites/default/files/documents/hsr_statements/43-fr-33450/780731fr43fr33450.pdf>

¹⁸² FTC Statement of Basis and Purpose for the Hart-Scott-Rodino Regulations, 43 Federal Register 33450 at 33465 (Federal Trade Commission, 31 July 1978).

¹⁸³ 16 CFR Section 801(1)(i).

¹⁸⁴ Steven C Salop S. and Daniel P O'Brien, ‘Competitive Effects on Partial Ownership: Financial Interest and Corporate Control’ (2000) Antitrust Law Journal, Vol 67, 559–614.

substantive antitrust analysis, and possibly reflects the judgment of Congress that acquisitions of less than 10 percent of a company's stock, made for investment purposes, do not raise sufficient antitrust concerns to warrant any advance review.”

Salop and O'Brien refer to the HSR implementing regulation as another source for ascertaining the meaning of "investment" as providing that acquisitions are made "solely for purposes of investment" when the acquirer has no intention of participating in the formulation, determination, or direction of the basic business decisions of the issuer. They refer to the FTC's Statement of Basis and Purpose for this regulation which identifies six types of conduct evidencing intent inconsistent with "solely for investment" purposes: (1) nominating a candidate for the board of directors of the issuer; (2) proposing corporate action requiring shareholder approval; (3) soliciting proxies; (4) having a controlling shareholder, director, officer, or employee simultaneously serving as an officer or director of the issuer; (5) being a competitor of the issuer; and (6) doing any of the foregoing with respect to any entity directly or indirectly controlled by the issuer.

Salop and O'Brien underline that while the Clayton Antitrust Act applies to acquisitions of any part of the "stock" of another company, the HSR Act applies more narrowly to acquisitions of "voting securities." The HSR Act defines voting securities as any securities entitling the holder to vote for the election of directors. *Salop and O'Brien* highlight that this could reflect a view that acquisitions of non-voting stock raise less antitrust concern, and that, in this regard, the HSR rules indicate that an acquisition of stock that does not allow for voting on directors should raise less antitrust concern because it confers "far less significant" power.

Salop and O'Brien conclude that the HSR Act and regulations add some clarity in distinguishing partial ownership acquisitions that are merely passive investments from those that confer control over the acquired firm, while still conceding that though that the law remains highly uncertain and provides very little guidance for antitrust practitioners trying to assess the antitrust risk of partial stock acquisitions.

Pini highlights that the above interpretation seems to exclude passive investments. *Pini* counters the above by stressing that the FTC's Statement of Basis and Purpose for the Hart-Scott-Rodino Regulations, provides six factors that could be considered inconsistent with the investment-only purpose and that among them is the fact that the acquirer is "a competitor of the issuer" which *Pini* asserts "excludes the possibility to consider the acquisition of a passive minority shareholding in a competitor consistent with the subjective intention to purchase it solely for the purpose of investment."

The Federal Trade Commission has, in a number of recent cases, challenged reliance on the exemption on the basis that the investor was not passive within the meaning of the exemption. In August 2015, the U.S. FTC announced a settlement with Third Point, LLC and three affiliated investment funds for violations of the HSR Act in connection with their 2011 acquisitions of shares in Yahoo! Inc. (Yahoo).¹⁸⁵ Third Point had asserted that it was exempt from the premerger filing requirements of the HSR Act under the “solely for the purpose of investment” exemption. However, the FTC countered that Third Point took actions inconsistent with an investment-only intent, such as communicating with third parties to determine their interest in becoming the CEO or a board candidate of Yahoo. It is interesting to note that the two dissenting Republican commissioners nonetheless believed that enforcement was unwarranted here, where no harm to competition was implicated and where enforcement could “chill” beneficial shareholder activism. The two Republicans signaled a willingness to significantly broaden the scope of the exemption.

With regard to common shareholdings, the US government in its 2017 submission to the Directorate for Financial and Enterprise Affairs Competition Committee of the OECD¹⁸⁶ highlighted that creating across-the-board limitations on common ownership without sufficient evidence of anticompetitive effects could:

“impose unintended real-world costs on businesses and consumers by making it more difficult to diversify risk. Given the ongoing academic research and debate, and its early stage of development, the U.S. antitrust agencies are not prepared at this time to make any changes to their policies or practices with respect to common ownership by institutional investors. The agencies evaluate new learning from the academic community and are prepared to take action when appropriate. Where sufficient evidence exists that the effect of particular acquisitions may be substantially to lessen competition, the agencies will consider appropriate responses, including possible enforcement actions”. The above view was echoed in statements made by the US antitrust agencies as part of the public hearings on common ownership in December 2018.¹⁸⁷

¹⁸⁵ Debbie Feinstein, Ken Libby and Jennifer Lee, ‘Investment-only means just that’ (24 August 2015) Bureau of Competition. <<https://www.ftc.gov/news-events/blogs/competition-matters/2015/08/investment-only-means-just>>

¹⁸⁶ Directorate for Financial and Enterprise Affairs Competition Committee, *Hearing on Common Ownership by institutional investors and its impact on competition - Note by the United States* (OECD, 28 November 2017). <[https://one.oecd.org/document/DAF/COMP/WD\(2017\)86/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2017)86/en/pdf)>

¹⁸⁷ Directorate for Financial and Enterprise Affairs Competition Committee, *Hearing on Common Ownership by institutional investors and its impact on competition - Note by the United States* (OECD, 28 November 2017). <[https://one.oecd.org/document/DAF/COMP/WD\(2017\)86/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2017)86/en/pdf)>

5.4 Critique of the US Merger Control Thresholds and Minority Interests

The scope of US anti-trust rules in terms of controlling minority interests is unclear. The breadth of Sections 7 and 7A of the Clayton Antitrust Act appears very broad indeed and is not limited by the jurisdictional limitations of control that hamper the Irish and EU merger control regimes. However, the solely for investment exception and the corresponding exemption from the requirement to notify transactions under the HSR Act for certain transactions up to 10% of share capital appear to have led to the view that passive investments tend to fall outside of the US federal system of merger control. As a result, there appears to be a view or culture which has emerged to say that purely passive investments are in themselves not problematic and attention appears to focus on the passive or active nature of the minority investment. *Pini* summarises the position as follows:

“Despite the effort of the Agencies (in particular the DOJ) and of the (economic and legal) doctrine to interpret this exception in line with the results of the economic theory (and the aim of the Congress), it appears that the Courts still prefer an interpretation substantially excluding from scrutiny passive investments and their effects on competition.

Even though the American System seems to have all the most appropriate tools to address the potential anticompetitive effects of passive investments, a broad interpretation of the investment exemption may be an impediment in the scrutiny of minority acquisitions.”

Therefore, the apparent exclusion of passive minority interests means that minority interests which have been recognised by the Commission in the SWD White Paper as being potentially harmful based on established theories of economic theory effectively fall outside of the US system of merger control.¹⁸⁸ The uncertainty surrounding both the solely for investment purposes exceptions to Section 7 and the mandatory filing regime under the HSR represent a significant gap in the machinery available under US law to control the acquisition of minority interests similar to the positions under UK and German merger control laws.

As we saw above,¹⁸⁹ US merger control does not specifically address common shareholdings, the US government stating in December 2017, in its submission to the

¹⁸⁸ Please see section 4.3 above.

¹⁸⁹ Please see section 4.1 above.

Directorate for Financial and Enterprise Affairs Competition Committee of the OCED, that given the ongoing debate and research and its early stage of development, the U.S. antitrust agencies were not prepared at that time to make any changes to their policies or practices with respect to common ownership by institutional investors and that “where sufficient evidence exists that the effect of particular acquisitions may be substantially to lessen competition, the agencies will consider appropriate responses, including possible enforcement actions.” The above remained the position of the US antitrust agencies at the public hearings hosted by the FTC in December 2018.¹⁹⁰

6 BRAZIL

The jurisdictional thresholds for mandatory filings under Brazilian merger control are framed to capture the acquisition of a much wider category of minority cross shareholdings than those applicable under the Irish 2002 Act or the 2004 EMCR. More specifically, Article 90 of Law no. 12,529/2011¹⁹¹ defines concentration to include “one (1) or more companies acquire, directly or indirectly, by purchase or exchange of stocks, shares, bonds or securities convertible into stocks or assets, whether tangible or intangible, by contract or by any other means or way, the control or parts of one or other companies”. Resolution No. 33 of 2022 of the Brazilian competition agency, Conselho Administrativo de Defesa Econômica (“**CADE**”),¹⁹² provides that

the acquisition of a minority shareholding must be notified to CADE if it (i) results in the acquisition of corporate control; or (ii) does not result in the acquisition of corporate control, but satisfies the de minimis rule. Under the de minimis rule, the acquisition of a minority interest is mandatory if:

6.1 The acquirer becomes largest investor;

6.2 The target company is neither a competitor nor operating in a vertically related market, provided that:

¹⁹⁰ Directorate for Financial and Enterprise Affairs Competition Committee, *Hearing on Common Ownership by institutional investors and its impact on competition - Note by the United States* (OECD, 28 November 2017).

<[https://one.oecd.org/document/DAF/COMP/WD\(2017\)86/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2017)86/en/pdf)>

¹⁹¹ In force as of May 2012. An English version of law no 12.529/11.

<<https://www.oabsp.org.br/comissoes2010/gestoes2/2016-2018/regulacao-economica/legislacao/LAW%20No%2012529%202011%20-English%20version%20from%2018%2005%202012.pdf/download>>

¹⁹² Resolution No 33 of 2022 which consolidated Resolutions Nos 02/2012, 09/2014 and 16/2016 into a single text.

- 6.2.1 as a result of the transaction, the acquirer directly or indirectly holds 20% or more of the target's total capital or common stock; or
 - 6.2.2 the acquisition is made by a person that holds 20% or more of the target's total capital or common stock, and as long as the interest being acquired, directly or indirectly, of at least one seller alone, is equal to or greater than 20% of the target's total capital or common stock; or
- 6.3 The target company is either a competitor or it is operating in a vertically related market, provided that:
- 6.3.1 the acquisition grants the acquirer, directly or indirectly, an interest equal to or greater than 5% of the target's total capital or common stock; or
 - 6.3.2 the transaction results in the acquiring holding 5% or more of the target's total capital or common stock , where the acquirer already holds 5% or more of the target's total capital or common stock.

For the purpose of the *de minimis* rule, one must take into account not only the acquirer activities, but also the activities of other companies belonging to the same economic group, as defined by CADE. CADE has broadly interpreted the concept of a corporate for the purposes of calculating turnover and attributing interests to the merger parties. In Case No. 08700.000395/2019-83 (*Gavea/Chilli Beans*), CADE held that concept of economic group includes not only companies in which the parties and their group own a controlling shareholding or a relevant minority interest (equal to or above 20% of the total or voting stock), but also all entities that are *de facto* controlled by the group even if no shares are held in these entities. In this case, CADE indicated that the business format franchising model of Chili Beans granted the franchisor decisive influence (control) over how the franchisee managed and conducted its business, which could have led the market to believe that all franchisees operated as a single economic entity. CADE further determined that Chilli Beans franchisees could not influence the way in which their products were sold and that franchisees had to abide by the commercial guidelines established by the franchisor. According to CADE, this type of arrangement would give the franchisor contractual control over all franchisees, even if they had full autonomy on other matters, such as investment decisions and costs and expenses. The above position appears wider than the calculation of turnover and identification of relevant interests attributable to an undertaking concerned under the terms of Article 5(4) of the 2004 EMCR which requires ownership of more than half the capital or business assets, the power to exercise more than half the voting rights, the power to appoint more than half the members of the supervisory board, the

administrative board or bodies legally representing the undertakings, or the right to manage the undertakings' affairs

In essence, if there is horizontal or vertical overlap between the activities of the acquirer and the target, an acquisition of an interest of 5% or more will trigger a notification (assuming of course that the turnover thresholds are met). It should be noted that the 5% threshold applies to all capital stock and not just voting stock. Furthermore, the present author understands that the above threshold applies irrespective of whether or not the 5% interest is active or passive, and in this context, this author wrote to CADE, asking them to confirm the absence of a passive/active distinction for this purpose and they confirmed same by email dated 17 January 2018. The above is consistent with the Secretariat of the OECD Competition Committee's understanding of the position under Brazilian merger control where it stated that "[t]hus, Brazil appears to be one of the few jurisdictions where purely passive interests over a very low de-minimis threshold are covered by the definition of a merger transaction."¹⁹³ Furthermore, if there is no horizontal or vertical overlap, law no 12,529/2011 and implementing CADE resolutions provide a threshold of 20% (as opposed to 5%) applies.

The following are examples of reported cases in Brazil involving the review of cross minority interests. Each of the cases discussed below resulted in the imposition of remedies. In Case no. 535500.021373/2010 *Telefónica/Brasilcel*,¹⁹⁴ Telefónica notified its acquisition of a 50% of interest in Brasilcel held by Portugal Telecom and PT Móveis. At the time, the target, Brasilcel, was a majority shareholder of Vivo and Telefónica, and had a minority stake in Tim. The transaction was found to raise competitive concerns as Telefónica would control Vivo and have a minority stake in Tim, Vivo's competitor. CADE's Administrative Tribunal decided to approve the transaction subject to conditions and CADE's final decision was to impose on Telefónica the obligation not to maintain any direct or indirect financial position in Tim.¹⁹⁵

¹⁹³ OECD Policy Roundtables, *Definition of Transaction for the Purpose of Merger Control Review* (OECD, 2013), 151.
<<https://www.oecd.org/daf/competition/Merger-control-review-2013.pdf>>

¹⁹⁴ Case no 535500.021373/2010 *Telefónica/Brasilcel*.

