



Support study for impact assessment concerning the review of Merger Regulation regarding minority shareholdings

Final report

Report by Spark Legal Network and Queen Mary University of London

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**Support study for impact
assessment concerning
the review of
Merger Regulation regarding
minority shareholdings**

Final report

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Executive Summary

Context and methodological approach

The purpose of the study is to provide DG Competition with additional information on the topic of acquisitions of non-controlling minority shareholdings from the point of view of both competition and corporate law and practice in different jurisdictions. In particular, the study provides factual information in order to form a well-informed and comprehensive view on the current practice in jurisdictions where acquisitions of non-controlling minority shareholdings are subject to merger review, as well as on the different levels of rights usually attached to non-controlling minority shareholdings in several countries.

In more precise terms, the study is broken down into two interrelated topics: first, the assessment of the features of the merger control regimes in the United Kingdom, Germany, Austria, the United States, Japan and Brazil, which provide for the review of acquisitions of non-controlling minority shareholdings from a competition point of view; and, second, research on the rights typically attached to different levels of minority shareholding (in law and in practice) in the United Kingdom, Germany, France, the Netherlands and the United States. The research at national level was performed by means of desk research on the legal systems of the Member States and non-EU countries in question, followed by a limited number of interviews with representatives of national competition authorities, legal practitioners and investors in each jurisdiction (except Brazil, for which only desk research was carried out). The data collected through desk research and interviews were subjected to comparative analysis, and a set of conclusions were drawn, as summarised below.

Comparative analysis of modalities of national merger control regimes for review of acquisitions of non-controlling minority shareholdings

In the jurisdictions analysed in our report, acquisitions of minority shareholdings are, beyond certain levels and/or under certain conditions, subject to review by the relevant competition authorities pursuant to their respective merger control rules, regardless of whether or not such acquisitions give the acquirer control over the target company.

The national competition regimes examined follow to some degree different approaches in the review of acquisitions of non-controlling minority shareholdings. In particular, there are some differences as to the legal test for when an acquisition should be subject to review by the competition authority: in the UK, the acquisition of a 25% shareholding triggers a rebuttable presumption of “material influence”, the relevant criterion for a transaction being potentially subject to review by the Competition and Markets Authority (“CMA”), whereas a 25% shareholding constitutes an unambiguous legal threshold for determining jurisdiction of the respective national competition authorities in Germany and in Austria. Another more general but notable difference between the UK regime and the German and Austrian ones is that the UK has a system of voluntary notification.

However, there are also some similarities. For example, as indicated, several of these regimes take into account a level of shareholding of 25% (be it as a presumption or as a legal threshold) in order to establish where review should take place. Furthermore, there are similarities between the UK and Germany in relation to the concepts of “material influence” (in the UK) or “material competitive influence” (in Germany) that the acquirer can have on the target, which triggers the competition authority’s

jurisdiction, and in particular in relation to the (additional) factors that need to be in place for such influence to exist. In the US, acquisitions above 10% which are not solely for investment purposes must be notified to the antitrust agencies, unless the acquirer is an institutional investor, in which case the threshold is raised to 15%. In Japan, if a transaction results in the acquirer holding more than 20% of the target (and this shareholding is sufficient to make the acquirer the leading shareholder) or holding 50% of the voting rights, the Japanese Fair Trade Commission ("JFTC") can assume jurisdiction.

In all jurisdictions examined there are practical examples where non-controlling minority acquisitions have been scrutinised by competition authorities. However, as our analysis shows, in all the EU and non-EU countries examined, there were very few cases involving acquisitions of non-controlling minority shareholdings that actually raised competition concerns. An initial reading of these data would therefore suggest that the non-controlling minority shareholding issue is a relatively minor one when it comes to competition enforcement.

Generally, however, the number of merger cases remedied or prohibited by the European Commission is only 6.5%.¹ Thus, it should be noted that the problematic cases in merger control are always a small subset of those which are notified. Even accounting for this, however, the number of problematic acquisitions of non-controlling minority shareholdings identified at national level is particularly low.

Nonetheless, this does not change the reality that there are, from time to time, minority acquisitions which give rise to competition concerns. Of particular note are those which could not be reviewed by the European Commission, since non-controlling minority shareholdings are outside the scope of the EU Merger Regulation. For instance, Ryanair's acquisition of a non-controlling minority shareholding in Aer Lingus ultimately escaped the European Commission's jurisdiction. In addition, there have been problematic cases in the national jurisdictions examined (albeit very few), which suggests that some form of control of non-controlling minority acquisitions may be desirable.

To the extent that there are Member States that cannot review acquisitions of non-controlling minority shareholdings, as their national laws do not enable the competition authority to do so, there may be some merit in introducing the competence for the European Commission to assess some of these cases under the EU Merger Regulation (so long as they meet the turnover thresholds under which they have an "EU dimension" according to the said Regulation). Furthermore, the European Commission might be better placed than one or several national competition authorities to assess the impact of acquisitions of non-controlling minority shareholding on EEA-wide or cross-border markets.

In view however of the very low number of problematic acquisitions of non-controlling minority shareholdings, it would seem essential that any administrative burden which a merger control regime for non-controlling minority shareholdings places on business is not disproportionate, while still ensuring that the few problematic cases that arise are caught.

While any review system would generate a certain degree of administrative burden on businesses, in the national regimes which currently have such a system in place there appears to be a reasonable balance between such administrative burden and the need

¹ As of 31st May 2016. See <http://ec.europa.eu/competition/mergers/statistics.pdf>

to identify problematic acquisitions. In particular, stakeholders underlined that, on the one hand, in the UK notification is voluntary and that, on the other hand, in Germany, Austria and the US, which each have a compulsory notification system for minority shareholding acquisitions, the information requirements for filing a notification are perceived as relatively light, in particular compared to merger notifications to the European Commission.

On the contrary, the perception of stakeholders interviewed for this study is that if a targeted transparency system at EU level (as proposed in the European Commission's 2014 White Paper "Towards more effective EU merger control"²) were to be introduced, business would have to bear substantial additional administrative burden.

Thus, if the Commission's initiative to develop jurisdiction over non-controlling minority acquisitions at EU level were to proceed, such a system would need to ensure an appropriate balance between the ability to review potentially anti-competitive transactions, while at the same time reducing administrative burdens to the minimum and fitting seamlessly with the existing systems of merger control at European and national level.

Thus, should the European Commission decide to put forward a legislative proposal for the introduction of a system for the review of non-controlling minority acquisitions at EU level, such a regime should address, in particular, a number of issues:³

- A threshold triggering the review of the acquisition of the minority shareholding (in the form of a legal threshold or presumption) should be set for the purposes of legal certainty. A threshold established at a level of 25% appears appropriate given that according to our findings in the comparative analysis of the rights attached to minority shareholdings (see below for further details) such a level is generally not considered to be passive;
- At the same time a "safe harbour" could be provided, below which a minority shareholding would generally not be subject to review. Such a "safe harbour" could potentially be set at 15%, as suggested during some stakeholder interviews, or perhaps at 10%, given that according to our findings such a shareholding is generally considered to be passive. However, in determining any "safe harbour", the difficulties associated with identifying a clear threshold for demarcating active or passive minority shareholdings should be taken into account;
- Finally, the European Commission should provide some guidance on the concepts discussed above in order to determine whether a minority shareholding transaction should be reported.

