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EU Merger Control and Acquisitions of (Non-Controlling) Minority Shareholdings - The State of Play

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Abstract: This contribution investigates whether a regulatory / enforcement gap exists in the current EU system of concentration control and if so, what is its degree of seriousness, in order to possibly warrant regulatory intervention at EU level. In this respect, the evidence stemming from economic theory regarding the potential anti-competitive effects that (non-controlling) minority stake acquisitions may give rise to, is discussed. Furthermore, the existing constraints (mainly related to company law instruments) that may alleviate the need for merger control intervention are dealt with. Also, the appropriateness of the existing legal tools is evaluated, with a reference to the Commission's past practice and the case-law of the EU Courts. In this respect, due attention is paid to the *Ryanair / Aer Lingus* case, given the complex problems it raised in connection with non-controlling minority shareholding acquisitions. This contribution concludes that the European merger control system exhibits certain enforcement / regulatory gaps that may indeed require (regulatory) intervention.

Keywords: minority shareholdings, non-controlling stakes, structural links, effective merger control, decisive influence, cash-flow rights, control rights, unilateral effects, coordinated effects, *Ryanair / Aer Lingus*, enforcement / regulatory gap, Regulation 139/2004

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1. Introduction

On several rather recent occasions,[1] through the voice of Competition Commissioner Joaquin Almunia, the European Commission has acknowledged the existence of a possible enforcement gap in the EU merger control system, namely the fact that the acquisitions of non-controlling minority stakes escape the Commission's scrutiny under Regulation 139/2004.[2] Sometimes in a more forceful manner than on other occasions, the core of this idea is stated either with a reference to the limited coverage that the Merger Control Regulation offers with regard to the transactions susceptible to review, either in the context of the limits of Articles 101 and 102 TFEU when dealing with minority shareholding transactions, or while referring to the fact that (significant) competitive harm may stem from this type of deals. To further study whether it would be opportune to bring non-controlling minority shareholding acquisitions within the scope of the Merger Control Regulation, in late June 2013 a Commission Staff Working Document titled *Towards more effective EU merger control* (hereinafter the Commission's Staff Working Document) was issued.[3] The Staff Working Document covers the same ground mentioned above: it acknowledges that effective competition policy requires having the appropriate means to tackle all sources of harm to competition and consumers; it continues by stating that acquisitions of non-controlling minority shareholdings may in some cases lead to anti-competitive effects and as things stand, the Commission does not seem to have the tools to systematically prevent anti-competitive effects deriving from such structural links. Having this in mind, one of the consultation paper's objectives is to propose a reflexion and seek comments from stakeholders on the appropriateness of applying merger control rules when dealing with the anti-competitive effects stemming from certain acquisitions of non-controlling minority shareholdings.[4]

The contribution at hand aims to address the concerns listed above: whether a regulatory / enforcement gap exists in the current EU system of concentration control and if so, what is its degree of seriousness, in order to possibly warrant regulatory intervention at EU level. This endeavour will be accomplished by way of a legal analysis of the current mechanisms available in the Commission's 'toolkit', which may be employed to tackle non-controlling minority interests, with a view to their practical application appropriateness, and to the reliability of the results they deliver. Should the existing mechanisms of control prove to be inadequate or insufficient with regard to the satisfactory coverage of the types of transactions concerned, this contribution will attempt to assess the solutions currently available, even if they pertain to other (connected) areas of law, such as company law or corporate governance rules. This is so, since amending the current concentration control system envisaged by the Merger Control Regulation is a cumbersome and to a certain extent, sensitive topic, which one may view as a last resort possibility. After all, as we shall detail shortly below, overregulation and resource consumption are considerations that should not be overlooked. Furthermore, the contribution will dwell on, and rely upon the evidence stemming from economic theory for the purpose of substantiating our findings with regard to the existence and degree of seriousness of the European merger control system's potential

[1] See for example: Joaquin Almunia, *EU merger control has come of age*, "Merger Regulation in the EU after 20 years", co-presented by the IBA Antitrust Committee and the European Commission Brussels, 10 March 2011, SPEECH/11/166, Joaquin Almunia, *Merger review: Past evolution and future prospects*, Conference on Competition Policy, Law and Economics, Cernobbio (Italy), 2 November 2012, SPEECH/12/773, Joaquin Almunia, *The role of competition policy in times of crisis*, 29th Annual AmCham EU Competition Policy Conference (Brussels), 6 December 2012, SPEECH/12/917, Joaquin Almunia, *Presenting the Annual Competition Report for 2012*, 28 May 2013, SPEECH/13/474. The concerns regarding minority shareholdings are not new at EU level (see for example the *Green Paper on the Review of Regulation 4064/1989*, COM (2001) 745 final). However, lately one may notice the Commission's keen interest in the importance of such shareholdings in today's economy. In this respect one may notice that in 2011 the following two invitations to tender studies were launched: *Study on the importance of minority shareholdings in the EU,* COMP/2011/016 and *Provisions of data for the assessment of the importance of minority shareholdings in the EU*, COMP/2011/029.

[2] *Council Regulation 139/2004 on the control of concentrations between undertakings*, OJ L 24, 29.01.2004, hereinafter the European Merger Control Regulation.

[3] http://ec.europa.eu/competition/consultations/2013_merger_control/index_en.html, retrieved on June 21st, 2013.

[4] The second objective of the consultation paper is to seek comments on the effectiveness and smoothness of the case referral system to transfer cases from Member States to the Commission, both before and after notification.

enforcement / regulatory gap. To phrase this in a nutshell, if this is the current system of control and these are the mechanisms the Commission and the Courts use in their decisional practice and case-law on one hand, and if these are the signals and answers one receives from an economic take of market realities on the other hand, are we dealing with a consistent match of the two sides of the coin? Is there need for a more coherent middle ground, which could better satisfy the needs of both correctly tackling anti-competitiveness and genuinely reflecting economic market realities?

Studying these matters is important from different perspectives, or in other words with a view to different interests: if some sort of adjustment of the system in force is needed, before embarking on a hefty task of amending the Merger Control Regulation, the Commission will have to pay due attention to the much desired legal certainty, effectiveness and completeness that the EU merger control system should bring to the table. Speaking of legal certainty and effectiveness, the issue may also be viewed from the market players' perspective. Should the EU merger control system incur such a change, there may be a risk of undertakings being deterred from doing business in the EU Internal Market due to fear of overregulation. Is this really a desirable outcome, given the economic *status quo* in the EU? Can Europe afford scaring away important tax contributors in the context of achieving the desideratum of enhancing Europe's competitiveness in the global market place?[5] Returning to the Commission's standpoint, it is imaginable that it is very much preoccupied with its investigative burden and the possible undue consumption of resources. The latter is indeed a valid argument especially in times of crisis. In this context, the more fundamental question regarding the actual need to tackle non-controlling minority stakes acquisitions arises. In a system of concentration control, where more than 90% of the transactions investigated are cleared in the first appraisal phase,[6] one may indeed ask the question of how significant is the competitive harm that may stem from minority stake acquisitions in order to overburden the Commission with this extra amount of work? Of course, a fine balance has to be reached between these diverse concerns.

This contribution is structured as follows: the first section deals with the current legal regime of (non-controlling) minority shareholdings in EU competition law, with a focus on Articles 101 and 102 TFEU, and the Merger Control Regulation. Special attention is also dedicated to the *Ryanair / Aer Lingus* cases, having in mind this saga's importance in the discussion of whether a gap indeed exists. The implications of the relationship between corporate law instruments and competition law tools dealing with minority shareholdings is then touched upon, immediately followed by a discussion of the evidence stemming from economic theory and the classic theories of harm, meant to establish if the current EU merger control system allows potentially harmful transactions to slip through the cracks. This contribution ends with a set of conclusions, aiming also at previewing the manner in which the Commission intends to remedy the current concerns relating non-controlling minority shareholding acquisitions.

2. The *Status Quo*

2.1. The Concept of Control and the Meaning of Decisive Influence in Regulation 139/2004

Understanding the concept of control in the context of the merger review is important, as this concept is inherent in the definition of a concentration transaction. The EU Merger Control Regulation applies to transactions where a structural change of control on a lasting basis occurs. Correctly grasping the definition of the concept of concentration and furthermore, the definition of the concept of control is essential, because altering the

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[5] This is one of the key elements with regard to the role the Single Market should have in the current economic and social context. See *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Single Market Act II, Together for new growth*, COM (2012) 573 final, p. 4.

[6] See EU Merger Control statistics until November 30th, 2013, retrieved on December 2nd, 2013 at http://ec.europa.eu/competition/mergers/statistics.pdf

European merger control system to the effect of bringing acquisitions of non-controlling minority stakes within the ambit of the competition law rules contained in Regulation 139/2004 necessitates a rethinking of the traditional understanding of the concept of economic concentration, with all the consequences that follow from this. Also, as we shall detail below, much of discussion in the *Ryanair / Aer Lingus* case surrounded the importance of the concept of concentration and its impact on the Commission's capacity to investigate minority interest ownerships.

Essential information concerning the concept of control is to be found in the Commission's Consolidated Jurisdictional Notice.[7] Furthermore, the concept of control and its core element, namely the concept of 'decisive influence' have been thoroughly discussed in many contributions,[8] especially in the periods following the enactment of Regulations 4064/1989[9] and 139/2004. Consequently, the following lines will only provide a brief overview of the *status quo* and certain discussions of potential minority shareholding problems that may occur in practice, in connection to the concept of control.

The notion of control is broadly construed and is developed in Article 3, par. 2 and 3 of the Merger Control Regulation, by providing a non-exhaustive list of means of establishing control: rights, contracts or any other means. The Consolidated Jurisdictional Notice builds on the principles and definitions embedded in Regulation 139/2004. In this respect, par. 16 of the Notice provides that a concentration may occur on a legal (*de jure*) or *de facto* basis, it may take the form of sole or joint control and it may extend to the whole or parts of one or more undertakings. Furthermore, control may be acquired in a direct manner, or indirectly, for example by using subsidiary companies, or by creating a joint venture meant to coordinate the owners' joint control.[10] What is more, the Merger Control Regulation will also apply to changes in the quality of control[11] (from sole to joint control and vice versa), thus covering the entrance of one or more new controlling shareholders, irrespective of whether or not they replace existing controlling shareholders, and the reduction of the number of controlling shareholders.[12]

For a transaction to fall under the scope of Regulation 139/2004, one of its essential features should be that it confers the possibility of exercising decisive influence over the behaviour of another undertaking. This will normally happen when one deals with ownership or the right to use all or parts of the assets of an undertaking and when one identifies rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking.[13] The mere possibility of exercising decisive influence should suffice, without the need to prove the actual use of such influence.[14] When deciding whether decisive influence exists the Commission was traditionally given a great deal of discretion. However, in time the Commission's decisional practice placed limits on this discretion. The core of this has been originally 'codified' in the Commission's Notice on the Definition of a Concentration,[15] later on replaced by the Consolidated Jurisdictional Notice.

Decisive influence does not necessarily entail obtaining absolute (sole or joint) control over an undertaking. What the Commission will be interested in is the decisive influence, which has a certain weight.[16] Normally, the acquisition of majority (50.1% or higher) shareholdings would fall under this category; the most likely materialization in this context would be where decisive influence takes the form of positive rights that give direct

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[7] OJ C95 of 16.04.2008.

[8] See for example Broberg, M., *The concept of control in the Merger Control Regulation*, E.C.L.R., Issue 12, Sweet & Maxwell, 2004 and Luebking, J., *Commission adopts Jurisdictional Notice under the Merger Regulation*, Competition Policy Newsletter, Issue 3, 2007.

[9] *Council Regulation 4064/1989 on the control of concentrations between undertakings*, OJ L 395, 30.12.1989.

[10] Case IV/M.787 - *TNT / GD Net.*

[11] For example, see case IV/M.23 - *ICI / Tioxide.* See also par. 83-90 of the Consolidated Jurisdictional Notice.

[12] See Jones, A. & Sufrin, B., *EU Competition Law. Text, Cases and Materials*, 4th edition, oxford University Press, 2011, p. 871.

[13] Article 3, par. 1 and 2 of Regulation 139/2004.

[14] Case IV/M.330 - *McCormick / CPC / Rabobank / Ostmann.*

[15] OJ C 66, 02.03.1998.

[16] Broberg, M., *op. cit.*, p. 742.

operational control over the target undertaking. At the other end of the spectrum, it was argued that in principle, the protection provided under domestic company law rules to certain categories of persons would not suffice in order for sufficient influence to be established. According to the provisions of par. 22 of the Consolidated Jurisdictional Notice, while such domestic legislation may confer some power of control, the concept of control under the European Merger Control Regulation is not related to such means of influence as it focuses on decisive influence enjoyed on the basis of rights, assets or contracts or equivalent *de facto* means. This is not a hard and fast rule though, since practical situations may occur in which the protection conferred by rules of domestic company law amounts to decisive influence.[17]

Minority shareholdings may also be relevant when talking about transactions that allow decisive influence to be exercised. For example, par. 57 of the Consolidated Jurisdictional Notice provides that sole control may occur on a legal basis in situations where specific rights are attached to the minority shareholding.[18] These may be preferential shares to which special rights are attached, enabling the minority shareholder to determine the strategic commercial behaviour of the target company, such as the power to appoint more than half of the members of the supervisory board or the administrative board. Also, acquiring a so-called negative control, namely the possibility of vetoing important business strategy decisions, such as the approval of capital expenditure of a certain level, thus creating so-called deadlock situations, may be a good example in this respect.[19] A minority shareholder may also be deemed to have sole control on a *de facto* basis. This is in particular the case where the shareholder is highly likely to achieve a majority at the shareholders' meetings, given the level of its shareholding and the evidence resulting from the presence of shareholders in the shareholders' meetings in previous years (the so-called dispersed nature of the remaining shareholdings).[20] Without needing to extend this discussion too far, it must be stated that minority shareholdings may form part of situations of joint control as well. This is where the importance of how veto rights are exercised is crucial and the Consolidated Jurisdictional Notice provides valuable information in this respect. Specifically, the existence of joint control will depend on the precise content of the veto right itself and also the importance of this right in the context of the specific business of the joint venture. To this end, the company's business plan, the powers relating to the appointment of senior management and determination of budget, the investment policies pursued and certain market-specific rights will be taken into account.[21]

Having in mind the above, it is safe to state that control may be exercised even if less than 50% of the shares carrying voting rights is acquired, just as ownership of more than 50% of the shares of an undertaking will not necessarily involve the existence of control, should certain restrictions on voting rights attach.[22] In other words, there is no prescribed minimum level of shareholding above which, minority shareholding acquisitions will necessarily be caught by the European Merger Control Regulation.[23] It is a question of law and fact in each case.[24]

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[17] See case T-282/02, *Cementbouw v. Commission*, 2006, ECR-II 319.

[18] See for example case IV/M.258 - *CCIE / GTE.*

[19] Par. 56 of the Consolidate Jurisdictional Notice states: 'Where the company statutes require a supermajority for strategic decisions, the acquisition of a simple majority of the voting rights may not confer the power to determine strategic decisions, but may be sufficient to confer a blocking right on the acquirer and therefore negative control.'