¹⁹⁵ The summary of the decision provided in the Brazilian government's submission to the Directorate for Financial and Enterprise Affairs Competition Committee of the OECD states that "[I]n addition, alternatively, the transaction could be approved by a new member at Vivo's board of directors that had experience in the sector and was not a part of another telephone company in Brazil. That way, Vivo's control would be shared and the possibility of coordination could be avoided through the independent controller."

Case no. 08012.009198/2011-21 CSN/Usiminas¹⁹⁶ involved companies that competed in the market for the production of flat steel, namely, CSN and Usiminas. CSN announced the acquisition of 4.99% of common shares and 4.99% of preferred shares of Usiminas and, later, CSN released 4 notices to the market reporting additional acquisitions in Usiminas totalling 14.13% of participation in common shares and 20.69% in preferred shares. The former Secretariat of Economic Law (SDE-MJ) became aware of CSN's purchase of shares, as well as its intention to form part of the controlling block of the investee, requesting that the companies submit the transactions for CADE's competition review. The outcome of the case was that CADE entered into an agreement with the parties, in which it imposed, among other measures, restrictions on CSN's "political" rights in Usiminas regarding CSN's ability to vote in the election of the Board of Directors and the Fiscal Council of Usiminas. In 2016, however, CADE's tribunal, by a majority, agreed temporarily to relax the restrictions, allowing CSN to nominate members to Usiminas' Fiscal and Administration councils on the basis of "the financial and corporate situation of Usiminas" being "extremely delicate". In 2017, there was a fresh request to derogate from the restrictions but the tribunal decided unanimously to reject the request.

There are no specific merger control rules applicable to common ownership. The Brazilian government noted in its submissions to the Directorate for Financial and Enterprise Affairs Competition Committee of the OECD entitled "Common ownership by institutional investors and its impact on competition - Note by Brazil"¹⁹⁷ that:

"...it is possible to conclude that an institutional investor, even if it is a minority shareholder with passive participations, can affect the competitive dynamics of the market. That is because there are nuances regarding the exercise of power on companies, not related necessarily to the concept of control, such as significant influence, relevant influence, financial interests and interpersonal contacts, that can result in commercial strategies with potential anticompetitive effect."

The Brazilian government concluded regarding common ownership that "...although there is still a long path ahead, there is an important indication that the discussion is necessary

¹⁹⁶ Case no 08012.009198/2011-21 CSN/Usiminas.

¹⁹⁷ Directorate for Financial and Enterprise Affairs Competition Committee, *Common ownership by institutional investors and its impact on competition - Note by Brazil* (OECD, 22 November 2017). This report also contains a discussion on the calculation of turnover of institutional investors and what portfolio interests are taken into account for turnover and substantive merger review purposes.

<[https://one.oecd.org/document/DAF/COMP/WD\(2017\)79/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2017)79/en/pdf)>

and that it is possible that the anti-competitive effects of the minority interests of these agents are not sufficiently addressed.”

It is clear that the jurisdictional scope of the Brazilian merger control regime is not limited by the narrow concept of control/decisive influence which defines the limits of the Irish and EU merger review systems. Furthermore, it is not limited to interests that entail a measure of influence such as Article 101 of the EU Treaty as interpreted by the Court of Justice of the European Union (“**CJEU**”) in *Philip Morris*¹⁹⁸ or the systems of UK or German merger control discussed above. Similarly, the Brazilian system of merger control does not seem to contain a solely for investment purposes style exception as found in Section 7(3) of the US Clayton Antitrust Act which has proved to be a gateway for permitting certain passive cross minority interests in the US. However, the Brazilian merger control regime is very much geared towards capturing cross minority interests and not common ownership. As we shall see in Chapter 6 (the final Chapter), the broad Brazilian jurisdictional scope informs certain aspects of the author’s suggested jurisdiction model.

7 CONCLUSIONS ON THE REVIEW OF THE ABOVE MERGER CONTROL SYSTEMS

It is readily apparent that the merger control regimes in jurisdictions such as the UK, Germany, the US and Brazil entail the application of jurisdictional thresholds that are significantly broader than those applicable under Irish and EU merger control. None of the UK, German, US or Brazilian merger control systems require the acquisition of sole or joint control as a pre-requisite to the application of their merger notification regimes and therefore, to that extent, are not hampered by the jurisdictional limitations inherent in the narrow concept of control well entrenched in Irish and EU merger control. It appears that, in the US, all acquisitions of shares and assets are potentially caught (subject to meeting financial thresholds and certain other exceptions such as the solely for investment exception), whereas the UK and Germany has adopted the test of material influence and competitively significant influence tests respectively. As noted in section 2 above, the UK does not have a system of mandatory notification of mergers. Instead, the UK applies a system where mergers are open to scrutiny if they meet certain jurisdictional thresholds which include the acquisition of material influence. Brazil imposes mandatory notification for the acquisition of cross shareholdings, involving horizontal or vertical overlap, of interests amounting to 5% or more of total capital. Each of the above jurisdictional tests appears to be broader than the concept of control utilised by Irish and EU merger control

¹⁹⁸ Please see Chapter 3.

law. Despite the thresholds in the above jurisdictions not being as inherently limited and therefore exclusionary as those applied under Irish and EU merger control, it is clear from a review of the jurisdictional criteria (and the solely for investment exception in the case of the US), that each of them (other than Brazil) appears to require a certain level of influence before the merger notification regime is applicable. In other words, the above regimes effectively exclude transactions involving the acquisition of passive minority interests (in the US the percentage needs to be below the thresholds of 10% or 15% of the total voting securities of the target). As we saw in Chapter 1, when reviewing the relevant economic theories of harm applicable to cross and common minority shareholdings, the Commission in the SWD White Paper, and in the recent merger control cases of *Dow/DuPont* and *Bayer/Monsanto*, recognises the considerable body of economic theory regarding the potential harm involved in the acquisition of passive minority cross and common shareholdings in certain circumstances. The apparently more jurisdictionally generous regimes applicable in the UK, Germany and the US still suffer from an active influence requirement, not dissimilar to that applied under the general competition rules set out in Sections 4 and 5 of the 2002 Act in Ireland and Article 101 and 102 of the TFEU (as interpreted by the CJEU in *Philip Morris* and discussed extensively in Chapter 3). In other words, each of the UK, Germany and the US systems of merger control, being three of the most developed systems of merger control in the world, suffer from a significant jurisdictional gap, the UK entailing the further significant shortcoming of not having a system of mandatory *ex-ante* notification. Furthermore, none of the above national merger control regimes including Brazil specifically address common shareholdings. Therefore, although the above systems have jurisdictional features that are apparently more attractive in terms of regulating the acquisition of potentially harmful minority interests than under the 2002 Act or the 2004 EMCR, it is clear that none of them represent the ideal model to be followed for the comprehensive reform of jurisdictional criteria applicable to minority interests under Irish or EU merger control law. In Chapter 6, the present author examines the proposals put forward by the Commission following its 2013 consultation for the extension of the 2004 EMCR to capture minority non-controlling cross shareholdings followed by a critique of same and puts forward suggestions for a model framework of jurisdictional criteria to allow for the control of cross and common minority interests.

COMPETITION LAW AND THE REGULATION OF NON CONTROLLING MINORITY INTERESTS: THE REGULATORY GAP

CHAPTER 6

PROPOSALS FOR REFORM

1 INTRODUCTION

In previous chapters of this thesis, the theories of harm surrounding cross and common minority shareholdings and how the jurisdictional criteria for compulsory notification of transactions under Irish and EU merger control laws do not capture the acquisition of non-controlling minority interests, were both examined. This examination was followed by a review of the approach taken in certain jurisdictions that have merger control regimes which extend to the acquisition of non-controlling minority interests. In this Chapter, the proposals put forward by the Commission following its 2013 consultation on whether or not Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings¹ ("**2004 EMCR**") should be extended to capture non-controlling minority interests are examined. It is important to note that the above consultation and subsequent 2014 White Paper towards more effective EU merger control² ("**White Paper**") are focused on the competition law implications of cross-ownership, as opposed to common ownership, although the Commission briefly touches upon addressing coordination concerns arising from multiple minority interests in describing its preferred option³ without actually using the term common ownership which only emerged years later. As identified in Chapter 1, a debate has emerged in recent years as to the competition law implications of common ownership, which more latterly has, to a large extent, eclipsed the debate surrounding cross ownership.

It appears that the Commission has shelved its proposals to extend the 2004 EMCR to cross shareholdings. As mentioned in the introduction to the thesis, Commissioner Verstager underlined that extending the 2004 EMCR to capture non-controlling interests

¹ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L24/1.

² White Paper towards more effective EU merger control.

<http://ec.europa.eu/competition/consultations/2014_merger_control/mergers_white_paper_en.pdf>

The White Paper was accompanied by a Commission staff working document ("**SWD 2014 Consultation**") which provided a more detailed analysis of the considerations underlying the White Paper and its policy proposals.

<http://ec.europa.eu/competition/consultations/2014_merger_control/staff_working_document_en.pdf>

³ Please see section 2.5 below.

would not be in line with proportionality and would create “a lot of complexity”.⁴ The above marked a change of policy under the reign of Commissioner Vestager on this issue from that of her predecessor, former Commissioner Joaquín Almunia. The above change of policy occurred notwithstanding the extensive proportionality analysis in the White Paper and given that proportionality has not prevented the Commission from framing the long-standing jurisdictional thresholds in terms of turnover, such that many transactions are caught which pose absolutely no, or hardly any, competition concerns, but are considered acceptable in the pursuit of the policy objective of clarity and ease of application of the merger thresholds. Commissioner Vestager’s change of policy has been made notwithstanding the Commission’s views on cross ownership and the potential for harm which were articulated in some detail in the 2013 consultation and ensuing 2014 White Paper and despite the clear and unequivocal endorsement by the Commission in the *Dow/DuPont* decision of the theories of harm regarding cross and common ownership at a time when Margaret Vestager was serving her third year as Commissioner in charge of competition policy. It is difficult to understand why proposals for the regulation of minority interests have not been advanced particularly given that in relation to cross shareholdings, as discussed in this Chapter, the Commission has satisfied itself as to the applicable economic theories of harm and actually evaluated and chosen the preferred framework machinery to address the regulatory gap.

The review and critique of the Commission’s proposals in this final Chapter is followed by a set of proposals devised by the author for establishing the jurisdictional elements of a revised system of merger control to capture minority interests which is designed to address the regulatory gap arising from the shortcomings of the current system for regulating the acquisition of minority interests under Irish and EU competition law. The proposals developed by the author seek to strike a balance between the following considerations:

- addressing the flaws in the current Irish and EU competition law regimes as they apply to minority interests;
- learning from the experiences of the competition law regimes in selected jurisdictions, other than the EU, and avoiding the pitfalls that have challenged the regulators in those jurisdictions;

⁴Refining the EU Merger Control System, Studienvereinigung Kartellrecht Brussels, 10 March 2016.

<https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/refining-eu-merger-control-system_en>

- introducing clear and wide jurisdictional criteria to ensure that a broad range of minority interest transactions are brought within its scope thereby capturing minority interest transactions that are potentially harmful from a competition perspective and applying economic theories of harm as they evolve based on emerging trends in the market; and
- ensuring that the proposed regime does not impose a disproportionate burden on business.

2 THE WHITE PAPER

The Commission in Commission Staff Working Document Towards more effective EU merger control⁵ ("**SWD 2013 Consultation**"), invited stakeholders to provide their views on the following three options to extend EU merger control to capture minority shareholdings:

- Notification System: This would extend the current system of prior notification of mergers to non-controlling minority shareholdings;
- Self-Assessment System: Under this proposal, there would be no obligation to notify non-controlling minority shareholdings, but the Commission would have the power selectively to open an investigation on its own motion or following a complaint; and
- Transparency System: This option would result in an obligation for parties to file a short information notice that would be published on the Commission's website and would serve to inform the Commission, Member States and potential complainants about the transaction and provide the Commission with the power selectively to open an investigation.

In response, most private stakeholders (companies, industry associations, law firms and law associations) stated that, if the Commission were to introduce a system for the control of minority shareholdings, they would favour a self-assessment system with the possibility of making a voluntary notification without, in the interests of legal certainty, having to wait for the grant of approval which applies under the current system of Irish and EU merger control (known as a standstill obligation⁶). This system was also preferred by the United Kingdom (which has a similar system for merger control in place under its national law). A few respondents favoured the transparency system, again with the possibility of voluntary

⁵ Commission Staff Working Document Towards more effective EU merger control.

<http://ec.europa.eu/competition/consultations/2013_merger_control/merger_control_en.pdf>

⁶ Please see Chapter 2, para 9.3.8

notifications and no stand-still obligation. The notification system was considered by the vast majority of private stakeholders (including businesses, business associations and law firms.) to be disproportionately burdensome and, for that reason, it was disregarded following the public consultation and was not dealt with further in the process.