Comparative analysis of the rights attached to non-controlling minority shareholdings in law and in practice

² COM(2014) 449 final.

³ Other issues were raised during the elaboration of this study. For instance, regarding the deadline for the Commission to decide whether to examine the acquisition of a non-controlling minority shareholding under the targeted transparency system proposed in the White Paper, one option would be to maintain the period proposed in the White Paper within which the European Commission may open a full assessment of the transaction, but not to incorporate a standstill period. This would turn the regime from mandatory to semi-voluntary as the parties would still need to report the transaction and provide relevant but limited information for this assessment step but they could already go ahead with the implementation of the acquisition. This could help to alleviate the burden for the vast majority of transactions that do not induce any anticompetitive issues. Alternatively, a shorter suspension period, within which the European Commission may open a full assessment of the transaction, could also address the concerns raised.

There are some significant differences between company law rules in the jurisdictions examined. Nonetheless, certain commonalities can be observed concerning the rights typically granted by law, which can be summarised as follows:

- Usually certain rights tend to apply to all shareholders (such as the right to vote in annual general meetings);
- Often a right to information exists. The information to be provided can however differ. It may be expressed as a right to receive information, or a right to request information;
- Often minority shareholders have rights to convene a general meeting or place an item on the agenda (usually arises with a low level of shareholding);
- While the vast majority of decisions tend to be made by majority voting (50%), each jurisdiction provides for certain crucial issues being decided by a qualified majority or super-majority (generally either 2/3rds or 75%). Thus, shareholders with more than 1/3rd or 25% of shares (depending on the jurisdiction in question) can veto certain decisions;
- It is generally the case that there are relatively few mandatory provisions in the company laws, and a large freedom is left to participants in companies as to how they define their relationship with each other and the company.

National laws tend, thus, to leave a wide degree of discretion to parties as to the rights which are granted to shareholders in practice, with such rights varying depending on the needs of the parties in any given case. It was thus noted by many of the stakeholders interviewed across the various jurisdictions that it is not possible to neatly divide these rights by percentile and that the rights granted to non-controlling minority shareholdings tend to vary on a case-by-case basis. It was also noted that there may be myriad reasons why a particular level of shareholding is acquired and why particular rights are obtained.

Subject to this very real caveat, an attempt has been made to define thresholds above which a shareholding may generally be regarded as active or below which a shareholding might typically be regarded as passive.

A broad threshold of 25% was identified as one above which a shareholding would generally not be considered to be passive on the basis that:

- The relevant company laws in several Member States provide for the possibility of blocking of special resolutions;
- There is evidence that the granting of veto rights to the minority shareholder is relatively common once this percentage is reached;
- A shareholding above this threshold is likely to be seen as conferring the ability to materially influence the general policy of the company; and
- Unambiguous notification thresholds exist at this level of shareholding in the applicable legislation in Germany and Austria.

A broad threshold of 10% was identified as one below which a shareholding would generally be considered to be passive on the basis that:

- It is the threshold for exemption from notification in the US if the investment is solely for investment purposes (provided the shareholding is not in a competitor and is not accompanied by additional rights);
- There is generally no ability to block special resolutions below this level of shareholding; and
- In practice, it is quite rare that any significant rights (such as board seats or vetoes) are acquired with a shareholding of less than 10%.

Caution should be exercised, however, before reading too much into these thresholds. They should be understood as general thresholds developed on the basis of a limited stakeholder engagement exercise. They are not without prejudice to specificities of particular cases (e.g. it may well be the case that a shareholder with a 9% holding acquires a veto right over certain issues affecting the strategy or market conduct of the company in which it holds the shareholding). It was not possible to define with precision any threshold between 10% and 25% where it could be said that a shareholding was active or passive, and it is submitted, on the basis of input received from stakeholders, that it may be unwise to do so.

In case a system for the review of acquisitions of non-controlling minority shareholdings were introduced at EU level, these findings would support a proposal that a legal threshold or presumption of jurisdiction for the acquisition of non-controlling minority shareholdings could be set at 25% and a safe harbor at 10-15%.

1. Introduction

The notion of minority shareholdings is manifold. Broadly speaking, it “refer[s] to situations in which a shareholder holds less than 50% of the voting rights attached to the equity of the target firm.”⁴ A distinction must moreover be drawn between, on the one hand, minority shareholdings that confer “decisive influence” and, hence, control upon their holder and, on the other hand, minority shareholdings that do not confer control in the legal sense (so-called “non-controlling minority shareholdings”). It is the latter meaning that we will use throughout this report, unless otherwise specified.

As stressed by L. Idot,⁵ the issues relating to minority shareholdings are old ones in EU competition law. They were indeed raised for the first time as early as in 1987, in the *Phillip Morris* case.⁶ The Court of Justice recognised for the first time that an agreement between two undertakings on the acquisition of minority shareholdings may, under certain conditions, be subject to the application of Article 101 TFEU.

Acquisitions of non-controlling minority shareholdings fall, however, outside the scope of application of the EU Merger Regulation. The European Commission has, over the past couple of years, increasingly expressed its concerns as to the existence of an enforcement gap in the EU Merger Regulation in that regard. Given the fact that they are not “controlling” under the Merger Regulation, they are therefore not notifiable, even if they may bring about anticompetitive effects.⁷ When neither Article 101 TFEU nor Article 102 TFEU are applicable, acquisitions of non-controlling minority shareholdings fall thus outside of the jurisdiction of the Commission under the competition rules.

1.1 Context of the study

The 2004 Merger Regulation

While the anti-competitive behaviours defined in current Articles 101 and 102 TFEU have been prohibited since the adoption of the Treaty of Rome, it is not before the year 1989 that the Council adopted a fully-fledged merger control system in the first Regulation on the control of concentrations between undertakings (the “First Merger Regulation”).⁸

The First Merger Regulation described the notion of concentration as the merger of two or more previously independent undertakings or the acquisition of direct or indirect control, by any means, of the whole or parts of one or more other

⁴ Annex I to the Commission Working Staff Document, Towards more effective EU merger control, Economic literature on non-controlling minority shareholdings (‘Structural links’), 2013, SWD(2013) 239 final, p. 6.

⁵ L. IDOT, “Non-controlling minority shareholdings in European merger control and under Article 101 TFEU,” available from <https://www.studienvereinigung-kartellrecht.de/downloads/forum-kartellrecht/2012-idot-praesentation.pdf>. See also B. E. HAWK & H. L. HUSER, “‘Controlling’ the shifting sands: minority shareholdings under EEC competition law,” (1993) *Fordham International Law Journal*, Vol. 17, Issue 2, pp. 294-330.

⁶ Joined Cases 142 and 156/84 *British-American Tobacco e.a. v Commission* (“Philip Morris”) [1987]. See also the underlying cases before the European Commission: IV/30.342 and IV/30.926.

⁷ Commission Staff Working Document Impact Assessment Accompanying the 2014 White Paper Toward more effective merger control, SWD(2014) 221 final, p. 11.