[20] Consolidate Jurisdictional Notice, par. 59. See also Case IV/M.343 - *Société Générale de Belgique / Générale de Banque*, Case COMP/M.3330 - *RTL / M6* and Case IV/M.159 - *Mediobanca / Generali.*

[21] See par. 68-73 of the Consolidate Jurisdictional Notice.

[22] See for example case IV/M.17 – *MBB / Aerospatiale*.

[23] Miller, S. R.; Raven, M. E.; Went, D., *Antitrust Concerns From Partial Ownership Interest Acquisitions: New Developments in the European Union and United States*, CPI Antitrust Chronicle, January 2012 (1), p. 3.

[24] From this point of view, the Commission must perform complex assessments in order to correctly understand the specific sectors and markets in which undertakings are active and consequently the significance attached to specific voting rights or veto abilities, in the context of the undertakings' internal functioning and corporate strategies. To exemplify, one could imagine that the possibility of vetoing investment-related decisions may be key to the functioning of undertakings active in financial markets, whereas veto rights pertaining to research and development may be essential for undertakings active in the consumer electronics market and pharmaceutical sectors.

Deciding whether the possibility of exercising decisive influence exists is also important with regard to establishing which undertakings involved in a transaction should be considered 'undertakings concerned' for the purpose of calculating the aggregate turnover and examining whether the turnover thresholds in Article 1 of Regulation 139/2004 have been met. Friend[25] provides a realistic example where concerns relating to minority shareholdings may occur from this point of view: imagine a joint venture in which only some of the shareholders have joint control, while others are simply regarded as passive minority investors (albeit with minority protection rights). There may be perfectly sound business reasons why the transaction is structured in this way, reasons that have nothing to do with merger control 'avoidance', such as for example, certain investors having particular expertise or making a larger investment, and therefore demanding direct role in management. The Consolidated Jurisdictional Notice draws a distinction between veto rights over strategic business decisions, which confer control and veto rights, which are seen as normal minority protection, that do not confer control.[26] The turnover of the undertakings possessing the latter category of rights will not be taken into account in determining whether the European Merger Control Regulation applies to such a practical situation. Should undertakings involved in such a transaction wish to curb the application of the Merger Control Regulation this template may be used to this end: the essential veto rights as far as the concept of control is concerned may be placed in the hands of companies with lower turnover, so the Internal Market dimension thresholds are not met, thus resulting in the non-application of the competition rules contained in Regulation 139/2004.

Furthermore, it may very well be the case that certain transactions (entailing for example four participating undertakings, with no specific veto rights assigned and the shareholding of these undertakings lies equally at 25%) cannot be properly assessed *ex-ante* in order to correctly determine which shareholders will form a majority in the decision-making organs of the company. Par. 80 of the Consolidated Jurisdictional Notice provides that absent strong common interests between shareholders that might point to *de facto* joint control, these kinds of transactions are not treated as concentrations under the current rules.[27]

Summing up, the concept of decisive influence in the context of minority shareholdings is important because as things stand, the European Commission restricts the application of the one-stop-shop principle embedded in Regulation 139/2004 to controlling stakes. This means that minority shareholding acquisitions are not caught unless they have (decisive) influence attached to them that goes beyond what would normally be expected to protect an investment of that proportion. In other words, the minority shareholder has to be able to determine the strategic commercial behaviour of the target.[28]

Where the acquisition of minority shareholdings does not confer the possibility of exercising decisive influence, this transaction will not fall within the ambit of application of the competition rules contained in the European Merger Control Regulation, as a self-standing transaction. However, this does not mean that such transactions do not raise competitive concerns. As we will detail in Section 3.2 of this of the contribution, economic evidence shows that competitive concerns may occur in connection to some types of non-controlling minority stake acquisitions, yet the degree of intensity of such concerns may vary depending on several sets of circumstances, such as type of rights acquired, market settings, type of transaction performed, etc. If such concerns exist, it may be wise to first investigate how the Commission has been dealing with them so far, given the existing legal tools it possesses. The following section will provide that under certain conditions Articles 101 and 102 TFEU may be useful in this context. Furthermore, ancillary assessment of such transactions may be performed under the Merger Control Regulation, if a connection with a

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[25] Friend, M., *Regulating minority shareholding and unintended consequences,* E.C.L.R., 2012, 33(6), p. 304-305.
[26] See par. 66 of the Consolidate Jurisdictional Notice.
[27] Friend, M., *op. cit.*, p. 305.
[28] Drauz, G.; Mavroghenis, S.; Ashall, S., *Recent Developments in EU Merger Control*, Journal of European Competition Law & Practice, 2012, Vol. 3, No. 1, p. 58. See also Schmidt, J. P., *Germany: Merger control analysis of minority shareholdings – A model for the EU?*, Horizons - Concurrences – Revue des droits de la concurrence, no. 2/2013, p. 207.

different notifiable concentration may be established. However, as we shall detail below, this level of intervention may not necessarily be sufficient, as certain types of transactions may not be properly investigated, or they may 'slip through the (investigative) cracks'.

Furthermore, other problems may also occur in practice since other jurisdictions with different threshold standards (which may very well fall short of conferring 'decisive influence') may trigger the application of their domestic concentration control systems. Certain authors argue that this situation may undermine the objective of harmonized rule-making and creates the undesirable possibility of protracted scrutiny of a particular shareholding.[29] For example, in the UK a test of 'material influence' is used rather than the stricter European 'decisive influence' test. Similarly, in Germany a test of 'competitively significant influence' is in place.[30] Of course, studying the national experiences with non-controlling minority shareholdings may be interesting from the EU merger control system's standpoint, in the event a change of the latter will take place to the effect of bringing non-controlling minority shareholdings under the concentration control appraisal mechanisms. The Commission's Staff Working Document and its annexes pay due attention to this issue, by thoroughly reviewing the domestic authorities practice in certain European and non-European jurisdictions, and by taking account of the lessons that may be learned or the models that may be used when potentially amending the Merger Control Regulation. Furthermore, the discussion of non-controlling minority shareholdings in the context of EU merger control may be impacted by the debates surrounding the idea of greater convergence / harmonisation of (domestic) merger control rules, aimed at avoiding situations where the substantive and procedural rules between the different domestic systems may lead to inconsistent outcomes, and also at conferring greater legal certainty to, and reduced burdens and costs for those undertakings involved in (cross-border) concentration transactions.[31] These are however issues that go beyond the scope of the contribution at hand. Returning to our analysis it is important to ask the question whether acquisitions of non-controlling minority shareholdings are properly or improperly dealt with under the current rules of EU competition law? In other words, are the existing EU law rules capable of accurately shielding the functioning of the competitive process in the Internal Market from the harm that such interests may create?

2.2. The Regime of Minority Shareholdings in EU Competition Law

It is important to (briefly) discuss the manner in which EU competition law deals with the minority shareholdings that escape the classic application of the Merger Control Regulation, because correctly understanding the law currently in force is a necessary prerequisite of any debate surrounding a potential regulatory change. When talking about the classic application of the EU merger control rules, we refer to the application of the one-stop-shop principle, embedded in the *ex-ante* system envisaged by Regulation 139/2004, meant to assess whether a shift in control over the behaviour of an undertaking is likely to lead to a significant impediment to effective competition. Three legal avenues have proven useful in the past, to deal with non-controlling minority shareholdings: the Merger Control Regulation itself, Article 101 TFEU and Article 102 TFEU. Let us start with the analysis performed while using the classic competition law tools, the cartel prohibition and the prohibition of the abuse of a dominant position.

2.2.1. Article 101 TFEU

According to Schmidt, the *ex-ante* inapplicability of the European Merger Control

[29] See Riis-Madsen, C.; Stephanou, S.; Kehoe, K., *Reform of the EU Merger Regulation: Looking Out for the Minority*, CPI Antitrust Chronicle, January 2012 (1), p. 3.

[30] See also the Commission's Staff Working Document, p. 4-5.

[31] See for example the positions taken by Commission officials Joaquin Almunia and Nadia Calvino at the Global Competition Review's Conference, Brussels, 28 September 2010. See also Galloway, J., *Convergence in international Merger Control,* the competition Law Review, Volume 5, Issue 2, 1009, p. 179-192; Lang, J. T., *Harmonizing National Laws, Procedures and Judicial Review of Mergers in the EU and EEA*, 18th St. Gallen International Competition Law Forum ICF, 7-8 April 2011.

Regulation to the acquisition of non-controlling minority shareholdings does not imply an area immune from law.[32] This is evident from the jurisprudence dating even before the entry into force of Regulation 4064/1989, when Article 101 TFEU was used to tackle the acquisition of minority stakes that are large enough to enable the owner to exercise some influence on the commercial and strategic behaviour of the company,[33] (yet falling short of conferring control in the sense later on implied by the Merger Control Regulations). The *Philip Morris / Rothmans* case[34] is well known and provides a good example in this respect. The case involved an agreement through which Phillip Morris intended to acquire a 30.8% interest in its competitor, cigarette manufacturer Rothmans, from its South African owners Rembrandt, though the voting rights to be obtained by Philip Morris were limited to 24.9%. Mention should be made that the agreement was the result of the changes requested by the Commission to the original agreement that entailed a 50% - 50% ratio for the division of shares between Rembrandt and Phillip Morris. Both groups kept the right of first refusal should the other wish to sell, and there were also other arrangements to ensure that Philip Morris had neither board representation nor managerial influence over Rothmans, while also preventing information concerning Rothmans being available to Philip Morris. The Court of Justice concluded that the agreement had neither the object, nor the effect of distorting competition by creating the premises for cooperation and / or exchange of commercially sensitive information between the parties involved. In other words, the conduct does not in itself constitute a restriction of competition, yet it 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. Most importantly, the Court listed the most likely situations in which such distortions may occur, especially in oligopolistic markets with high barriers to entry: where the investing company obtains legal or *de facto* control of the commercial conduct of the other company; where the agreement provides for commercial cooperation between the companies; where it creates a structure likely to be used for such cooperation; 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.

One has to observe that this ruling was handed down before the first Merger Control Regulation entered into force. However, the Court's ruling contains references to a company obtaining legal or *de facto* control of the commercial conduct of the other company, which is nowadays a key element in merger control analysis under the Merger Control Regulation. The Court also recognized the possibility of anti-competitive effects stemming from a minority shareholding acquisition even in the case of non-achievement of control, specifically in cases in which the acquisition would have been a tool for commercial cooperation between the competing parties. Furthermore, speaking of commercial cooperation, even though the Court makes no express reference to the concept of reciprocity of share participation in the company, cross-shareholders' participations seems to be the reasonable condition for commercial cooperation to take place.[35]

The *Philip Morris / Rothmans* doctrine was used in cases following the adoption of Regulation 4064/1989, which carved out situations of decisive influence from the application of Article 101 TFEU. To be more specific, as of September 1990, the *Philip Morris / Rothmans* principles can only be considered relevant for cases falling short of conferring control through the possibility of exercising decisive influence. For example, in both *Olivetti / Digital*[36] and *BT / MCI*[37] at issue were acquisitions of minority stakes that did not lead to a

[32] Schmidt, J. P., *op. cit.*, p. 211.
[33] Toth, A., *TEU Competition Law Aspects of Minority Shareholdings*, World Competition 35 / 4, 2012, p. 614; Russo, F., *Abuse of Protected Position? Minority Shareholdings and Restriction of Markets' Competitiveness in the European Union*, World Competition, 29 / 4, 2006, p. 619.
[34] Cases 142/85 and 156/84, *British American Tobacco Company Limited and R. J. Reynolds Industries Inc. v. European Commission*, 1987, ECR 4487.
[35] Russo, F., *op. cit.*, p. 621.
[36] Case IV/34.410.
[37] Case IV/34.857.

change in control, mainly because of the transactions' features being drafted to the effect that further increases of shareholdings were not possible. Furthermore, in both cases the Commission noticed that board representation was limited and in any case, not capable of giving rise to coordination of competitive behavior, or exchanges of sensitive information. Consequently, both cases were thought not to fall under the provisions of Article 101 TFEU. The seeds of *Philip Morris / Rothmans* are evident, since on both occasions it was reiterated that this doctrine is still applicable law and that even in the absence of control, competitive problems may occur. More importantly, as Russo points out, these two cases confirmed the view that the Merger Control Regulation cannot cover all the competitive problems deriving from minority shareholding acquisitions and that the instruments provided by Article 101 TFEU may still be indispensable in dealing with problematic circumstances.

2.2.2. Article 102 TFEU

To start off, it has to be made clear that the application of Article 102 TFEU requires the existence of a dominant position. Should this not be the case, the assessment of minority stake acquisitions cannot be brought under the competitive analysis of this Treaty article. The applicability of Article 102 TFEU to minority shareholdings was discussed as early as the *Philip Morris / Rothmans* judgment. On this occasion, the Court stated in par. 49 of the ruling that in the case of undertakings holding a dominant position on the market, the acquisition of a minority shareholding in a competing company could constitute an infringement of Article 102 TFEU, if it confers some influence on the commercial policy of the competitor. However, the Court did not clarify what it meant by some influence. The opportunity to clarify this concept arose in the *Gillette* case,[38] in which the Commission performed an interpretative analysis of the *Philip Morris / Rothmans* principles. Specifically, while referring to the concept of 'some influence', in par. 24 of its decision the Commission observed that Gillette's capacity to influence the commercial conduct of both Eemland (which is the owner of Wilkinson Sword, also, a part of the participation of Eemland in Wilkinson Sword was acquired by Gillette) and Wilkinson Sword (Gillette's main competitor) was much less likely to be effectively used because of the absence of any voting rights in Wilkinson Sword. However, Gillette has become the main shareholder and creditor of Eemland, the latter feature bringing the situation closer to a cross-shareholding setting. Furthermore, Gillette could have used its rights to prevent future concentration plans that Eemland would have had, and Gillette would have not approved of. The economic links created between the companies involved could not have been perceived as not impacting the independent determination of market conduct. Consequently, an infringement of Article 102 TFEU was established since the transaction influenced the structure of the market, thus weakening competition in the sense of spirit and letter of the *Hoffmann-La Roche* ruling.[39]

What is surprising about the *Gillette* case is that although the circumstances of this case seem less serious than the ones in the *Philip Morris / Rothmans* case, namely a smaller interest acquisition, an infringement of the EU competition law rules was established. While using the rationale of *Philip Morris / Rothmans*, the Commission succeeded in extending its reach. Even more surprisingly, even though a clear reference is made to the *Michelin* ruling,[40] in that a dominant undertaking has a special responsibility of not allowing its conduct to impair undistorted competition, there was no mention of the landmark *Continental Can* judgment,[41] which postulated that strengthening of a dominant position (via an acquisition) may constitute an abuse of an already existing dominant position.