Following the public consultation in 2013 inviting the expression of views on the reform of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings ("**2004 EMCR**")⁷ including the treatment of minority interests, the Commission in 2014 adopted its White Paper and the Staff Working Document Impact Assessment *Accompanying the document* White Paper Towards more effective EU merger control⁸ ("**Impact Assessment**") in which the Commission considered various procedural options, before concluding that its preferred option was the targeted transparency system involving the submission of a basic information notice. Under such a system, a full notification would only be required for transactions which the Commission intended to investigate further.

2.1 Preferred Option: Targeted Transparency System

The Commission in the Impact Assessment chose the targeted transparency system on the basis that it fully met the criteria which were emphasized by stakeholders in the public consultation and in contacts with stakeholders. The Commission identified the following advantages of this option:

- Under this option it was likely that potentially harmful transactions would be caught and brought to the attention of the Commission's and Member States whilst other transactions more innocuous in nature, such as acquisitions for investment purposes, would not fall under the Commission's competence. Accordingly, this option limited the number of cases to strictly what was necessary under the overall aim of preventing harm to consumers.
- This option limited the administrative burden on businesses and enforcement costs for the public authorities involved (Commission and NCAs), first, by capturing only

⁷ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] L24/1.

⁸ Staff Working Document Impact Assessment Accompanying the document White Paper Towards more effective EU merger control.

<http://ec.europa.eu/competition/consultations/2014_merger_control/impact_assessment_en.pdf>

the potentially problematic cases, and second, by limiting the amount of information to be submitted to the Commission at the initial stage.⁹

- This option fitted with the existing systems for the control of minority shareholdings on a national level. The transparency notice would inform the Member States of the transactions and allow them to request a referral. The three weeks waiting period would also ensure that the Member States with a notification system and stand-still obligations were not faced with already implemented transactions before they start their investigations.

2.2 Thresholds for Targeted Transparency System

The Commission in the *Commission Staff Working Document Accompanying the document White Paper towards more effective EU merger control* ("**SWD White Paper**")¹⁰ sets out the proposed jurisdictional thresholds for requiring the submission of an information notice on the following terms, the Commission describing the basis for them as capturing transactions which would presumptively create a "competitively significant link"¹¹: First, the minority shareholding must be acquired in a competitor or in a directly vertically-related company. For the purpose of establishing the Commission's competence, the concept of "competitor" would not require a detailed antitrust analysis of the relevant markets. The Commission explains that rather, it would take into account whether the companies are active in the same sector and the same geographic area and, based on the self-assessment of the parties, whether the acquirer has a competitive relationship to the target. The Commission in a footnote¹² clarifies that this approach would also capture an acquisition of a minority shareholding by one company which itself does not compete with the target, but which already holds a minority stake (or more) in one or more other firm(s) competing with the target. The Commission in the above footnote is expressly acknowledging that in determining whether the acquirer has an existing presence on the same market as the target or a market upstream or downstream of the target, it will consider the existence of a prior equity interest as a presence for this purpose. The Commission does not prescribe the requisite specific characteristics of the pre-existing equity interest, and it begs the question

⁹ Only if the Commission decides to investigate a case, the parties would have to submit a full notification. Such a system would therefore resolve the concerns of many stakeholders, in particular, businesses, business associations and law firms, that a system should not be disproportionately burdensome on parties.

¹⁰ Commission Staff Working Document accompanying the document White Paper towards more effective EU merger control. <http://ec.europa.eu/competition/consultations/2014_merger_control/staff_working_document_en.pdf>

¹¹ This is the expression used in the jurisdictional test for controlling cross minority shareholding in German merger control law (please see Chapter 5).

¹² Footnote 67 of the SWD White Paper.

of whether the Commission intended to require the existing interest to satisfy the same 5% or 20% criteria it was proposing as jurisdictional limits for the preferred targeted transparency system. The author is of the view that it is imperative to specify with absolute clarity the circumstances in which an existing interest would constitute sufficient presence for this purpose. Clearly, presence through an existing equity interest could, depending on the applicable criteria, capture common shareholdings, as an institutional investor with one or more equity interests intending to acquire an equity interest in the same market (or upstream or downstream of its existing interest(s)) could be caught. The Commission explains that the main possible theory of harm applicable in a case where the presence of the acquirer is defined by reference to an existing equity interest would be one of coordination, where, for instance, the holding company sits on the board of several competitors and has access to confidential information which it can share with the other competitors. The Commission states that although the likelihood that such a case would result in competition concerns may be less than in the case of a direct link between acquirer and target, such transactions would still fall under the Commission's competence. The Commission warns that one would also need to consider the turnover calculation and the definition of undertakings concerned for such cases.

Second, the link would be considered significant if: (1) the acquired minority shareholding is above certain thresholds (e.g. around 20% of the total share capital); or (2) the minority shareholding is above 5%, but below the 20% threshold, provided that additional rights are present. The Commission clarified that the following considerations applied to the threshold levels:

- National corporate law often foresees that shareholding conferring certain levels of voting rights enable the shareholders to block special resolutions. The Commission stated that this right allows the shareholder to influence the target company's strategy. The percentage level of voting rights that enables the shareholder to block special resolutions differs between Member States and depends on the corporate form, but is frequently set at 25%.¹³ The Commission explained that a shareholding

¹³ Section 191(2) and (3) of the Companies Act 2014 ("**2014 Act**") provides that a condition for the passing of a special resolution is that it is passed by not less than 75% of the votes cast by the members concerned in person or by proxy at a general meeting. The following is a list of the main decisions that require a special resolution under the 2014 Act: Change of company name (section 30), adoption or amendment to Constitution (section 3032/59), reduction in share capital (section 84 - alternatively by Summary Approval Procedure), re-registration of company type (section 1285), resolve that share capital not already called up shall be capable of being called up in winding up (section 79), conversion of shares to redeemable shares (section 83), variation of rights attaching to shares (section 88), variation of rights attaching to shares on reorganisation (alternatively by Summary Approval Procedure) (section 91), acquisition by a company of its own shares (section 105), release

at around this level very often results in blocking and other corporate rights, so a 25% shareholding should be the upper limit for a threshold. The Commission highlighted that the above threshold could also be reached on the basis of a *de facto* blocking minority due to low attendance rates at the annual shareholder meetings (please see below).

- The Commission highlighted that higher shareholdings shift financial incentives to a greater extent, so the rights attached to such shareholdings may be less important in assessing whether a minority shareholding is potentially anti-competitive. The Commission clarifies that in fact, according to economic theory, financial incentives that may affect the incentives for firms to compete can be considered significant at a threshold significantly lower than 25% and for this purpose the Commission in a footnote simply refers to the “responses to the Consultation Paper from economic consultancies and academics.” The Commission does not identify which responses from economic consultancies and academics it was referring to.¹⁴ The Commission proceeds to conclude that “[o]n this basis, the Commission should consider approximately 20% as an appropriate starting point for analysing financial incentives.” The Commission, in a footnote to the above sentence where it suggests 20% as an appropriate starting point, confusingly adds the following:

“Alternatively, a 15% threshold could be envisaged. For instance, the United Kingdom has set a threshold of 15% above which it may examine any case (see OFT, “Mergers - Jurisdiction and procedural guidance”, para. 3.20). This might also serve as a clear-cut threshold above which a shareholding would be considered a “competitively significant link”.

The Commission proceeds to continue its analysis of passive minority interests on the basis of the 20% threshold, apparently ignoring the point that minority interests below that level might involve harm.

- If the minority shareholding is above 5% but below 20%, additional elements would have to be present in order for a minority shareholding to qualify as a competitively

of rights of a company under a contract to purchase its own shares (section 105), determine the re-allotment price of Treasury Shares (section 109), assignment of office of a director (section 153), decision on general management of a company (section 158), Summary Approval Procedure (section 202/Chapter 7), approval of common draft terms of certain types of merger (section 473) and winding Up (Strike Off – section 731/ Liquidation - section 579).

¹⁴ At Section 3 below the submissions made by the economic consultancies and academics in the context of the 2013 Consultation are examined.

significant link. For example, a shareholding could qualify if it results in a "de-facto" blocking minority due to the low attendance level at shareholder meetings or because the shareholder agreement grants additional rights. The Commission states that other elements would typically include (i) a seat on the board (or the agreement or likelihood to be elected to the board) and (ii) information rights giving access to commercially sensitive information. The Commission clarifies that when establishing the "additional elements", typically rights stemming from the shareholding itself, corporate law, or a shareholders agreement, are important for determining whether the shareholding creates competitively significant links.

- The Commission examines a minimum threshold highlighting that "experience shows that competitive harm is very unlikely for shareholdings of 5% or less." It is noteworthy that the Commission does not present any evidence of such experience. The Commission continues that "[o]n the other hand, shareholdings above 5% that are linked to special rights such as board seats make competitive harm possible because the shareholding goes beyond mere financial participation for investment purposes." The Commission notes that U.S. anti-trust law exempts acquisitions of voting securities of 10% or less from the filing obligation if the acquisition is made "*solely for the purpose of investment*" and that the exemption does not apply if the acquirer is a competitor or can nominate a candidate for the board of directors, for example.¹⁵ The Commission confirms that the above suggests a safe harbour of 5% seems appropriate, especially as further conditions would exist up to the 20% threshold (e.g. additional rights, acquisition of a stake in a competitor or vertically related company).
- The Commission points out that other agreements, such as cooperation agreements, R&D agreements, joint production agreements, joint purchasing agreements, long-term exclusive supply agreements, off-take agreements, sometimes coincide with the acquisition of a minority shareholding. Where a minority shareholding is only acquired in support of broader cooperation, the Commission suggests excluding these agreements from the assessment as to whether a transaction creates a competitively significant link and falls within the Commission's jurisdiction. The Commission suggests that, in line with current practice for concentrations, these agreements could be assessed in the competitive assessment of the overall transaction. The Commission asserts that distinguishing between the rights linked to the shareholding itself and commercial agreements

¹⁵ Please see Chapter 5 for a discussion of the treatment of minority interests under US law.

should increase legal certainty in determining whether or not a minority shareholding results in a competitively significant link.

The Commission commissioned Spark Legal Network and Queen Mary University of London to carry out a study entitled *Support study for impact assessment concerning the review of the Merger Regulation regarding minority shareholdings*¹⁶ (“**Impact Assessment Study**”) which was published in February 2017. The purpose of the Impact Assessment Study was described in the study as providing DG Competition with additional information on the topic of acquisitions of non-controlling minority shareholdings from the point of view of both competition and corporate law and practice in different jurisdictions. In particular, the study is described as providing “factual information in order to form a well-informed and comprehensive view on the current practice in jurisdictions where acquisitions of non-controlling minority shareholdings are subject to merger review, as well as on the different levels of rights usually attached to non-controlling minority shareholdings in several countries.” The Impact Assessment Study itself reveals that its authors approached their research mandate on the premise of ascertaining and recommending thresholds designed to identify the percentage level of minority interests where the shareholding could be described as passive or active and, on that basis, minority interests which are passive would fall outside the targeted transparency system. The above is revealed in the Executive Summary which highlights that, should the European Commission decide to put forward a legislative proposal for the introduction of a system for the review of non-controlling minority acquisitions at EU level, such a regime should address, in particular, a number of issues including the following:

“ A threshold triggering the review of the acquisition of the minority shareholding (in the form of a legal threshold or presumption) should be set for the purposes of legal certainty. A threshold established at a level of 25% appears appropriate given that according to our findings in the comparative analysis of the rights attached to minority shareholdings (see below for further details) such a level is generally not considered to be passive;

¹⁶ European Commission, *Support study for impact assessment concerning the review of the Merger Regulation regarding minority shareholdings* (Spark Legal Network and Queen Mary University of London, 2016).

<http://ec.europa.eu/competition/publications/reports/KD0416839ENN.pdf>

At the same time a “safe harbour” could be provided, below which a minority shareholding would generally not be subject to review. Such a “safe harbour” could potentially be set at 15%, as suggested during some stakeholder interviews, or perhaps at 10%, given that according to our findings such a shareholding is generally considered to be passive. However, in determining any “safe harbour”, the difficulties associated with identifying a clear threshold for demarcating active or passive minority shareholdings should be taken into account;”

From the above, it can be seen that the proposal preferred by the Commission in the form of the targeted transparency system appears to make a marked jurisdictional distinction between active and passive minority interests, and that this approach informed the approach of Spark Legal Network and Queen Mary University of London in the Impact Assessment Study.

Apart from the jurisdictional scope of the proposed targeted transparency system in terms of identifying relevant transactions for review, the Commission in the Impact Assessment highlighted the following features of the proposed transparency regime:

- 2.2.1 The submission of an information notice which would contain information relating to the parties, a description of the transaction, the level of shareholding before and after the transaction as well as some market information.¹⁷
- 2.2.2 In order to maintain the functioning of the referral system, the Commission stated that it might consider introducing a waiting period of, for example, 15 working days, within which the competent Member States would also be able to request a referral and within which the Commission could decide to initiate an investigation, and hence request a full notification from the parties.¹⁸

¹⁷ The information would be sufficient to allow the Commission to decide whether to further investigate the transaction and to allow the Member States to consider if they wanted to request a referral. In order for the parties to have legal certainty, and as requested by almost all stakeholders, such a targeted transparency system would be combined with a possibility for the parties, if they so wished, voluntarily to submit a full notification from the outset.

