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The Evolution of Merger Control Regime in EU and Minority Interests

I. Current State of EU Merger Control and Provisions for the Future

Prior to Regulation (EEC) No 4064/89[1] the Commission did not opt to employ crystal-clear borderlines to determine the notion of minority interests within the EU community. The concepts of decisive influence and no influence over the commercial activities of the target firm seem to remain unclear even though the Commission recognized their existence.[2] The Commission appeared increasingly willing to apply Article 85 and especially the *Philip Morris* doctrine. However, after 1990 and the implementation of Regulation (EEC) No 4064/89 the Commission adopted an enhanced interpretation of the decisive influence standard in a number of acquisitions of minority shareholdings that had previously fallen under Article 85(1) of the EC Treaty.

This chapter provides an up-to-date retrospective view of the merger control regime within the Community and a thorough investigation of the concept of minority interests under this regime.

A. Regulation (EEC) 4064/89 as the Starting Point

Regulation (EEC) 4064/1989 is characterized by the Commission as 'the original Merger Regulation'.[3] Its adoption by the Council led to the introduction into European competition law of a comprehensive and systematic approach to ex-ante merger control, based on the relevant cumulative experience of the previous years.

Two main cases are considered to be the precursors for the adoption of Regulation (EEC) No 4064/89: the *Continental Can* case[4] and the *Philip Morris* case.[5] Focusing on the *Philip*

[1] Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings [1989] OJ L395/1.

[2] [1989] OJ L395, 1, corrected version [1990] OJ L257.

[3] See the Commission Staff Working Document (accompanying the White Paper 'Towards more effective EU merger control') SWD(2014) 221 final, para 5.

[4] Case 6/72 *Europemballage and Continental Can v Commission* [1973] ECR 215, [1973] 8171 CMLR 199.

[5] Cases 142 and 156/84 *BAT and RJ Reynolds v Commission* and *Philip Morris* [1987] ECR 4487, [1988] 4 CMLR 24.

Morris case, it is important to underline the sense and significance of control as it was framed by the European Court of Justice (ECJ):

> That will be true [ie the fact that the acquisition of an equity interest in a competitor does not by itself restrict competition; nevertheless, it might serve as an instrument to this goal] in particular where, by the acquisition of a shareholding or through subsidiary clauses in the agreement, the investing company obtains legal or de facto control of the commercial conduct of the other company or where the agreement provides for commercial co-operation between the companies or creates a structure likely to be used for such co-operation. That may also be the case where the agreement gives the investing company the possibility of reinforcing its position at a later stage and taking effective control of the other company.[6]

Under this pioneering—for the day—system, mergers between undertakings meeting minimum certain turnover thresholds ought to be notified in advance to the Commission, which used—and continues to use—a *competition-based test* in order to decide whether or not they are compatible with the internal market.[7] Since its adoption, merger control has come to constitute one of the main pillars of EU competition law and its basic features are well established.

At the present time EU merger control is making an important contribution to the functioning of the internal market, since on the one hand it establishes a uniform set of rules for corporate restructuring and on the other hand it ensures that competition and consumers are not harmed by concentrations creating excessive market power.[8] As expected in a global economy, EU merger control is increasingly concentrating on cross-border cases and more specifically on cases that have an impact on the European economy.[9] Undisputable confirmation for this is the significant increase in recent years of the percentage of EU merger control cases where non-EU firms have been involved and, conversely, the corresponding decrease in cases where firms from the same Member State are involved; these last cases overall account for only a minor percentage. While both categories of the above-mentioned cases may also have pan-European importance, this trend is consistent with the Commission's intention of focusing on mergers that have a European Economic Area (EEA)-wide or global impact.[10]

[6] Ibid, paras 38 and 39.

[7] This is the reason why, in theory, '[i]t is … important to realize that undertakings may fall within the ECMR on the basis of their turnover even if they have minimal or even no assets within the Community'. See DG Goyder, *EC Competition Law*, 4th edn (Oxford, Oxford University Press) 342. Case IV/M.619 *Gencor/Lonrho* [1996] 4 CMLR 742 (on appeal Case T-102/96 [1999] ECR II-753) and Case IV/M.877 *Boeing/McDonnell Douglas* [1997] OJ L336/16 constitute relevant examples.

[8] Since the application of Regulation (EEC) 4064/89, the essential principle continues to be that 'any concentration with an EU (ex Community) dimension creating or strengthening a position as a result of which effective competition in the internal market (ex Common Market) or a substantial part of it is significantly impeded is to be declared incompatible with the internal market (ex Common Market)'. See Goyder, ibid, 340–41.

[9] However, at least at the beginning (in 1989), 'adoption of the Merger Regulation proved difficult partly because of the concerns of certain Member States, whose power to investigate a merger would be limited by an exclusive competence at the level of the Community'. E Kameoka, *Competition Law and Policy in Japan and the EU* (Cheltenham, Edward Elgar, 2013) 96–97.

[10] Criticism of the 4064/1989 Regulation can be found in: RA Kassamali, 'From Fiction to Fallacy: Reviewing the EC Merger Regulation's Community Dimension Thresholds in the Light of Economics and Experience in Merger Control' (1996) 21 ELRev Checklist No 2 CC/89 and MP Broberg, *The Commission's Jurisdiction to Scrutinise Mergers*, 2nd edn (Dordrecht, Kluwer International, 2003) ch 9.

Simultaneously, national competition authorities (NCAs) are focusing increasingly on mergers within national dimension.[11]

B. Reform Under Regulation 139/2004

The current Merger Regulation is the result of a reassessment of Council Regulation (EEC) No 4064/89; before the publication of Merger Regulation 139/2004, a Commission Green Paper was published in 2001.[12]

The principal aim of Regulation (EEC) No 4064/89 was the 'creation or strengthening of a dominant position' test. However, in 2004, with the implementation of Merger Regulation 139/2004, the 'significant impediment of effective competition' (SIEC) test was introduced (among other things) as the relevant criterion for assessing mergers and the previous 'creation or strengthening of a dominant position' test was replaced.[13]

Merger Regulation 139/2004 continued, like its 'predecessor', to apply only to concentrations, ie those transactions involving acquisitions of control by enterprises over other enterprises or parts of them. Nevertheless, the experience of recent years shows that acquisitions of equity stakes which are below the level of control, and therefore not captured by Regulation 139/2004, may in some cases lead to structural changes in the market. Therefore, the discussion that took place in the Commission Staff Working Document[14] had the intention of examining whether the Merger Regulation should be extended to cover such transactions.