2.2.3. Summing Up…

One may observe that the EU competition law system is not short of tools that may be used to deal with non-controlling minority shareholdings. Their appropriateness when dealing

[38] Case IV/33.440.
[39] Case 85/76, 1979, ECR 461, par. 91.
[40] Case 322/81, 1983, ECR 3461.
[41] Case 6/72, *Europemballage Corporation and Continental Can Company Inc. v. Commission*, 1975, ECR 495.

with ownership of such interests may be however questionable. First, in the words of Commissioner Almunia,[42] the actions that are possible under Articles 101 and 102 TFEU do not cover all situations. This assertion is also reiterated in the Commission's Staff Working Document.[43] Second, speaking of the appropriateness of using these tools, which are not specifically designed to deal with such business transactions, several conclusive observations may be made.[44] Article 101 TFEU requires the presence of an agreement, which may not always be the case for transactions involving minority shareholdings; Article 101 TFEU is not necessarily designed to deal with structural changes in the market; the conditions and application of Article 101, par. 3 TFEU may be regarded as too restrictive for concentration transactions; the time constraints under which concentrations are performed clash with the somewhat slow decision-making process pertaining to Article 101 TFEU and last but not least, it may be problematic to apply this legal provisions to hostile take-overs, also having in mind that in par. 44 of the Commission's *BT / MCI* decision it was confirmed that as a general rule,[45] Article 101 TFEU does not apply to agreements for the sale or purchase of shares. With regard to Article 102 TFEU, the main concern is connected with the need of a dominant position being established. Furthermore, just as in the case of Article 101 TFEU, the procedures unfold *ex-post factum*, which is neither an ideal, nor a realistic approach[46] to market realities, they are lengthy and somewhat inflexible.

What may be drawn from Commissioner Almunia's statement and from the Commission's Staff Working Document (including its annexes) is that acquisitions of non-controlling minority shareholdings may require room in the Merger Control Regulation appraisal mechanism as self-standing transactions. This brings us back to our previous questions: should this type of (self-standing) transactions be conferred more specific attention? Is there really a regulatory / enforcement gap in the European merger control system in need of filling? This is where we have to nuance our previous assertion relating to the non-applicability of the Merger Control Regulation to acquisitions of non-controlling minority stakes. As we shall see below, a more appropriate statement would be that such transactions may be dealt with under the Merger Control Regulation, however as things stand, mostly in an incidental manner in connection to other self-standing, notifiable transactions. It is to this issue that we now turn.

2.2.4. The Merger Control Regulation

The discussion has to be viewed from two angles: first with regard to pre-existing non-controlling minority shareholdings that need to be presented to the Commission while notifying a different concentration transaction, and second in connection to interventions on non-controlling minority shareholdings after the prohibition of the (more complex) transaction that they form part of.

Let us start with the former setting. Pre-existing minority shareholdings falling short of the prior notification thresholds may still be investigated by the Commission, however such minority shareholdings are ancillary to a main transaction,[47] and are therefore

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[42] Joaquin Almunia, SPEECH/12/773.

[43] See the Commission's Staff Working Document, p. 5.

[44] For further details see Rusu, C. S., *European Merger Control: The Challenges Raised by Twenty Years of Enforcement Experience*, Wolters Kluwer Law & Business / Kluwer Law International, European Company Law / CECL Series, vol. 7, 2010, p. 115-116.

[45] This assertion has to be nuanced having in mind the provisions of par. 37-38 of the Court's ruling in cases 142/85 and 156/84, *British American Tobacco Company Limited and R. J. Reynolds Industries Inc. v. European Commission*: there it is acknowledged that although the acquisition of an equity interest in a competitor does not in itself constitute conduct restricting competition, it may nevertheless serve as an instrument for influencing the commercial conduct of the companies involved in the transaction, so as to restrict competition on the market in which they are active. Therefore, given the specific contractual and market contexts of each case, if the competitive behaviour of the parties is to be coordinated or influenced, Article 101 TFEU may be applicable. See also points 98-100 of the European Commission's 14th Report on Competition Policy, (1985).

[46] See Idot, L., *Non-controlling minority shareholdings in European merger control and under Article 101 TFEU*, EU Competition Law Forum, Brussels, 9 March 2012.

[47] See the Commission's Staff Working Document, p. 4.

substantively assessed mostly in the context of the connected concentration transactions which already form the object of the classic appraisal under Regulation 139/2004, and primarily in the context of the remedies and commitments stages.[48] This is because the current setup of Regulation 139/2004 does not give the Commission the formal and systematic *ex-ante* powers to investigate non-controlling minority shareholdings. However, it is important to recall that such existing minority shareholdings of 10% or more and interlocking directorships have to be identified in any notification to the Commission as far as they concern affected product markets, in relation to which information has to be provided according to Sections 4.2.1 and 4.2.2 of Form CO.[49] According to the provisions of par. 3 and 13 of the Commission's Staff Working Document – Annex II: *Non-controlling minority shareholdings and EU merger control*, at least 53 merger cases have been identified since 1990 where non-controlling minority stakes were relevant for the competitive assessment of the transactions. Furthermore, such structural links were found to create competition problems in at least 20 of these cases, across the whole range of unilateral,[50] coordinated,[51] and foreclosure effects,[52] and sometimes even in the context of potential entry.[53] Annex II to the Commission's Staff Working Document contains an interesting selection of cases dealing with non-controlling minority shareholdings assessed by the Commission since the entry into force of the first Merger Control Regulation.[54] In the following paragraphs we will try to outline the guiding lines of the Commission's assessment capabilities in the context of pre-existing non-controlling minority stakes, by taking a brief look at some cases it has dealt with over time (cases which are not necessarily outlined in the second Annex of the Staff Working Document).

The most common example entails a pre-existing minority interest of company X in company Y, which may be part of the Commission's substantive assessment of the concentration between the undertakings X and Z. Such a setting is known in practice as interests in third party competitors. This was exactly the setting in the *Thyssen / Krupp* transaction[55], in which the merger between these two undertakings created the likelihood of links being established between Thyssen and Kone (the market leader and the runner-up), while Krupp was priorly the holder of a 10% stake in Kone, with the right of appointing one member of the board of directors. The Commission cleared the concentration, however under the condition that Krupp's minority stake in Kone would be stripped of the right to appoint the member of the board of directors. Similarly, in the *Allianz / AGF* case,[56] the former company acquired control over the latter, while the latter held a minority 24.9% stake in a third company, Coface. In order for the concentration to be cleared, AGF put forward a commitment to divest its shares in Coface and to remove the members of the management board it had appointed.[57]

As a general enforcement policy, the Commission is very sceptical with regard to behavioural remedies and about the efficacy of a Chinese Wall (i.e. the non-disclosure of confidential information between the undertakings involved) as a remedy to the risks of coordination arising from interlocking directorates,[58] and has a clear preference for structural remedies, for the purpose of avoiding situations which facilitate coordination between market

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[48] This may occur either before or during the Phase I administrative proceedings, so as to facilitate the process of obtaining unconditional merger clearance, as it was the case in the M.113 – *Courtaulds / SNIA* and M.3547 - *Banco Santander / Abbey National* transactions, or later on during the appraisal process when the merging parties have given formal commitments to divest, as a condition of clearance, as it was the case in the M.1673 *VEBA / VIAG* and M.5406 – *IPIC / MAN Ferrostaal* transactions.

[49] Schmidt, J. P., *op. cit.*, p. 211.

[50] M.3653 - *Siemens / VA Tech,* M.1980 - *Volvo / Renault.*

[51] M.1383 - *Exxon / Mobil*, M.1673 - *VEBA / VIAG*

[52] M.2050 - *Vivendi / Canal+ / Seagram*, M.5406 - *IPIC / Man Ferrostaal.*

[53] M.4153 – *Toshiba / Westinghouse.*

[54] See for example cases such as: M.3696 - *E.ON / MOL*, M.3653 - *Siemens / VA Tech*, M.1453 – *AXA / GRE.*

[55] Case IV/M.1080.

[56] Case IV/M.1082.

[57] Similar situations occurred in the the M.6662 *Andritz / Schuler* and M.6541 *Glencore / Xstrata* transactions.

[58] For further details and extensive case-law analysis see Toth, A., *op. cit.,*p. 612.

players. This was emphasized in transactions such as *Hoechst / Rhone-Poulenc*[59] and especially while assessing the acquisition of the operations of Toys 'R' Us by Blokker, in the Netherlands.[60] Speaking of structural remedies, divestitures or considerable limitations of minority shareholdings,[61] the conversion of an active shareholding into a passive one, by waiving certain contractual rights,[62] and the elimination of interlocking directorates seem to be the best bet for undertakings aiming to have a transaction cleared.[63]

The second setting concerning non-controlling minority shareholdings in the context of the Merger Control Regulation's appraisal process is somewhat more challenging. Here we have to distinguish between minority shareholdings that are part of a notified and already implemented concentration transaction and those that were acquired before a controlling bid was launched and then prohibited.[64] In both situations the relevant provision of the Merger Control Regulation to be applied is Article 8, par. 4 which allows the Commission to require the undertakings concerned to dissolve the (prohibited or priorly implemented) 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. The outcomes that may arise in these two settings differ, as we will see in the analysis below, to the effect that the Commission's powers under Article 8, par. 4 are limited to concentrations that were implemented and that provision does not catch minority shareholdings acquired with a view to a takeover bid when such stake by itself does not confer decisive influence.[65]

The first situation was at hand in the famous *Tetra Laval / Sidel* case.[66] This case pertained to an already notified and implemented concentration and the matter to be discussed here is the retention of a minority shareholding after the Commission issued the prohibition decision. Briefly, the setting of *Tetra Laval / Sidel* was as follows. Tetra Laval acquired 95% of the shares of Sidel. The Commission prohibited this transaction and ordered the divestiture of this shareholding. The General Court annulled the Commission's decision (pertaining to the actual prohibition and the divestiture) and the ECJ upheld the General Court's ruling. Tetra claimed that even if divestiture should occur, it should still be allowed to hold a minority stake in Sidel, as long as this will not confer upon it the possibility to exercise decisive influence, since this would not require a clearance under the Merger Control Regulation. However, the Commission had a different standpoint, assessing the matter under Article 8, par. 4 of the Merger Control Regulation, and concluding that restoring effective competition would be impeded if Tetra would retain such a minority shareholding in Sidel. Furthermore, such a setting could hinder the prospect of a successful divestiture and would allow Tetra to retain economic incentives to refrain from competition and to engage in exclusive vertical relations with Sidel.[67] We will return to the *Tetra Laval / Sidel* analysis in the paragraphs to follow, but for now it will suffice to conclude that in cases dealing with minority shareholdings as part of a notified, and later on prohibited transaction, intervention on the Commission's behalf after the prohibition, is possible.[68]

The second situation deals with the acquisition of a minority stake before the

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[59] Case IV/M.1378.
[60] Case IV/M.890 – *Blokker / Toys 'R' Us*.
[61] See for example the recent case COMP M.6541 – *Glencore / Xstrata*, where Glencore was required to divest a minority shareholding in a mining and metals company.
[62] See Case IV/M.1080 – *Thyssen / Krupp*.
[63] See also par. 13 of the Commission's Staff Working Document – Annex II: *Non-controlling minority shareholdings and EU merger control.*
[64] Idot, L., *op. cit.*
[65] van de Walle de Ghelcke, B., *Minority Shareholdings in EU merger control: "No, thank you" or a Gap to be filled?*, 'Merger Control and Minority Shareholdings: Time for a Change?', Concurrences – Revue des droits de la concurrence, no. 3/2011, p. 22.
[66] Case COMP/M. 2416; Case T-5/02 *Tetra Laval BV v. Commission*, 2002, ECR II-04381; Case C-12/03 P, *Commission v. Tetra Laval BV*, 2005, ECR I-00987 and Case C-13/03 P, *Commission v. Tetra Laval BV*, 2005, ECR I-01113.
[67] See also Toth, A., *op. cit.*, p. 609-610.
[68] See also case COMP/M.2283 - *Schneider Electric / Legrand*.

launching of a public bid. Should this public bid result in control being conferred on the acquirer, and if later on the Commission blocks this transaction, the question arises whether Article 8, par. 4 of Regulation 139/2004 may be used for the purpose of divesting the already acquired minority stake. This was the setting of *Ryanair / Aer Lingus.* Having in mind the implications that the transactions involved caused, we will dedicate a bit more attention to this analysis. After all, it may be the case that the *Ryanair / Aer Lingus* transaction best emphasizes the very gaps that the current European merger control system potentially exhibits. And who knows, just as *Tetra Laval / Sidel* did at its time, it may be that the *Ryanair / Aer Lingus* saga will become the landmark transaction that pushed for another major overhaul of the European merger control system.

2.2.4.1. *Ryanair / Aer Lingus*

The unfolding of the events was as follows: in 2006, Ryanair acquired roughly 19% shareholding in the competing Irish flag carrier, Aer Lingus. This transaction needed no notification under the European Merger Control Regulation since the stake did not amount to control being conferred on the acquirer. In October – November 2006, Ryanair launched a bid, which would have raised its interest in Air Lingus to roughly 25%. The clear intent of Ryanair was to acquire control over Aer Lingus. Ryanair notified the Commission of this proposed acquisition. In late December 2006, the Commission initiated an in-depth investigation of the transaction, as it regarded the entire operation comprising the acquisition of shares before and during the public bid period as well as the announcement of the public bid itself, as a single concentration within the meaning of Article 3 of Regulation 139/2004. In mid-2007, the Commission prohibited the concentration under Article 8, par. 3 of the same regulation.[69] Ryanair appealed this decision.[70] The ruling of the General Court, which was handed down in mid-2010 is not necessarily of interest for the purpose of this contribution. However, it is worth mentioning that in a very detailed ruling the Court fully endorsed the Commission's assessment and reached the conclusion that the decision entailed a sound and solid prohibition. What is striking is the great level of detail of the General Court's analysis, addressing almost every single argument put forward by Ryanair, and not shying away from discussing such technical and complex subjects as efficiencies and quantitative data. In that respect it follows the approach of all main judgments since *Schneider / Legrand* and *Tetra Laval / Sidel*, which paved the way for a more careful re-examination of merger decisions by the General Court.[71]

Coming back to the original prohibition decision, contrary to what Aer Lingus requested, this decision did not contain any divestiture obligations in connection to the Ryanair previously acquired minority shareholding and the acquired stake via the public bid. The reason for this was because the Commission did not believe that it had the powers to do so, as this 25% shareholding did not confer on Ryanair control over Aer Lingus. Furthermore, the Commission also rejected the submission of Aer Lingus that such shareholding represented a partial implementation of the concentration. According to the Commission such an analysis is not consistent with the language of Article 8 par. 4 of Regulation 139/2004 (which refers to a concentration that 'has already been implemented') and it considered that its jurisdiction is limited to situations where control has been acquired. This was not the case since Ryanair was prohibited from acquiring control over Aer Lingus.[72] Aer Lingus made an application to the General Court for interim measures and for suspension of the operation, which formed the object of the prohibition decision and also appealed this decision,[73] arguing that an implementation of the transaction had occurred, thus contravening the standstill obligation in Article 8 par. 4 of the Merger Control Regulation. In March 2008 the Order of the President of the Court was handed down, and in July 2010, the General Court ruled on the

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[69] Case COMP/M.4439.
[70] Case T-342/07, *Ryanair Holdings plc v. Commission*, 2010, n.y.r.
[71] For further discussions on this ruling of the General Court, see Koch, O., *Yes we can (prohibit) – The Ryanair / Aer Lingus merger before the Court*, Competition Policy Newsletter, No. 3, 2010.
[72] See van de Walle de Ghelcke, B., *op. cit.*, p. 20.
[73] Case T-411/07, *Aer Lingus Group Plc v Commission*, 2008, ECR II-411.

lodged appeal, upholding the Commission's decision on this matter, finding that there was no change of control and therefore no concentration, and that the minority shareholding did not constitute an implementation of the transaction. Although the arguments focused around gun-jumping rather than if there had been a notifiable transaction, whether the Commission should have the powers to intervene where a minority shareholding may have an effect on the competitive conditions in the market once again became a moot point.[74]

The Order of the President of the Court primarily deals with two (interconnected) issues, namely the interpretation of the concept of concentration, on one hand, and the concept of implementation of a concentration, on the other hand. These issues will be detailed in the following paragraphs. As far as the General Court's judgment is concerned, it was not appealed and, as things stand it reflects the applicable law with respect to the functioning of Article 8, par. 4 of the Merger Control Regulation.

