Minority Shareholdings in EU Merger Control

- The Added Value of the 2014 White Paper -

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The Topics of Today

- Brief introduction to the 2014 White Paper
- Defining minority shareholdings
  - ‘Competitively Significant Links’
- The control method
  - ‘Targeted Transparency System’
The 2014 White Paper – Preceding Steps

- The *status quo*
  - economic theory
  - EUMR
  - articles 101 & 102 TFEU
  - other legal provisions

- Is there really a problem? >>>* Ryanair / Aer Lingus*

- Past efforts to tackle the minority shareholdings problem
    - proportionality & administrative burden
  - 2011: discussions on a potential regulatory / enforcement gap
    - Tenders for studying the importance of minority shareholdings for the EU economy
  - 2013 SWD and 2 annexes
    - a (potential) enforcement / regulatory gap
The 2014 White Paper – Brief Outline

- **Purpose & objectives**
  - stocktaking & further boosting coherence and convergence
  - improving the effectiveness of EU merger control

- **Theories of harm**
  - coordinated effects (VEBA / VIAG)
  - unilateral effects (Ryanair / Aer Lingus, Siemens / VA Tech)
  - vertical effects (IPIC / MAN Ferrostaal)

- **3 main principles:**
  - cover all sources of competitive harm
  - proportionality (administrative burdens on all parties involved)
  - consistency with EU and domestic merger control systems

  ✓ Conclusion: ‘competitively significant links’ should be tackled via a ‘targeted transparency system’
Non-Controlling (Minority) Shareholdings - I

- Merger Control Regulation & Consolidated Jurisdictional Notice
- 2009 OECD Report
  - ‘minority shareholdings’ or ‘partial ownerships’
  - <50% of voting rights
- 2011 Tendered Studies for the Importance of Minority Shareholdings in EU Economy
  - participation in the share capital of a firm, insufficient to attribute any sort of control
- Meadowcroft & Thompson
  - pre-merger holdings, blocking holdings, holdings providing effective control, diversification and proxy agreements
Non-Controlling (Minority) Shareholdings - II

- Germany - Act against Restraints of Competition, Chapter VII
  - 25% of an undertaking’s capital or voting rights or
  - direct / indirect exercise of ‘competitively significant influence’

- The UK - Enterprise Act 2002 - Part 3
  - ability to materially influence an enterprise’s policy

- 2013 SWD does not give much away
  - ‘safe harbours’: either percentage-based, or substantive criteria (‘material or competitively significant influence’)

- 2014 WP: narrowing down the problem or reaching a solid compromise?
  - competitive dimension: horizontal or vertical
  - significance dimension: percentage-based (around 20%), or combination (5-20% + de facto blocking minority, seat on target’s board, or access to commercially sensitive information)
Control System - Potential Options

- If a change is bound to occur, what would be the options?

- Least intrusive
  - no change - *laissez-faire*
  - alter enforcement priorities of Art. 101 & 102 TFEU
  - technical amendment to Art. 8, par. 4 EUMR >> unitary approach to the concept of concentration

- Somewhat more intrusive – 2013 SWD
  - extending the notification system
  - self-assessment system
  - transparency system

- How do these options score as far as burdens, costs, legal certainty and coverage of problematic transactions are concerned?
The ‘Targeted Transparency System’

- **Steps**
  - self-assess > submit notice (+ waiting period) > Commission’s discretion
  - (MS referral request) > full notification > limited period for investigation

- **Recurring question:** is this a good compromise?
  - cost and burdens increased?
  - contents of the notice – how much does it differ from a full notification?
  - what about the legal certainty aspect?
  - preference for prior or post implementation appraisal?
  - is reliance on self-assessment safe?
  - transactions falling through the enforcement cracks?
  - how to establish *prima facie* competitive concerns?
Thank you for your attention!

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Dutch Cabinet on minority shareholdings

Thijs Kirchner
Competition and Consumers directorate

17th September 2014
Fokke & Sukke
Leggen hun eisen op tafel

Opsplitsen die Wereldbank!!

Wij hebben tenslotte 2,6% van de aandelen!

The Netherlands
Dutch Cabinet on minority shareholdings

• On the 9th of July the Commission published the white paper

• Cabinet response was sent to Parliament on the 8th of September

• ACM was involved in Cabinet response

• Dutch parliament has 30 days from the 8th of September to change the course of the Dutch Cabinet

• Response also covers case referrals
Dutch Cabinet on minority shareholdings

• In general the response is very open, and asks the Commission to further develop the ideas on minority shareholdings

• We agree with the Commission that minority shareholdings may lead to anti-competitive effects

• But Commission skips a few steps by concluding that the transparency system should be introduced

• Interim conclusion: the Dutch Cabinet is not convinced that the proposed solution is proportional
Questions to the Commission

- Further analyze the frequency of the occurrence of minority shareholdings and impact of those holdings on competition
- Reason further why abuse of a dominant position can’t be used
- How effective are the systems in the UK, Germany and Austria?
- Further explore the possibility of a self-assessment system
- What will happen to the SIEC test?
Two unknowns

• The Commissions writes in the staff working document that the SIEC test should be adapted to minority shareholdings.
• But there is no proposal. Unclear what the exact effects of introducing a transparency system would constitute.

• Commission asks Member States to apply EU merger control regulation parallel with national regulation.
• Burden and effect of introducing a transparency system in Netherlands unclear.
VvM meeting 17 September 2014
Commission White Paper: proposed changes to the EU Merger Regulation

Winfred Knibbeler
Minority Shareholdings – “Competitively Significant Link”

**Competitively significant link:**
- Target is *competitor* or *vertically related company* AND
- Acquired shareholding is EITHER
  - Around 20%
  OR
  - Between 5% and around 20% AND “additional factors.”

**Unclear concepts:**
- Actual or potential competitors?
- Directly vertically related company?
- Non-controlling minority shares in joint ventures
- Unsuitable for jurisdictional threshold?
Turnover calculation and suspension period

**Turnover calculation**

- What are the undertakings concerned?
- How should group turnover be calculated?

**Suspension period**

15 day suspension period during which:

- Commission may require full notification
- Member States may request referral
- Para. 107 public bids - acquirer cannot exercise voting rights, not even to safeguard own minority rights
- Why suspension period combined with powers to intervene during 4-6 months, combined with interim measures?
Notification threshold and penalties

Notification threshold

• When will the Commission be competent to require full notification?
• Is the threshold similar to Article 4(4) EUMR, i.e. notification is required if the minority shareholding may “significantly affect competition”?

Extension of NCA competence?

• Can NCA’s request referral even if they would not normally have jurisdiction over acquisitions of non-controlling interests?
Debate
Debate Questions

1. Does an enforcement gap exist under the current rules? What is the scale of the problem being tackled by the proposed changes?

2. Is the administrative burden of the ‘transparency system’ proportional to the anti-competitive effects it captures?

3. If the ‘self-assessment’ method of control is still in the cards, is the ex-post v. ex-ante control methods debate still of actuality?

4. By combining the requirement of “an information notice” with a 15-days suspension period and powers to intervene during a further 4-6 months period the Commission is wanting to have its cake as well as eat it. The 15-days suspension period is not necessary and can be removed.
5. Should there be a clearly defined limit on the Commission’s discretion to select the cases that *prima facie* merit in-depth assessment?