Furthermore, Merger Regulation 139/2004 enables Member States to refer cases to the Commission, and vice versa, before notification; it is also possible for several Member States jointly to refer a case to the Commission after notification. These possibilities create a positive impact as well as some shortcomings that are also analysed in the Commission Staff Working Document.[15]

[11] For instance, Art 7 of the Greek Competition Law (eg law 3959/2011 'Protection of Free Competition' (Gov't Gazette Issue A' 93/20.04.2011)) provides that:

1. Any concentration of undertakings subject to prior notification which *may significantly impede competition in the national market or in a substantial part of it* [emphasis added], in terms of the specific characteristics of goods or services, especially by creating or strengthening a dominant position, shall be prohibited by decision of the Competition Commission.
2. In appraising the potential of a concentration to significantly impede the competition within the meaning of paragraph 1, account shall be taken, in particular, of the structure of all the relevant markets, of the *actual or potential competition from undertakings located inside or outside Greece* [emphasis added], of any legal or other barriers to market entry, of the market position of the undertakings concerned and their economic and financial power, of the alternatives available to suppliers and users, of their access to sources of supply or markets for the goods, of the supply and demand trends for the relevant goods and services, of the interests of the intermediate and ultimate consumers and of the contribution to technical and economic progress and to improving economic efficiency, provided that it is to consumer's advantage and does not form an obstacle to competition.

[12] Green Paper on the Review of Council Regulation (EEC) No 4064/89, COM(2001) 745 final.

[13] See P Fotis, 'Merger Enforcement: Law and Statistical Evidence Worldwide' (2013) 5(3) *International Journal of Economics and Business Research* 272, 273–77.

[14] Above n 3.

[15] Ibid.

C. Substantive Evaluation

i. Assessment Under the SIEC Test

As was mentioned above, the most substantial modification of EU merger control took place in 2004, when the SIEC test was introduced.[16] The new test, based on the Commission's previous practice and the established case law of the Court, maintained that SIECs most prominently arise through the creation or strengthening of a dominant position; however, the new test closed a possible enforcement 'gap' by ensuring that mergers resulting in 'non-coordinated effects' in oligopolistic markets, even if the merged entity would not have become dominant, were 'captured'/covered by the Merger Regulation.

Note, in particular, Recital 25 of the Merger Regulation 139/2004, where it is mentioned that:

> In view of *the consequences that concentrations in oligopolistic market structures may have, it is all the more necessary to maintain effective competition in such markets*. Many oligopolistic markets exhibit a healthy degree of competition. However, under certain circumstances, concentrations involving the elimination of important competitive constraints that the merging parties had exerted upon each other, as well as a reduction of competitive pressure on the remaining competitors, may, even in the absence of a likelihood of coordination between the members of the oligopoly, result in a significant impediment to effective competition. The Community courts have, however, not to date expressly interpreted Regulation (EEC) No 4064/89 as requiring concentrations giving rise to such non-coordinated effects to be declared incompatible with the common market. Therefore, in the interests of legal certainty, it should be made clear that this Regulation permits effective control of all such concentrations by providing that any concentration which would significantly impede effective competition, in the common market or in a substantial part of it, should be declared incompatible with the common market. The notion of 'significant impediment to effective competition' in Article 2(2) and (3) should be interpreted as extending, beyond the concept of dominance, only to the anti-competitive effects of a concentration resulting from the non-coordinated behaviour of undertakings which would not have a dominant position on the market concerned.[17]

Under Regulation (EEC) 4064/1989, the strong possibility that the so-called 'dominance test' would not capture mergers with potentially anticompetitive non-coordinated effects in cases where the merged entity did not become dominant created legal uncertainty. According to economic theory, in an oligopoly where only a few firms[18] are active and none is individually dominant, and where collusion is not possible,[19] merging firms might have the incentive to increase their prices unilaterally, *even if they do not become dominant*. After the merger, the remaining market participants would benefit from the reduction in competitive

[16] See para 3 of Art 2 of the Merger Regulation 139/2004, according to which the Commission ought to assess whether a concentration 'would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position'. This test replaced the previous substantive test, the so-called '*dominance test*', ie the test demanding 'creation or strengthening of a dominant position', which was enshrined in Art 2 of Council Regulation (EEC) No 4064/89.

[17] Emphasis added.

[18] On this see R Selten, 'A Simple Model of Imperfect Competition where Four Are Few and Six Are Many' (1973) 2 *International Journal of Game Theory* 141–201.

[19] See F Alese, 'The Economic Theory of Non-collusive Oligopoly and the Concept of Concerted Practice under Article 81' (1999) 20 *European Competition Law Review* 379.

pressure and might also increase their prices, leading to an overall price increase in the market. This result is quite possible in markets with differentiated products.[20]

Therefore, the new SIEC test was designed to capture these so-called 'gap' cases, ie mergers that allow firms to raise prices unilaterally even though these mergers do not create or reinforce either a single or a collective dominant position. The *T-Mobile Austria/tele.ring* case constituted the first example,[21] and was followed by many others.[22]

As the Commission intended to increase the transparency and predictability of merger analysis under the new test, it published a set of Guidelines on the assessment of horizontal mergers (the so-called 'Horizontal Merger Guidelines').[23] These were augmented in 2008 by Guidelines on the assessment of non-horizontal mergers (the so-called 'Non-Horizontal Merger Guidelines').[24] The Non-Horizontal Guidelines are highly significant as, with respect to input and customer foreclosure, they define a structured approach based on the SIEC test.[25]

In addition, since Commission decisions in merger cases are frequently subject to demanding judicial review, the EU courts provide relevant guidance. More specifically, the EU courts may examine both the completeness and accuracy of the evidence relied upon by the Commission and whether that evidence is capable of verifying the concluding remarks drawn from it.[26] Nevertheless, since 2004 no Commission decision either approving or prohibiting a merger has been definitively annulled by the EU courts; on the contrary, nearly all decisions in merger cases taken by the Commission over the last decade, despite the fact they were appealed, have been upheld by the EU courts. To be precise, the only Commission decision in a merger procedure taken after 2004 and annulled by an EU court with an irreversible judgment did not concern the compatibility of the merger with the internal market but rather the approval of a proposed purchaser of a business which

[20] See also J Beath and Y Katsoulakos, *Economic Theory of Product Differentiation* (Cambridge, Cambridge University Press, 1990).

[21] See, inter alia, COMP/M.3916 *T-Mobile/Tele.ring*, decision of 26 April 2006.

[22] For example, COMP/M.4141 *Linde/BOC*, decision of 6 June 2006; COMP/M.4187 *Metso/Aker Kvaerner*, decision of 12 December 2006; COMP/M.4844 *Fortis/ABN Amro*, decision of 3 October 2007; COMP/M.5224 *EDF/British Energy*, decision of 22 December 2008; COMP/M.6203 *Western Digital/Hitachi*, decision of 23 November 2011; COMP/M.6497 *Hutchinson/ Orange*, decision of 12 December 2012; and COMP/M.6570 *UPS/ TNT Express*, decision of 30 January 2013.