⁸ Council Regulation (EEC) 4064/89 of 21 December 1989 on the control of concentrations between undertakings.

undertakings.⁹ The notion of control was defined, in this context, as conferring the possibility of exercising decisive influence on an undertaking.

In addition, the scope of control conferred upon the European Commission to appraise mergers of EU (then “Community”) dimension¹⁰ relied, under the First Merger Regulation, on a dominance test:

“A concentration which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared incompatible with the common market.”¹¹

The adoption in 2004 of the current Merger Regulation¹² (which has replaced the First Merger Regulation) has brought about fundamental changes. While the Regulation maintains the same definition of concentration, based on the notions of control and decisive influence,¹³ it has replaced the substantive test and thus significantly altered the way concentrations are to be appraised by the Commission. Article 2(3) of the Merger Regulation is indeed formulated as follows:

“A concentration which would significantly impede effective competition, in the [internal] market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the [internal] market”.¹⁴

As a result, the dominance test has been replaced by the Significant Impediment of Effective Competition (“SIEC”) test, which relies more strenuously on the effects of the concentration, and not only on the rather formal notion of dominance. It moreover explicitly allows the Commission to declare mergers creating non-coordinated effects on oligopolistic markets incompatible with EU law. As a result, one of the main purposes of the adoption of the 2004 Merger Regulation was to fill the “enforcement gap” resulting from the First Merger Regulation because the previous test was not believed to clearly capture likely unilateral effects resulting from a merger in an oligopolistic market, where the merged entity would not have become dominant.¹⁵

The enforcement gap in the EU Merger Regulation concerning acquisitions of non-controlling minority shareholdings

⁹ Article 3 of Regulation (EEC) 4064/89 of 21 December 1989 on the control of concentrations between undertakings.

¹⁰ Article 1 of Regulation (EEC) 4064/89 of 21 December 1989 on the control of concentrations between undertakings.

¹¹ Article 2(3) of Regulation (EEC) 4064/89 of 21 December 1989 on the control of concentrations between undertakings.

¹² Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EU Merger Regulation).

Official Journal L 24, 29.01.2004, p. 1-22.

¹³ Article 3 of Regulation (EC) 139/2004 of 20 January 2004 on the control of concentrations between undertakings (“the Merger Regulation”); Para. 16 of Commission consolidated Jurisdictional Notice under the Merger Regulation, 2008/C 95/01; C. S. Rusu, “EU merger control and acquisitions of (non-controlling) minority shareholdings – The state of play,” 2014, *CLaSF WP Series No. 10*, p. 4; M. Broberg, “The concept of control in the Merger Control Regulation,” E.C.L.R., Issue 12, Sweet & Maxwell, 2004.

¹⁴ In its Recital 25, the Merger Regulation indicates that *“The notion of ‘significant impediment to effective competition’ [...] should be interpreted as extending, beyond the concept of dominance, only to the anti-competitive effects of a concentration resulting from the non-coordinated behavior of undertakings which would not have a dominant position on the market concerned.”*

¹⁵ Kokkoris I. *The Treatment of Non-Collusive Oligopoly Under the ECMR and National Merger Control*, Routledge, 2010.

As already stated above, one of the main issues stemming from the Merger Regulation relates to the fact that the European Commission currently lacks jurisdiction to review acquisitions of non-controlling minority shareholdings.

Several theories of harm hold that such acquisitions may, under certain circumstances, have detrimental effects on competition, and therefore on consumer welfare.¹⁶ They notably rely on an economic notion of control, since their purpose is to assess to what extent the acquisition of non-legally controlling minority shareholdings allows the acquirer to have its objectives taken into account in a firm's decisions.¹⁷ They have notably been asserted by the OECD¹⁸ and the UK Office of Fair Trading, one of the predecessors of the CMA.¹⁹

These economic theories argue that the effects induced by the acquisition of non-controlling minority shareholdings may raise concerns both in horizontal and vertical scenarios through two main channels: the shifting of incentives and the facilitation of sharing information. They first distinguish *horizontal unilateral effects*, which consist in reducing competitive pressure between competitors.²⁰ As stated by the Commission, "when having a financial interest in competitors' profits, firms 'internalise' the positive effects from restricting their own output or raising their prices on their competitors' profits."²¹ Similarly, the acquirer may limit the competitive strategies available to the target through the acquisition of voting rights or influence over the outcome of special resolutions.²² Theories of harm also single out *horizontal coordinated effects*, which refer to the facilitation of coordination among competitors.²³ They underline, in this respect, that minority shareholdings, which create structural links between two or more undertakings through the acquisition of corporate rights, may provide access to more detailed information.²⁴ Last but not least, these theories refer to *vertical effects* to describe situations where the acquisition of minority shareholdings allows companies to hamper competitors' access to inputs – in case of partial backward integration – or customers in case of partial upward integration.²⁵ As summed up by the Commission:

¹⁶ For an overview, see, e.g., D. SPECTOR, "Some economics of minority shareholdings," *Concurrences* 3-2011, pp. 14-18.

¹⁷ Annex I to the Commission Working Staff Document, Towards more effective EU merger control, Economic literature on non-controlling minority shareholdings ('Structural links'), 2013, SWD(2013) 239 final, p. 7.

¹⁸ OECD Policy Roundtables, Minority Shareholdings, 2008: http://www.oecd.org/competition/mergers/41774_055.pdf.

¹⁹ OFT, Minority interests in competitors – A research report prepared by DotEcon Ltd, March 2010: <http://www.dotecon.com/assets/images/oftmic.pdf>.

²⁰ Commission Staff Working Document, Towards more effective EU merger control, SWD(2013) 239 final p. 4.

²¹ Annex I to the Commission Working Staff Document, Towards more effective EU merger control, Economic literature on non-controlling minority shareholdings ('Structural links'), SWD(2013) 239 final, p. 9. See also White Paper, Towards more effective EU merger control, COM(2014) 449 final, pp. 9s.

²² White Paper, Towards more effective EU merger control, COM(2014) 449 final, pp. 9s.

²³ Commission Staff working Document, Towards more effective EU merger control, SWD(2013) 239 final, p. 4.

²⁴ Annex I to the Commission Working Staff Document, Towards more effective EU merger control, Economic literature on non-controlling minority shareholdings ('Structural links'), SWD(2013) 239 final, p. 9.

²⁵ Commission Staff working Document, Towards more effective EU merger control, 2013, SWD(2013) 239 final, p. 4. See also Annex I to the Commission Working Staff Document, Towards more effective EU merger control, Economic literature on non-controlling minority shareholdings ('Structural links'), SWD(2013) 239 final, p. 17.