¹⁸ Where the Commission decides not to investigate, the parties would be free to implement the transaction. The Commission stated that while the waiting period does lead to some cost to businesses as they cannot implement the transaction immediately, it might also directly benefit consumers and save costs for companies where the acquisition does raise competition concerns. The Commission highlights that experience from the UK and Germany has shown that prolonged

- 2.2.3 The Impact Assessment states that in order for the Commission not to take an overly cautious approach to initiating an investigation within the 15 working days following the information notice, it could also take up the case in a limited period of time after the waiting period (e.g. within four to six months, similar to the period in which the UK competition authorities have to act in the UK system).¹⁹
- 2.2.4 Should the Commission request a notification or the parties notify voluntarily, the suspension obligation would apply to ensure that any future prohibition or remedy decision is not prejudiced.²⁰

The Commission in the Impact Assessment examined the following in the context of the preferred option: (a) subsidiarity and the European added value; and (b) proportionality:

(a) **Targeted Transparency System/Subsidiarity/European Added Value**

Regarding the possible extension of the Merger Regulation to minority shareholdings, it was considered by the Commission that action at EU level along the lines of the preferred option would respect the principle of subsidiarity since there is a clear need for and added value in such action compared to action on Member State level. The examples of cases examined by Member States which apply merger control to minority shareholdings showed that a number of these cases (such as *Ryanair/Aer Lingus*²¹ or *General Motors/PSA*²² cases

litigation may lead to a delay in the divestment of a minority shareholding, and hence any anti-competitive harm arising from it may persist over a long period of time such as the *Ryanair/Aer Lingus* transaction, where the initial stake was acquired by the end of 2006 and was still held by Ryanair at the time of the Impact Assessment in 2014. German law initially did allow the immediate acquisition of a minority stake and only provided for investigation of the transaction ex-post. However, the law was amended in 1998 due to the damaging effect of anti-competitive minority stakes which continued to be held during litigation. The Commission states that under German law acquisitions of minority shareholdings are now subject to the same system (i.e. ex-ante control with stand-still obligation) as concentrations.

¹⁹ In these circumstances, the transaction may already be either fully or partially implemented before the Commission decides on an investigation. In this case, interim measures could be used to ensure that there is no exercise of special rights, and that the acquirer would not be able to vote its shares, until the Commission has approved the transaction.

²⁰ 2004 EMCR, art 7(1).

²¹ 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* (Competition Commission, 2 August 2013).

<https://assets.digital.cabinet-office.gov.uk/media/5329ddc8ed915d0e60000189/130828_ryanair_final_report.pdf>

²² *General Motors Holdings LLC/Peugeot S.A.* Bundeskartellamt B9 32/12GM/PSA.

<https://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Entscheidungen/Fusionskontrolle/2012/B9-32-12.pdf?__blob=publicationFile&v=2>

The press release in English.

which were dealt with under UK and German merger control laws respectively) clearly have a dimension going beyond one Member State and therefore the Commission would have been the more appropriate authority to investigate the impacts of these transactions on competition, as the competence of the competition authorities of the individual Member States is limited to assessing the effects of the transaction in their respective territories. On the other hand, the Commission would be able to assess the effects of a transaction in the territories of all the Member States. For example, in *Ryanair/Aer Lingus*, the UK authorities were limited to reviewing the transactions only as regards the routes out of the UK where both Ryanair and Aer Lingus were competing, while the transaction would have affected many more routes between Ireland and destinations in other Member States. The UK authorities were not able to look at these routes. Similarly, as regards *General Motors/PSA*, any effects of this transaction between a US and French company which are both active globally, would not have been limited to Germany, but might have had effects also on other Member States, and the Commission, rather than the German Bundeskartellamt, would have been the more appropriate authority to look at this case.

The Commission noted that having examined the “competitively significant influence” cases of the Bundeskartellamt, roughly 40-45% of these cases would have an EU dimension, i.e. would have met the turnover thresholds of the Merger Regulation. The Commission concluded that therefore, it appears that, in general, the Commission would be better placed to investigate a sizeable proportion of minority shareholding cases currently analysed in Germany.

The Commission underlined that in 1989, when merger control was first introduced at EU level, only a few Member States had merger control regimes in place. At the time of the Impact Assessment, 27 out of 28 Member States applied merger control. Therefore, the fact that at the time of the Impact Assessment only 3 out of 28 Member States had the competence to review the acquisition of non-controlling minority shareholdings, did not obviate the need to tackle the enforcement gap. In addition, the large majority of Member States that introduced merger control legislation, in the wake of the adoption of the first EU Merger Regulation in 1989, largely designed their rules following the EU model. Therefore, in most cases, the choice not to extend merger control to non-controlling minority shareholdings was not based on an in-depth analysis of the potential anti-competitive harm that might be caused by such transactions.

<https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2012/26_10_2012_PSA_GM.html?nn=3591568>

(b) Targeted Transparency System/Proportionality

The Commission explained that the preferred option was “fully in line” with the principle of proportionality, both as regards its general approach and the content of the individual measures envisaged. As demonstrated through the evaluation in line with the assessment criterion “preventing harm from competition and consumers”, the preferred option of a targeted transparency system is suitable to achieve the objective of ensuring that those acquisitions of minority shareholdings that could possibly cause anticompetitive harm can be examined by the Commission (or by an NCA requesting a referral). By contrast, a self-assessment system would not be sufficient to guarantee that such cases are brought to the attention of the Commission and/or NCAs. On the other hand, as shown through the evaluation based upon the assessment criterion “administrative burden on businesses”, the targeted notification system did not impose any burden on businesses that goes beyond what is necessary to achieve the objective. Firstly, it did not extend to all transactions involving the acquisition of non-controlling minority shareholdings but only to those between competitors or vertically related companies, thereby excluding, from the outset, a large majority of unproblematic transactions from any scrutiny. Secondly, it did not impose a fully-fledged obligation for ex-ante notification (such as for full mergers) on all transactions covered but, as a first step, only an obligation to file a much shorter information notice (and possibly to observe a limited waiting period); only in cases the Commission decides to investigate the case (or it is referred to an NCA) the normal procedure under the Merger Regulation (or the relevant national legislation) applies. By contrast, a targeted notification system would partly go beyond what is strictly needed to attain the objective, since it would subject all relevant transactions between competitors or vertically related companies to a full *ex-ante* notification obligation.

3 CRITIQUE OF THE COMMISSION’S PREFERRED OPTION

It is clear from the Commission’s Impact Assessment and SWD White Paper that the preferred option entailing the submission of an information notice would apply only in the following circumstances:

- The shareholding is acquired in a competitor or a vertically related company (such as a supplier or customer); and
- The shareholding is (i) 5% or more and combined with certain rights including, but not limited to, board representation, the right to block special resolutions and

information rights giving access to strategic information, or (ii) above a certain higher level of, for example, 20%.

It is submitted that there are potentially significant flaws with framing the criteria for lodging a compulsory information notice on the terms suggested in the Impact Assessment and SWD White Paper. As we saw in Chapter 1, passive equity stakes can give rise to competition issues both in terms of unilateral and co-ordinated effects. The formulation of the criteria for the submission of a compulsory information notice to the Commission on the above terms underlines that the Commission is making a very definite and marked distinction between what could be broadly described as active and passive minority interests. The active and passive distinction is broadly plausible from a substantive policy perspective given that active equity stakes are generally acknowledged as being potentially more harmful than passive stakes.²³ However, it is important that the jurisdictional thresholds are not couched in terms that purport to filter cases by making excessive use of substantive analysis, as by doing so, there is a significant risk that potentially harmful transactions escape regulatory scrutiny. In other words, it is important not to confuse the jurisdictional thresholds with the substantive test or to allow the jurisdictional tests to stray into the substantive analysis. The Commission, to date, in relation to merger control, has otherwise generally been careful not to confuse the jurisdictional tests with the substantive examination. The thresholds for compulsory notification set out in the 2002 Act and 2004 EMCR are based on a definition of merger and acquisition and concentration respectively and the turnover of the undertakings involved or concerned which are very much divorced from any substantive issues which may be raised by the transaction at issue. The Commission has approached the question of jurisdictional thresholds in terms of control and turnover since the introduction of EU merger control in September 1989 including the 2002 Act in Ireland. The sole purpose of defining the jurisdictional thresholds by reference to the turnover of the undertakings concerned was to catch mergers with an EU dimension, and leave it to Member States to regulate transactions which fell below the thresholds. Indeed, the national merger control systems of most national jurisdictions in the EU, including those introduced after the coming into force of first EU merger control system in 1989, are based on control and turnover thresholds that are unrelated to any substantive issues which may be involved in the transactions concerned. The author firmly believes that if a policy decision is made to extend Irish/EU merger control to minority interests, the initial jurisdictional thresholds should be relatively straightforward and clear and avoid getting into the complexities inherent in determining the level of harm which may be caused by different

²³ Please see Chapter 1.

types of minority interests. A lack of clarity in a jurisdictional test undoubtedly will give rise to much interaction between advisors and the CCPC/Commission in seeking to apply the tests to a given situation and will result in the making of cautious fail-safe notifications or submissions given the concern over the sanctions involved. Belgium is a good example of a jurisdiction where issues arose in the past from the use of a substantive test for jurisdictional merger control purposes.²⁴ In the period between 1991 and 1999, the thresholds for the compulsory notification of a merger or acquisition in Belgium were twofold, worldwide turnover and a combined market share of the parties in Belgium. The International Competition Network's Notification & Procedures Subgroup of the Merger Working Group in its report to the ICN Annual Conference in Kyoto in April 2008²⁵ reported on the market share threshold that applied in Belgium as of 1991 as follows:

"The market share test was derived from the then draft EC Merger Regulation ("ECMR") which indicated that the EC Commission would not block mergers with a market share below 20 per cent. The rationale behind the market share test was that the Authority would not require notification of a merger that the EC would not block, thus, in effect, a substantive test was used for jurisdictional purposes."

The above 1991 thresholds applicable in Belgium were revised in 1995 to include an increase of the market share test from 20% to 25%. The revised 1995 thresholds applied until 1999 when the market share test was abolished altogether. The ICN Notification & Procedures Subgroup noted as follows regarding the 1995 revised market share threshold:

"However, the non-legislative "effects" test and the legislation's market share test provided too much uncertainty to merging parties, and as a result, merger notifications did not decrease. The Authority found that parties continued to either notify unproblematic deals on a "fail safe" basis or had to engage the Authority's staff (in this case, the Competition Service) in such extensive pre-filing dialogue to establish jurisdiction (which still often resulted in fail-safe filings as the Competition Service could not bind the Competition Council on jurisdictional issues) that the resource utilisation issue did not diminish as hoped."

²⁴ Brazil, the Czech Republic, Poland and Turkey have also abandoned the market share test. OECD Council Report by the Competition Committee on Country Experiences with the 2005 Recommendation of the Council on Merger Review [C(2005)34].

<<https://www.oecd.org/daf/competition/ReportonExperienceswithMergerReviewRecommendation.pdf>>

²⁵ International Competition Network's Notification & Procedures Subgroup of the Merger Working Group in its report to the ICN Annual Conference in Kyoto in April 2008.

<<http://www.internationalcompetitionnetwork.org/uploads/library/doc326.pdf>>

Based on the tests proposed by the Commission as its preferred option for regulating the acquisition of minority interests, all equity stakes of 5% or more in a competitor (or in a business operating upstream or downstream of the acquirer) which loosely could be termed as active investments would be caught by the proposed regime, whereas the making of a passive investment in a competitor (or business operating upstream or downstream of the acquirer) would fall outside the proposed compulsory notification regime in circumstances where the percentage stake was below a much higher threshold figure of say 20%. The following is a stark but relevant example of the application of the above: let us take a duopolistic market in which a large competitor, holding a significant market share of 50% on the relevant market, acquires a 19.9% equity stake in its only rival holding the 50% balance of market share. The above acquisition would escape the compulsory information notice regime as long as the investment did not entail certain rights including board representation, the right to block special resolutions and information rights giving access to strategic information.

The Commission in the Impact Assessment and SWD White Paper to some extent examines the additional rights that need to be present for shareholdings between 5% and 20% to trigger the compulsory information notice. The Commission in this context states that a shareholding could qualify if it results in a *de facto* blocking minority due to the low attendance level at shareholder meetings or because the shareholder agreement grants additional rights. Regarding a *de facto* blocking minority arising from low attendances, the Commission cites the example of the UK case in *BskyB/ITV*²⁶ where a *de facto* blocking minority was found to exist in a minority stake of 17.9%. The Commission in the Impact Assessment states that "[o]ther elements would typically include (i) a seat on the board (or the agreement or likelihood to be elected to the board) and (ii) information rights giving access to commercially sensitive information. The Commission explains that when establishing the "additional elements", typically rights stemming from the shareholding itself, corporate law, or the shareholder agreement are important for determining whether the shareholdings create competitively significant links.