Let us first focus on the notion of a single concentration. The approach preferred by the Commission, namely that the several transactions performed by Ryanair in a reasonably short period of time amount to a concentration, was not contested by Aer Lingus. One of the consequences of treating a series of share acquisitions as a single concentration is that due to the provisions of Article 21, par. 3 of the Merger Control Regulation, which states that no Member State shall apply its national legislation on competition to any concentration that has an Internal Market dimension, individual acquisitions of non-controlling minority shareholdings can no longer be assessed by domestic authorities, which may have access to specific tools to tackle such transactions.[75]

As far as the implementation of a concentration discussion is concerned, the President of the Court clearly framed the question: does the concept of implementation, which is the gateway to the application of Article 8, par. 4 of Regulation 139/2004 entail full consummation (acquisition of actual control) or will it suffice if individual actions of the transaction (steps which may fall short of conferring control) are performed? Embarking on a linguistic reading, the President of the Court preferred the former interpretation. After all, the language of Article 8, par. 4 points to 'dissolving a concentration', which entails that a concentration exists and control has been acquired.

This is where the President of the Court's reasoning and the Court's rationale (which in its ruling also dealt with the fact that the staggered acquisition of an interest in Aer Lingus amounted to a single concentration and whether these operations amount to implementation) turn confusing. According to van de Walle de Ghelcke,[76] the straightforward approach would be that if the individual transactions taken together amount to a concentration within the meaning of Article 3 of the Merger Control Regulation, these transactions should be taken into account when discussing the concept of implementation too, and the Commission should not feel hindered in applying Article 8, par. 4 of the Regulation. The Court had a different standpoint, in that it kept account of the concept of single concentration only in the context of the examination procedure, in order to prevent the implementation of the transaction during proceedings. In other words, that concept is only relevant to safeguard the effectiveness of the Commission's final decision. Once a (prohibition) decision is adopted, the concept of a single concentration no longer plays any role. Consequently the acquisition of a minority shareholding does not constitute a partial implementation. In other words, the same setting may be viewed as a concentration at first, and not as a concentration later. We agree with the author mentioned above when he states that this rationale creates controversy, as Recital 20 of the Merger Control Regulation's preamble deals with the concept of single concentration in the context of defining the concept of concentration and not as a parameter of the standstill obligation. By overlooking this aspect, the Court and its President seem to have departed from a unitary approach to the application of some of the Merger Control Regulation's key

[74] Drauz, G.; Mavroghenis, S.; Ashall, S., *op. cit.*, p. 58-59.

[75] See also Henning, L. & Haans, J., *Minority Shareholdings and Merger Control after Ryanair / Aer Lingus – "No worries, mate?"*, E.C.L.R., 29/11, 2008, p. 625.

[76] See van de Walle de Ghelcke, B., *op. cit.*, p. 21. For a similar opinion supported by lengthy analysis see Henning, L. & Haans, J., *op. cit.*, p. 626.

concepts.

The discussion of the concept of a single concentration and full / partial implementation of a concentration brings us to the next item to be touched upon, namely the actual powers of the Commission under Article 8, par. 4 of the Merger Control Regulation. The General Court confirmed that the Commission's powers in this context are limited to the situations where a concentration was already implemented, in the sense that a change of control had occurred. In the words of the Court, 'the concept of concentration cannot be extended to cases in which control has not been obtained (...). The Commission is not granted such a power under the Merger Control Regulation.' In the present case, a single concentration composed of several transactions existed; it had also been found incompatible with the Internal Market and consequently prohibited; yet the notified transaction had not been implemented. Indeed the Court examined whether, factually, the use by Ryanair of its shareholders' rights could amount to conferring decisive influence. The Court concluded that despite Ryanair's attempts to interfere with Aer Lingus' management and commercial strategy, these could not be assimilated to a form of control since Ryanair was unable to impose its will.[77] Thus the Court concluded that where the power of exercising decisive influence is not conferred on the acquirer, there is no acquisition of control and consequently no implementation of a concentration. Thus, the second condition for applying Article 8, par. 4 was not met, and there was nothing more that the Commission could have done with regard to the divestiture requests lodged by Aer Lingus. This observation provides the contrasts between the *Ryanair / Aer Lingus* setting and the *Tetra Laval / Sidel* setting, discussed above, in which the concentration has already been implemented. In *Tetra Laval / Sidel* a change of control had already occurred and therefore the Commission had jurisdiction over an implemented concentration found incompatible and could properly apply Article 8, par. 4 of the Merger Control Regulation. To conclude, where there is implementation Article 8, par. 4 bites, and where there is no implementation, it does not. This situation has deeper consequences than one may observe at first sight, because this is where the domestic rules (not necessarily belonging to the domestic competition policies, but most likely to domestic corporate laws or takeover regulations) come into play. These rules may be, and in some cases are divergent, and as surprising as it may sound, these discrepancies may result in a differential impact of the application of Article 8, par. 4 of the Merger Control Regulation. We will return to this discussion in the next section, when the value of corporate law constraints while appraising non-controlling minority shareholdings will be discussed.

What are the conclusions that one can draw from the analysis above? It may be the case that *Ryanair / Aer Lingus* will become the new *Tetra Laval / Sidel*, in that it is after landmark rulings like the latter that the wheels have been set in motion for a major shift in the European merger control system. *Ryanair / Aer Lingus* has the potential of being the 'last drop that spills the cup', since the Court endorsed the Commission's approach of not being able to investigate certain minority shareholdings under the Merger Control Regulation. Furthermore, as Toth correctly points out, because the *Ryanair / Aer Lingus* case involved Ryanair launching a public bid to acquire shares in Aer Lingus, this enabled the application of Article 101 TFEU to be circumvented, since there was no agreement between the undertakings. Second, as Ryanair lacked a dominant position on the relevant market, Article 102 TFEU could not been applied either.[78] Consequently, we believe that none of the legal mechanisms we discussed above confer the appropriate tools to tackle practical situations such as the one occurring in *Ryanair / Aer Lingus.* The President of the Court in his Order, while pointing out the potential solutions that Articles 101 and 102 TFEU may confer, also acknowledged the difficulties that their application may encounter. Hence, one can safely draw the conclusion that, as far as the *Ryanair / Aer Lingus* setting shows, we are dealing with an enforcement gap.

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[77] Some authors believe that it is a pity that the Court did not elaborate more on the potentially harmful competition effects of minority shareholdings. This may have been indeed desirable. For further details see Koch, O., *op. cit.*, p. 45.

[78] Toth, A., *op. cit.*, p. 618.

The General Court in its ruling on the appeal lodged by Aer Lingus seems to be timidly pointing in this direction too, by stating that where there is no concentration with an Internal Market 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. In other words, where the EU merger control system cannot step in, room is made for domestic regulations to be applied. Aer Lingus also pointed out the regulatory lacuna during the appeal proceedings, by stating that everything has to do with the narrow interpretation of the concept of implementation of a concentration, and we may add the unique interpretation of the concept of a single concentration. The President of the Court disagreed though, by stating that minority shareholdings relieve domestic authorities from their competences only if they are a step towards acquiring control in the sense of the Merger Control Regulation. Once the Commission prohibits the transaction, the concentration no longer exists and the provisions of Article 21, par. 3, no longer bind the Member States.[79]

This seems to be an odd outcome. First, by virtue of Article 21, par. 3 of Regulation 139/2004, acquisitions of non-controlling minority shareholdings are taken away from the domestic (perfectly) capable assessment, since such transactions form part of a single concentration, within the meaning of Article 3 of the same Regulation, that can be assessed by the European Commission. This set of transactions is assessed under the provisions of Regulation 139/2004 and a prohibition decision is adopted under Article 8, par. 3. Then, the conclusion is reached that we are actually not dealing with a concentration, since the acquirer was prohibited from acquiring control and decisive influence has thus not been exerted. Further, we realize that there is no concentration implementation and hence a divestiture cannot be ordered. Yet these interest ownerships, as we shall see below, may have a more or less significant competitive impact on the market. Consequently, we return these transactions to their home jurisdictions where they can be disciplined accordingly. The inconsistencies that result from such a situation are evident and worrisome. Yet this is exactly what happened, as the Office of Fair Trading (OFT) initiated an investigation under the UK Enterprise Act 2002, which allows for non-controlling minority shareholdings to be assessed as self-standing transactions, due to the broader jurisdictional thresholds the UK merger control system enforces.

Despite Ryanair's original concerns as far as the OFT's intervention coming too late, the UK authorities assumed jurisdiction on the basis that Ryanair's shareholding in Aer Lingus (which now amounts to almost 30%, due to certain other small acquisitions performed after the Commission's initial prohibition decision) confers 'material influence' over the target and thus gives rise to a 'relevant merger situation'. After an 18-month long investigation the OFT referred the matter to the Competition Commission (CC), which published its initial findings, in May 2013,[80] and its final report which confirms the initial findings, in August 2013.[81]

The CC concluded that Ryanair's shareholding in Aer Lingus gives it the ability to exercise material influence over the commercial policy and strategy of Aer Lingus. This view was reached having regard to a range of factors, such as Ryanair's ability to block special resolutions concerning the ability of Aer Lingus to pursue its interests, shareholding levels and patterns of attendance and voting at shareholders meetings, board representation, the status and expertise of the acquirer and its corresponding influence with other shareholders, etc. This resulted in a relevant merger situation being identified. The relevance of the factors pointing to the ability to exercise material influence is further discussed in the context of the transaction's competitive effects' assessment. This assessment concluded that the creation of the relevant merger situation has resulted, or may be expected to result, in a substantial

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[79] See also Henning, L. & Haans, J., *op. cit.*, p. 627.

[80] The Notice of provisional findings was published on the CC's website, alongside a comprehensive Report detailing the CC's analysis and a Notice of possible remedies to be used. For further information, see http://www.competition-commission.org.uk/our-work/directory-of-all-inquiries/ryanair-aer-lingus, retrieved on the 6th of June, 2013.

[81] For further information, see the following link, retrieved on September 5th, 2013: http://www.competition-commission.org.uk/our-work/directory-of-all-inquiries/ryanair-aer-lingus.

lessening of competition within the UK market for the supply of air passenger services on a number of routes between the UK and the Republic of Ireland. Specifically, Ryanair's shareholding would be likely to be a significant impediment to Aer Lingus's ability to engage in synergy creating combinations that would have rendered Aer Lingus as a stronger competitor to Ryanair. Furthermore, Ryanair's ability to block special resolutions of Aer Lingus might hamper the target's ability to issue shares and raise capital. Also, substantial market entry seems to be less likely due to this concentration, in order to offset the substantial lessening of competition; the same stands for likely expansion by other airlines. Still, the CC finds it unlikely for coordinated effects to occur from this transaction. All in all, given the closeness of competition between the acquirer and the target, the CC found that Ryanair would have an incentive to use its influence to weaken Aer Lingus's effectiveness, a situation that would not occur if a non-competitor were to hold a similar minority shareholding. The CC finally provided indication of the remedies that must be used to resolve these concerns. Nothing surprising here: the effective and proportionate remedy according to the CC's final report was to require a partial divestment of Ryanair's shareholding to 5%, facilitated by the appointment of a Divestiture Trustee, entrusted with selling the divestment shares to suitable purchasers. This divestiture should be accompanied by obligations on Ryanair not to seek or accept board representation or acquire further shares in Aer Lingus.

Even before the final report was issued, the reactions to the CC's provisional findings were not long awaited. Michael O'Leary, Ryanair's CEO characterized the CC's findings as "bizarre and manifestly wrong" and announced that Ryanair plans to fight the CC through the appeal courts if it continued to maintain its "untenable position". Mr. O'Leary continued by stating that the CC's position is "bogus and baseless" and is an "enormous waste of UK taxpayer resources, which would be better served if the UK Competition Commission investigated (rather than ignored) British Airways' recent takeover activity, instead of wasting time pursuing this Irish case, which is of no consequence to UK consumers."[82] Despite this rather aggressive reaction, shortly after the publication of the CC's preliminary findings, but before the final report was issued, Ryanair announced its offer to sell its 29% shareholding in Aer Lingus to any other EU airline that makes an offer accepted by the majority of Aer Lingus shareholders.[83] Once the final report was issued, Ryanair appealed the CC's decision to the Competition Appeal Tribunal, proceedings which are currently pending. Therefore the CC has not yet issued its final order seeking to implement the divestiture up to the level of 5% shareholding, although a draft version of this final order was published for consultation in early November 2013.[84]

In the meantime, certain developments regarding the *Ryanair / Aer Lingus* saga occurred at the European level and they are worth a brief mention here: in December 2008 Ryanair launched a second bid for the acquisition of Aer Lingus, but it quickly abandoned it in January 2009, after the Irish government indicated that it would not support the bid. In July 2012 Ryanair notified the European Commission of its third bid for Aer Lingus.[85] After an in-depth investigation, the Commission concluded that the merger would have harmed consumers by creating a monopoly or a dominant position on 46 routes where, currently, Aer Lingus and Ryanair compete vigorously with each other. This would have reduced choice and, most likely, would have led to price increases for consumers travelling on those routes. The Commission's investigation confirmed the existence of high barriers to entry stemming, in particular, from Ryanair's and Aer Lingus's strong market positions in Ireland. The market investigation showed that there was no prospect that any new carrier would enter the Irish market after the merger, in particular by the creation of a base at the relevant Irish airports,

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[82] See http://www.ryanair.com/en/news/uk-competition-commission-provisional-decision-on-ryanair-aer-lingus-6-, retrieved on the 6th of June, 2013.

[83] See http://www.ryanair.com/en/news/ryanair-offers-to-sell-aer-lingus-stake-to-another-eu-airline, retrieved on the 27th of July, 2013.