[23] See the Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C31/05.

[24] See the Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2008] OJ C265/6.

[25] It should be emphasized that the EU courts frequently used both the horizontal and non-horizontal Guidelines as a benchmark for assessing the legality of the Commission's substantial analysis of mergers. According to the settled case law, the Commission is bound by the guidance documents (soft law) it has issued: see eg, Case C-322/88 *Grimaldi/Fonds des maladies professionelles*, 13.12.1989, para 18. See also Von Jurgen Schwarz, 'Soft Law im Recht der Europaischen Union' [2011] *EuR* 3 et seq; C Thibierge, 'Le droit souple' [2003] *RTDCiv* 599 et seq; and KC Wellens and GM Borchardt, 'Soft Law in European Community Law' (1989) 14 *EL Rev* 267 et seq). However, these guidance documents remain subject to scrutiny by the EU courts for their compliance with Treaty provisions and the Merger Regulation (see eg, Case T-282/06 *Sun Chemical ea v Commission* [2007] ECR II-2149, para 55. See also Case 294/83 *Les Verts* [1986] ECR 1339, para 24 and Case 322/88 *Grimaldi v Fonds des Maladies Professionnelles* [1989] ECR 4407, para 18.

[26] See in particular Case T-12/03 P *Commission v TetraLaval* [2005] ECR I-987, paras 39 et seq; Case C-413/06 P *Bertelsmann and Sony v Independent Music Publishers and Labels Association (Impala)* [2008] ECR I-4951, paras 47 et seq; Case T-342/07 *Ryanair v Commission* [2010] ECR II-3457, paras 29 et seq.

had to be divested according to a conditional clearance decision.[27] Besides, the judgment of the General Court in Case T-464/04 *Independent Music Publishers and Labels Association (Impala) v Commission*,[28] which annulled the Commission's unconditional clearance of COMP/M.3333 *Sony/BMG*,[29] was overturned on appeal in Case C-413/06 P *Bertelsmann and Sony v Impala*;[30] hence, the Commission's decision was ultimately upheld.

ii. The Significance of Quantitative and Qualitative Evidence

The introduction of the SIEC test highlighted that, beyond analysing the structural effects of a merger, the Commission also assesses market characteristics (ie product substitutability or differentiation, capacity constraints, elimination of an important competitive force, impediment to competitors' expansion, market contestability, barriers to entry, etc) and whether actual or potential competition is eliminated by the merger.

In certain cases the Commission has found that competition concerns were absent despite the high combined market shares of the parties involved; the existing competitive constraints in these cases constitute the main factor determining that these specific mergers were unlikely to impact negatively on competition and thus on consumers. Nevertheless, there were also certain other cases where the Commission identified non-coordinated effects despite the fact the merged company's market share was similar to, or even lower than, that of its rivals.

In addition, as far as complex mergers are concerned, the Commission now uses a variety of data and empirical techniques to perform more rigorous economic analysis. The techniques used are based on data availability and range from descriptive statistics to merger simulation, taking into account demand estimation or direct evaluations of competitive constraints. It ought to be mentioned that in several recent cases a range of sophisticated economic analyses[31] has been used to assess the existence of a SIEC.[32]

The Commission considers the combination of quantitative and qualitative evidence as a *conditio sine qua non* for a complete and accurate merger analysis. More specifically, on the one hand it considers mainly economic and numerical evidence to be important in assessing merger cases. On the other hand, it considers that this quantitative analysis ought always to be integrated into the context of more qualitative evidence, eg minutes of interviews with horizontal- or vertical-level market participants (suppliers or distributors, etc), replies by customers and competitors to requests for information and internal documents of the parties involved. It is crystal clear that these two types of evidence counterbalance,

[27] See COMP/M.2978 *Lagardère/Natexis/VUP*, decision of 30 July 2004, which was annulled in last resort by judgment of the Court of Justice of 6 November 2012 in Joint Cases C-553/10 P and C-554/10 P *Commission and Lagardère v Editions Odile Jacob* (nyr).

[28] Case T-464/04 *Independent Music Publishers and Labels Association (Impala) v Commission* [2006] ECR II-2289.

[29] Decision of 19 July 2004.

[30] Case C-413/06 P *Bertelsmann and Sony v Independent Music Publishers and Labels Association (Impala)* [2008] ECR I-4951.

[31] A very useful economic analysis regarding the reasons for which firms merge is found in Scherer and Ross, *Industrial Market Structure and Economic Performance*, 3rd edn (Boston, Houghton Mifflin, 1990) 159–67.

[32] See eg, COMP/M.6570 *UPS/TNT Express*, decision of 30 January 2013; COMP/M.6458 *Universal Music Group/EMI Music*, decision of 21 September 2012; COMP/M.6471 *Outokumpu/Inoxum*, decision of 7 November 2012; and COMP/M.6663 *Ryanair/Aer Lingus*, decision of 27 February 2013.

rather than substitute for, each other. The main issue, therefore, is the supplementation and not the substitutability.

iii. Indicative Example

In Case COMP/M.6203 *Western Digital/Hitachi*[33] the Commission examined a proposed acquisition in the market for hard disk drives (HDDs). The Commission approved the proposed acquisition of Hitachi Global Storage Technology (HGST)[34] by a US competitor, Western Digital. The approval was conditional on divestment of essential production assets for 3.5-in HDDs, namely a production plant, and certain other measures were also included.

In the specific (oligopolistic) market, the transaction would have reduced the number of active rivals in the HHD sector from four to three and from three to two in the market for 3.5-in HDDs. When assessing the impact of this transaction the Commission took into account two types of data: (a) customer submissions and other qualitative evidence that proved the significance of security of supply for HDD customers; (b) quantitative evidence in the form of commercial data on transactions between the parties involved and their customers, as well as commercial data for the same issues of their main competitors, and bidding data showing the absence of exclusiveness, since most customers multi-source their HDD supplies. Based on analysis of this combined quantitative and qualitative evidence, the Commission established the significance of the presence of a third supplier and that removing Hitachi from the market would harm consumers—hence the Commission's stipulation concerning divestment and accompanying measures.

D. Theories of Harm and Investigation by the Commission in Horizontal, Vertical and Conglomerate Mergers

In recent merger cases, horizontal non-coordinated effects cases have accounted for about 90 per cent of interventions by the Commission. In these cases the Commission intervened either by accepting remedies in Phase I or Phase II, or by prohibiting the merger; there were also cases where the parties abandoned the merger in Phase II. On the contrary, coordinated effects cases have been very rare: the last case was *ABF/GBI* from 2008.[35]

It has to be noted here that a Phase I decision by the Commission is based on Article 6b whereas a Phase II decision by the Commission is based on Article 6c of Merger Regulation 139/2004. Specifically, Article 6b of Merger Regulation 139/2004 states that:

> Where it finds that the concentration notified, although falling within the scope of this Regulation, does not raise serious doubts as to its compatibility with the common market, it shall decide not to oppose it and shall declare that it is compatible with the common market.
>
> A decision declaring a concentration compatible shall be deemed to cover restrictions directly related and necessary to the implementation of the concentration.