The above proposal, if implemented, would require the parties to carry out, on a self-assessment basis, an examination of all the circumstances surrounding the acquisition of

²⁶ Competition Commission, *Acquisition by British Sky Broadcasting Group Plc of 17.9 per cent of the Shares in ITV Plc, A report sent to Secretary of State (BERR)* (Competition Commission, 14 December 2007).

<<http://webarchive.nationalarchives.gov.uk/20101227023510/http://www.bis.gov.uk/files/file43218.pdf>>

Please see Chapter 5.

the minority interest and to foresee whether or not the acquirer will have the requisite level of *de facto* influence to trigger a notification. This no doubt will involve a complex and uncertain evaluation of all the facts and possible outcomes in order to decide whether jurisdictionally the acquisition of the minority stake is within scope of the regulatory regime on the basis of *de facto* influence. Indeed, existing Irish and EU merger control, which is limited to the acquisition of sole or joint control, requires the parties to carry out an assessment of whether the acquisition of a minority stake gives rise to *de jure* or *de facto* sole or joint control which can entail a complex and uncertain forward looking analysis. As examined in Chapter 2, there are various circumstances discussed in the EU Consolidated Jurisdictional Notice²⁷ where a minority stake can give rise to the acquisition of control/decisive influence for merger control purposes such as where the minority shareholder is likely to achieve a majority of the votes cast at a shareholders meeting, given the level of its shareholding and the evidence resulting from the presence of shareholders in the shareholders' meetings in previous years, whether the remaining shares are widely dispersed, whether other important shareholders have structural, economic or family links with the large minority shareholder or whether other shareholders have a strategic or purely financial interest in the target company.²⁸

The carrying out of a *de facto* control analysis on a self-assessment basis in the context of the existing Irish and EU merger control regimes can be problematic given the difficulties in ascertaining the precise facts and then applying a legal test to them which is inherently uncertain. The above analysis of the possible existence of *de facto* sole or joint control can involve a complex and uncertain analysis prompting the parties to make a detailed and complex jurisdictional submission which causes further delay and cost to the merger process. The above would also very much be true in seeking to apply a *de facto* influence test for minority interests. It is submitted that influence should very much be part of the substantive analysis of the competition law implications, but not serve to act a demarcation line for jurisdictional purposes, particularly given the emerging economic theories of harm surrounding no influence minority interests and certain Irish and EU case law to date in which influence did not appear to at the forefront of the regulator's mind when framing the remedy for divestiture of the minority interest.

²⁷ Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004, paras 54 to 84 on the control of concentrations between undertakings [2008] C95/1.

²⁸ Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004, para 59 on the control of concentrations between undertakings [2008] C95/1.

The implementation of the Commission's proposals as per SWD 2014 and the Impact Assessment would require the parties to a proposed minority stake transaction potentially to carry out four jurisdictional assessments in relation to the acquisition of a minority interest as follows:

- First, whether or not the acquisition of the minority interest would give rise to sole or joint control according to the existing Irish and EU merger control regimes;
- Secondly, whether the parties operate on horizontal or vertically related markets,
- Thirdly, whether the minority interest entails the requisite level of influence or rights to trigger the requirement to lodge an information notice, and
- Fourthly, whether the relevant turnover thresholds are met.

The parties would have to contend with a total of four jurisdictional tests, as opposed to the control and turnover tests currently applicable to concentrations at EU level and mergers and acquisitions under the Irish Competition Act 2002 (as amended).

The making by the Commission of a significant distinction between active and passive stakes, as well as the corresponding percentage equity which could be acquired without having to go through the automatic scrutiny arising from the compulsory information system, would provide businesses and their advisors with considerable opportunities to structure transactions in such a way as to navigate the jurisdictional thresholds, in circumstances where the equity stake creates a link which could give rise to competition issues when applying established economic theories of harm. The above would yet again create a situation where much of the focus of attention would be given to jurisdictional matters which are separate and distinct from the substantive issues which the regime was intended to address. Once again, one would be drawn into a situation where limiting or unclear criteria will render the competition agencies powerless to intervene in the face of potentially harmful, but possibly compliant, strategic moves which may adversely impact on competition.

It should be noted that there were numerous merger review cases involving divestiture of minority interests where the minority interest was between 5% and 20%, but which did not appear to entail the minimum rights that would be required for the lodging of a compulsory notification notice under the proposals namely, board representation, the right to block special resolutions and information rights giving access to strategic information. In *Scottish*

Radio Holdings Plc/Capital Radio Productions Limited,²⁹ the Competition Authority was notified under s.18(1) of the 2002 Act of the proposed acquisition by Scottish Radio Holdings Plc of the entire issued share capital of Capital Radio Productions Limited. The purchaser owned Today FM which at the time was the only national commercial radio station in Ireland. The target owned FM104 which was active on the radio advertising market in Dublin City and County which in turn held an 8.89% interest in News 106 Limited (trading as Newstalk 106FM) which was a competitor in the radio advertising market also in Dublin City and County. The Authority determined that the above equity interest gave rise to an SLC on the basis that it gave rise to the potential for “co-ordinated behaviour with adverse effects for consumers”. The Authority noted that the minority interest had recently been reduced to over 8% as a result of a rights issue and that it did not give rise to board membership. Furthermore, under Irish company law at the time (and at the time of writing), the blocking of a special resolution required the support of those representing more than 25% of the votes present or by proxy. As a result, it would not have come within the scope of the compulsory information notice regime proposed by the EU Commission. The Authority determined that the equity link raised concern in that it facilitated the exchange of competitively sensitive business information between FM 104 and Newstalk 106 “potentially thereby reducing competition”. The Authority also pointed out that the owners of 98FM were also the primary shareholders in News 106 Limited and that allowing the equity interest to be maintained “could facilitate information sharing between two of the largest firms in the Dublin radio market”. The Authority concluded that “effective relief” was best served by divestiture and that this was “in line with best international practice”. It is noteworthy that the above link between FM 104, Newstalk 106 and 98FM existed before the notified transaction giving rise to the merger review in which the above equity link was examined and determined by the Authority as giving rise to co-ordinated effects. The notified acquisition itself, in which the purchaser owned Today FM pre-acquisition, did not alter or contribute to the risk of co-ordination arising out of the above equity link. The link between FM 104, Newstalk 106 and 98FM was regarded by the Authority as harmful entirely independently of the notified transaction.

*Glencore/Xstrata*³⁰ was a merger review carried out by the Commission under the 2004 EMCR and concerned the acquisition by Glencore, the world's leading metals and thermal coal trade, of Xstrata, the world's fifth largest metals and mining group. Glencore was the largest supplier of zinc metal in the EEA on the basis of an exclusive off-take agreement

²⁹ *Scottish Radio Holdings Plc/Capital Radio Productions Limited* (Case No M/03/033) Determination of the Competition Authority 23 February 2004 .

³⁰ *Glencore/Xstrata* (Case No COMP/M.6541) Commission Decision 22 November 2012.

with Nyrstar, the world's largest zinc metal producer, in which Glencore also had a 7.79% minority shareholding. The Commission's investigation found that the merger, as initially notified, gave rise to competition concerns through unilateral effects, increasing the merged entity's ability and incentive to control the level of zinc metal supplies in the EEA. In order to remove these concerns, Glencore committed, *inter alia*, to divest its minority shareholding in Nyrstar. Post transaction, Nyrstar was the largest competitor to the merged business and had the biggest zinc smelter in the EEA. The divestment of Glencore's 7.79% minority stake in Nyrstar was described as contributing to eliminate the serious doubts identified in the commodity grade zinc market, as it would allow Nyrstar to be fully independent from the merged entity. The divestment of the minority stake would remove the structural link between Nyrstar and Glencore, thereby taking away the ability of Glencore to appoint an observer to the board of Nyrstar and remove the potential for Glencore to obtain any access to competitively-sensitive information. In order to maintain the structural effect of Glencore's commitment to divest its minority stake in Nyrstar, Glencore was required, for a period of ten years, neither to acquire any stake in Nyrstar nor to acquire direct or indirect influence over Nyrstar. The Commission stated that, in itself, the divestiture removed a limitation on Nyrstar's incentives to compete with the merged entity in the EEA. It appears that Glencore did not have a seat on the board of Nyrstar, would not have had the ability to block special resolutions and did not have a right to information. The remedy was couched in terms to prevent any future ability of Glencore to appoint board members, exercise influence or to obtain information. Therefore, it appears the acquisition by Glencore of the 7.79% interest in Nyrstar would not have been caught by the compulsory information notice system proposed by the Commission even though the zinc market in the EEA was highly concentrated and Glencore and Nyrstar appeared to have significant market positions.

The Commission in the SWD White Paper appears to struggle in its deliberations leading to the choice of the 20% passive threshold. The Commission initially presents 20% as the threshold. The above is followed by a discussion of the considerations applicable to the threshold level which includes a reference to the fact that the percentage level of voting rights required to block special resolutions is frequently set at 25%³¹ and that a shareholding at this level often involves "blocking and other corporate rights" and that, therefore, 25% should be the upper limit. Significantly, the Commission, as part of the considerations for setting the threshold, states as follows:

³¹ The Commission refers to Belgium, Germany and the UK as having a 25% threshold for publicly listed companies while the threshold was 33.33% in other Member States such as France and Italy.

“Second, higher shareholdings more strongly shift financial incentives, so the rights attached to such shareholdings may be less important in assessing whether a minority shareholding is potentially anti-competitive. In fact, according to economic theory financial incentives that may affect the incentives for firms to compete can be considered significant at a threshold significantly lower than 25%.”

The Commission in a footnote at the end of the last sentence in the above quote refers to the “responses to the Consultation Paper from economic consultancies and academics” without further discussion as to the content or arguments put forward in the above responses.³² In fact, the responses from economic consultancies and academics were relatively few. CRA Charles River Associates in its comments in the context of the 2013 Consultation supports a self-assessment system under which there would be an exemption for minority shareholding below 5%, as typically these are unlikely to result in control or substantial unilateral effects (except in special circumstances), and that, under such a system, minority interests above 5% should be self-assessed to determine whether they have the potential to harm competition and therefore require notification. They suggested that although minority interests in rivals of between 5% and 10% were unlikely to result in effective control, they “could still generate substantial unilateral effects in a number of circumstances”. CRA Charles River Associates proposed a two-step procedure to identify those shareholdings most likely to result in harm commencing with calculating an adjusted market share that treats acquiring a 10% minority stake in a firm as equivalent to acquiring 10% of its market share, so for example a firm with a 20% market share acquiring a 10% stake in a firm with a 30% market share would give an adjusted market share of 23% ($20\% + 10\% \times 30\%$). CRA Charles River Associates suggest, as a second step, applying a 25% threshold to the adjusted market share so that links above this threshold might require more careful assessment and those below were unlikely to cause significant harm. CRA Charles River Associates asserted that shareholdings greater than 10% had the potential to lead to control of the rival by the acquiring party. They suggest that such acquisitions should be treated similarly to a full merger. In particular, the existing merger guidelines could be adapted so that a combined market share of both parties below 25% would be taken as evidence that the shareholding is unlikely to cause harm and can be safely allowed go ahead without further investigation and that those above might warrant more careful assessment. The author acknowledges the apparent attraction in the above approach to jurisdiction in that it does not seek to make influence or access to information as key determining factors for minority stakes above 5%. However, the suggested approach does

³² Please see section 2.5 above.

again confuse the substantive analysis with the jurisdictional thresholds which do need to benefit from clarity and ease of application in order to be workable. The use of a market share threshold is inherently ambiguous given that it is naturally dependent on correctly defining the relevant markets. As discussed above, the experience of using a market share threshold in Belgium for merger control purposes proved to be problematic in numerous respects leading to their replacement by other clearer jurisdictional criteria.

The significant relaxation of the criteria for making a compulsory information notice in respect of passive minority equity stakes in terms of percentage threshold appears to lose sight of the concerns relating to passive equity stakes discussed and acknowledged by the Commission in the SWD 2013 Consultation and the SWD White Paper (as summarised in Chapter 1). Despite the above discussion of passive investment by the Commission, it is noteworthy that the Commission in the White Paper and related documents such as the SWD White Paper and the Impact Assessment did not even mention one of the most significant economic and legal analyses of passive minority interests, conducted by *Gilo* in a scholarly article entitled “*Passive Investment*”³³ in which he articulates the theories of harm regarding passive investment. *Gilo* clarifies that passive investment can entail both unilateral and coordinated effects. He explains that the unilateral anticompetitive effects of passive investment stem from the fact that competition, even absent passive investment, is imperfect in many oligopolistic markets, so that competition does not drive prices all the way down to marginal cost.³⁴ *Gilo* explains that the unilateral anticompetitive effects are exacerbated if the investing firm A’s rivals react to firm A’s reduced aggressiveness by becoming less aggressive themselves, a result predicted by some standard oligopoly models, especially Bertrand-type price-setting models in differentiated markets. In markets characterized by this type of competition, passive investment could be a device to induce rivals to raise their prices. He points out that other models, including most Cournot-type quantity-setting models, predict that firm A’s rivals would react by expanding their quantities and taking market share from firm A. In markets characterized by these models, passive investment cannot be motivated by a desire to increase profits through a unilateral anticompetitive effect since such investment would only raise rivals’ profits at the expense of the investing firm. The intuition for this result is that if rivals respond to the investing firm’s price increase by expanding output, the investing firm’s market share diminishes, and this

³³ David Gilo, ‘Passive Investment’ (22 February 2009) Issues in Competition Law and Policy, Vol 3. Other works by Gilo on the subject of passive investment include ‘The anticompetitive effect of passive investment’ (2000) Michigan Law Review, Vol 99.