Although anti-competitive effects resulting from minority stakes are likely to be less pronounced than in the case of acquisition of control, such minority participations can lead to a significant impediment to effective competition.²⁶

As shown by L. Idot,²⁷ the European Commission can already make use of several legal tools to review the acquisition of minority shareholdings. First of all, the Merger Regulation applies in all cases where the minority shareholdings confer control. Second of all, the Merger Regulation applies to minority shareholdings connected to the notified merger (for instance if control is acquired in a company that already has a non-controlling minority stake in a competitor of the acquiring firm).²⁸ Third of all, in cases where the Merger Regulation is not applicable because the acquisition of minority shareholdings does not confer control, the European Commission can apply Article 101 and/or Article 102 TFEU. This has long been established by the Court of Justice in case *Phillip Morris* and by the Commission in its *Gillette* decision.²⁹ However, as noted by numerous authors and the Commission itself, the application of these provisions is rather circumscribed since Article 101 requires the existence of an agreement/concerted practice between one or more undertakings while Article 102 requires the pre-existence of a dominant position.³⁰

As a result, and despite the existence of potential detrimental economic effects on competition and consumer welfare, the Commission currently lacks jurisdiction to review the acquisition of non-controlling minority shareholdings when Articles 101 and 102 TFEU are not applicable. This also raises the issue of creeping mergers, which correspond to cases where an interest in a company is gradually acquired, as illustrated by the seminal *Aer Lingus/Ryanair* saga. This case relates to Ryanair's attempt to acquire Aer Lingus. The Commission prohibited the concentration in June 2007 on the basis that it would cause serious competition harm. In the meantime, Ryanair had made several share acquisitions, leading to a 29,4% stake in Aer Lingus' share capital. It kept these minority shareholdings after the Commission's prohibition decision. Yet, the Commission could not order the divestiture of these acquisitions and could not adopt interim measures under Article 8(5) of the Merger Regulation as requested by Aer Lingus. It argued that its control over EU mergers did not extend to the acquisition of non-controlling minority shareholdings. The General Court confirmed the various decisions of the Commission: it first rejected Ryanair's appeal against the prohibition decision³¹ and then dismissed Aer Lingus' appeal against the decision not to take action under Article 8(5), thus upholding the Commission's view that it

²⁶ Commission Staff Working Document, Impact Assessment Accompanying the document White Paper, Towards more effective merger control, SWD(2014) 217 final, p. 13.

²⁷ L. IDOT, "Non-controlling minority shareholdings in European merger control and under Article 101 TFEU," available from <https://www.studienvereinigung-kartellrecht.de/downloads/forum-kartellrecht/2012-idot-praesentation.pdf>.

²⁸ See, e.g.: M.5406 IPIC / MAN Ferrostaal (2009), M.4153 Toshiba / Westinghouse (2006), M.3696 E.ON/MOL (2005), M.3653 Siemens / V A Tech (2005), M.1673 VEBA/VIAG (2000) *Yara/Kemira GrowHow* (Case COMP/M.4730) [2007] OJ C 245/05, *McCormick/CPC/Rabobank/Ostmann* (Case No IV/M.330) [1993] OJ C 256/03 See Commission Staff working Document, Towards more effective EU merger control, SWD(2013) 239 final p. 4; Annex II to the Commission Working Staff Document, Towards more effective EU merger control, Non-controlling minority shareholdings and EU merger control, SWD(2013) 239 final p. 4.

²⁹ Joined Cases 142 and 156/84 *British-American Tobacco e.a. v Commission* ("Philip Morris") [1987] and Commission Decision of 10/11/1992, *Warner-Lambert/Gillette* [1993] IV/33.440. See Commission Staff working Document, Towards more effective EU merger control, SWD(2013) 239 final p. 4; White Paper, Towards more effective EU merger control, COM(2014) 449 final, p. 11

³⁰ A. TZANAKI: 'The Curious Case of Minority Shareholdings in EU Competition Law: To Reform or Not To Reform?' available from <http://www.lawphdconference.ed.ac.uk/2014/11/19/the-curious-case-of-minority-shareholdings-in-eu-competition-law-to-reform-or-not-to-reform/>. Kokkoris I., and Shelanski H., *EU Merger Control: A Legal and Economic Analysis*, Oxford University Press, 2014.

³¹ Case T-342/07, *Ryanair v. Commission* [2010].

currently lacks jurisdiction to control the acquisition of minority shareholdings.³² By contrast, the UK Office of Fair Trading opened an investigation in 2010, which led to the Competition Commission requiring a partial divestment of Ryanair's shareholding from 29,8% down to 5%.³³ The UK competition authorities indeed apply a "material influence" test,³⁴ which grants them a broader control power than that of the European Commission, based on the "decisive influence" test as defined in the Merger Regulation.

Against this background, the European Commission has, over the past few years, expressed its concerns as to the existence of an "enforcement gap," as deplored, for instance, by Joaquín Almunia, in 2011, when he was Vice President of the European Commission responsible for Competition Policy.³⁵ As a result, it has set forth a proposal that, if adopted, would give it the means to review certain acquisitions of non-controlling minority shareholdings and to request the undertakings to fully or partially divest a minority shareholding.

The proposal of the European Commission

The Commission published a Staff Working Document in 2013, entitled *Towards more effective EU merger control*.³⁶ This document raised two series of issues, relating to minority shareholdings and the referral system respectively. As far as the former are concerned, the Commission considered that extending the scope of the Merger Regulation to allow the Commission to review certain acquisitions of non-controlling minority shareholdings may be warranted to protect competition and consumers. To this end, it launched a public consultation, in which it notably asked which enforcement model the various stakeholders would opt for: 1) a notification system (i.e. obligation to notify any minority shareholdings acquisition); 2) a self-assessment system (i.e. undertakings would be left free to notify); or 3) a transparency system (i.e. obligation to file a short information notice).

Once the results of the consultation were published, the Commission issued a White Paper in 2014,³⁷ in which it gave more details as to the review mechanism that could be set up to assess acquisitions of non-controlling minority shareholdings. First, only cases where such acquisitions would create a competitively significant link between the acquirer's and the target's activities would be covered by the envisaged system. This competitively significant link was described as allowing the former to "influence materially the commercial policy of the target and therefore its behavior in the marketplace or grant it access to commercially sensitive information."³⁸ Two cumulative criteria would have to be fulfilled:

- acquisitions of a minority shareholding in a competitor or vertically related company (i.e. there needs to be a competitive relationship between acquirer and target); and
- the competitive link would be considered significant if the acquired shareholding is (1) around 20% or (2) between 5% and around 20%, but accompanied by additional factors such as rights which give the acquirer a "de-facto" blocking

³² Case T-411/07, *Aer Lingus Group v. Commission*, [2010].

³³ See UK Court of Appeal, *Ryanair Holdings PLC v. Competition and Markets Authority*, 12 February 2015, Appeal n. C3/2014/1376.

³⁴ See the discussion of the minority merger control system in the UK in Chapter 2.

³⁵ J. ALMUNIA, EU merger control has come of age, *Merger Regulation in the EU after 20 years*, Brussels, 10 March 2011: http://europa.eu/rapid/press-release_SPEECH-11-166_en.htm.

³⁶ Commission Staff working Document, *Towards more effective EU merger control*, SWD(2013) 239 final.

³⁷ White Paper, *Towards more effective EU merger control*, COM(2014) 449 final.

³⁸ White Paper, *Towards more effective EU merger control*, COM(2014) 449 final, p. 13.

minority, a seat on the board of directors, or access to commercially sensitive information of the target.³⁹

The Commission moreover expressed its preference for a targeted transparency system, under which “an undertaking would be required to submit an information notice to the Commission if it proposes to acquire a minority shareholding that qualifies as a ‘competitively significant link’.”