[84] For further information, see the following link, retrieved on November 20th, 2013: http://www.competition-commission.org.uk/assets/competitioncommission/docs/2012/ryanair-aer-lingus/131105_ryanair_aerlingus_notice_and_order_%20for_%20public_consultation.pdf.

[85] Case M.6663.

and challenge the new entity on a sufficient scale. During the investigation, Ryanair offered remedies, consisting mainly of the divestiture of Aer Lingus' operations on 43 overlap routes and the cession of take-off and landing slots at London airports. The Commission assessed these remedies thoroughly and carried out several market tests. However the remedies proposed fell short of addressing the competition concerns raised by the Commission. Consequently the transaction was prohibited in February 2013.[86] In May 2013 Ryanair appealed the Commission's decision to the General Court.

What is interesting to notice for the purpose of this contribution is that during the domestic proceedings in the UK, Ryanair made references to some of the European Commission's findings in the proceedings surrounding this last bid of Ryanair for Aer Lingus. Specifically, Ryanair claimed that the CC is bound by the findings of the European Commission regarding the evolution of the competition between the two parties since 2006. Consequently Ryanair claimed that the CC may not find a substantial lessening of competition in those markets where the European Commission had not identified problems. The CC disagreed, claiming that its analysis of past events and also of future likely market dynamics, took into account that, absent Ryanair's shareholding, competition since 2006 and in the future would have developed differently and may have been stronger. Can we see potential divergent outcomes in the horizon? Whatever the answer may be, one may notice that this situation emphasizes once again how deep the discrepancies are between EU and domestic merger control; and this is not only a matter of procedural choices, but a more fundamental problem of enforcement priorities and ultimately views on how competition should function in the market. A thorough analysis of this last assertion goes beyond the scope of this contribution. However, in connection with the possible solutions that may be put forward in order to close the EU merger control system's potential regulatory / enforcement gaps relating to non-controlling minority shareholdings, and with regard to the fact that a harmonized system of concentration control may bring about important benefits for both competition authorities and market players, one could put forward arguments to the effect of alleviating such uncomfortable practical situations.

3. Should We 'Mind the Gap, Yet Again?

The *Ryanair / Aer Lingus* saga, especially the proceedings connected with the first notification from 2006, have left the impression that as far as enforcement capabilities are concerned, the European merger control system may indeed exhibit gaps. But at its core, in its essence, does an acquisition of non-controlling minority shareholdings really have a competitive impact? And if so, is this impact so detrimental to the functioning of the market as to warrant the need for new enforcement tools to tackle it? It may be wise to investigate what economic theory and the classic theories of harm teach us in this respect. Furthermore, it may be interesting to investigate whether there are any constraints that can be imposed on the practical exploitation of minority shareholdings, constraints, which would relieve the need for competition law interventions (be them regulatory or casuistic).

3.1. The Value of Corporate / Company Law Instruments

From the outset the matter has to be viewed from two broad standpoints. As Russo correctly points out,[87] there are mainly two different perspectives from which minority participations in companies' equity capital may be analyzed: the classic perspective of protection, and the undue anti-competitive advantage approach. On one hand, improved protection of minority shareholders' rights is of paramount importance in the ordinary development of everyday economic life and this is where European company law instruments have brought about a significant contribution.[88] The main concerns revolve around the issue

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[86] See also Joaquin Almunia, *Introductory remarks on Merger Ryanair / Aer Lingus*, SPEECH/13/164, 27 February 2013.

[87] Russo, F., *op. cit.*, p. 608.

[88] Several soft and hard-law initiatives for a general improvement of the conditions through which minority shareholders participate in the management of the company of which they own a part have been put forward at a European level. To name a few: *Report of the High Level Group of Company Law Experts on a Modern*

of minority shareholdings' protection against possible mismanagement, change of company structure and objectives, or exclusion from the effective decision-making process (the so-called 'dictatorship of the majority'). Affording such protection is important in order to foster participation in the company equity, and in order to prevent conflicts relating to management choices unforeseeable at the time of acquisition of shares, which are not agreed upon by, or are financially detrimental to the (minority) shareholders. Equally, such protection is driven by the increasingly internationalized economic environment, where also due to more business-friendly regulatory systems, foreign capital participations are tending to become the rule rather than the exception.[89]

On the other hand, minority shareholdings may be viewed as capital participation, which may in certain specific cases provide companies with a hardly detectable anti-competitive advantage, rather than require protection (of minority shareholders) against possible unfair disadvantage and mistreatment. According to Russo, certain types of minority shareholdings may be excluded from this discussion, in the sense that any anti-competitive effects may be offset by efficiency gains. Also, as the same author points out, competitive concerns may not necessarily arise when talking about small share acquisitions in non-competing firms, or in cases involving companies that are not in a position to influence the market structure for lack of market power, or in general when a minority shareholding does not grant rights to control or influence the commercial conduct of the company, or when pure (passive) financial investments are at stake. These statements have to be interpreted with caution though, since in practice there may very well be a thin line between rights that allow a certain degree of influence to be exerted and situations when this is not necessarily the case. Also, as we will detail below, competitive concerns may arise from other links established between the parties to a transaction, which are not necessarily concerned with control *per se*. Having this in mind, we may qualify the statements of Russo by stating that in practice, there are situations in which indeed competitive effects of minority stakes acquisitions are absent, but in (most) situations such effects are present. Whether from a competition law standpoint they are negligible or not, is also a matter that we will attempt to develop in the paragraphs and sections to follow. In such circumstances the protection that corporate law instruments may confer is used to disguise anti-competitiveness. This will most likely be the case if minority shareholding acquisitions occur between competitors, between companies in vertical relations, or between undertakings in neighboring markets.

With respect to such transactions, Struijlaart[90] claimed in 2002 that the old Merger Control Regulation 4064/1989, with its [strict] control threshold (which remained untouched in Regulation 139/2004) is an ineffective instrument to deal with all anti-competitive minority shareholding acquisitions, and as we have already shown, this is why occasional application of Articles 101 and 102 TFEU may prove to be necessary. Schmidt enunciates a similar idea.[91] While noticing that limited attention is currently devoted to the issue, the author states that only to the extent existing legal constraints that alleviate anti-competitive concerns are clearly insufficient, the question should be raised whether any kind of merger control (mandatory, voluntary, selective, pre-merger or post-merger, etc.) would be the adequate enforcement tool. In other words, only if existing legal tools do not get the job done, should

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Regulatory Framework for Company Law in Europe, Brussels, 2002, *Communication from the Commission - Modernising Company Law and Enhancing Corporate Governance in the European Union - A Plan to Move Forward*, COM/2003/0284 final, *Directive 2004/25/EC on takeover bids*, OJ L 142, 30.4.2004, *Directive 2007/36/EC of the on the exercise of certain rights of shareholders in listed companies*, OJ L 184, 14.7.2007, *Directive 2005/56/EC on cross-border mergers of limited liability companies*, OJ L 310, 25.11.2005, Commission's *Communication: Action Plan: European company law and corporate governance - a modern legal framework for more engaged shareholders and sustainable companies*, COM(2012) 740 final. For further information on the manner in which (European) Corporate Law tackles the problems connected to minority shareholdings, see also Dorresteijn, A., Monteiro, T., Teichmann, C.; Werlauff, E., *European Corporate Law*, 2nd Edition, Wolters Kluwer - Company Law Series, 2009.

[89] See also Russo, F., *op. cit.*, p. 608-611.

[90] Struijlaart, R., *Minority Share Acquisitions Below the Control Threshold of the EC Merger Control Regulation: An Economic and Legal Analysis*, World Competition 25(2): 173–204, Kluwer Law International, 2002, p.174.

[91] Schmidt, J. P., *op. cit.*, p. 210.

merger control come into the discussion.

The matter may be viewed from several standpoints. A first possibility of viewing the constraints that alleviate anti-competitive concerns relates to the application of Articles 101 and 102 TFEU to acquisitions of non-controlling minority shareholdings. We have outlined the manner in which these classic competition law tools function in this context in the previous sections. Therefore, it will suffice to conclude here that in certain settings,[92] these legal provisions may be regarded as constraining the need for merger control rules to apply to such minority interests ownerships. Therefore, it may be argued that when existing competition law provisions are sufficiently apt to deal with non-controlling minority shareholdings, merger control may be regarded as superfluous.

Second, domestic rules (either antitrust or corporate law rules) may present such constraints, to the effect that application of European competition law rules (namely Articles 101 and 102 TFEU and the Merger Control Regulation) will not be necessary. This was acknowledged in the *BT / MCI* case, mentioned above. 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 to MCI's confidential information. The Commission continued by acknowledging that both US corporate and antitrust laws impeded any misuse of (or even the access to) any piece of confidential information of MCI by BT. Consequently, the investment agreement concluded between these two parties was drafted in such a way that no control or influence could have been sought, and no shareholdings increases could have been achieved. Finally, the conclusion reached by the Commission was that the investment at hand did not fall under the application of Article 101 TFEU.

Yet consequences may differ from one jurisdiction to the other, as Kalbfleisch points out,[93] because domestic company law provisions influence the outcome. Company law may give minority shareholders different levels of powers over a competitor (also with a view to the protection of such shareholders): the right to influence the agenda of the general meeting, the right to see company documents, the right to appoint non-executive directors, all of which may determine whether there is scope for anti-competitive behaviour in an individual case. Indeed, according to Ignjatovic and Ridyard, [94] the ability of minority shareholders to influence company policy will generally be contrary to the commercial interests of the other (majority) shareholders, and such ability would exist only in the presence of some failure of corporate governance. If such failures were found to be prevalent, this would raise public policy concerns that go beyond the functioning of competition policy, and may be more appropriately dealt with by reforms of corporate governance norms rather than by tweaking merger control rules.

A good first example of how corporate law rules intertwine with the need of antitrust enforcement comes from the Netherlands. The Dutch Competition Authority, while investigating the status of minority shareholdings in certain sectors, observed whether the non-binding Dutch Corporate Governance Code of 30 December 2004 was being respected. The code applies to all Dutch listed companies and, amongst other constraints it limits individuals from acting as a member of a Supervisory Board in too many companies for too long. While in most cases, the provisions of the Code are complied with, a refinement of the Dutch Corporate Governance Code was regarded as necessary by certain authors,[95] in order to further diminish the anti-competitive risks (mainly due to coordinated effects or interlocking directorships). For instance, interlocking directorships in oligopolistic markets could be forbidden. However, this is a far-reaching amendment, difficult to implement, having in mind the sensitivity surrounding oligopolistic markets. In any case, the Dutch Corporate Governance Code does show that some constraints are in place and consequently, case-law

[92] I.e., when an agreement has been concluded, or when a dominant position has been established, etc.

[93] Kalbfleisch, P., *Minority Shareholdings in Competing Companies*, 'Merger Control and Minority Shareholdings: Time for a Change?', Concurrences – Revue des droits de la concurrence, no. 3/2011, p. 39.

[94] Ignjatovic, B; Ridyard, D., *Minority Shareholdings: Material Effects?*, CPI Antitrust Chronicle, January 2012 (1), p. 7.

[95] Kalbfleisch, P., *op. cit.*, p. 40.

relating to investigations of such minority stakes is rather scarce in the Netherlands.

Further examples relating to the constraints imposed by domestic rules may be found in German legislation. Schmidt aptly demonstrates how German corporate laws and corporate governance regulations set additional restrictions, which may limit the occurrence of potential anti-competitive concerns, and consequently the need for intervention using antitrust tools. This is done in relation to both stock corporations (AG) and limited liability companies (GmbH). In stock corporations, the votes pertaining to a non-controlling minority shareholdings can only block certain corporate matters, such as amendment of the articles of association, capital increase and decrease, termination of the corporation, and squeeze-out or recall of supervisory board members. In this type of business organization, shareholders' meetings do not decide in substance upon important business matters, as executive board members are managing the company independently, while not being subject to direct instructions by the shareholders or the supervisory board.[96] Furthermore, according to the provisions of the German Stock Corporation Act (AktG), shareholders have a (somewhat limited) right of information during shareholders' meetings, typically in connection to assets, finance and profit. The depth of this information is controlled by the board, to the effect that if such information is damaging to the company, it will not be disclosed to the shareholders. Having regard the above, one may conclude that in the case of stock corporations, safeguards are in place due to corporate law instruments so that owners of non-controlling minority stakes do not acquire influence that may be problematic from a competition law perspective. In the case of limited liability companies, the situation differs to a certain extent. The German Limited Liability Companies Act (GmbHG) provides that the members of the general shareholders' meeting exercise general control over the managing directors (appointment, dismissal, etc.) and have specific functions allocated to them, such as approval of accounts, changes in capital and alteration of articles. Furthermore, shareholders may issue binding instructions to the managers.[97] Unlike the situation for stock corporations, the subject matter of shareholders' meetings of limited liability companies has business relevance,[98] yet it is doubtful that sufficient influence can be attached to the votes pertaining to a non-controlling minority shareholding, to trigger competitive concerns. As far as the right of information is concerned, again unlike the situation of stock corporations, in the case of limited liability companies, any shareholder has a wide-ranging right to information with respect to all matters of the company, with the exception of such a right being rejected by the managing director, if there are concerns that the shareholder may use the information inappropriately, which will cause damage to the company. Consequently, although non-controlling minority shareholders have more extensive rights in the context of a limited liability company than in the context of a stock corporation, there are statutory provisions aimed at restricting such rights, so that potential competitive concerns do not arise. Last but not least, as far as sensitive information exchanges between the minority shareholder and the target are concerned, in the case of both stock corporations and limited liability companies German legislation (AktG and GmbHG) provides for a balance between the minority shareholder's right to information, on the one hand and the antitrust constraints imposed on all shareholders and the target, on the other hand. Should sensitive information exchanges fall under the German cartel prohibition legal provisions, these provisions will apply to the effect of limiting the possibility of influence and of access to information by the minority shareholder.[99]

A third set of constraints may again relate to the relationship between (domestic) company law rules and merger control. The impact of such constraints may be rather remote inasmuch these potential constraints are connected to the interpretation of the concept of control. However, in such a situation, the constraints arise from the application of domestic rules, which result in forcing a given transaction to fall within the ambit of application of the European merger control rules. The starting point here should be the provisions of Directive

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[96] See also Dorresteijn, A., Monteiro, T., Teichmann, C.; Werlauff, E., *op. cit.*, p. 172.
[97] *Ibid.*, p. 171.
[98] Schmidt, J. P., *op. cit.*, p. 211.
[99] *Ibid.*

2004/25/EC on takeover bids. The purpose of this Directive is to create a level playing field for takeover bids in the Internal Market.[100] To this end, the Directive lays down measures coordinating the laws, regulations, administrative provisions, codes of practice and other arrangements of the Member States, relating to takeover bids for the securities of companies governed by the laws of Member States, where all or some of those securities are admitted to trading on a regulated market. Article 5 of the Directive concerns the protection of minority shareholders and the mandatory bid. Briefly, these provisions provide that where a natural or legal person, as a result of an acquisition, holds securities of a company (the securities of which are admitted to trading on a regulated market), which directly or indirectly give him / her a specified percentage of the voting rights in that company, giving him / her control of that company, Member States shall ensure that such a person is required to make a bid as a means of protecting the minority shareholders of that company, and also with a view to prevent speculative bids. Furthermore, Recital 9 of the Directive's preamble states that Member States should take the necessary steps to protect the holders of securities, in particular those with minority holdings, when control of their companies has been acquired. The Member States should ensure such protection by obliging the person who has acquired control of a company to make an offer to all the holders of that company's securities for all of their holdings at an equitable price.