³⁴ Gilo explains that imperfect competition occurs, for example, in markets characterized by product differentiation or in which a firm’s location is important to consumers (such as retail markets).

effect more than offsets the increase in its profits per unit. Assuming passive investment nevertheless occurred (say, for other motivations), prices will still be higher than before the passive investment since, although firm A's rivals raise output, they do so by less than firm A's output reduction.

With regard to co-ordinated effects, *Gilo* states that passive investment in a competitor may make price collusion more likely in some situations, and, at times, raise the collusive price. Passive investment makes the investing firm less eager to undercut the collusive price. *Gilo* states that the question of whether collusion is sustainable in an industry depends on the eagerness to deviate of the industry maverick. Suppose firm A is the industry maverick. *Gilo* clarifies that accordingly, in the maverick model, a necessary condition for a coordinated anticompetitive effect to arise from passive investment is that the maverick makes the investment. If the maverick firm A invests in a rival, firm A becomes less likely to deviate from collusion. One possibility is that before the investment firm A found it profitable to deviate from collusion, whilst afterwards the investment firm A finds it unprofitable to deviate. Note that firm A's rivals may well refuse to participate in collusion in the first place if they know that firm A would deviate from it anyway. This suggests that firm A can passively invest in rivals in order to credibly commit to becoming less aggressive, thereby inducing its rivals to collude.

Gilo asserts that passive investment may in some situations substantially harm competition by raising the probability of a collusive price in certain circumstances. *Gilo* states that identification of the cases in which a passive investment by a maverick in a rival could substantially harm competition is similar, to a large extent, to that of horizontal mergers. In particular, the fewer firms there are in the market, the larger the probable anticompetitive effects. This is because the fewer the firms, the higher the prospects of collusion being sustainable in the first place. Furthermore, the larger and more profitable the investee firm, the stronger the potential anticompetitive effect because the investing firm will place more weight on its stake in its rival and hence be induced to compete less vigorously. Naturally, the larger the level of investment, the stronger the potential anticompetitive harm.³⁵

³⁵ David Gilo, Yossi Mosche and Yossi Spiegel, 'Partial Cross ownership and Tacit Collusion' (2006) *The RAND Journal of Economics* Vol 37.

Gilo, Mosche and Spiegel examine passive investment by looking at the industry's most efficient firm and its rivals, and find that such passive investment indeed facilitates tacit collusion and also tends to raise the collusive price. Unlike the case where firms have the same marginal costs, here firms have different monopoly prices on which they wish to collude. The Gilo-Moshe-Spiegel model posits that the collusive price is a compromise between the monopoly prices of the different firms. In this model, the most efficient firm is the industry maverick. Due to its cost advantage, incentives of the most efficient firm

to deviate from collusion are the greatest: it has less to lose from a price war, and more to gain from undercutting the collusive price, because its monopoly price is the lowest. Gilo, Moshe and Spiegel show that when the most efficient firm invests in its less efficient rivals, the collusive price rises, since the most efficient firm identifies with the preference of the less efficient rival regarding the level of the collusive price, to the extent of its stake in the less efficient rival. Moreover, the collusive price (assuming collusion is sustainable) rises the less efficient the firm in which the investment had been made. On the other hand, Gilo, Moshe and Spiegel show that collusion becomes more sustainable the more efficient the firm is in which the investment had been made. This is because the more efficient the firm is in which the investment had been made, the higher its collusive profits are, and the more the investing firm has to lose undercutting the collusive price. These two results imply that the most efficient firm would prefer to invest in its most efficient rivals since this can facilitate collusion more effectively and keep the collusive price closer to the collusive price preferred by the most efficient firm.

In David Gilo, 'Passive Investment' (22 February 2009) *Issues in Competition Law and Policy*, Vol 3, Gilo examines the following specific examples of passive investment:

Multilateral Passive Investment: This form of passive investment involves interlocking cross-ownership among multiple rivals in the marketplace. In Chapter 1, I examined the examples of industries where such interests are known to exist such as the Japanese and the U.S. automobile industries, the global airline industry, the European Union airline industry, the Dutch financial sector, the Nordic power market and the global steel industry. *Gilo* explains that when partial ownership is multilateral, its coordinated effects are more complex which stems from the fact that given multilateral partial ownership, if one firm raises its stake in a rival, the incentives of all firms engaged in the multilateral ownership scheme are affected. Such an increase in one firm's stake in its rival not only raises all firms' profits from colluding, it also raises all firms' profits from deviating from collusion. *Gilo* concludes that "[a]ccordingly, it seems hard to verify whether such an increased stake indeed facilitates collusion". He clarifies that in at least in some models, an increased stake facilitates tacit collusion, although there are two exceptions, the first being where the increased stake is held in the industry maverick, and the second where the industry maverick holds no direct or indirect stake in the firm that raised its stake in a rival. In these two cases, the prospects of tacit collusion are unaffected, that is, the increased stake has no coordinated effects. *Gilo* states that in the model, all firms have the same marginal costs, produce a homogenous product, are not capacity constrained, and compete with regard to price.

Combined Coordinated and Unilateral Effects: *Gilo* asserts that in cases where passive investment has unilateral effects, the coordinated effects of passive investment become more complicated because when firms engage in price wars, it is plausible to assume that they revert to the price they would have charged in equilibrium had there not been collusion. Please see David A. Malueg, *Collusive Behavior and Partial Ownership of Rivals* (1992), *International Journal of Industrial Organisation*, Vol 10 Issue 1. However, passive investment raises prices and profits in such an equilibrium. In these cases, on the one hand, passive investment in a rival tends to deter the investing firm from price cutting by making it share its rival's losses from the price cut and the price war that follows. On the other hand, passive investment may *encourage* price cutting by raising the profits that could be made during the price war. *Gilo* refers to *Malueg* having shown that in certain cases the latter effect may outweigh the former, and in such cases passive investment hinders tacit collusion. *Gilo* asserts that "[s]till, from a legal policy perspective, it would be difficult to expect firms actually to engage in passive investment if it causes tacit collusion to break down. Accordingly, a court or agency could often reject a claim according to which passive investment might actually have caused tacit collusion to break down due to its positive effects on the profitability of price wars. This is because it is often unlikely that passive investment was motivated by benign factors that were so profitable so as to offset the losses involved in the breaking down of collusive pricing."

Passive Investment by Controlling Shareholders: *Gilo* explains that when a firm's controlling shareholder invests in the firm's competitor, the anticompetitive effects could be exacerbated compared to the case in which the firm itself invests in its competitor. Firstly, as with passive investment among the firms themselves, the firm's controller internalizes part of the rival's losses from a price cut and the price war that would follow. This in itself deters the controller from making its firm price cut. Secondly, the smaller the controller's stake in its own firm is, the stronger the anticompetitive effect is. The effect could be replicated by managers holding even small stakes in rival firms. This is because the smaller the controller's stake in its own

It is interesting to note that much of the objection raised by the stakeholders in the context of the 2013 Consultation and the White Paper to the notion of extending the EU system of merger control to minority interests was based on the premise that substantive issues would

firm, the more weight the controller places on his stake in the rival. This implies that controllers who have stakes in rivals could facilitate collusion by diluting their stakes in their own firms. Accordingly, consent decrees that approve a certain stake that a controller holds in a rival should add that the controller would not be allowed to dilute its stake in its own firm, as such dilution has the same effect as an increase in the controller's stake in the competing firm. *Gilo* provides a simple numerical example of where General Motors (GM), which is National's controller, passively acquires 25% of Avis, which is National's competitor. Suppose further that GM initially holds 100% of National. Assume that if National competes vigorously (e.g., cuts prices), National makes a net gain of \$3, but Avis loses \$8. Thus, assuming GM controls National's pricing policy, GM will cause National to price cut because GM makes \$3 from National's increased profits (100 percent of \$3), while it loses only \$2 from Avis decreased profits (25 percent of \$8). Suppose now, however, that GM dilutes its stake in National to 55 percent instead of 100 percent. The other 45 percent may be held, for example, by public shareholders or by non-public minority shareholders that do not possess control. Assume further that GM runs National so as to maximize GM's own profits, so that it disregards profits that flow into the hands of passive investors in National. Under these assumptions, GM will refrain from making National cut price. If National cuts price, then GM would gain only \$1.65 from National's increased profits (55% of \$3), but GM would lose \$2 through its stake in Avis (25% of \$8). More generally, the smaller the stake that GM has in National, the more weight GM places on its stake in Avis and the less incentive GM has to run National competitively.

Passive Investment by Controlling Management: *Gilo* clarifies that the analysis of passive investment by a firm's controlling shareholder in the firm's competitor is directly analogous to passive investment by a firm's manager in the firm's competitor. He points out that suppose, in the above car rental example, that National's CEO holds Avis's stock. As a result, if National's CEO causes National to cut prices, this will harm Avis's profitability and will reduce the value of the CEO's investment in Avis. Therefore, holding Avis's stock will cause the CEO to manage National as a less vigorous competitor. *Gilo* explains that the discussion of passive investment by a controlling shareholder revealed how the smaller the controller's stake is in the firm it controls, the stronger the controller's commitment is to run the firm less competitively. A manager who is not a controlling shareholder might have a very small stake in the firm he manages (in the form of stock, options, or compensation components that are positively linked to the firm's profits). In such a case, even very small stakes held by the manager in competing firms will suffice to give the manager incentives to operate his employer's business less competitively. Furthermore, in cases in which competitors observe that the manager holds a stake in a competitor, such a stake can induce competitors to compete less vigorously themselves.

Passive Investment by Controlling Shareholders and Firms: *Gilo* posits that when passive investment by controllers is combined with passive investment by firms, an increase in passive investment among the firms could be procompetitive. For example, it might hinder rather than facilitate collusion. He explains that in order to see why, suppose that the controlling shareholder of firm A, the industry maverick, holds a 25% stake in a competing firm B. Suppose further that firm B invests in 25 percent of firm A. As a result, the controlling shareholder's total stake in its own firm, firm A, increases over its direct share in firm A by the indirect stake it holds in firm A by virtue of its shareholding in firm B. The smaller the stake the controller holds in its own firm is, the more weight it places on its stake in a rival firm. Accordingly, when a controller's direct or indirect stake in its own firm increases, it places less weight on its stake in the rival and therefore manages its firm as a more vigorous competitor. When the industry maverick becomes a more vigorous competitor, collusion is harder to sustain. Indeed, as shown in *Gilo, Moshe, and Spiegel*, when the maverick's controller directly or indirectly holds a stake in a rival, and this rival raises its direct or indirect stake in the maverick firm, such an increased stake hinders tacit collusion and therefore could be procompetitive. *Gilo* highlights that a similar reasoning holds for the analysis of the unilateral effects of passive investment. If firm A's controller holds a stake in rival B, and now rival B invests (or increases an existing stake) in firm A, two opposing effects arise. On the one hand, firm B will tend to raise prices due to its stake in firm A. On the other hand, firm A's controlling shareholder regains a larger indirect stake in firm A, making it place less weight on its stake in firm B. This latter effect tends to make firm A a more vigorous competitor than before B's investment in A.

arise in relatively few cases and that, therefore, business would be subjected to a regime where, in the vast majority of cases, the acquisition did not pose a substantive competition issue. It is submitted that the above argument is fundamentally flawed. This is underlined by the experience with German merger control. As mentioned in Chapter 5, the Commission in the 2013 Consultation Paper highlighted that although transactions notified under the “competitively significant influence” criterion involving equity purchases below 25% accounted for only circa 0.6% of all notified cases in Germany, they represented 11% of all merger prohibitions in German merger control. The above clearly shows that proportionately, at least in Germany, transactions notified on the basis of being below 25% of the target and competitively significant account for a disproportionately high number of problematic cases giving rise to a prohibition.

The flaw in the argument by stakeholders, in the context of the 2013 Consultation and the White Paper to the notion of extending the EU system of merger control to minority interests, that substantive issues would arise in relatively few cases is also highlighted by the fact that the EU system of merger control has been in force since September 1990 and substantive issues feature in a relatively small number of cases overall. In 2021, only 2.7% of decisions taken on foot of concentrations notified under the 2004 EMCR involved substantive issues resulting in remedies (there were no prohibitions in 2021),³⁶ and, similarly, in 2021, only 4% of the determinations issued by the CCPC involved mergers notified under Part 3 of the 2002 Act that were approved with remedies proposals (again there were no prohibitions in 2021)³⁷. As mentioned above, the jurisdictional criteria for the compulsory notification of mergers is based on the definition of concentrations at EU level (and the definition of merger or acquisition in Ireland under the 2002 Act) and the relevant turnover thresholds. The jurisdictional criteria do not feature any substantive element whatsoever. There is at present under the Irish and EU system of merger control a simplified merger control procedure which applies to cases involving no, or limited, horizontal or vertical overlap.³⁸ Over 76% of concentrations notified to the Commission in 2021 were approved under the simplified procedure (43% of the CCPC’s merger determinations in 2021 were made under the

³⁶ DG COMP. Statistics on Mergers cases.