In its 2014 Staff Working Document accompanying the White Paper the Commission gave more details as to how a targeted transparency system could be designed.⁴⁰ It defined, first of all, the scope of the information notice, which would contain information about the parties, their turnover, a description of the transaction, as well as some essential market information about the parties and their main competitors. It then gave an indication as to how long the waiting period, during which the parties would not be able to close the transaction, would last by suggesting 15 days. It finally suggested a prescription period of four or six months upon submission of the information notice, within which the Commission could open an investigation.

Following the White Paper, the Commission launched a new phase of consultation in 2014. Many stakeholders expressed concerns about the propositions made by the Commission in its White Paper, in particular the proportionality of the targeted transparency system and the burdens created by the information requirements.

1.2 Objectives of the study

Against this background, the purpose of the study is to provide DG Competition with additional information on the topic of acquisitions of non-controlling minority shareholdings in order to form a well-informed and comprehensive view on the current practice in other jurisdictions and the different levels of rights usually attached to non-controlling minority shareholdings.

In more precise terms, the study is broken down into two interrelated topics: (topic 1) the assessment of the features of a certain number of merger control regimes, which provide for the review of acquisitions of non-controlling minority shareholdings; and (topic 2) research on rights attached to different levels of minority shareholdings. Examining competition and corporate rules of other legal systems may substantially contribute to helping the Commission appraise whether the various criticisms made to its proposal to set up a targeted transparency system are valid and what alternative systems, if any, could be designed to tackle non-controlling minority shareholdings while also addressing those criticisms.

First of all, the Study Team examined the conditions under which acquisitions of non-controlling minority shareholdings are reviewed under merger control in the three EU Member States which have such jurisdiction, namely Austria, Germany, and the UK.⁴¹ As for legal systems outside the EU, we studied the merger control regimes of Japan and the US.⁴² In addition, a brief overview of the regime in Brazil has been provided.⁴³

³⁹ White Paper, Towards more effective EU merger control, COM(2014) 449 final, p. 13.

⁴⁰ Commission Staff Working Document accompanying the document White Paper, Towards more effective merger control, SWD (2014) 221 final, pp. 31s. See also the Commission Staff Working Document Impact Assessment Accompanying the document White Paper, Towards more effective merger control, SWD(2014) 217 final.

⁴¹ See Chapter 2.2, 2.3 and 2.4 of this report.

⁴² See Chapter 2.5 and 2.6 of this report.

⁴³ See Chapter 4 of this Report.

Focusing on these different legal systems⁴⁴ has shed light on the various conditions under which acquisitions of minority shareholdings may be reviewed and on the various control regimes that have been adopted so far.

All in all, looking closely at these various legal systems, their legal rules and the decisions of competition authorities and courts,⁴⁵ allowed the Study Team to compare various existing models of enforcement and get a better idea as to whether a targeted transparency system at EU level could impose excessive administrative burden on companies, the Commission itself and the NCAs, as well as to whether it would fit with the EU and national merger control regimes and contribute to creating further cooperation and convergence between EU merger control and national regimes.

Secondly, the Study Team has examined the corporate law rules of France, Germany, the Netherlands⁴⁶ and the UK, and, outside the EU, focused on the US. Our research focused on two legal forms of company for each of these jurisdictions, as well as the *Societas Europaea* (in respect of the EU countries).⁴⁷ We assessed the thresholds from which the acquisition of minority shareholdings typically confers influence upon the acquirer in each of these countries, both in law and in practice. We focused, in particular, on the levels of voting rights that enable a minority shareholder to block certain actions (such as special resolutions). Similarly, we sought to determine the levels from which shareholders may have access to significant pieces of information, or board representation. On the basis of the assessment of the data collected, the Study Team has attempted to determine whether there is a threshold below which a shareholding may generally be considered to be passive.

1.3 Data collection

The study at Member State level was performed by executing a round of desk research on the legal systems of the Member States and non-EU countries in question, followed by 38 interviews with representatives of competition authorities, legal practitioners and investors.

The output of the data collection is presented in Chapters 2 and 3, while the analysis and conclusions based on the data collected are succinctly presented in Chapter 4. It should be noted that the study is limited in scope, with only a limited number of stakeholders interviewed in each jurisdiction, which the Study Team attempted to aggregate. Such an aggregation is thus not based upon a comprehensive consultation with all relevant stakeholders in each jurisdiction. This caveat should be borne in mind by the reader when reviewing the opinions attributed to stakeholders in each jurisdiction.

⁴⁴ For an overview, see Annex II to the Commission Working Staff Document, Towards more effective EU merger control, Non-controlling minority shareholdings and EU merger control, SWD(2013) 239 final, pp. 11s.

⁴⁵ For examples of decisions, see Annex II to the Commission Working Staff Document, Towards more effective EU merger control, Non-controlling minority shareholdings and EU merger control, SWD(2013) 239 final, pp. 11s.

⁴⁶ P. KALBFLEISCH, "Minority shareholdings in competing companies," *Concurrences* 3-2011, pp. 37-41.

⁴⁷ However, it should be noted that the *Societas Europaea* was not regarded by stakeholders interviewed as being relevant in practice, due to the low level of usage of this company form.

2. Modalities of national merger control systems which review the acquisition of non-controlling minority shareholdings

2.1 Introduction

Following our desk research and the stakeholder interviews, this section sets out a factual description of the relevant merger control regimes inside the EU (UK, Germany and Austria) and some regimes outside the EU (United States and Japan) in relation to non-controlling minority acquisitions. For each country, the descriptions are divided into 3 sub-sections: jurisdictional criteria; past decisions and enforcement trends; and stakeholder experiences. The first two are primarily the result of desk research, which has been carried out by the completion of the desk research questionnaires, while the sub-section on stakeholder experiences gives a brief summary of the insights captured during the stakeholder interviews which were carried out. There is also a brief section summarising the system of control of minority acquisitions in Brazil, based on desk research only. Finally, this Chapter provides a brief comparative analysis of the features of the regimes reviewed.

It is important to stress the descriptive, rather than analytical nature of this chapter. The lessons learned from the study with respect to the design and functioning of a possible targeted transparency system at EU level, are succinctly presented in Chapter 4.

2.2 United Kingdom

2.2.1 Jurisdictional Criteria

In the UK, jurisdiction to review the acquisition of non-controlling minority shareholdings does not depend on a bright-line threshold laid down in the applicable law (the Enterprise Act). The competent body, the Competition and Markets Authority (CMA), may review a non-controlling minority shareholding where it confers on the acquirer the ability to exercise material influence over the target company. "Material influence" is a concept that includes the ability to influence strategic decisions.⁴⁸ In its Guidance on Jurisdiction and Procedure, the CMA lays down that an acquirer is presumed to have the ability to exercise material influence if it has acquired 25% or more of the shares of the target company. However, this presumption is rebuttable depending on the case.

There is no formal requirement that the shareholding confer specific rights on the acquirer. The CMA, however, is notably concerned with determining whether the shareholding enables the acquirer to block special resolutions or entitles it to board representation.