[33] Commission's decision of 23 November 2011.
[34] HGST was a subsidiary of Hitachi of Singapore recently renamed Viviti Technologies.
[35] COMP/M.4980 *ABF/GBI Business*, decision of 23 September 2008.

Article 6c of Merger Regulation 139/2004 states that:

> Without prejudice to paragraph 2,[36] where the Commission finds that the concentration notified falls within the scope of this Regulation and raises serious doubts as to its compatibility with the common market, it shall decide to initiate proceedings. Without prejudice to Article 9,[37] such proceedings shall be closed by means of a decision as provided for in Article 8(1) to (4),[38] unless the undertakings concerned have demonstrated to the satisfaction of the Commission that they have abandoned the concentration.[39]

Furthermore, there have been relatively few vertical and conglomerate cases; more precisely, vertical mergers account for just 7.5 per cent and conglomerate mergers, which are much rarer, account for 2.5 per cent of interventions in the period 2011–14. The *TomTom/Tele Atlas*[40] and *Nokia/NAVTEQ*[41] cases constitute challenging cases with vertical concerns. Conglomerate merger cases may also raise interesting competition issues. One relevant example is the *Intel/McAfee* case.[42]

E. Efficiencies (Static and Dynamic) and Innovation

The Commission explains in its Horizontal Merger Guidelines that 'it is possible that efficiencies brought about by a merger counteract the effects on competition and in particular the potential harm to consumers that it might otherwise have'.[43] This is the reason why, during the assessment of a merger's impact on competition, the Commission proceeds to 'an overall competitive assessment', including any likely merger-specific efficiencies to the extent that 'they are likely to enhance the ability and incentive of the merged entity to act pro-competitively for the benefit of consumers'.[44]

In reality the Commission's assessment is a balancing exercise, in which possible anti-competitive concerns are weighed against efficiencies. In fact, it is not an exaggeration to say that it is about a kind of a rule of reason approach.[45]

In particular, the Commission will examine the existence or not of the demanded efficiencies with respect to whether overall (a) the efficiencies are checked and confirmed, (b) the efficiencies are merger specific and (c) the benefits of the efficiencies are likely to be transferred to consumers.[46]

[36] According to para 2 of Merger Regulation 139/2004: 'Where the Commission finds that, following modification by the undertakings concerned, a notified concentration no longer raises serious doubts within the meaning of paragraph 1(c), it shall declare the concentration compatible with the common market pursuant to paragraph 1(b).

The Commission may attach to its decision under paragraph 1(b) conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the common market.'

[37] Article 9 of Merger Regulation 139/2004 deals with the procedure under which the Commission referrals a case to the component authorities of the Member States.

[38] Article 8(1) to (4) deals with the powers of decision of the Commission.

[39] See also the case M.1383 *Exxon/Mobil* in section I.A.iv in ch 5. The Greek Competition Law No 3959/2011 includes corresponding articles for Phase I & II decisions of the Hellenic Competition Commission. See especially Fotis (n 13), 273–75.

[40] COMP/M.4854 *Tom Tom/Tele Atlas*, decision of 14 May 2008.

[41] COMP/M.4942 *Nokia/NAVTEQ*, decision of 2 July 2008.

[42] COMP/M.5984 *Intel/McAfee*, decision of 26 January 2011.

[43] Above n 23, para 23.

[44] Ibid, para 77.

[45] See eg, RH Bork, *The Antitrust Paradox. A Policy at War with Itself* (New York, The Free Press, 1993) 15–22.

[46] Above n 44, para 78.

According to the Horizontal Merger Guidelines, the notifying parties must provide, in a timely manner, all the necessary information in order to prove that the efficiencies demanded meet these criteria.

Accordingly, assessment of these efficiencies has become an integral part of merger analysis, and hence inherent to merger control, for at least the past decade.

i. UPS/TNT Express *as an Example for the Significance of Efficiencies*

Case COMP/M.6570 *UPS/TNT Express*[47] constitutes a useful instance of a case where the assessment of efficiencies was extremely important in the competitive evaluation of the proposed merger. In addition, the specific case was considered as a 'gap' case, since it would have probably led to price increases without the creation or strengthening of dominance. DHL would have continued to be a market leader in some countries, but the proposed merger would have led to the removal of a significant competitive player in concentrated markets[48] across the EU.

The efficiencies claimed by the parties were partially recognised by the Commission, which was able to quantify the recognised efficiencies and the expected price rise. More specifically, the Commission noted the economies of scale and scope due to air network synergies resulting mainly from the fact that the merged entity would need fewer, larger aircraft for the combined small parcels volume than the individual parties in the pre-merger stage. By including assessment of the efficiencies in its overall analysis of the effects of the merger, the Commission was capable of excluding anticompetitive effects at least for a number of countries. Nevertheless, the recognised efficiencies were not sufficient to counterbalance the expected negative effects in all countries. In those cases where the parties did not offer sufficient remedies and competition concerns remained, the concentration was prohibited.[49]

It is generally accepted that innovation is a main driver for competitiveness and growth in the global economy.[50] Under European competition rules, merger enforcement can create the necessary conditions for fostering innovation by protecting competition; consequently, it can lead to better market outcomes not only in terms of lower prices and increased output but also in terms of better product quality, variety and innovation. For instance, in the *Intel/McAfee* case concerning central processing units (CPUs)[51] and chipsets,[52]

[47] Commission's decision of 30 January 2013.

[48] For instance, markets with few and strong players/competitors.

[49] However, see R Whish, *Competition Law*, 5th edn (Oxford, Oxford University Press, 2005) 873, who says that '[o]utright prohibitions are rare'.

[50] See J Temple Lang, *European Community Antitrust Law: Innovation Markets and High Technology Industries*, ed B Hawk (Fordham Corporate Law Institute, 1996) ch 23; LB Landman, 'Innovation Markets in Europe' (1998) 19 *European Competition Law Review* 21.

[51] According to the *Microsoft Computer Dictionary* (5th edn, Redmond, WA, 132), the CPU is the device within an electronic device (mostly a computer) that interprets and executes instructions. Therefore, the CPU constitutes the computer's 'brain': it generally comprises millions of transistors that process data and control other devices in a computer system. In addition, the CPU has the ability to fetch, decode and execute instructions and to transfer information to and from other resources over the computer's main data-transfer path.