For the purpose of this contribution what this means is that when a certain percentage of voting rights has been acquired, domestic legislation pushes towards the avoidance of a situation where a minority shareholder may still have a strong enough presence in the target so as to influence its policy and trigger anti-competitive effects. Of course, the protection conferred on the minority shareholders relates to this category of investors obtaining a fair deal when they are 'bought out'. As far as the acquirer of control is concerned, the domestic implementing legislation pushes the acquirer to launch a mandatory bid. This in turn will make it clearer that the operation will fall within the ambit of the European merger control system, at least as far as the requirements of the operation constituting a concentration are concerned, and granted the other jurisdictional requirements (i.e. the Internal Market dimension of the transaction) are met. Of course, the provisions of the Directive discuss the matter of control being acquired, which in turn should automatically render the transaction as already meeting the relevant criteria of the Merger Control Regulation. In other words, we are not facing non-controlling minority shareholdings, as one could argue that we are indeed in the presence of controlling shareholdings. However, according to Article 5, par. 3 of the Directive, the percentage of voting rights, which confers control and the method of its calculation, shall be determined by the rules of the Member States. Still, as we have already provided above, the notion of control may be perceived differently by the regulations of different Member States, as it may be connected to different levels of influence that the acquirer may have over the target. Furthermore, certain jurisdictions may have opted for different methods and timeframes for the mandatory bid to be performed, of course within the limits of Directive's provisions. For the purpose of our contribution one could conclude that the concrete effect of the mandatory bid would be to accentuate the control held by the acquirer (thus triggering the Merger Control Regulation application), and to reduce the influence that minority shareholders may retain over the target (thus reducing the occurrence of situations in which minority shareholdings may need tackling via competition law rules).

A good example with regard to the discussion above would be again a comparison between the *Tetra Laval / Sidel* and the *Ryanair / Aer Lingus* settings. Although the *Tetra Laval / Sidel* case started unfolding before the entry into force of the Takeover bids Directive, the substance of the arguments may still stand. In *Tetra Laval / Sidel* the acquirer was obliged under the French corporate law rules in force to acquire the remaining shares before the Commission's decision under the European Merger Control Regulation, which turned out to be a prohibition. In the *Ryanair / Aer Lingus* case, the bid was (under Irish law) conditional upon the Commission's transaction approval and it lapsed when Phase II proceedings were initiated under the Merger Control Regulation. This is important because, had the Irish

[100] Dorresteijn, A., Monteiro, T., Teichmann, C.; Werlauff, E., *op. cit.*, p. 85.

takeover rules been different, the Commission would have dealt with a transaction clearly entailing the acquisition of control and consequently the Commission would have had jurisdiction over the whole of Ryanair's shares in Aer Lingus, and it could have ordered the divestment sought by Aer Lingus, including the initial minority shareholding. However, as the two cases unfolded, the differences in domestic corporate law rules pursuing other objectives than the protection of competition, rendered the different application of Article 8, par 4 of the Merger Control Regulation and consequently different outcomes of the two cases. A setting as such is difficult to accept and it seems unfortunate that the Court did not address this situation it its rulings.[101]

To conclude, one may observe that there is much that can be done under the company law rules, and from this point of view, the contributions of domestic corporate governance codes and of the provisions of the Takeover bids Directive are valuable. Yet, for the purpose of the competitive impact of certain types of shareholdings, the constraints imposed by the (harmonized) domestic corporate law rules can only reach so far, due to the limits imposed by the specific legal provisions of domestic or EU law. In any case, one may conclude from the discussion above that in general, corporate law provisions push towards avoiding the problems that certain types of shareholdings can create from a competition law point of view. The result is that some of the regulatory gaps are plugged, yet as we shall detail below, the evidence stemming from economic theory seems to suggest that certain gaps may still exist.

3.2. Brief Overview of Economic Theory[102]

How do acquisitions of non-controlling minority shareholdings hinder the competitive process in the day-to-day economic reality? Before we dive in this analysis, certain preliminary observations have to be made. First, it is important to understand the reasons why, or the drivers behind acquiring minority stakes in a different company. Generally, one can identify various motives for companies to engage in, broadly speaking, concentration transactions. These motives may very well be economically sound and pertinent, just as much as they may be categorized as non-economic, or non-wealth enhancing. Schenk[103] thoroughly discusses drivers such as hubris, reputation, cascades, regret, minimax regret, rational herding, etc. and filters their relevance in the context of the European merger control system. At least some of these motives may easily be conceived as lying behind minority stakes acquisitions, as well. Actually, as portrayed in par. 21 of the Commission's Staff Working Document – Annex I: *Economic Literature on Non-Controlling Minority Shareholdings ("Structural links")*, equity investments may be a means to gain access to specific assets, including new technologies, additional financial resources, and innovative managerial practices amongst others. Also, equity block purchases are found to lead to increased stock values, investment expenditures and operating cash flow of the target firms especially when the participating firms also form alliances or joint ventures. For minority share ownership though, certain more specific scenarios may be brought to the attention. Meadowcroft and Thompson[104] distinguish between: pre-merger holdings (or the so-called staggered operations), blocking holdings (which prevents the acquisition of a target by a third party), holdings that can provide effective control (in the sense of the Merger Control Regulation), diversification (acquisition which relates to penetrating a new market)

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[101] See also van de Walle de Ghelcke, B., *op. cit.*, p. 22.

[102] In 2009 the OECD has issued a comprehensive report dealing with the competitive relevance of minority shareholdings acquisition. While incorporating contributions from over 20 jurisdictions, the report also thoroughly deals with the economics of minority shareholdings and the competition policy tools used to tackle such transactions. For a comprehensive analysis, supported by a valuable literature review and useful practical examples we highly recommend it. Space precludes us from thoroughly relating the entirety of the report's analysis, however, we will pinpoint its conclusions where appropriate. See OECD Directorate for Financial and Enterprise Affairs - Competition Committee, *Antitrust Issues Involving Minority Shareholding and Interlocking Directorates*, DAF/COMP (2008) 30, 23 June 2009, p. 19-52.

[103] Schenk, H., *Mergers and Concentration policy,* in Bianchi, P. & Labory, S. (eds.), *International Handbook of Industrial Policy*, Cheltenham: Edward Elgar, 2006, p. 153 -179.

[104] Meadowcroft S. & Thompson, D., *Minority Share Acquisition: An Impact upon Competition*, Office for Official Publications of the European Communities, 1986.

and proxy agreements (so-called substitutes to agreements which may fall under the application of the cartel prohibition). Each one of these scenarios has a different impact on the competitive process, ranging from minimal, in the context of diversification driven acquisitions, to particularly suspect in the context of proxy agreements. With regard to the latter for example, Reitman [105] states that should there be no efficiency gains (R&D achievements), which arise as a result of the interchange of information between the parties, such transactions are only entered into with a view to increasing market power. Regardless of which of the scenarios above may be the actual rationale or basis of a transaction, the analysis of the resulting competitive effects has to be nuanced having in mind the type of rights that are at stake in a given transaction.

According to the par. 1 of the first Annex to the Commission's Staff Working Document*,* the economic effects of minority shareholdings on competition in the market significantly depend on the financial interests flowing from them and the corporate rights conferred by them. Spector[106] categorizes share ownerships in two types of rights[107]: cash-flow rights, which entitle the shareholder to a percentage of the profits of the company[108] and control rights, which are more complex and pertain to the influence that may be exerted on the behavior of a company.[109] These two types of rights may very well overlap, especially in situations of full control, but this distinction is important for the purpose of assessing minority shareholdings, because there may be cases where one may be faced with non-controlling shareholders that have comprehensive cash-flow rights, a situation which is also known as the silent financial interest. Par. 33-36 of the first Annex to the Commission's Staff Working Document provide further examples of scenarios in which the minority shareholder may influence decisions of the target only to a certain degree, without satisfying the criterion of decisive influence. As we have already shown and as we will further detail below, this is an important issue, since as things stand, EU merger control analysis is apt to deal only with control rights, conceived in the context of (self-standing) acquisitions of control / exercise of decisive influence. Yet, cash-flow rights may also play an important role, having in mind the returns that companies engaged in minority stakes acquisitions expect from this kind of transactions, the links these rights create between different shareholders and the connected incentives they may have, to behave in a certain way in the market, or to compete more or less vigorously. In this respect it seems odd that the current European merger control rules, while occasionally accepting the importance of cash-flow rights, as it was the case in the *Exxon / Mobil* transaction,[110] afford different treatment to these two categories of rights in cases of minority shareholding acquisitions.

Some authors believe that much of the discussion should be framed around the concept of incentives. It is argued that (non-controlling) minority stake acquisitions may reduce the incentives of the parties to behave independently in the market,[111] with all the consequences that follow from such an outcome. According to Ignjatovic and Ridyard,[112] there are three quite separate mechanisms whereby this might occur: first, acquiring a shareholding in a competitor may change the competitive incentives of the acquiring firm, and this is due to the possibility of recapturing losses caused by lower sales connected to price increases of the acquirer, through the acquirer's shareholding in the target firm. This is also called internalizing the price-setting decisions. Second, the acquisition of a minority

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[105] Reitman, D., *Partial Ownership Arrangements and the Potential for Collusion*, Journal of International Economics, 3/ 313, 1994.

[106] Spector, D., *Some Economics of Minority Shareholdings,* 'Merger Control and Minority Shareholdings: Time for a Change?', Concurrences – Revue des droits de la concurrence, no. 3/2011, p. 14-15.

[107] See also Salop, S. & O'Brien, D., *Competitive Effects on Partial Ownership: Financial Interest and Corporate Control*, Antitrust Law Journal, Vol. 67, 2000, p. 559–614.

[108] See also par. 27 of the Commission's Staff Working Document – Annex I: *Economic Literature on Non-Controlling Minority Shareholdings ("Structural links").*

[109] *Ibid*., par. 28.

[110] Case IV/M.1383. The Commission stated in its decision that 'a reinforcement of the equity links between companies on the same market increases the possibility for the use of market power.'

[111] See also Schmidt, J. P., *op. cit.*, p. 209.

[112] Ignjatovic, B; Ridyard, D., *op. cit.*, p. 2-3.

shareholding may, even absent of control over the target, enable the acquiring firm to influence materially the decisions of the target company in relation to key competitive parameters so as to confer a competitive advantage to the acquirer's other interests in the market. As a result, the acquiring firm might succeed in forcing the target firm to harm its own commercial interests by competing less effectively, to the benefit of the acquiring firm. Third, cross-shareholdings across companies could also, in principle, facilitate coordination between competing firms if they enable information sharing in respect of confidential market information, or increase the ability of the acquirer to influence the target's competitive strategy. The potential adverse outcome in such cases would be a general collusive increase in the prices of both firms. We have seen references, or better yet hints to all these three mechanisms in the analysis performed by the Commission and the Courts under all the available current legal tools: the Merger Control Regulation and Articles 101 and 102 TFEU. Does economic theory support the analysis performed so far, while using the approach provided by these legal tools? Or are the competitive concerns regarding acquisitions of non-controlling minority stakes so serious that indeed these legal tools do not serve their purpose correctly?

Reynolds and Snapp performed an impressive analysis of the effects that partial ownerships (i.e. non-controlling stakes) and joint ventures may have on competition.[113] Although these authors' work was published before Regulation 4064/1989 came into force, the general rationale may very well be valid today: an increase in the level of ownership links between competing firms, in a concentrated market, yet with insufficient transparency for the players to correctly factor in production quantity, results in a decline in equilibrium market output. Furthermore, tacit or explicit collusion and exchange of information may be facilitated, with the consequence of, for example, making it less attractive to cheat on a cartel, thus strengthening the cartel altogether. In other words, unilateral and coordinated effects may occur in connection to minority stakes ownership. Furthermore, Meadowcroft and Thompson,[114] claim that such effects may occur not only in a horizontal relationship between the undertakings involved, but also in vertical settings, where such minority stakes ownerships may increase market power, and result in foreclosure effects.[115]

The Commission's Staff Working Document also acknowledges that non-controlling minority shareholdings may lead to competitive harm in the same manners: via unilateral, coordinated and vertical effects.[116] We will continue our discussion in the paragraphs to follow, by using exactly this tripartite structure of analysis.

3.2.1. Unilateral / Non-Coordinated Effects

In broad terms, a (non-controlling) minority shareholding acquisition may stifle competition by generating so-called unilateral or non-coordinated effects.[117] A simple example of this is the potential incentive to increase prices or reduce quality, or an incentive not to compete aggressively,[118] once such a transaction has been performed. Potential anti-competitive effects may be particularly pertinent if the relevant market is concentrated, and the parties are close competitors, or key market players and when the magnitude of passive investment is large enough.[119]

To detail, let's assume X and Y are active in the same relevant market and X acquires 20% of the shares in Y. Let us also assume that there is no shift in the control of Y so as to trigger the application the European Merger Control Regulation. Thus, our analysis should focus on cash-flow rights rather than control rights. Before the acquisition, X will only increase its prices if the losses that it incurs, by customers switching to the Y product /

[113] Reynolds, R.J.; Snapp, B.R., *The Competitive Effects of Partial Equity Interest and Joint Ventures*, International Journal of Industrial Organisation, Volume 4, Issue 2, 1986.
[114] Meadowcroft S. & Thompson, D., *op. cit.*
[115] For a thorough account of the economic theories briefly summarized above, see Struijlaart, R., *op. cit.*
[116] See The Commission's Staff Working Document, p. 3.
[117] See for example case COMP/M.4150 - *Abbott / Guidant* and case COMP/M.1712 - *Generali / INA*.
[118] See also Kalbfleisch, P., *op. cit.*, p. 38.
[119] See Idot, L., *op. cit.*, and Schmidt, J. P., *op. cit.*, p. 209

service, will be counterbalanced by the additional revenues generated by the price increase. After the acquisition is performed, although the pricing tactics of Y will not be changed, since there are no control rights of X in Y, X may be less inclined not to increase its prices, knowing that the losses that it may incur by potentially raising the price and thus losing customers to Y, will be counterbalanced by appropriating 20% of Y's profits, due to its minority shareholding in Y.[120] More complex situations may of course occur in practice, involving undertakings that are not direct competitors, but for the sake of the argument this simple didactical example shows that extending the unilateral effects framework to acquisitions of minority shareholdings may be conceptually straightforward; yet the likelihood of problematic unilateral effects arising in such transactions is significantly, more likely proportionally lower than in the case of fully-fledged concentrations. According to Ignjatovic and Ridyard, and as portrayed in the first Annex to the Commission's Staff Working Document,[121] assessing unilateral effects in cases of minority shareholdings acquisitions differs from standard merger analysis in two significant respects. First, analyzing incentive effects relating to price, quality, etc., pertains only to the acquirer since the target will adopt the same profit-maximizing policy, irrespective of the minority stake being acquired. Second, because we are dealing with a minority stake acquisition, the 'internalization' of losses between the parties to the concentration is proportionally weaker, and consequently the likelihood that acquiring a minority stake in a competitor will lead to increases in price is necessarily lower.[122]

The discussion above focused on acquisitions of non-controlling minority stakes. If control rights are at stake, yet no or little cash-flow rights are present, the influence that the acquirer may have on the decisions of the target may lead to a so-called degradation of the target's offering since there is a higher incentive for the acquirer to raise the prices of the target. This is also acknowledged in the first Annex to the Commission's Staff Working Document.[123] Due to the absence or insignificance of cash-flow rights, the acquirer has little incentive to raise its prices, since it will be able to appropriate a very small proportion, if any, from the profits of the target. This differs considerably from the outcome in cases of fully-fledged mergers.[124] In fact, the smaller the minority stake (yet this minority stake should confer the possibility of influencing the target) the better for the acquirer, for the following two reasons: the acquisition costs will be smaller and the reduced revenues it will accrue from its minority shareholding (due to the target's loss of sales) will be counterbalanced by the acquirer's increased sales in the same market. In other words, the acquirer will gain from consumers switching from the target to the acquirer. However, the setting described above will very much depend on, amongst other elements, the level and features of the control acquired, the actual ability to influence the target's behaviour and the target's majority shareholders' capacity to prevent the degradation of its interests. Also, according to Dubrow,[125] there might be several countervailing factors that potentially attenuate the effects of structural links. These include, for example, 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 the conduct of the acquiring firm.