As regards the relationship between the acquirer and the target company, the law does not require that the two enterprises provide products or services that belong to the same market. Yet, it bears noting there are two limbs to the jurisdictional

⁴⁸ It must be noted that the concept of "control" in UK merger law is broader than under the EU Merger Regulation and includes not only "decisive influence" but also the notion of "material influence". However, for the purposes of the present study we will refer to the acquisitions which confer the ability to exercise material influence over the target as acquisitions of "non-controlling minority shareholdings".

thresholds in the UK, one being satisfaction by the target of a certain level of turnover; and the second being satisfaction of a combined share of supply test. To be capable of satisfying the share of supply test, the parties must both be active in the supply (or purchase) of the same category of goods or services. In practice, this means that the test is not met in cases where the parties are solely active at different levels of the supply chain.⁴⁹

Finally, with respect to the procedural aspects, the UK has a voluntary notification system. Once jurisdiction is established, the notification procedure is substantively the same for all types of transactions, including acquisitions of minority shareholdings that may confer on the acquirer the ability to exercise material influence.

2.2.2 Past decisions and enforcement trends

Decisions in the field of acquisitions of minority shareholdings represent a rather small part of the practice of the CMA (and its predecessors). Decisions where the CMA intervened to block the acquisition or approve it subject to conditions are even fewer. Perhaps the most notable example of intervention that involved the acquisition of a low level of shareholding is the decision dealing with the acquisition by BskyB of 17.9% of the shares in ITV.⁵⁰

An overview of the relevant decisional practice reveals that the CMA has found that the acquirer may exercise material influence over the target company in cases where it has the ability to block a special resolution⁵¹ and/or appoint a director to the board. On certain occasions, the CMA has also taken into account the status and expertise of the acquirer in order to determine whether it may exercise material influence over strategic and commercial decisions.

Overall, as a result of a very limited amount of cases that have been scrutinized by the CMA in this field, no discernible trends can be identified, with intervention taking place only occasionally over any period.

⁴⁹ Whereas the turnover test captures both horizontal and non-horizontal mergers, in case of the share of supply test the CMA's jurisdiction is in principle limited to horizontal mergers.

⁵⁰ In November 2006 BskyB acquired 17.9% of ITV plc. Having received reports from the OFT and OFCOM pursuant to section 44 and section 44A respectively of the Enterprise Act 2002 ("Act"), the Secretary of State announced on 24 May 2007 his decision to refer the transaction to the Competition Commission under section 45(2) of the Act. The Competition Commission found that the acquisition gave BskyB the ability to materially influence ITV, taking into account the size of the shareholding which, in view of past voting patterns, could allow BskyB to block special resolutions. Regard was also had to the fact that BskyB was the largest shareholder. The Secretary of State decided to impose the remedies recommended by the Competition Commission: partial divestment of BskyB's shares in ITV down to a level below 7.5% and behavioural undertakings from BskyB, including undertakings which require them not to dispose of the shares to an associated person, not to seek or accept representation on the Board of ITV and not to reacquire shares in ITV. https://assets.publishing.service.gov.uk/media/55194c63ed915d1424000382/sky_berr_decision.pdf, paragraph 25.

⁵¹ Decisions requiring special resolutions include decisions on the disapplication of pre-emption rights, which ensure that any new equity issued by a company must first be offered to existing shareholders, amendments to the Articles of Association, and reduction or modification of a company's share capital. In UK Company Law, a special resolution is a resolution passed by 75% of the members present in person or by proxy and entitled to vote at a general meeting. The corporate circumstances that require a special resolution are laid down in the UK Companies Act 2006, which is available at: http://www.legislation.gov.uk/ukpga/2006/46/pdfs/ukpga_20060046_en.pdf Please note that the UK Companies Act was partly amended in 2013; the amendments, however, did not affect the provisions regarding the decisions that require special resolutions.

During the past 10 years, not many acquisitions of minority shareholdings have fallen under the scrutiny of the UK authorities. To our knowledge, the cases set out in Table 1 are those that were assessed since 2006:

Table 1: Cases examined by the UK authorities since 2006

Case	Relevant date	Outcome
Ryanair/Aer Lingus	Closed: 1 October 2015	The Competition Commission investigated the acquisition by Ryanair of a 29.8% stake in Aer Lingus and required Ryanair to sell its stake down to 5%)
Coca-Cola/Monster Beverages	Closed: 6 January 2015	The transaction did not qualify for investigation due to not meeting the UK turnover test or the UK share of supply test.
Sports Direct/Blacks Leisure Group	Closed: 3 June 2010	The OFT did not have jurisdiction to examine as a "relevant merger situation" had not arisen. This was due to the consideration by the OFT that the acquirer did not have the ability to materially influence the target.
BSkyB/ITV	Closed: 20 December 2007 (judgment of appeal before CAT delivered in September 2008)	The Competition Commission investigated the acquisition of 17.9% of ITV plc by BskyB and on its recommendation the Secretary of State required the partial divestiture to below 7.5% and behavioural undertakings.
CDPO/IUK	Closed: 31 July 2007	CDPO acquired from British Gas plc a 25 per cent equity stake in IUK ⁵²

2.2.3 Stakeholder experiences

Stakeholders were of the opinion that the UK merger control regime for the acquisition of non-controlling minority shareholdings does not give rise to concerns that the

⁵² <https://www.gov.uk/cma-cases/caisse-du-d-p-t-et-placement-du-qu-bec-interconnector-uk-ltd>

threshold for triggering jurisdiction is too high or too low. This is attributed to the following four parameters:

- First, in the UK, notification is voluntary. As a result, the parties self-assess whether or not the transaction in which they are involved may raise any anti-competitive concerns; as regards the acquisition of non-controlling minority shareholdings in particular, these concerns are reportedly rare.
- Second, interested stakeholders remark on the clear guidance that the CMA has provided on the normative concept of “material influence”. A representative from the CMA noted that it keeps its guidance under review in this area and that, where novel issues arise around jurisdiction, it is always possible to request informal advice as to whether or not a transaction would enable the acquirer to exercise material influence. The representative of the CMA was of the view that such guidance, combined with the CMA decisional practice, ensured a sufficient degree of legal certainty in this area.
- Third, the 25% threshold which creates the presumption that the acquirer has the ability to exercise “material influence” is deemed to be reasonable given that the purchase of 25% of the shares of an enterprise confers on the acquirer the ability to block special resolutions.
- Finally, interested stakeholders noted that the CMA (and its predecessors) have intervened restrictively in this area, cautiously avoiding over-enforcement. This is illustrated by both the low number of cases in which the authorities intervened and the level of the shareholding on which the finding of material influence was based (20-25%, combined with additional rights, including board representation).

Interested stakeholders further expressed the view that the current rules achieve an adequate balance between the burden imposed on companies and the need to control acquisitions with possible anticompetitive effects. Again, the voluntary notification system and the clear guidance provided by the CMA were put forward to substantiate this view. One stakeholder also commented on the “sophisticated” merger intelligence function within the CMA,⁵³ which reportedly enables: (i) parties to identify which cases should be notified (or are otherwise at risk of being investigated after they have been completed); and (ii) the CMA to focus on those exceptional cases raising real concerns notwithstanding the fact that only a minority stake has been acquired. Interested stakeholders are of the view that the above parameters ensure that the principle of proportionality is respected. In other words, it is believed that the system is carefully designed to capture rare, problematic cases, minimizing the risk of over-enforcement.