<https://competition-policy.ec.europa.eu/mergers/statistics_en>

³⁷ CCPC Annual Report 2021.

<<https://www.ccpc.ie/business/wp-content/uploads/sites/3/2022/07/2022.07.25-CCPC-Annual-Report-2021-Final.pdf>>

³⁸ Please see EU regime details. Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004 OJ 2013 C366/5.

Please see details on the Irish system. Simplified Merger Notification Procedure Guidelines.

<<https://www.ccpc.ie/business/wp-content/uploads/sites/3/2020/05/Simplified-Merger-Notification-Procedure-Guidelines.pdf>>

simplified procedure). The Commission in the SWD White Paper stated that to further simplify the 2004 EMCR procedures, the Commission should consider exempting certain categories of mergers from the prior notification requirement. The exemption would include certain categories of cases currently falling under the simplified procedure, such as cases leading to no "reportable markets" due to the absence of any horizontal or vertical relationship between the parties. The Commission clarifies that if it did issue such an exemption, a possible replacement procedure would include extending the targeted transparency system as suggested for minority shareholdings, to cover such exempt transactions. Thus, the Commission would be informed by an information notice and would be free to investigate a case. If it decided not to investigate, the transaction could be implemented after three weeks without the need for a clearance decision. In any case, the proposal is that all transactions, including those benefitting from the simplified procedure, would involve a filing, be it a notification or an information notice.

As a result of the turnover based thresholds, at present, the vast majority of transactions notified under the 2004 EMCR and the 2002 Act do not entail any substantive competition issue at all. Many of the transactions involve parties which are not operating on horizontal or vertically related markets. However, it appears to be an accepted feature of merger control policy worldwide that a consequence of having clear and precise jurisdictional criteria is that many mergers not involving any substantive issue are subjected to the merger review process provided that they have a material nexus to the reviewing jurisdiction. Please see Section 2 of Chapter 5 for the recommendations of international bodies such as the ICN and the OECD. It is submitted that it would be difficult to reconcile the active/passive minority interest distinction/dimension of the jurisdictional test for the submission of an information notice as part of the targeted transparency system in the Commission's proposals as per the SWD White Paper on the one hand with the clear recommendations of both the ICN and OECD that the thresholds should be clear and objectively quantifiable on the other.

In the author's view, the system of EU merger control has worked relatively well in respect of transactions involving the acquisition of controlling interests, inspired by some of the most mature and well-established systems of merger control in the world. However, one of the author's biggest criticisms of the system of EU merger control (and by analogy the Irish system of merger control under the 2002 Act which very much follows the EU model) since the inception of EU merger control in 1990, is the significant prominence of the jurisdictional dimension of the regime. It is submitted that the jurisdictional aspects of EU merger control have occupied a disproportionate level of attention since the entry into force of Council

Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings³⁹ ("**1989 EMCR**"). At present, the Commission's guidelines dedicated to the jurisdictional aspects of 2004 EMCR, namely, Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings⁴⁰ ("**EU Consolidated Jurisdictional Notice**") are significantly more lengthy than the combined length of the two Commission guidelines for the substantive, as opposed to jurisdictional, assessment of mergers under 2004 EMCR, namely Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings⁴¹ ("**EU Horizontal Merger Guidelines**") and Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings⁴² ("**EU Non-Horizontal Merger Guidelines**"). In the author's experience, considerable resources are expended by the Commission, as the executive body for the enforcement of the EU system of merger control, and the national competition regulators policing national merger control regimes modelled on the EU regime, and by merger control practitioners, in exploring and assessing jurisdictional, as opposed to substantive, issues in terms of preparing, and responding to, detailed jurisdictional submissions and queries. It is at best, very difficult to understand why the EU institutions have put in place, and maintained, a system that entails such a significant focus on the rules and associated issues related to establishing the demarcation lines for delineating the confines of its merger control jurisdiction, as opposed to developing and ameliorating substantive EU merger control policy.

The current systems of Irish and EU merger control do not regulate the acquisition of non-controlling common shareholdings. As discussed in Chapter 1, common ownership is a situation where one or more of a firm's shareholders directly or indirectly hold an equity interest in one or more of the firm's rivals. Under the current system of merger control in Ireland and at EU level, the acquisition of a non-controlling minority interest by an acquirer with one or more existing non-controlling interests does not trigger a compulsory notification on the basis that the transaction does not give rise to the acquisition of sole or joint control. Therefore, it is possible for institutional investors to acquire minority interests in various

³⁹Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings.

<<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31989R4064&from=EN>>

⁴⁰ Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings [2008] C95/1.

⁴¹ Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C31/5.

⁴² Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2008] C265/6.

competitors in a given product and geographic market, in each case, without amounting to a merger or acquisition for Irish and EU merger control purposes. As a result, and as explored in Chapter 4, the competition law implications of such minority interests is only likely to attract regulatory scrutiny in a merger control context once a subsequent transaction takes place that amounts to a merger or acquisition which is subject to a merger review. As discussed in Chapter 4, the EU Commission in the *Dow/DuPont* and *Bayer/Monsanto* merger control cases, examined the presence of institutional investors as part of the merger review analysis, the Commission concluding that in each of the cases, the HHI, being the usual measure of concentration, was not appropriate, given the presence of cross shareholdings, and that their existence was to be taken into account in the merger review. The existing Irish and EU mergers regime, with its requirement that the transaction gives rise to sole or joint control, allows for institutional investors to acquire a series of minority non-controlling equity stakes in players actively competing in the same relevant market that is highly concentrated and therefore already suffering from a distinct absence of competition, without having to notify the transaction under the merger control regime.

Below I examine the possibility of using legal machinery outside of competition policy such as taxation in order to pursue a competition policy objective of reducing non-controlling minority shareholdings.

4 POTENTIAL FOR USE OF NON-COMPETITION MACHINERY TO FURTHER COMPETITION POLICY ON MINORITY INTERESTS

The author is aware of the potential for the use of legal machinery outside of competition law to address minority interests. For example, tax law could be used to encourage the disposal of minority interests through favourable capital gains tax treatment and in this way address the adverse competition issues arising from minority shareholdings. In Germany, the Reduction of Tax Act 2000 was introduced to provide *inter alia*, capital gains tax relief to corporate and individual shareholders selling shareholdings in domestic and foreign entities⁴³ although the objective of the above was to provide stimulus to the German economy and not to address competition policy issues. The author appreciates that tax and other policy measures can and are used to promote, address or protect various public policy interests and issues such as regional development and employment. However, it is

⁴³ Tax Reduction Act 23 October 2000 (Steuersenkungsgesetz).

Mark Milner, 'Share tax plan may change face of Corporate Germany' *The Guardian* (London, 24 December 1999).

<<https://www.theguardian.com/business/1999/dec/24/3>> accessed 21 February 2023.

Eugen Bogenschütz, 'Germany: German Tax Reform 2000 Through 2002 – An Overview' (25 September 2001) Mondaq.

<<https://www.mondaq.com/article/13577/german-tax-reform-2000-through-2002-an-overview>> accessed 21 February 2023.

submitted that the use of tax policy is not the most appropriate framework to pursue or address competition law policy considerations or issues. The competition analysis of minority interests is highly fact specific requiring an evaluation of the particular circumstances of each case and the application of theories of harm (which can and do evolve) to the facts taking account of market characteristics, likely market developments and the counterfactual. The author is of the view that the above exercise should be carried out by legal and economic experts responsible for, and experienced in, applying competition law and developing policy in this area. It is difficult to see how a tax measure or policy which would be of general application to a defined category of situations would be able to provide the specificity of analysis and tailored treatment of the particular circumstances presented by a given case to determine what action, if any, should consequently be taken. In the not entirely dissimilar vein of pursuing policy using tools from a different field of law, the author refers to the failed attempt by the Commission to use EU State aid rules to seek to curb Ireland's tax policy on FDI in the context of alleged aid to the Apple group⁴⁴ and similarly, Luxembourg tax policy in relation to alleged aid to Fiat.⁴⁵

5 SUGGESTED FRAMEWORK FOR THE CONTROL OF MINORITY INTERESTS

As discussed above in relation to Irish and EU law and in Chapter 5 in relation to certain developed merger control jurisdictions, there are material shortcomings in the competition law framework for the regulation of non-controlling cross shareholding minority interests in Ireland, the EU and various other jurisdictions around the world which include the following:

- 5.1 Irish and EU merger control simply do not capture the acquisition of non-controlling minority interests at all and the general competition laws controlling restrictive agreements and abuse of a dominant position are inadequate in a number of significant respects particularly given that certain jurisdictional hurdles that need to be overcome for them to apply. Both the Irish and EU merger control regimes fail to appreciate and address the competition issues articulated by leading economics

⁴⁴ Case T-892/1 *Ireland v European Commission* ECLI:EU:T:2020:338 in which the General Court annulled Commission Decision (EU) 2017/1283 30 August 2016 on State aid SA.38373 TFEU OJ 2017 L 187/1 in which Ireland was found to have breached the rules on State aid contrary to Article 107(1) of the TFEU.

⁴⁵ Joined Cases C-885/19P and C-898/19P *Fiat v European Commission* ECLI:EU:C:2022:859 where the CJEU overturned the General Court's decision to uphold Commission Decision (EU) 2016/2326 of 21 October 2015 on State aid SA.38375 (2014/C ex 2014/NN) OJ 2016 L351/1 in which Luxembourg was found to have granted State aid to Fiat contrary to Article 107(1) of the TFEU.

academics in their formulation and expression of economic theories of harm both in relation to cross and common minority shareholdings;

- 5.2 The merger control systems within the EU that currently regulate the acquisition of non-controlling minority interests, such as the UK and Germany, only extend to capturing the acquisition of such interests in limited circumstances. The above regimes capture interests that are “competitively significant” holdings in Germany and involve “material influence” in the UK which necessarily limit their application to active investments in certain circumstances. Furthermore, the merger control system in the UK is voluntary which means that acquisitions of minority interests can in practice escape review; and
- 5.3 The jurisdictional scope of the US Hart Scott Rodino system of merger control is very broad and covers non-controlling interests without imposing a competitively significant test, but contains an exception for acquisitions of less than 10% (15% for institutional investors) if the investor has “no intention of participating in the formulation, determination, or direction of the basic business decisions of the issuer.” The above has been construed as applying to passive investments thereby excluding such investments from the ex-ante system of merger control in the US. The effect of the above is that purely passive minority investments below the above percentage thresholds escape the Hart Scott Rodino filing and waiting period procedure. As mentioned in Chapter 5, the focus of recent enforcement activity of the Federal Trade Commission and the US Department of Justice, in relation to the above exemption, has been to challenge the position taken by investors claiming to benefit from the exemption and not making a filing on the basis that the acquisitions had an active non-passive dimension which brought them outside the terms of the exemption. The focus of the agencies was closely to examine the facts surrounding the purchase and to conclude that a number of factual elements rendered the investment sufficiently active as to fall outside the passive exemption. The author respectfully submits that the above active versus passive analysis should take place in the context of a substantive review as opposed to delineating the scope of the regime and the jurisdictional thresholds for filing and review. Again, the above has created a situation where there is too much focus on the application of the jurisdictional thresholds for mandatory filing which, it is submitted, stray into considerations which are more appropriate for a substantive review.

The jurisdictional limitations of the above merger control regimes necessarily limit, and therefore exclude, the application of *ex-ante* compulsory notification and review to

potentially harmful transactions according to established and evolving, economic theories of harm. The author firmly believes that it is imperative that a balance should be struck in formulating the jurisdictional criteria for the compulsory notification and review of minority interests between ensuring that they are calibrated in such a way as to be sufficiently wide and flexible to cover as many potentially harmful acquisitions as possible but, at the same time, take cognizance of the potential compliance burden imposed on business. It is absolutely key that broad scope and flexibility are central to the jurisdictional test for notification and review and that we move away from a system that is characterised by an overly technical, and thereby limiting, approach that has hampered the Irish and EU merger control systems' ability to control and assess non-controlling minority interests. Furthermore, it is essential that in seeking to reconcile the above objectives of scope, flexibility and absence of disproportionate burden, the jurisdictional criteria are couched on terms that are sufficiently clear and unambiguous to render them readily applicable in practice and do not seek to introduce elements that are inherently substantive in nature (in other words, are designed to address substantive issues that are more appropriately catered for in the review process as opposed to seeking to apply a substantive filter at the jurisdictional stage).

*Tzanaki*⁴⁶ made a succinct call for jurisdictional flexibility in the context of common ownership as follows:

“If cautionary tales and policy recommendations would come in headlines, those would include the following. Small (shareholding) is not necessarily innocent. Voting (stock) is not really passive. Individually harmless (shareholding links) may be in aggregate harmful. Diffuse common ownership may easily go under the radar of most existing merger control regimes as they are premised on a paradigm of a “single firm dominance” in the market and a “single blockholder investor” within governance, that nevertheless neatly fits the concentrated common ownership variety. Smart merger control design would need to steadily adjust its analytical and jurisdictional tools to capture the newly revealed dynamics.”