[52] A chipset refers to a designated group of integrated circuits that is designed to perform more than one related function. Its main task is to connect the CPU to a specified set of other components. The chipset primarily constitutes a 'bridge', which is dedicated to connecting the CPU to the high-speed components, notably the main memory and graphics controllers, and to the lower-speed peripheral devices. Chipsets are generally designed to work with a specific family or generation of CPUs: a CPU and chipset combination needs to be compatible in order to function. See paras 12–13 of the *Intel/McAfee* case.

the remedies/commitments[53] helped to preserve innovation in security software and simultaneously ensured that competitors were not foreclosed.[54]

F. Merger Control During the Financial and Economic Crisis

The experience of the global financial and economic crisis has demonstrated that the EU Merger Regulation can provide all the necessary tools for applying effective merger control even in times of economic distress. The truth is that the Commission has taken due account of the market changes resulting from the economic crisis. However, the Commission stood firm against demands for a more lenient approach to EU merger control. Thus, by maintaining competitive market structures during the economic downturn, the Commission has created the necessary conditions for the foundation of a sustainable subsequent rise.[55]

For example, in the particularly sensitive banking sector, a set of remedies applied to the BNP Paribas–Fortis merger[56] was sufficient to allay competition concerns in the credit card market. In a thoughtful decision, a partial derogation from the suspension obligation was granted in order to ensure that BNP Paribas could give timely and necessary support to the acquired Fortis assets with the intention of keeping them operational.

Similarly, in the *Fortis/ABN Amro* case[57] full implementation was ensured by the Commission of the remedies that it had accepted immediately before the financial crisis aimed at preserving competition in the banking market for small and medium enterprises (SMEs) in the Netherlands after the economic recovery. When circumstances demand, the Commission may use the tools at its disposal to examine the cases, taking also into account the deteriorating economic environment.

In particular, this has been done mainly by thoroughly analysing failing firm arguments (when mergers are notified but not finally accepted)[58] and by developing a refined analysis of the framework for competitive assessment (principally involving analysis of the market, ie contestability, barriers to entry and potential competition).[59] During this assessment, the Commission undertakes a thorough investigation of whether the deterioration of the competitive structure following the merger would have occurred despite the merger.

More specifically, the Horizontal Merger Guidelines declare that:

> [T]he Commission may decide that an otherwise problematic merger is nevertheless compatible with the common market if one of the merging parties constitutes a failing firm. The basic requirement is that the ascertained deterioration of the competitive structure that follows the merger cannot be said to be caused by the merger.[60]

More specifically, it is acceptable[61] for this result to arise in cases where 'the competitive structure of the market would deteriorate to at least the same extent in the absence of

[53] See mainly paras 333–50 and also pp 63 et seq of the *Intel/McAfee* case.
[54] COMP/M.5984 *Intel/McAfee*, decision of 26 January 2011.
[55] Above n 3, para 25.
[56] COMP/M.5384 *BNP Paribas/Fortis*, decision of 3 December 2008.
[57] COMP/M.4844 *Fortis/ABN Amro Assets*, decision of 3 October 2007.
[58] See mainly COMP/M.6796 *Aegean/Olympic II*, decision of 9 October 2013; COMP/M.6360 *Nynas/Harburg*, decision of 2 September 2013.
[59] See eg, COMP/M.6447 *IAG/bmi*, decision of 30 March 2012.
[60] See eg, Joined Cases C-68/94 and C-30/95 *Kali and Salz*, para 110.
[61] Above n 47, paras 89–90.

the merger'.[62] It should be remembered that in order to assess the competitive effects of a merger, the Commission compares the competitive conditions that would result from the notified merger with the conditions that would have prevailed without the merger occurring.[63] In the same context it is useful to note that, accordingly, in the case of a merger that has been implemented without having been notified, the Commission would estimate the merger in the light of the competitive conditions that would have prevailed without the implemented (but not notified) merger. The truth is that in most of the cases the competitive conditions existing at the time of the merger constitute a relevant comparison for evaluating the competitive effects of a merger. Nevertheless, under some circumstances, the Commission may take into account future changes to the market on the assumption that these specific changes can reasonably be predicted.[64] The Commission, when considering what constitutes a relevant comparison, may in particular assess the market's contestability, taking account of the likely entry or exit of firms if (hypothetically) the merger did not take place.[65]

i. COMP/M.6360 Nynas/Harburg *Case as an Example*

Case COMP/M.6360 *Nynas/Harburg*[66] constitutes a useful example. More specifically, the Commission cleared the proposed acquisition by Sweden's Nynas AB of certain Shell Deutschland Oil GmbH refinery assets which were located in Hamburg/Harburg (Germany). The Commission's assessment showed that, in the hypothetical absence of the notified transaction, the Harburg refinery assets would most probably exit the market; this would have been much worse for the competitive structure of the relevant markets in comparison with the reasonably foreseeable effects of the concentration. This case therefore provides a good example of the Commission's approach when it compares the competitive conditions that would prevail in the absence of a merger with the conditions that would result if the same merger is completed.

G. Remedies in Case of Competition Concerns

In the event that the Commission identifies competition concerns when examining a notified merger, the parties involved have the opportunity to offer commitments in order to remedy those concerns. If the Commission considers that the commitments proposed are adequate to minimize the competition concerns and are sufficient to confirm the merger's compatibility with the internal market, it will give permission for the transaction subject to those commitments. As a consequence of this authorization, the commitments are binding on the parties.[67]

[62] Joined Cases C-68/94 and C-30/95 *Kali and Salz*, para 114. See also Commission Decision 2002/365/EC in Case COMP/M.2314 *BASF/Pantochim/Eurodiol* [2002] OJ L132, 45, paras 157–60.

[63] See eg, Whish (n 49), mainly the chapter with the section 'Determining and Applying the Correct Competition Test', 788–90.

[64] See eg, Commission Decision 98/526/EC in Case IV/M.950 *Hoffmann La Roche/Boehringer Mannheim* [1998] OJ L234, 14, para 13; Case IV/M.1846 *Glaxo Wellcome/SmithKline Beecham*, paras 70–72; Case COMP/M.2547 *Bayer/Aventis Crop Science*, paras 324 et seq.

[65] See eg, Case T-102/96 *Gencor v Commission* [1999] ECR II-753, paras 247–63.

[66] Commission's decision of 2 September 2013.

[67] See mainly para 2 of Art 6 and para 2 of Art 8 of Regulation 139/2004.

In reality, commitments are crucial elements of merger control when one considers that the large majority of cases that raise competition concerns are not prohibited, but are cleared with commitments. Indeed, during the last 25 years only 24 transactions have been prohibited. Furthermore, the overall percentage of merger cases where the Commission intervened in order to maintain effective competition in the single market has been stable at around 5–8 per cent of all notified mergers in recent years. It ought to be clarified that these cases include mergers cleared in Phase I or in Phase II with commitments, prohibitions as well as mergers abandoned after the opening of an in-depth investigation. Although this proportion varies depending on the nature of the transactions notified to the Commission, the fact that it generally remains stable at around 5–8 per cent of all notified mergers indicates the maturity of the system.