All in all, according to par. 44 of the first Annex to the Commission's Staff Working Document, unilateral anti-competitive 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,

[120] See also par. 42 of the Commission's Staff Working Document – Annex I: *Economic Literature on Non-Controlling Minority Shareholdings ("Structural links").*
[121] *Ibid.*, par. 5 and 41.
[122] See Ignjatovic, B; Ridyard, D., *op. cit.*, p. 3-4.
[123] See par. 6 and 38 of the Commission's Staff Working Document – Annex I: *Economic Literature on Non-Controlling Minority Shareholdings ("Structural links").*
[124] See also Spector, D., *op. cit.*, p. 15.
[125] Dubrow, J. B., *Challenging The Economic Incentives Analysis of Competitive Effects in Acquisitions of Passive Minority Equity Interests*, Antitrust Law Journal, Vol. 69, 2001, p. 113–145. See par. 43 of the Commission's Staff Working Document – Annex I: *Economic Literature on Non-Controlling Minority Shareholdings ("Structural links").*

even though the criterion of 'decisive influence' is not met.

3.2.2. Coordinated Effects

A (non-controlling) minority shareholding acquisition may also hinder competition by generating coordinated effects, [126] especially in situations of cross-participation. Acquisitions of minority stakes may create 'structural links' between the parties involved and these links, in turn may facilitate express or tacit collusion, or be, in effect, a means to monitor compliance with a cartel's rules.[127] According to the provisions of par. 8 and 46 of the first Annex to the Commission's Staff Working Document, the market must be sufficiently transparent to allow the participants to monitor the terms of coordination and to allow deviations to be easily detectable and deterred against. Also, reactions from outsiders must not be able to undermine the expected results of coordination. There are several possibilities of how these outcomes may occur in practice[128]: first, the minority stake acquisition may affect the revenues accrued by the parties to the transaction and also it may change the nature of the incentives to deviate from collusion. Second, information exchanges between the undertakings at hand may occur, thus enhancing market transparency and facilitating or reinforcing the coordinated strategy. For the sake of completeness, minority ownerships in competing companies may also signal to the rest of the market that there is an intention to compete less vigorously. This may induce the whole industry to reduce competition and favour a collusive equilibrium to the detriment of consumers.[129]

Regarding the pay-offs that the acquirer and the target may secure, the discussion is very much similar to the analysis we provided in the context of unilateral effects in the previous section, and it applies *mutatis mutandis*. With regard to the incentives to coordinate, par. 49-59 of the first Annex to the Commission's Staff Working Document provide a thorough review of the relevant economic evidence. Gilo, Moshe and Spiegel[130] emphasize that structural links facilitate collusion whenever they help the firm with the strongest incentives to deviate, to credibly stick to the collusive agreement. Also, Kühn and Rimler[131] show that structural links may be particularly conducive to collusion when firms can credibly make use of aggressive deterrent strategies in case of deviations from a collusive scheme. If colluding firms have minority shareholdings in their competitors, they indirectly suffer also from losses incurred by their competitors. In such a setting, more aggressive punishment strategies can be implemented and thus collusive schemes may be more easily sustained.

All in all, it is accepted that the structural links between undertakings may make collusion more likely, especially in situations where the minority stake affords a certain degree of control to the acquirer, enabling it to push the target closer to the coordinated pattern of behaviour. Still, even if one deals only with passive shareholdings, these may be regarded as factors that could contribute to sustaining collusion. However, there may be countervailing aspects that may be taken into account. The likelihood of 'cheating' may be curtailed by the limited spread of the structural links in the market / industry, or by the fact that one of the parties to the transaction has a reputation for preventing coordination from taking place.[132] Also the extent and nature of the minority participation could be relevant. For example, in situations of cross-participations, if such mutual ownerships are quite asymmetrical, this may lead to a deeper separation of the undertakings' interest, thus decreasing the likelihood of collusion.

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[126] See for example case COMP/M.1673, *VEBA / VIAG* and case IV/M.1080, *Thyssen / Krupp.*

[127] Kalbfleisch, P., *op. cit.*, p. 37-38.

[128] See par. 8-10 of the Commission's Staff Working Document – Annex I: *Economic Literature on Non-Controlling Minority Shareholdings ("Structural links").*

[129] Kalbfleisch, P., *op. cit.*, p. 38-39. See also Reynolds, R.J.; Snapp, B.R., *op. cit.*, p. 141.

[130] Gilo, D., Moshe, Y., Spiegel, Y., *Partial Cross Ownership and Tacit Collusion*, RAND Journal of Economics, Vol. 37, 2006, p. 81–99.

[131] Kühn, K. and Rimler, M., *The Comparative Statics of Collusion Models*, CEPR Discussion Paper no. 5742, 2006.

[132] See also Ignjatovic, B; Ridyard, D., *op. cit.*, p. 6-7 and Kalbfleisch, P., *op. cit.*, p. 38-39. For a different view on the matter, and for further analysis concerning the differences between a merger involving a maverick firm and passive shareholdings acquired in such a firm, see Gilo, D., Moshe, Y., Spiegel, Y., *op. cit.*

With regard to information exchanges, par. 47 of the first Annex to the Commission's Staff Working Document, as well as the OECD Report on minority shareholding and interlocking directorates,[133] provide that the acquisition of non-controlling minority stakes typically offers the acquiring firm a privileged view on the commercial activities of the target, such as plans to expand or to enter into major new investments that an independent competitor would normally not have. Furthermore, the presence of control rights, or reciprocal ownerships may permit a higher degree of information exchanges. To exemplify the above, let's assume that X holds a minority stake in Y, while Y in turn holds a minority stake in X. In a situation as such it may be argued that, depending of the features of the minority shareholdings (i.e. voting rights, veto powers, board representation, etc.) these two undertakings may have symmetric access to information that otherwise they would not have. Still, situations as such need to be interpreted with caution and one must correctly analyse the actual impact that such information flows may have. To further detail, it may be appropriate to add a new element to our hypothetical situation: let's assume that Y has a minority stake also in Z. This does not necessarily mean that X will have better information about Z's market moves. In order to draw such a conclusion, one must assess whether there are sufficiently trustworthy means through which such flows of information may be transmitted. Yet information flows may still occur even without any actual contact between the companies involved. According to Spector, owning cash-flow rights in a competitor may facilitate the detection of deviations away from a hypothetical collusive agreement because suspiciously high profits may reveal that this competitor secretly undercut rivals and acquired new customers. In markets lacking transparency, such an indirect way of acquiring information may facilitate the detection of cheaters and the disciplining of competitors.[134]

Summing up, coordinated effects may arise in cases involving horizontal acquisitions of non-controlling stakes, either via exchanges of information, or by changing the nature of the incentives to deviate from collusion. Very much will depend though on the circumstances of the market and industry sector at hand.

3.2.3. Vertical Transactions

So far the discussion has been mainly focused on horizontal transactions, with keen attention dedicated to transactions between competitors. However, it may be the case that acquisitions of minority stakes in the context of vertical transactions may raise competitive concerns.[135] In a similar manner with horizontal transactions, there are two main ways in which non-horizontal concentrations may significantly impede effective competition: non-coordinated effects and coordinated effects.[136] Consequently, the discussion should be framed in similar terms to the analysis performed for horizontal transactions[137]: minority stakes acquisitions v. fully fledged mergers, cash-flow rights v. control rights, ability and incentive to alter the competitive behaviour of the target, etc. According to par. 60 of the first Annex to the Commission's Staff Working Document, specific to vertical shareholdings is their direction: a forward shareholding arises if an upstream firm owns shares of a downstream firm. A backward shareholding arises if a downstream firm owns shares of the upstream firm. Therefore, in vertical transactions, the main concern from a competitive standpoint is the possibility of anti-competitive foreclosure to occur, be it input foreclosure, or customer foreclosure, mainly through preferential treatment, facilitating reciprocal or exclusive dealing, and tying arrangements.[138]

The first Annex to the Commission's Staff Working Document outlines the main conclusions drawn from economic evidence with regard to both forward and backward

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[133] OECD Directorate for Financial and Enterprise Affairs - Competition Committee, *op. cit.*, p. 30.
[134] Spector, D., *op. cit.*, p. 18.
[135] See for example case COMP/M.5096, *RCA / MAV Cargo*.
[136] Par. 17 of the *Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings*, OJ C 265, 18.10.2008.
[137] See also par. 60 of the Commission's Staff Working Document – Annex I: *Economic Literature on Non-Controlling Minority Shareholdings ("Structural links").*
[138] See Idot, L., *op. cit.*

shareholdings: forward passive shareholdings tend to be pro-competitive, but may to some extent also facilitate (partial) foreclosure, to a degree that can actually be more pronounced than in cases of fully-fledged mergers; forward shareholdings may also help upstream firms to commit to higher prices if contracts with downstream firms are not observable to all downstream customers. Backward minority shareholdings that confer control to the downstream firm tend to significantly facilitate input foreclosure, whereas passive backward shareholdings may dampen downstream competition and thereby lead to increased consumer prices, however, to a lesser degree than in cases of fully-fledged mergers.[139]

Generally speaking, non-horizontal transactions are less likely to significantly impede effective competition than horizontal mergers, due to the absence of loss of direct competition and also due to the fact that this type of transaction provides substantial scope for efficiencies.[140] This is why the Commission is unlikely to find concerns in non-horizontal mergers, be it of a coordinated or of a non-coordinated nature, unless the market share and concentration levels post-merger of the new entity in each of the markets concerned are not in conformity with the provisions of par. 25 of the *Non-Horizontal Merger Guidelines*, or unless special circumstances are present, such as significant cross-shareholdings or cross-directorships among the market participants.

Spector details situations as such by providing that depending on what type of anti-competitive foreclosure may be at hand, in cases of minority stakes acquisitions, the following underlying mechanisms should be present: in case of input foreclosure, a combination of control rights in the upstream firm (necessary with respect to the ability to foreclose) and cash-flow rights in the downstream firm (necessary with respect to the incentive to foreclose) and in the case of customer foreclosure, a combination of control rights in the downstream firm (necessary with respect to the ability to foreclose) and cash-flow rights in the upstream firm (necessary with respect to the incentive to foreclose).[141] The author concludes that the assessment of minority shareholdings between vertically related firms is less automatic than in horizontal situations. Consequently, a scenario as such ought not be assessed in isolation and, as in the case of fully-fledged mergers, it should take into account the actual level and features of the control acquired.[142] Somewhat comparable conclusions are also drawn by Flath,[143] who argues that predicting the effects of non-controlling vertical minority shareholdings is significantly more complicated when compared to horizontal holdings, since the effects on price and advantages to consumers may vary greatly.

All in all, even if anti-competitive concerns connected to vertical minority stakes transactions occur less often than in cases of horizontal transactions, caution should be exercised when dealing with such acquisitions. Examples of vertical effects in the context of minority stakes acquisitions are few. At EU level for instance, in *IPIC / MAN Ferrostaal,*[144] at stake was a minority interest held by MAN Ferrostaal in Eurotecnica, a provider of technology and engineering services. This may have allowed MAN Ferrostaal to determine the technology licenses distribution by Eurotecnica and thus exclude competitors. The Commission cleared the transaction with the remedy entailing MAN Ferrostaal divesting its minority stake in Eurotecnica.[145]

4. Synthesis and Conclusions

The discussion provided in the previous sections has shown that competition related

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[139] See par. 11-13, 65, 70 and 75 of the Commission's Staff Working Document – Annex I: *Economic Literature on Non-Controlling Minority Shareholdings ("Structural links").*

[140] See par. 11-13 of the *Non-Horizontal Merger Guidelines.*

[141] See also par. 11 of the Commission's Staff Working Document – Annex I: *Economic Literature on Non-Controlling Minority Shareholdings ("Structural links").*

[142] Spector, D., *op. cit.*, p. 17.

[143] Flath, D., *Vertical Integration by Shareholding Interlocks*, International Journal of Industrial Organization, 7 / 369, 1989, cited in Struijlaart, R., *op. cit.*, p. 181-183.

[144] Case COMP/M.5406.

[145] Schmidt, J. P., *op. cit.*, 209-210.

effects may arise in connection to non-controlling minority stakes in several ways: strengthening the existing anti-competitive links between undertakings, at times embodied in agreements that are by themselves anti-competitive; strengthening the anti-competitive effects of an abuse of a dominant position, or fortifying the dominant position itself; fortifying (in an ancillary manner) the restrictions caused by a concentration transaction (setting in which divestitures and other remedies come into play) and last but not least, restrictions of competition resulting from the minority participations themselves, especially in situations of cross-participations, ownerships in competitors or third parties (via joint venture transactions). For the sake of completeness, one has to mention that acquisitions of minority shareholdings may raise competitive concerns in the larger picture by deterring market entry.[146] In this respect the role of the existing legal tools, such as Articles 101 and 102 TFEU and the provisions of the Merger Control Regulation has been evaluated, in order to see whether the mechanisms they provide cover to a sufficient extent the problems that may occur in connection with minority stakes acquisitions.