One stakeholder, however, made a remark on the general notification process, to which all acquisitions of control (within the meaning of UK law), including potentially problematic acquisitions of minority shareholdings granting material influence, are subject. In particular, the concern was expressed that, although historically the notification process itself has been relatively streamlined, the combination of a binding timetable under the current regime and the requirement to establish completeness of notifications using the Merger Notice before the formal review period starts to run might occasionally lead to an unduly burdensome and time consuming review process.

⁵³ CMA intelligence function, CMA Merger Guidance, “The CMA’s market intelligence function”, paragraphs 6.5 et seq.: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/384055/CMA2__Mergers__Guidance.pdf

Interested stakeholders also gave their views on the potential impact of the introduction of a “targeted transparency” system at EU level whereby acquisitions involving a “competitively significant link” between the acquirer and the target would give rise to an obligation to submit a brief information notice. Stakeholders broadly agree that, procedurally, a voluntary self-assessment regime would be the most appropriate and proportionate mechanism to address the ‘enforcement gap’ that currently exists at EU level. It was also noted that an extension of the Merger Regulation’s scope of application would benefit from being implemented in a manner that fits well with all merger control regimes that are currently in place across the EU. It was also acknowledged that a mandatory notification system for acquisitions of minority shareholdings has proved effective in jurisdictions outside of the EU, including in the US. As such, it was considered that several aspects of the ‘targeted transparency system’ provide a good framework to progress the proposals with a view to reaching a solution that all Member States could support. However, there are transactions, including unproblematic private equity and venture capital investments and investments in start-up businesses as well as full-function joint ventures located outside of the EEA, which should be excluded from the scope of the targeted transparency system.

The opinion was expressed that the introduction of a targeted transparency system would be inconsistent with the UK’s voluntary review process not least in that mergers involving a higher level of control would not, under the present regime, require notification. In addition to the paradox that the obligation to submit a brief information notice would create, stakeholders are of the view that the existing voluntary system has proved to work well; as a result, any changes would jeopardize its effectiveness. On a more specific note, stakeholders believe that the extent of the impact on companies of the introduction of a targeted transparency system would largely depend on the choice of the jurisdiction test, the scope of the information notice, and the timing and suspensory provisions. As regards the jurisdiction test, stakeholders remarked on the importance to have clear guidance on: (i) the meaning of the term “competitively significant link” (e.g. which company should be regarded as “competitor”? Does the term also refer to “vertically integrated companies?”); (ii) the thresholds at which jurisdiction would be triggered (otherwise the European Commission faces the risk of being overwhelmed with notifications which parties may be tempted to submit in order to avoid penalties); and (iii) the additional parameters under which a low threshold could trigger intervention. Related to this latter point, it was also suggested that the level of shareholding at which “significance” is presumed be increased from 20% to 25% and that a higher ‘safe harbour’ level of shareholding be introduced (e.g. 15%).

As regards the scope of the information notice, concerns were expressed over the amount of information that the undertakings involved in the transaction are required to provide. Stakeholders referred to the concept of “essential market information” which should be included in the information notice submitted by the parties. They emphasized that this concept should be strictly limited and clearly defined in order to avoid placing an excessive burden on the notifying firms. The representative from the CMA underlined the need to ensure that the information submitted is sufficient for the CMA (in common with other NCAs) to assess whether to make an Article 9 request. The following information, in particular, could be included in the notice:

1. patterns of attendance and voting;
2. veto rights, special voting arrangements or other special provisions (such as share options);
3. status and expertise and ability to influence policy formulation at an earlier stage,

4. board representation, which may alone confer material influence;
5. the acquirer's corporate/industry expertise, experience and incentives; and
6. the presence of any cooperation agreements or financial arrangements.

With respect to timing and suspension requirements, stakeholders questioned whether a 15 working day suspension period is justified in the case of acquisitions of non-controlling minority interests. They further suggested a shorter period (1 or 2 months at most) during which the European Commission may still open an investigation.

Finally, broader concerns were expressed regarding the Commission's initiative itself to introduce the "targeted transparency system" in order to mitigate concerns that may arise from the acquisition of non-controlling minority shareholdings, given the infrequency with which they create harm to competition, and the chilling effect that a disproportionate requirement to notify might generate on European markets, most notably European equity and financial investment markets.

2.3 Germany

2.3.1 Jurisdictional Criteria

The German Act against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen, "GWB"), contains two key provisions concerning jurisdictional criteria with regard to non-controlling minority shareholdings. The first (§ 37(1) No. 3(b) GWB) sets out that jurisdiction is established where the acquiring party reaches a 25% shareholding in the target. Crucially, the application of this provision is not dependent on the acquirer acquiring a 25% stake; it will also apply where the acquirer acquires a smaller incremental shareholding which, cumulatively, brings the existing shareholding up to the 25% threshold. It is not necessary for the shareholding to confer any particular rights on the acquirer in order for jurisdiction to be established, nor is it necessary to establish a competitive relationship between the acquirer and the target.

In addition to this first, clear threshold, there is another provision concerning acquisitions of shareholdings of less than 25%. No. 4 of § 37(1) GWB provides that a concentration exists in case of:

"any other combination of undertakings enabling one or several undertakings to exercise directly or indirectly a material competitive influence on another undertaking."

This provision is less clear cut, but more flexible. It is considered a useful provision to prevent circumvention of the merger rules on minority shareholdings by a party acquiring e.g. a 24.9% stake in the target. However, the term "material competitive influence" is not defined in German merger law, or in specific guidance from the Bundeskartellamt ("BKartA"). Essentially, where there is a shareholding of less than 25%, the material competitive influence may arise if there exist certain "plus factors", which have been defined in decisions of the courts and the practice of the BKartA. Thus, some additional rights must be conferred on the acquirer in order for this provision to be invoked. In addition, a competitive nexus, whether horizontal or vertical, is required. If such a nexus does not exist, there would not be a material competitive influence. In determining whether it is required to notify, the parties will thus consider whether the acquirer and the target are active in the same or vertically related markets. However, the parties generally do not engage in a detailed market definition prior to deciding whether or not to notify. The reason for this is that the notification process is relatively straightforward, so if there is a doubt, it is generally less burdensome to notify than to engage in a detailed assessment of the relevant market. In respect of minority acquisitions, there is a requirement that not only the undertakings participating in the concentration are required to notify, but also the seller.

The notification itself is not particularly burdensome. § 39(3) GWB requires information on the form of the concentration. The notification shall contain the following particulars with respect to every undertaking concerned:

1. Name or other designation and place of business or registered seat;
2. Type of business;
3. Turnover in Germany, in the EU and worldwide;

4. The market shares, including the bases for their calculation or estimate, if the combined shares of the undertakings concerned amount to at least 20 per cent within the scope of application of the GWB or a substantial part thereof;⁵⁴
5. In the case of an acquisition of shares in another undertaking, the size of the interest acquired and of the total interest held;
6. A person authorised to accept service in Germany if the registered seat of the undertaking is not located within the scope of application of the GWB.