In addition, the Commission's practice regarding remedies was further revised in its 2008 Remedies Notice.[68] In the revised Remedies Notice it was also explained that a sale of subsidiary commitment is the best way to eliminate competition concerns and, furthermore, constitutes the benchmark against which the suitability of other proposed remedies ought to be measured. The new Remedies Notice promotes a more standardized approach towards remedies, focusing more closely on their effectiveness. In particular, the new Notice clarifies and strengthens the following: (i) the requirements for the scope of a subsidiary's selling, (ii) 'the requirements for appropriate purchasers, (iii) the hold-separate obligations of the parties pending the divestiture, the conditions for so-called carve-out divestitures (in cases where the divestment business is not an existing stand-alone business), and the supervisory role of the monitoring trustee'.[69]

i. The Example of COMP/M.5658 Unilever/Sara Lee

COMP/M.5658 *Unilever/Sara Lee*[70] illustrated the Commission's approach to structural/non-structural remedies. In order to alleviate the Commission's concerns, several non-structural remedies were offered by the merging parties, but the Commission did not consider these measures effective, despite the fact that rebranding in certain Member States was included in the specific measures. Finally, the commitment by the merging parties to sell off Sara Lee's Sanex brand and related business in Europe was accepted by the Commission, since this proposition offered a clear and workable remedy, which was considered sufficient to restore competition conditions in all markets where the Commission had concerns.

H. The Acceptable Risk of Complex Remedies

Simplification often results in efficiency and greater effectiveness. Conversely, complex remedies involve risks that need to be expected a priori. Inappropriate remedies may render official permission impossible, especially in cases where the buyer's identity is crucial, and consequently so-called 'fix-it-first' solutions are necessary. An indicative relevant example

[68] Commission Notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 [2008] OJ C267/1.

[69] Above n 3, para 30.

[70] Commission's decision of 17 November 2010.

is Case COMP/M.6570 *UPS/TNT*:[71] the parties proposed the sale of local subsidiaries in 15 countries and non-permanent access to UPS's air network was included in this proposition. The feasibility of such a remedy depended significantly on the identity of the purchaser, since it would be necessary to connect the sold-off assets to a functioning existing network which the parties involved were unable to suggest within the period required by the Commission's proceedings. Nevertheless, there are also some recent cases showing that the Commission can be flexible in discussing complex remedies: for instance, purchasers paying out at the beginning of the business arrangement or specific buyer requirements under the precondition that they are workable and supported by sufficient protective measures. Recent relevant examples with complex remedies are cases such as COMP/M.6576 *Munksjsö/Ahlstrom*,[72] COMP/M.6690 *Syniverse/Mach*[73] and COMP/M.6857 *Crane/MEI*.[74]

I. Forecast: Promoting the Level Playing Field, Cooperation and Convergence

The success of the Merger Regulation 139/2004 is undisputable, since it has truly succeeded both in levelling the playing field and providing a 'one-stop shop' scrutiny for mergers with an EU dimension.[75] Nevertheless, it is also accepted that Member States play significant roles in merger control enforcement in the EU. More specifically, in the seven years between 2001 and 2007 the combined NCAs handled nearly 4,000 merger cases per year on average. The necessity for a truly functional system that will scrutinize mergers throughout the EU demands cooperation, efficient work-sharing, and convergence between the Commission and the 27 Member States exercising merger control (Luxemburg is exempted).

The differentiation of merger rules and practices clearly creates administrative burdens for businesses and inevitably may also adversely affect the internal market. A consultation took place in preparation for a 2009 report from the Commission to the Council on the operation of the Merger Regulation;[76] in this consultation and in subsequent debates, concerns were expressed by stakeholders regarding the administrative burden and risk of differentiating decisions of competition authorities across the EU. More specifically, stakeholders stated that more convergence would be welcomed in this respect. The administrative burden is particularly significant in cases with cross-border effects, since these cases often require clearance from more than one NCA. It is therefore more than obvious that in such cases, differentiating rules may lead to higher costs for businesses and, in exceptional cases, inconsistencies are possible.

[71] Commission's decision of 30 January 2013.
[72] Commission's decision of 24 May 2013.
[73] Commission's decision of 29 May 2013.
[74] Commission's decision of 19 July 2013.
[75] See Whish (n 49) 816 et seq; Hawk and Huser, *European Community Merger Control: A Practitioner's Guide* (Dordrecht, Kluwer Law International 1996) ch IV; Cook and Kerse, *EC Merger Control*, 3rd edn (London, Sweet & Maxwell, 2000) ch 1.9; Levy, *European Merger Control Law: A Guide to the Merger Regulation* (London, LexisNexis, 2003) ch 1.3.
[76] See Communication from the Commission to the Council, Report on the functioning of Regulation No 139/2004, 18 June 2009, COM(2009) 281 final, accompanied by Staff Working Paper SEC(2009) 808 final/2 (the so-called '2009 Staff Working Paper').

Although NCAs usually apply Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) together with their national laws, the EU Merger Regulation itself constitutes a model that is applied to many national merger control regimes. Therefore, a basic *minimum* legislative convergence across national jurisdictions is observed, particularly regarding the substantive test for assessing transactions. One clear example is provided by Germany, which in 2013 replaced the previous dominance test with the SIEC test, thereby following the demands of the Merger Regulation 139/2004.[77]

Furthermore, a level of convergence has already been achieved regarding not only substantive but also jurisdictional issues due to increased cooperation between NCAs and the Commission. In 2010, the Commission and the NCAs established a Merger Working Group, the task of which was to foster further cooperation and convergence among the NCAs of the 27 Member States (with merger control regimes), based on the current institutional and legal framework. One year later (2011), the Merger Working Group adopted a set of best practices for merger cooperation between NCAs.[78] The truly beneficial result is that, in general, a close practical cooperation between the Commission and NCAs (as well as between the NCAs themselves) has now been established.

However, despite the level of convergence achieved to date, harmonisation remains incomplete. More specifically, among the notable points of differentiation are national laws according to which a government may be allowed to prevail over an NCA's negative competition-based merger decision by applying national merger control law, based on other public-interest considerations. Despite the fact such interventions are generally rare, the existence of such regimes has been detected in France, Germany, Italy, Spain and the United Kingdom (Greece was included before the country passed Law 3959/2011).[79]

According to the present data, most of the NCAs apply the SIEC or a similar test in their substantive analysis. Nevertheless, the importance of the way/ways in which such tests are further developed in guidance documents (the Commission's Horizontal and Non-Horizontal Guidelines)[80] and the ways in which they are applied and interpreted not only by competition authorities but also ultimately by reviewing courts should also be underlined. Differentiation in this respect can impact the substantive assessment and result in inconsistencies. Furthermore, Member States do not always follow the same approach regarding remedies.

