



# **Towards more effective EU merger control: Minority Shareholdings**

- Johannes Lübking
- Bruegel Workshop
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*All views expressed are strictly personal and do not necessarily reflect the official position of the European Commission*

# Introduction

- Consultation paper "Towards more effective EU merger control" published 20 June 2013
  - No need for a major overhaul of the ECMR (report on functioning of the ECMR, 2009).
  - Limited number of issues examined:
    - Minority shareholdings
    - Referrals
    - Technical issues
  - Open discussion launched on possible improvements. No decision taken yet on amendment of the ECMR.

# Enforcement gap in relation to acquisition of non-controlling minority shareholdings?

- Under EU Merger Regulation:
  - The Commission has no jurisdiction to examine cases of acquisition of minority stakes which do not confer control ...
- ... but where it has jurisdiction, Commission:
  - takes existing minority shareholdings into account when analysing effects of a merger on competition
  - may require divestiture of minority stake as condition for clearance
- ... leads to rather unsatisfactory situation that control depends on timing of acquisition of minority stake



# EU Antitrust Law

- Art. 101 TFEU: anticompetitive agreements
  - Applicable to acquisitions of minority shareholdings (ECJ in Philip Morris; 1984)
  - Requirements:
    - Restrictive agreement: acquisition of shares in stock exchange?
    - Restriction of competition: change of incentives?
- Art. 102 TFEU: abuse of a dominant position
  - Applicable to acquisitions of minority shareholdings (Commission decision in Warner-Lambert/Gillette, 1992)
  - Requirements: dominant acquiring company/acquisition as an abuse

# National competition laws

## UK

- Enterprise Act (2003): power to OFT and CC to assess minority shareholdings conferring « material influence ».

## Germany

- Section 37 (1) (3) (b) GWB: acquisition of shareholdings above 25%
- Section 37 (1) (4) GWB: acquisition of « competitively significant influence »

# Enforcement Gap – Findings

- Existing legal tools at EU level may not cover all possible anti-competitive effects deriving from acquisitions of minority shareholdings
- Substantive considerations call for tackling acquisitions of minority shareholdings under merger rules – EU and national experience
- Limited number of cases expected, but relevant enforcement activity
- Need to achieve the right balance for extension of EU merger control to acquisition of minority shareholdings:
  - Design system that does not create unnecessary administrative burden whilst ensuring to catch all anti-competitive mergers

# Minority shareholdings – Design and Options

Two main options:

- Notification system:
  - Extend current system of ex ante notification of mergers to structural links
- Selective system:
  - Commission may investigate transactions most likely to raise competition concerns. Commission's discretion to examine cases
  - No stand-still obligation

# Minority shareholdings – Design and Options

- Selective system: possible designs
  - Self-assessment system
    - No filing obligation for the parties
    - Commission relies on market intelligence and complaints
  - Transparency system
    - Parties file short information notice (to be published on website)
- Given the limited number of cases, a selective system may be more appropriate



# Minority shareholdings – Design and Options

- Commission's powers to examine structural links
  - Definition of "safe harbours"
    - Quantitative threshold (10% like in US); or
    - Qualitative threshold (like material influence)
  - Delineation to Article 101 TFEU / joint ventures
- Delineation of competences between Commission/Member States
  - Turnover thresholds;
  - Referrals
- Procedure
  - Voluntary notifications in selective system?

## Next steps:

- Public consultation until mid-September
- VP Almunia to decide on the basis of the public consultation whether to proceed with a legislative proposal