The bulk of the answer to the question whether acquisitions of non-controlling minority stakes raise anti-competitive concerns stems from the evidence provided by economic analysis performed in the context of the classic theories of harm: unilateral, horizontal and vertical effects. The conclusion that may be drawn from the discussion above, as also accepted in the first Annex to the Commission's Staff Working Document, is that acquisitions of non-controlling minority shareholdings are indeed capable of raising competitive concerns. It is true that these concerns may not always rise to the degree of seriousness that the problems occurring in cases of fully-fledged mergers. This is also acknowledged in the Commission's Staff Working Document.[147] As portrayed above, this is because the different features of the interplay between cash-flow rights and control rights, the degree of loss of competition, the remaining incentives to compete, the strength of the links between the parties, the possibilities to internalize losses, etc. Furthermore, the potential efficiencies stemming from acquisitions of non-controlling minority shareholdings are likely to be more limited than in the context of fully-fledged mergers.[148] All in all, the fact that anti-competitive effects may occur in cases of non-controlling minority stakes acquisitions cannot be doubted.

Similar conclusions were also drawn in the 2009 OECD Report on minority shareholding and interlocking directorates.[149] The Report contains an extensive analysis of the relevance of such shareholdings and companies links from a competition law perspective. The Report's background note draws the attention to the manner in which non-controlling minority shareholdings may impact the competitive process, while diving deep into economic theory. The Report essentially draws quite straightforward conclusions: the acquisition of a minority shareholding in a competing firm may lead to reduction of output and increase prices to the detriment of consumers' welfare; it may also lead to increased transparency and it may affect the firms' incentives to compete. These anti-competitive effects are likely to occur if the market is oligopolistic, with significant barriers to entry. If the structural links are

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[146] According to Idot, L., *op. cit.,* this will most likely happen through blocking a potential acquisition of the target by a competitor. Also, par. 76-80 of the first Annex to the Commission's Staff Working Document detail further possibilities of hindering market entry, for example in cases where the minority shareholding makes it less likely that the acquirer enters itself in the market where the target is active.

[147] See the Commission's Staff Working Document, p. 3. For the sake of completeness it is worth mentioning that the first Annex to the Commission's Staff Working Document also provides a consistent overview of certain tools used to measure the effects of certain types of minority stakes transactions, namely the Modified Herfindahl – Hirschman Index (MHHI) and the Price Pressure Index (PPI). These are concepts developed by economists in order to tackle structural links especially in the context of unilateral effects of horizontal transactions. These tools are also largely described in the 2009 OECD Report. The Commission's consultation documents appreciate the value of such tools, however according to the provisions of par. 93 of the first Annex to the Commission's Staff Working Document, 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.

[148] *Ibid.* See also par. 81 of the first Annex to the Commission's Staff Working Document.

[149] OECD Directorate for Financial and Enterprise Affairs - Competition Committee, *op. cit.*, p. 19-20.

reciprocal or involve many firms in the market, the magnitude of the anti-competitive effects increases. The risks of anti-competitive effects arise from both active minority interests (i.e. control rights) and passive minority interests among competitors (i.e. cash-flow rights).

The fact that non-controlling minority shareholdings may raise competitive concerns was also acknowledged on several recent occasions by high-ranking Commission representatives, although not necessarily representing the Commission's standpoint, but rather their personal views. First, in the context of the 2011 International Bar Association conference on merger control, held in Brussels in March 2011,[150] both Manual de la Mano, the Deputy Chief Economist at DG Comp, and Johannes Luebking, Head of Unit, Antitrust and Merger Case Support, looked into the possible economic impact of minority shareholdings, using both unilateral and coordinated effects theories. Like the conclusions of the 2009 OECD Report, these Commission officials point to the fact that, regardless of the fact that we are dealing with passive or active investments in a competing firm, an impact on the competitive status of the market may be detected. The materialization of this may be observed in shifting the incentives to compete, reduction of output, higher likelihood of collusion, as well as input and costumer foreclosure. Consequently, it was argued that the issue of acquisition of minority stakes does indeed require further reflection and discussion. Second, in July 2013, in the context of the 'Bruegel Competition Policy Lab: Minority Shareholding in EU Merger Control',[151] Mr. Johannes Luebking emphasized the current rather unsatisfactory situation resulting from the Commission's inability to tackle the competitive concerns stemming from certain minority shareholdings transactions, while Giulio Federico from DG Competition's Chief Economist Team dwelled on the manner in which competitive harm can occur in practice, in horizontal or vertical settings, while using recent case-law examples. One of the conclusions reached after this seminar was that the relevance of the competitive effects that non-controlling minority stakes create is indeed not simply theoretical. Third, in mid-October 2013, during the 'Minority Shareholdings: Is There a Need for Reform?' conference organized by the Concurrences Journal in association with Cadwalader, Wickersham & Taft and MAPP,[152] Mr. Johannes Luebking reiterated that there are indications according to which the legal tools currently available to the Commission do not provide a comprehensive basis to tackle all anti-competitive effects of minority shareholding acquisitions. Consequently, according to his opinion, extending the reach of the current European merger control system seems desirable. At the time of the event mentioned above, the Commission has already received a large number of stakeholders' responses to the consultation procedure stated in the summer of 2013. Therefore, while presenting the two main options for bringing non-controlling minority shareholding acquisitions under the cap of the Merger Control regulation appraisal process (namely a prior notification system and a selective system, further broken down into a self-assessment method and a transparency method),[153] the Commission official already had a rough overview of the reactions to the consultation documents, stemming from the business community, national competition authorities, law firms, etc. Mr. Luebking was thus in a position to preview the next steps of the process, which will entail the evaluation of the stakeholders' comments, the careful drafting of the envisaged changes and the approval of the potential amendments by the Member States in the Council and by the European Parliament. This will probably happen during the next mandate of the College of Commissioners, likely in 2014, that is if Commissioner Almunia will decide that the Commission should go ahead with the project. Of course, further experimentation may be done via a White Paper for instance, in case

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[150] *Merger Regulation in the EU after 20 Years*, Conference co-presented by the IBA Antitrust Committee and the European Commission, 9 - 11 March 2011, Brussels, http://www.int-bar.org/conferences/conf367/

[151] For more information, see http://www.bruegel.org/nc/events/event-detail/event/372-minority-shareholding-in-merger-control/, retrieved on August 14th, 2013.

[152] For further details about the event, see the following link, retrieved on November 20th, 2013: http://www.concurrences.com/Minority-Shareholdings-is-there-a/.

[153] These potential options of amending the Merger Control Regulation, including the procedural adjustments connected to the substantive alterations of the control system are presented in a more or less detailed manner in the Commission's Staff Working Document, p. 5-11.

additional testing of the options for a change is deemed necessary.

In any case, if anti-competitive effects may indeed arise in connection with non-controlling minority shareholdings, an important question inevitably follows. Is indeed (merger control) regulatory intervention necessary? We have provided above that some of the anti-competitive concerns relating to (non-controlling) minority shareholdings may be alleviated by the use of certain EU law and domestic law instruments. First, Articles 101 and 102 TFEU may be useful, however there are limits to the application of these legal provisions, and overall since these legal tools were not specifically designed to deal with acquisition transactions, questions may be raised with regard to their appropriateness when dealing with non-controlling minority stakes ownerships. The provisions of the Merger Control Regulation may also be used, however, as things stand, only in an ancillary manner, in connection with an already notified self-standing transaction. Furthermore, the divestiture problems, which occurred in *Ryanair / Aer Lingus* emphasized the limits of the current system of control embedded in Regulation 139/2004. Last but not least, the value of EU law and domestic company law and corporate governance instruments has to be mentioned. Still, the solution of using only such legal tools to deal with (non-controlling) minority shareholdings is not necessarily optimal. Some of these provisions apply only to certain types of companies (e.g. listed companies) and they may differ from one jurisdiction to another, depending on the degree of harmonization achieved, if any. In any case, such company law provisions will impact the outcome of a given case, and this will not always be done in a consistent manner.

The conclusion that can be drawn from the above is that the current treatment afforded to non-controlling minority shareholdings in EU law exhibits certain gaps: an enforcement gap – due to the fact that some ownerships as such, while raising anti-competitive concerns, may escape the Commission's assessment, given the existing EU law mechanism present in its 'toolkit'; a related regulatory gap – given the fact that Regulation 139/2004 is geared to catch only transactions that confer control, despite the fact that acquisitions of cash-flow rights (passive investments) may also raise competitive concerns. According to Spector,[154] this is an asymmetric treatment, which is unwarranted. If this is the case (namely a - rather serious - gap exists, and the current mechanisms of control have their limits), in the following lines we will briefly evaluate dwell on the steps taken by the Commission in order to remedy the existing concerns.

5. Looking Forward, What Is There To Be Done?

The signals coming from the Commission's stance, either via the speeches of Commissioner Almunia, or the positions taken by other Commission officials, and most importantly stemming from the initiation and content of the consultation procedure, embedded in the Commission's Staff Working Document - *Towards more effective EU merger control*, may be interpreted as a clear-cut acknowledgment of a regulatory / enforcement gap's existence. This translates in accepting that the current tools available to the Commission, and discussed throughout this contribution, offer insufficient coverage of minority shareholding related transactions. Consequently, it seems that an amendment of the Merger Control Regulation, meant plug the gap is in the cards. Of course, such an amendment entails far-reaching adjustments of the EU merger control system, regarding both the substance and the procedures. The question that inevitably follows is: what has already been done, and what is new on the Commission's agenda in this respect? Of course, this endeavour is complex enough to form the subject of a distinct research project, yet it seems appropriate at this time to pinpoint the steps already taken and those projected, to enable the Commission to bring non-controlling minority shareholdings, as self-standing transactions under the cap of the Merger Control Regulation's appraisal mechanisms.

The existence of the regulatory / enforcement gap is triggered not only by the *Ryanair / Aer Lingus* saga, although the proceedings surrounding this case point in the most evident manner towards the conclusion that a gap exists. As we have already provided above, the

[154] Spector, D., *op. cit.*, p. 16.

Commission's concerns with minority shareholdings are not new.[155] In this context, the added value of the analysis carried out between 2005 and 2011 in the Zephyr Database (dataset containing information on transactions resulting in changes of ownership in listed companies) is worth mentioning. The ins and outs of this analysis are outlined in par. 91-105 of the second Annex to the Commission's Staff Working Document: the main features, the methodology, the findings, practical examples, etc. The merit of this analysis, although not necessarily entirely conclusive, is that it strongly suggests the fact that there is a more or less significant number of cases (let us say a confirmed minimum), entailing minority stake interests, with a potential Internal Market dimension, that would warrant competition scrutiny, but currently fall outside the scope of the Merger Control Regulation because they do not involve a change of control. This shows that an amendment of the Merger Control Regulation as suggested above, will inevitably lead to an increase in the number of cases that the Commission will have to handle. The results of the tender studies on the importance of minority shareholdings in the EU[156] will most likely further the Commission's grasp on the increased workload it will have to take upon. In any case, while amending the Merger Control Regulation, the Commission will have to balance this increase in workload with keeping the quality of appraisal high, as well as with a reduced regulatory burden and a higher degree of legal certainty for the market players.

It is probably in this respect, that certain recent technical / procedural amendments to the functioning of the EU merger control system have entered into force. In December 2013 a package of reforms was adopted, which widens the scope of the Commission's simplified procedure and attempts to reduce the amount of information required for notifying transactions.[157] From the Commission's standpoint, the aim of the new rules is to streamline procedures, to the extent that 70% of the notified transactions will qualify for review under the Commission's simplified, fast track procedure. In connection with the assessment of minority shareholding transactions, what this means is that the Commission seems to be making room for bringing the acquisition of non-controlling minority shareholdings under its review procedures, by freeing up time and resources which currently pertain to rather non-problematic transactions. Will this suffice, though? The answer to this question has to be connected with how low the threshold of intervention will be set. In other words, which types of self-standing transactions will be investigated using merger control mechanisms in the future? Of course, this is a matter of redefining the concept of control, away from the mandatory finding of decisive influence being exercised, which is by its nature a substantive alteration of the Merger Control Regulation's content. Whether in turn, this will result in rethinking the Consolidated Jurisdictional Notice, the Internal Market dimension rule, or the functioning of the 'German clause' in Article 9 of the Merger Control Regulation, is again a matter of fine balancing between arguments pertaining to increased workload, resource consumption, legal certainty, etc.

Turning to the substantive amendments of the Merger Control Regulation, that may be contemplated, a first step would be to relax the threshold of 'decisive influence', as a constitutive element of the concept of control. This will in turn necessitate a revamping of the definition of concentration, fact that we have already pointed to above, in connection with our analysis of the *Ryanair / Aer Lingus* proceedings. The change may entail abiding to a lower, somewhat free-floating threshold, such as 'material or competitively significant influence', already used in the UK and German jurisdictions. Authors such as Schmidt[158] and Friend[159]

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[155] See footnote 1.
[156] *Ibid.*
[157] *Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004* and *Commission Implementing Regulation amending Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings.* For more information on this matter, see the following link, retrieved on December 8th, 2013: http://europa.eu/rapid/press-release_IP-13-1214_en.htm?locale=en
[158] Schmidt, J. P., *op. cit.*, p. 212.
[159] Friend, M., *op. cit.*, p. 305.

are not necessarily supporters of such an approach, while Bardong[160] advocates a more concrete threshold of intervention based on fixed level of shareholding (such as 10%), coupled with clearly delineated exemptions for typical situations in which competition issues can be excluded (the so-called 'safe harbours'). All things considered, it will all boil down to how exactly will structural links that would be subject to the Commission's scrutiny, be defined. The Commission's Staff Working Document contains a short discussion on the matter, however without conclusively settling the matter.[161]

In any case, the substantive alterations further call for some important practical considerations that should not be overlooked. Should the control of minority shareholding acquisitions occur *ex-ante* or *ex-post factum*? Both possibilities are envisaged in the Commission's Staff Working Document,[162] each exhibiting benefits and drawbacks. The *ex-ante* method of control may materialize in two, quite distinct ways: a mandatory notification system which would entail widely extending the current reach of Regulation 139/2004, and a selective ('transparency') system of identifying the cases which *prima facie* raise competitive concerns, thus placing a great deal of discretion in the Commission's hands with regard to the transactions that may be investigated. The *ex-post* method of control, also referred to as the 'self-assessment' system, would entail no need of a prior-notification of the transaction and no standstill obligation to comply with; the Commission would again have the discretion whether and when (of course, subject to certain reasonable time limits) to open an investigation provided that *prima facie* competitive concerns are identified.

The above observations are meant to shed light on the fact that altering the EU merger control system to the effect of allowing the appraisal of non-controlling minority shareholdings as self-standing transactions, is not as straightforward task as it may appear at first sight. While such amendments will most likely plug the enforcement / regulatory gap in question, we believe that further experimentation / fine-tuning and possibly a gradual change of the control system may be a path to take into account. After all, the consultation procedure started in June 2013 is an important step in this respect. To the same end, one may expect that should any substantial alterations of the EU merger control system with regard to minority shareholding acquisitions become reality, they will most likely be coupled with further guidelines, or other soft-law documents.

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[160] See Bardong, A., *The German Experience*, 'Merger Control and Minority Shareholdings: Time for a Change?', Concurrences – Revue des droits de la concurrence, no. 3/2011, p. 36.
[161] See Commission's Staff Working Document, p. 7.
[162] *Ibid.*, p. 5-11.