In addition, the existence of differentiation is possible regarding procedural rules (mainly time frames for review and stand-still rules), leading unavoidably to uncertainty and imposing (at least in some cases) additional costs on the undertakings involved.

For the above-mentioned reasons, the conclusion of the White Paper is that greater convergence, not only between the Commission and NCAs but also among the NCAs, is important for the creation of a truly level playing field and avoidance of undesirable

[77] See Achtes Gesetz zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen vom 29.6.2013 (BGBl. I, 1738).

[78] More specifically, it is about the EU Merger Working Group, Best Practices on Cooperation between EU National Competition Authorities in Merger Review, 8 November 2011.

[79] See Decision No 40/1996 of the Hellenic Competition Authority, by which the notified merger had been prohibited. Nevertheless, the competent minister approved this merger mainly for social reasons.

[80] Above nn 62 and 33, respectively.

inconsistencies.[81] For these serious reasons, the Commission and the Member States should continue to conform their practices by enhancing cooperation and sharing experience, using all available tools and forums (obviously, the Merger Working Group constitutes the main forum). Furthermore, regarding individual cases, NCAs ought to intensify their cooperation.

Inconsistencies can, in any event, be avoided by the NCAs by reference to the Commission. This is the reason why stakeholders (including NCAs) have proposed that parties should be able to request a referral if there is jurisdiction by only two Member States. According to Article 22 of Regulation 139/2004,[82] if NCAs are of the opinion that the Commission is best placed to achieve consistency, they can refer these cases to the Commission. The reform proposals on Article 22, set out in the White Paper,[83] suggest setting up a system based on an early (a priori) information notice. Such a system could facilitate practical cooperation amongst the NCAs in cross-border and multijurisdictional cases, even if no referral takes place. Hence, the necessity of a proposal that would make practical cooperation easier, and that would improve the exchange of case-related information between the Commission and NCAs is emphasized.

There is thus a necessity at least for a convergent interpretation. However, beyond such a not obligatory, ie voluntary 'soft convergence', Mario Monti[84] has referred to the possibility of extending the use of the substantive EU merger control rules. More specifically, Monti's conclusion was that, on the one hand, there is an interest in achieving greater convergence for the substantive assessment of mergers and the review process at national level and, on the other hand, that the objective of ensuring a level playing field would legally oblige NCAs to apply the substantive EU merger control rules at the national level also in those cases where mergers have cross-border effects. Three years later, the French NCA raised similar proposals in its report.[85]

[81] See recital no 14 of Regulation 139/2004, where the following is stated:

> The Commission and the competent authorities of the Member States should together form a network of public authorities, applying their respective competences in close cooperation, using efficient arrangements for information-sharing and consultation, with a view to ensuring that a case is dealt with by the most appropriate authority, in the light of the principle of subsidiarity and with a view to ensuring that multiple notifications of a given concentration are avoided to the greatest extent possible. Referrals of concentrations from the Commission to Member States and from Member States to the Commission should be made in an efficient manner avoiding, to the greatest extent possible, situations where a concentration is subject to a referral both before and after its notification.

It is observed that the Commission is emphasizing cooperation and deals with referral and competence.

[82] See mainly para 1 of Art 22, where it is stated that:

> One or more Member States may request the Commission to examine any concentration as defined in Article 3 that does not have a Community dimension within the meaning of Article 1 but affects trade between Member States and threatens to significantly affect competition within the territory of the Member State or States making the request. Such a request shall be made at most within 15 working days of the date on which the concentration was notified, or if no notification is required, otherwise made known to the Member State concerned.

[83] Above n 55, ch 4.2 ('The Proposed Measures and Policy Choices in the Area of Case Referrals').

[84] See M Monti, *A New Strategy for the Single Market at the Service of Europe's Economy and Society*, Report to the President of the Commission José Manuel Barroso, 9 May 2010.

[85] Autorité de la concurrence, Rapport au Ministre de l'Économie et des Finances, *Pour un contrôle plus simple, cohérent et stratégique en Europe*, 16 December 2013.

According to this point of view, the current enforcement framework of Articles 101 and 102 TFEU could constitute the appropriate basis for such a change: a move towards a system similar to this framework could be appropriate for transactions in the single market that have cross-border effects, which are increasing in number significantly. Furthermore, it could stop issues arising from the cases where NCAs dealing with the same case reach conflicting/contradictory results and could simplify the administrative burden for parties in multijurisdictional filings. Nevertheless, the undisputable truth is that such a modification, according to which both the Commission and the NCAs would apply the same EU substantive law (the so-called 'EU merger control area'), would inevitably require a more ambitious change of the current merger control system within the EU. So, the million-dollar question is: do we really need such an ambitious change?

II. Minority Interests in the Merger Control Regime: A Retrospective View to the Future

A. Commission's Green Paper

On 11 December 2001 the Commission of the European Communities published a Green Paper on the review of Council Regulation (EEC) No 4064/89.[86] The proposed revision was undertaken in order to ensure that Council Regulation (EEC) No 4064/89 will continue to be an effective tool for the enforcement of mergers and acquisitions within the Community and to enhance cooperation among the Member States. One of the issues under review was the applicability of the concept of concentration on minority shareholdings.

The Commission was particularly interested in transactions among competitors which did not entail acquisition of control, ie acquisitions of non-controlling joint or sole minority shareholdings as well as strategic alliances. The Commission's interest was due to the structural impact of such transactions on the markets involved and the difficulty defining them for the purposes of ex ante notification.[87]

The Commission was also worried about partial-function production joint ventures. As stated in the Green Paper,[88] 'the 1999 White Paper on modernisation of the rules implementing Articles 81 and 82 raised the question of whether partial-function production joint ventures should also be included under the Merger Regulation. However, in its proposal of 27.9.2000, the Commission deferred further examination of this issue to the review of the Merger Regulation.'[89]

Minority shareholdings and interlocking directorships were viewed as vehicles to alter the competitive incentives of the engaged firms in the markets where they were active. In particular, the link between them and joint dominance was an issue that emerged from the

[86] See also COM(2001) 745 final.
[87] Ibid, para 101.
[88] Ibid, para 102.
[89] The Commission was also concerned about certain transactions especially in the financial sector (eg venture capital).

relevant case law. However, only a limited number of such transactions raised competitive effects that could not be satisfactorily assessed under Articles 81 and 82 of the Treaty.[90] Therefore, the Commission stated that:

> Under this assumption it would appear disproportionate to subject all acquisitions of minority shareholdings to the ex ante control of the Merger Regulation. At the same time it appears doubtful whether an appropriate definition could be established capable of identifying those instances where minority shareholdings and interlocking directorships would warrant such treatment.[91]

The Commission's proposition regarding partial-function production joint ventures was that they might 'be subjected both to the dominance test and to Article 2(4) of the Merger Regulation'.[92] However, several difficulties that were raised during a subsequent consultation period indicated that this kind of joint venture 'may not be suited to control under a system of mandatory ex ante notifications'.[93] Such difficulties were, for instance, the non-existence of a legal definition for these kind of ventures and the view that they had similar characteristics to other types of joint ventures (R&D or distribution joint ventures) and therefore all of them should be suited to ex ante merger control. It should be mentioned here that partial-function joint production ventures were covered by block exemption regulations under Article 81 subject to a market share threshold of 20 per cent.

