FACULTEIT DER RECHTSGELEERDHEID

Minority Shareholdings in EU Merger Control

- The Added Value of the 2014 White Paper -

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Catalin S. Rusu

Radboud Universiteit Nijmegen

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
  - The 2001 Green Paper, COM(2001)745, par. 109
    - 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-asses > 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!

C.Rusu@jur.ru.nl

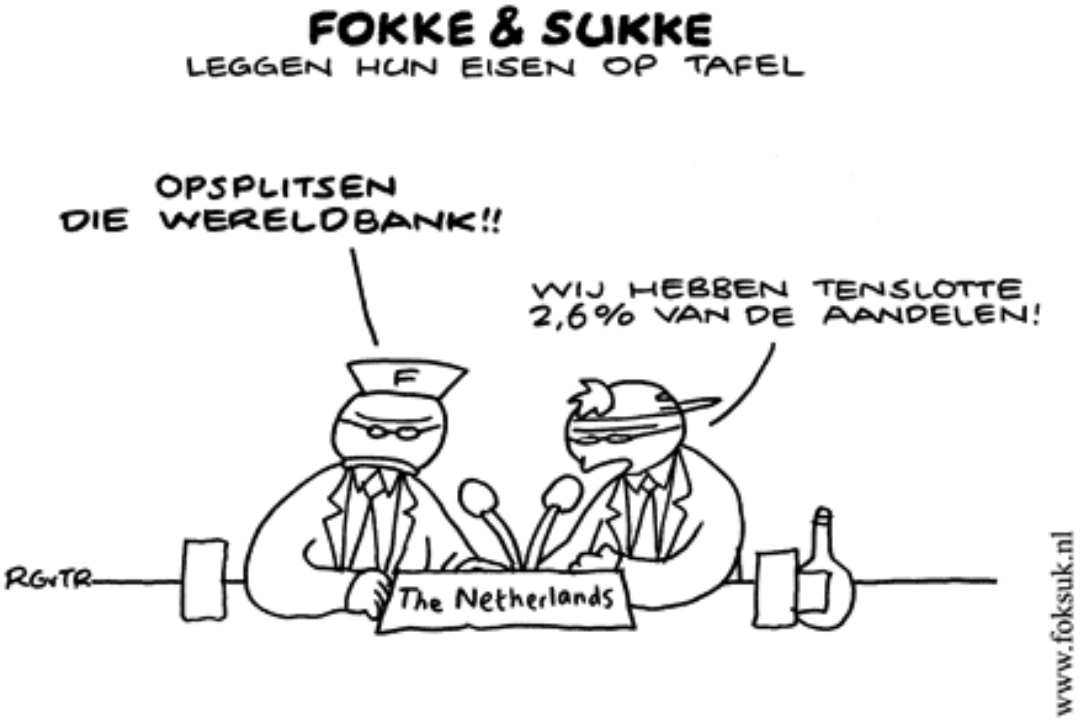
www.ru/nl/law/rusu

Ministerie van Economische Zaken

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!
F
RGVTR
The Netherlands
www.foksuk.nl

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

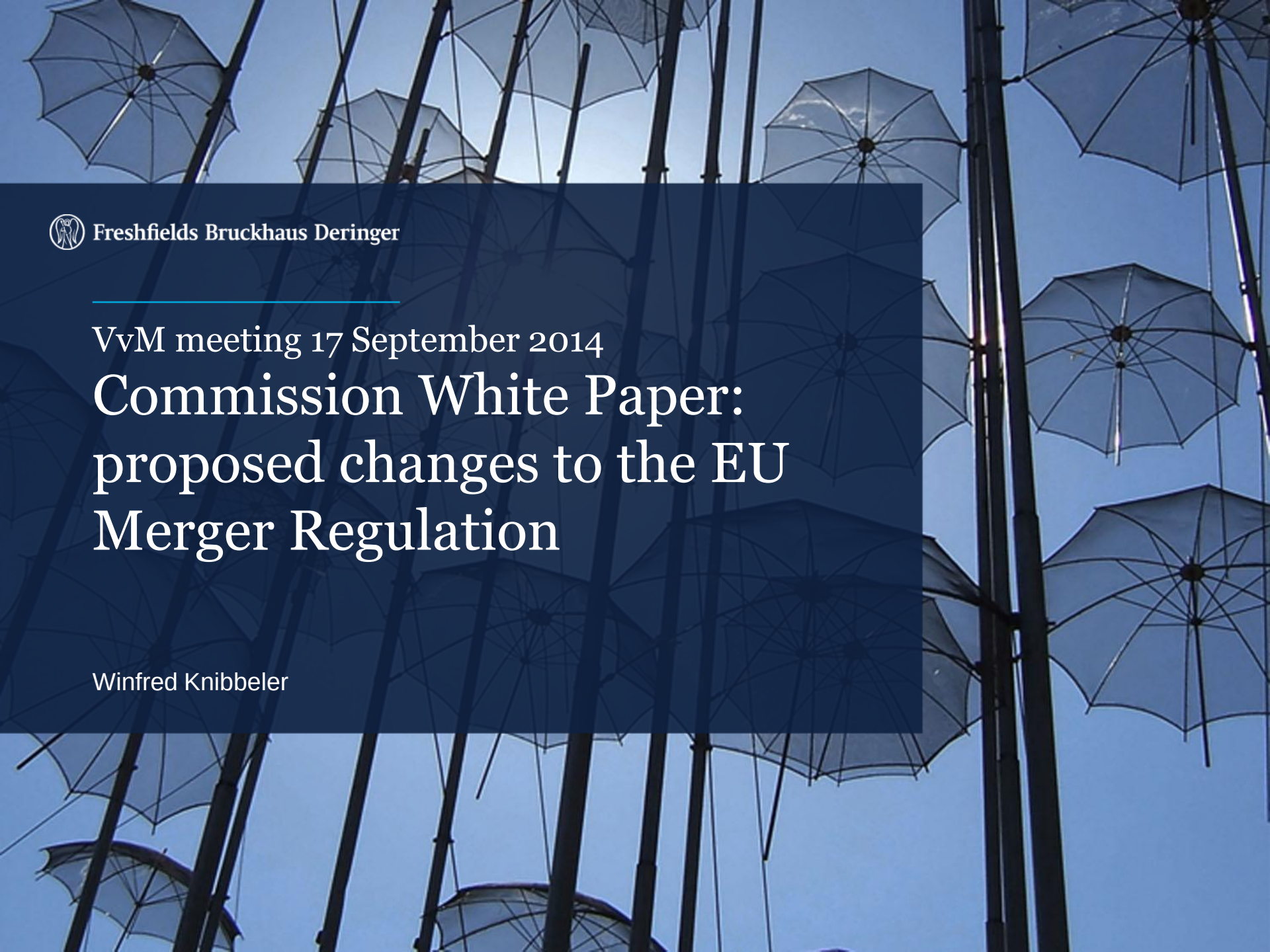
Questions to the Commission

- 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.



Freshfields Bruckhaus Deringer

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.**

Debate Questions (cont.)

5. **Should there be a clearly defined limit on the Commission's discretion to select the cases that *prima facie* merit in-depth assessment?**