The author's vision for a system of *ex ante* control governing the acquisition of minority interests is to define the jurisdictional limits on terms that provide a clear, broad and flexible structure within which to regulate such transactions while at the same time being cognizant

⁴⁶ Anna Tzanaki, 'Varieties and Mechanisms of Common Ownership: A Calibration Exercise for Competition Policy' (18 February 2021) *Journal of Competition Law and Economics*.

of the need to balance the above against the need to ensure that the regime does not impose a disproportionate burden on business. The author's proposals could be used as a base to frame new jurisdictional thresholds for Irish and also EU merger control. The author suggests the following which, to a limited extent, draws on certain elements of the US system of merger control as per Hart Scott Rodino, the Brazilian merger control regime as amended in 2014 and the proposals put forward by the Commission in the White Paper, but going much further to present, what the author believes, is a system that would go a long way to ensuring the existence of a jurisdictional platform with sufficient breath for regulating, on an *ex ante* basis, the acquisition of minority interests and enabling the application of economic theories of harm as they evolve through academic debate globally:

- (a) **Information Notice:** An information notice would be required to be submitted if the criteria set out below were met. The regime would be mandatory, unlike the voluntary system applicable at present under the system of UK merger control. The questions posed in the information notice would have to be carefully drafted to ensure that they require sufficient information to allow for a meaningful preliminary analysis to be conducted to determine whether *prima facie* any competition issue might exist and, therefore, whether or not further action needs to be taken such as insisting on the submission of a full notification (see below for further insights into this important recommendation). The information required would include any available information on the prevalence of existing minority interests in the sector concerned (in other words, whether common shareholdings are a feature of the sector concerned). It is important that the questions in the information notice specifically ask the reasons why the minority interest is being acquired. As discussed in Chapter 1, there are various studies which show that, among the principal reasons found to motivate the acquisition of a minority interest, is the gain of information on the target with a view to assessing whether or not to acquire full control at a future stage or to complement other relationships between the acquirer and the target which may be anticompetitive;
- (b) **Same Business Sector:** The information notice would be required where the acquirer and investee are active in the same business

sector. The author is not advocating that a strict competition product/service and geographic market definition be applied as such a technical approach could give rise to potential issues. The use of a strict competition product/service and geographic market definition could lead to views being taken that the parties are strictly speaking not operating on the same or related markets so as to circumvent the regime, particularly in transactions involving relevant product and geographic markets that have not been the subject of much precedent or where there is a lack of clarity as to the scope of the relevant markets. Furthermore, a technical market share test should not be used so as to avoid much time and resources at the preliminary stage being employed to identify the jurisdictional limits of the regime. As discussed in section 3 above, Belgium for a time applied a market share threshold for merger control purposes which according to the International Competition Network's Notification & Procedures Subgroup of the Merger Working Group in its report to the ICN Annual Conference in Kyoto in April 2008⁴⁷ led to transacting parties continuing to either notify unproblematic deals on a "fail safe" basis or the engagement with the Belgian Competition Service "in such extensive pre-filing dialogue to establish jurisdiction (which still often resulted in fail-safe filings as the Competition Service could not bind the Competition Council on jurisdictional issues) that the resource utilisation issue did not diminish as hoped".⁴⁸ The Commission, in the formulation and description of the preferred transparency option in the SWD White Paper, briefly touches upon using a broad same sector approach but in my view, it would be important to articulate this approach with clarity so as to ensure that this threshold does not stray into defining relevant product and geographic markets attracting the issues highlighted above. Brazilian merger control requires notification of transactions involving 5% or more equity where the parties are competitors or

⁴⁷ International Competition Network's Notification & Procedures Subgroup of the Merger Working Group in its report to the ICN Annual Conference in Kyoto in April 2008.

<<http://www.internationalcompetitionnetwork.org/uploads/library/doc326.pdf>>

⁴⁸ The author understands that at the time, the Belgian Competition Council decided merger cases and that the views of the Competition Service were not binding on it.

have activities that are vertically related (in other cases where such a relationship does not exist, the percentage equity threshold in Brazil is increased to 20%). In that way, it is submitted that the Brazilian merger control regime also suffers from an over technical approach to jurisdiction necessitating the premature definition of the relevant product markets.

- (c) **No 5% Exemption Threshold:** The author does not favour the use of a 5% exemption threshold where the parties are operating in the same sector unlike the Commission's preferred transparency option or the threshold applicable under Brazilian merger control. The Commission has suggested as part of its preferred transparency option, a minimum threshold of 5% of the target would apply, meaning that acquisitions in which the acquirer post transaction would hold a total interest of below 5% of the target would be exempt from having to submit the information notice. The Commission explained the rationale for the above on the basis that "experience shows that competitive harm is very unlikely for shareholdings of 5% or less".⁴⁹ The Commission does not explain the experience it has in mind for this purpose. It is clear that the Commission is suggesting that the sub 5% threshold exclusion is absolute, meaning it does not matter what rights or level of influence might accompany the equity stake concerned. Therefore, according to the Commission's proposal, a competitor in an oligopolistic market could acquire 4.9% of the issued share capital in its biggest rival, on terms that grant it certain additional rights such as rights to appoint a member of the board of the target and rights to information, short of amounting to sole or joint control, without having to get prior approval under the merger control regime. Of course, such an equity interest is still subject to the general Irish and EU competition rules prohibiting restrictive agreements and practices and abuse of a dominant position. However, as discussed in Chapter 3, the outcome of the

⁴⁹ 'Commission Staff Working Document Accompanying the document White Paper towards more effective EU merger control', para 93.

<http://ec.europa.eu/competition/consultations/2014_merger_control/staff_working_document_en.pdf>

application of the general competition rules to minority interests is inconsistent and therefore, uncertain.

The Commission appears to insist that for situations involving the acquisition of an interest between 5% and 20%, the stake would have to be accompanied by other rights such as board representation, the right to block special resolutions and information rights giving access to strategic information. The author advocates that the above rights should not feature in the thresholds for the application of the regime. One of the long-standing theories of harm acknowledged to exist regarding minority interests held in competitors including by *Salop and O'Brien* in their seminal paper in 2000 is the risk of unilateral effects where a firm holding shares in a competitor may be expected to compete less aggressively because it benefits financially from the success of its rival and suffers some of the detrimental consequences of taking away business from the rival. Furthermore, any attempt to define such rights for jurisdictional purposes will necessarily entail a lack of clarity which will result in utilising resources, both within and outside the regulator, in applying jurisdictional thresholds as opposed to evaluating substantively the competition issues associated with a proposed transaction, including the examination and application of emerging economic theories of harm and how they might apply. As discussed in Chapter 3, there are reported merger review cases in Ireland and at EU level involving existing minority interests which did not appear to be coupled with specific rights where the stake at issue was as low as 7% and 8%, which were found to give rise to substantive issues leading to a requirement for divestiture as part of a subsequent merger review. Furthermore, as examined in Chapter 1, there is evidence to suggest that institutional investors holding interests in competitors are often not as passive as once thought and that they can play a relatively active role in the decision making of the target. Furthermore, the Commission has found in industries in which institutional common shareholders are prevalent, the HHI, as the traditional measure of concentration, is not a reliable measure of concentration. The use of the 5%

criterion would render the regime unfit for the regulation of common minority interests. The proposal I am suggesting would render the jurisdictional criteria appropriate to regulate common minority shareholdings unlike the present system of merger control in Ireland and at EU level, and similarly unlike some of the leading and most developed systems of merger control in the world such as Hart Scott Rodino in the US, the Enterprise Act 2002 in the UK and the German Act against Restraints of Competition 1958 (GWB). In addition, as mentioned above, the acquisition of minority interests is often motivated by a desire to gain information on the target with a view to assessing whether to acquire full control at a future stage or to complement other relationships between the acquirer and the target which may be anticompetitive. Given the above factors, the author advocates that in cases where the parties are present on the same market, an information notice should be required irrespective of the level of shareholding being acquired;

- (d) **Presence in Sector:** A presence in the same business sector could be triggered by the acquirer or the target having an “interest” in the sector. The requirement to have an interest in the sector for this purpose would not necessitate the existence of sole or joint control of an existing business in the sector concerned. The presence in the same sector requirement would be met by any existing minority stake of a player in the sector. It is very important that this threshold be drafted carefully and broadly so that it is defined as any share of the total issued share capital irrespective of share class to avoid the selective creation of share classes to escape the regime (please see (f) below). In this way, the regime would be broad enough to capture common shareholdings;
- (e) **Place in Supply/Distribution Chain Irrelevant:** An information notice would be required where the parties are operating in the same sector irrespective of where they are in the supply or distribution chain, so that it would be broad enough to cover situations where the parties are present upstream or downstream of each other without, at the jurisdiction stage, having to get drawn

into specific relevant product/service and geographic market definitions and identifying vertical or horizontal activities/relationships;

- (f) **Calculation of Threshold:** Given the potential importance of, and reliance on, the threshold in terms of either existing interests and the interests being acquired, it will be critical to define the threshold of existing interests of the acquirer and the target by reference to any class of share, voting or otherwise.
- (g) **Ability to Acquire an Interest Sufficient:** Bearing in mind that each case will turn on its facts, the threshold would be met if the existing interest involves, or the transaction results in the acquisition of an interest in shares or only the potential to acquire an interest, through an option or conversion rights (such as convertible loan notes) or otherwise. In other words, the ability to acquire an interest would suffice as a relevant interest. For this purpose, the definition of “disclosable interest” could be used as per Section 258 of the Companies Act 2014 (“2014 Act”) as a starting point to frame a definition of relevant interest for this purpose;
- (h) **Connected Persons:** All interests of each party, its officers and directors, and related or connected persons, would have to be aggregated when assessing the application of the above threshold. For this purpose, it will be necessary to use broad definitions of connected persons such as those used in Section 220 of the 2014 Act or Section 10 of the Taxes Consolidation Act 1997;
- (i) **No Presence in Same Sector:** Where the parties are not present in the same sector, the author advocates the use of a 20% threshold, similar to that applicable under Brazilian merger control. In other words, in circumstances where the parties have no presence in the same business sector, all transactions where in the wake of the transaction, the acquirer would hold, directly or indirectly, 20% or more of the issued share capital of the target would be caught;

- (j) **Passive and Active Interests Caught:** The submission of an information notice would be required irrespective of whether or not the interest being acquired was active or passive (please see (c) above). In other words, the rights attached to the stake or the level of influence granted by the it, would not be considered at the jurisdictional stage. The purpose of the above is specifically to avoid having to analyse issues which are substantive in nature as part of the preliminary jurisdictional criteria. As discussed in Chapter 5, the above active/passive distinction for jurisdictional purposes has been the focus of much of the efforts of the US antitrust agencies in recent years in relation to the application of the solely for investment purposes exemption to minority interests (as opposed to the formulation of substantive US antitrust policy in this area). Similarly, the tests currently applied in merger control jurisdictions within the EU that extend to regulating non-controlling minority interests in certain circumstances, such as the UK and Germany, are confined to stakes giving rise to “material influence” and “competitively significant influence” respectively. The author advocates that any such active/passive/influence analysis should be part of the substantive substantial lessening of competition review as opposed to the jurisdictional filter to determine the categories of transactions for review.
- (k) **Waiting Period:** Similar to the Hart Scott Rodino merger regime in the US, the author advocates that the lodging of the information notice have suspensory effect, meaning that the parties cannot close the transaction until a specified period has expired. Mindful of proportionality and the need not to impose a disproportionate burden on business, the author advocates that, similar to the Hart Scott Rodino system applicable in the US, the parties be allowed to proceed to close the transaction on the expiration of a specified period without having to wait until the CCPC or the Commission actually issue a decision. In this way, the CCPC/Commission and Member States will have to act swiftly on the basis of the information available if it seeks to intervene further such as by taking interim measures and/or insisting on a full notification being submitted.

- (l) **Full Notification:** The CCPC or the Commission, as the case may be, would be empowered to require a full notification to be submitted where it has concerns on a *prima facie* basis regarding the proposed transaction based on the information supplied in the information notice and of course any other information available to the CCPC/Commission at the time.

In conclusion, it is the use of clear and unambiguous jurisdictional thresholds, and the statutory language to define them, that will shift the focus from the preliminary jurisdictional stage to the substantive analysis, thereby opening the door to an increase in the examination and application of economic theories of harm and their evolution. It is imperative that the primary focus of the competition regime to control minority interests should be the formulation and development of substantive policy informed by theories of harm as they evolve across the globe, away from the constraints inherent in ambiguous jurisdictional thresholds that tie up valuable and limited resources and offer transacting parties unintended opportunities to exploit in order to avoid regulatory review. In this way, jurisdictional clarity should result in a greater volume of valuable experience and precedent for an enhanced understanding of the complexities inherent in the evaluation of the economic theories of harm applicable to an analysis of the implications of minority interests from a competition perspective. The use of broad jurisdictional thresholds, coupled with clearly defined statutory parameters, will serve to widen the mergers regime, as it applies to minority interests, and distance the systems of Irish and EU merger control from the legacy of shortcomings that have marred the development of merger control policy for the regulation of minority interests, which have led to the present situation where the applicable regulatory merger control regimes are far behind the evolution of emerging economic theory resulting in stagnation of competition policy in this area. The author's proposals are designed to fill the significant regulatory gap that exists under Irish and EU competition law and to provide a gateway for much needed focus on the substantive implications of both cross and common minority shareholdings taking account of the applicable economic theories of harm as they evolve.

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