B. Commission's Tender Offer COMP/2011/029 on 27 October 2011

On 27 October 2011 the Commission launched a tender offer requiring data on the importance of minority shareholdings in the EU. The purpose of the offer was to promote future policy development regarding the economic importance of minority shareholdings to the EU economy. The Commission's general objective was therefore to acquire a critical database of minority shareholdings.

Prior to the Commission's Tender Offer, 'Commissioner Almunia [Vice President of the Commission responsible for Competition Policy] indicated a concern that EU merger control, in contrast to some national merger control regimes, is unable to investigate minority equity stakes as mergers'.[94] In his speech[95] the Commissioner indicated a potential enforcement gap among Member States and between the EU and the Member States.

C. Commission Staff Working Document 'Towards More Effective EU Merger Control'

On 25 June 2013 the Commission launched a working document concerning two critical issues of merger control within the EU: the ability of the Commission to examine minority

[90] See also COM(2001) 745 final, para 109.
[91] Ibid.
[92] Ibid, para 120.
[93] Ibid, para 121.
[94] See B Ignjatovic and D Ridyard, 'Minority Shareholdings, Material Effects?' (2012) 1(1) *CPI Antitrust Chronicle* 1.
[95] http://europa.eu/rapid/press-release_SPEECH-11-166_en.htm.

interests (or structural links) and the level of cooperation within the Member States through the system of post- and pre-notification referrals to the Commission.[96]

The Commission realized that the number of problematic cases of minority shareholdings was limited. It also noted that the anticompetitive effects of such cases were less pronounced than in full merger cases. However, the Commission also stated that the efficiencies deriving from cases of structural links were likely to be less enhanced than in full merger cases which might lead to a critical restriction of competition and especially to a reduction of effective innovation activity, distortions of demand, and increased prices of products.[97]

At the same time the Commission indicated its restricted ability to deal with cases of structural links. It mentioned that the only way to realize the existence of such links is in the context of a notified merger (pre-existing minority interests/shareholdings).[98] However, even though the Commission had the ability to take these links into account during the analysis of the notified merger, it did not have the competence under the Merger Regulation to analyse their potentially anticompetitive effects if the minority interests had been acquired after the notified merger.

Regarding the link between minority interests and their assessment under Articles 101 and 102 TFEU, the Commission mentioned that its ability to use these articles to intervene against minority shareholdings is limited and therefore does not cover all types of anticompetitive minority interests.[99]

In the light of the above considerations the Commission asked for the opinion of stakeholders 'on whether to extend the scope of application of the Merger Regulation so as to give the Commission the possibility to investigate and, if necessary, intervene against anti-competitive structural links'.[100] Two major options concerning the selection of cases and the procedure were introduced:

a) The first option was a simple extension of the current system of ex ante merger control to minority interests. Under this system all cases of minority interests would have to be notified to the Commission in advance (the notification system).
b) The second option foresaw the discretion of the Commission to select cases of minority interests to investigate. This discretion could be achieved either through a self-assessment system under which the 'obligation to notify a transaction to the Commission in advance would not apply to structural links, but instead the parties would be allowed to proceed with the transaction but the Commission would have the option whether and when to open an investigation'; or through a transparency system under which the parties in a potential problematic case of minority interests are obliged to notify it to the Commission through 'a short information notice (containing for example information on the parties, the type of transaction and possibly limited information on the economic sectors or markets concerned)'.[101]

[96] Commission Staff Working Document, 'Towards More Effective EU Merger Control', SWD(2013) 239 final.

[97] Ibid, 4. The potential anticompetitive effects of minority interests are analysed extensively in chs 4 and 7 below. Also, in ch 5 we provide an exhaustive review of merger cases not only from the EU, but also from the US and nations around the world.

[98] In ch 2 we present in detail the different notions of minority interests.

[99] See also ch 3 for an analysis of the Commission's ability to use antitrust rules in order to deal with minority interests.

[100] Above n 97, 6.

[101] Ibid, 7.

The Commission set out the basic merits of its endeavour which have to be investigated within the framework of minority shareholdings. These can be delineated under the following questions:

— Which acquisitions of minority shareholdings qualify as structural links?
— How can the scope of the Merger Regulation be delineated from the antitrust articles of the TFEU with regard to structural links?
— Will non full joint ventures remain subject to competition scrutiny under the antitrust articles of TFEU?
— Will the Commission continue to have the only power to assess concentrations with a Community dimension?
— Will the engaged firms in cases of minority interests have the option voluntarily to notify the transaction to the Commission?

Most of the answers to these questions were provided in the Commission's White Paper,[102] analysis of which will be presented in chapter 8. Concerning non full joint ventures, the Commission mentioned that these 'could … remain subject to competition scrutiny under Article 101 TFEU, save in exceptional cases where the structural links cannot otherwise be assessed under Article 101 TFEU'.[103] In addition, the Commission stated that the notion of concentrations with an EU dimension will also be applied on cases of minority interests and 'the substantive test foreseen in the Merger Regulation for the examination of "full" mergers, ie whether a transaction "significantly impedes effective competition", … could apply to structural links as well, possibly with some additional clarifications in the relevant Commission guidelines'.[104]

In the next chapter we present the different notions of minority shareholdings, either controlling or non-controlling, and in chapter 3 we investigate their existence under different merger control regimes within the EU, the US and nations across the globe. Chapter 4 introduces the reader to the economics of minority shareholdings, while chapter 5 extensively presents relevant case law. Chapter 6 presents the Greek coastal navigation case and chapter 7, in conjunction with chapter 4, analyses the empirical findings of the economic literature so far.

As we have already mentioned, in chapter 8 we analyse the Commission's White Paper and the proposed targeted system for investigating non-controlling minority shareholdings within the EU. Given the analysis in the previous chapters, in chapter 9 we present our opinion regarding the treatment of non-controlling minority shareholdings and the transparent system proposed by the Commission. Finally, the last chapter of this book presents our conclusions.

[102] White Paper, 'Towards More Effective EU Merger Control' SWD(2014) 449 final.
[103] Ibid, 8.
[104] Ibid, 7.