2.3.2 Past decisions and enforcement trends

The term “material competitive influence” is not defined in German merger law, nor is there any specific guidance from the BKartA. As indicated, decisions of the BKartA, and of the German courts have provided examples of what have been considered to be “plus factors” in certain cases. Such examples include:

- the right to nominate seats in the board of directors;⁵⁵
- consortium agreement in terms of voting within the shareholders’ meeting;
- veto rights in relation to the sale of shares of the target⁵⁶, and the execution of certain contract’s by the target;⁵⁷
- right to acquire more equity capital (pre-emption right);
- right to select a third acquiring party in the event of intervention by the BKartA;
- special voting rights within the shareholders’ meeting;
- installation of a permanent advisory council which approves the account statement including financial and investment planning as well as collaborating with the management;
- contractual agreement to retire the right of nominating seats in the board of directors in the case of BKartA intervention;
- Low attendance at shareholder meetings.

There does not exist a safe harbour in percentage terms below which the acquisition will benefit from a presumption of not giving rise to competitive problems, save in extraordinary circumstances. In practice, it is extremely rare for the BKartA to block acquisitions of less than 10%. However, on one occasion, it did block an acquisition of as little as 9.015%, although this decision was overturned by the Court.⁵⁸

There is no discernible correlation between the size of the shareholding and the imposition of remedies by the BKartA. Rather, the BKartA decides on a case-by-case basis, taking into account all the relevant considerations. Thus, it has blocked acquisitions pursuant to § 37(1) No. 3 lit. b GWB in cases where 30%⁵⁹, 33%⁶⁰ and 49,9%⁶¹ of the shares were being acquired, while it has approved acquisitions subject

⁵⁴ It should be noted that, for the purposes of the German legislation, the requirement concerning market share information is satisfied by an estimate, so long as the basis for the estimate is provided. Thus, the basis for estimating the market shares is left to the notifying companies.

⁵⁵ BKartA, B 9-100-01, „DPAG/ trans-o-flex“; BKartA, B8-263-00, „Neckarwerke Stuttgart/ Stadtwerke Reutlingen“; BKartA, B5-198-07, „A Tec/ Norddeutsche Affinerie“

⁵⁶ BKartA, B6-81-03, „Lausitzer Rundschau/ Wochenkurier“

⁵⁷ BKartA, B8-83-03, „RWE AG/ Rhein Ruhr AG“

⁵⁸ OLG Düsseldorf, 06th July 2005, „Bonner Zeitungsdruckerei“, WuW/E DE-R 1581, 1583)

⁵⁹ BKartA, B1-190-07, „Faber Basalt“.

⁶⁰ BKartA, B8-21-03, „E.ON AG/ Stadtwerke Eschwege“.

⁶¹ BKartA, B8-84-03, „E.ON AG/ Stadtwerke Lübeck“.

to conditions pursuant to § 37(1) No. 3 lit. b GWB in cases where 25%,⁶² 49%,⁶³ 37%,⁶⁴ 30%⁶⁵ and 47,89%⁶⁶ shareholdings were being acquired. Pursuant to § 37(1) No. 4 GWB, the BKartA has blocked acquisitions in cases where 15,1%,⁶⁷ 9,015%,⁶⁸ 24,9%⁶⁹ and 17,5%⁷⁰ shareholdings were being acquired. Moreover it approved acquisitions subject to conditions in such cases where 10,01%,⁷¹ 24,8%,⁷² 20%,⁷³ almost 25%⁷⁴ were being acquired. In one case it even ordered a de-merger where a 13,75%⁷⁵ shareholding was being acquired.

Due to the low number of cases, it would perhaps be inappropriate to speak of trends. However, the likelihood of intervention in respect of non-controlling minority shareholdings seems to be stable, and seems to be consistent with the level of intervention in respect of mergers generally. Over the last 15 years there have been quite a number of cases in the area of energy companies but the trend has changed recently. In the past, large energy producers were acquiring shareholdings in a network of local utilities (Stadtwerke) that are active at the local level. However, due to changes in the energy market, with fewer acquisitions of local utilities companies by big producers, it is not expected that the energy sector will stand out in the future.

2.3.3 Stakeholder experiences

Some concerns were expressed by several competition law practitioners about a perceived lack of legal certainty in relation to the test set out in No. 4 of § 37(1) GWB. The guidance as to what plus factors will impact on an assessment of "material competitive influence" stem from past BKartA decisions, and judgments of the courts. Some practitioners would like to see the BKartA issue clear guidelines in relation to these plus factors, perhaps setting out the relative importance of each factor, or surrounding considerations.⁷⁶ The interview participant from the BKartA noted however that over the past 15 years, there have been quite a number of decisions of courts and the BKartA, and this should form a good basis for parties to decide whether or not a notification is required.

The other factor which was of concern to some practitioners was the lack of a safe harbour below a certain percentage. In reality, though, it is extremely rare that the BKartA will regard a transaction of below 10% as being caught by No. 4 of § 37(1) GWB. In any event, certainty on this point could be achieved by the introduction of a safe harbour. It was also considered that a soft safe harbour could be established at a

⁶² BKartA, B1-80-02, „Asphaltmischwerke“; BKartA, B5-73-99, „Bilfinger-Buderus“; BKartA, B9-164-98, „Lekkerland Deutschland GmbH & Co. KG/ Lekkerland & Tobaccoland“; BKartA, B10-248-01, „RWE Umwelt/ Kreis Pinneberg“.

⁶³ BKartA, B8-109-00, „Contigas-Stadtwerke“.

⁶⁴ BKartA, B8-107-02, „EWE AG/ E.Dis AG“.

⁶⁵ BKartA, B2-333-07, „Edeka/Tengelmann“.

⁶⁶ BKartA, B8-67-09, „EnBW/ EWE AG“.

⁶⁷ BKartA, B5-198-07, „A-TEC Industries AG/ Norddeutsche Affinerie AG“.

⁶⁸ BKartA, B6-27-04, „DuMont Schauberg Expedition der Kölnischen Zeitung/ Bonner Zeitungsdruckerei“.

⁶⁹ BKartA, B6-81-03, „KG Wochenkurier/ Lausitzer Rundschau“.

⁷⁰ BKartA, B8-27-04, „Mainova AG/ Arschaffenburger Versorgungs GmbH“.

⁷¹ BKartA, B3-132-12, „Asklepios Kliniken“.

⁷² BKartA, B9-100-01, „Deutsche Post AG/ trans-o-flex“.

⁷³ BKartA, B8-83-03, „RWE AG/ RWE Rhein-Ruhr AG“.

⁷⁴ BKartA, B8-93-07, „RWE AG/ SWK Stadtwerke Krefeld AG“.

⁷⁵ BKartA, B5-198-07, „A-TEC Industries AG/ Norddeutsche Affinerie AG“.

⁷⁶ For example, it has been held that low shareholder participation in past general meetings may be a plus factor (as this can lead to a shareholder with a lower shareholding exerting more influence), but is not clear what the thresholds are, or what the time-frame is for such low shareholder participation in the past (i.e. for how many years must there have been lower shareholder participation?).

higher percentage. For example, at 15% or 20%, there could be a presumption that notification is not necessary unless certain extraordinary factors are present.

Against this perceived uncertainty stands the fact that the notification is quite unburdensome for the parties. The information to be provided is relatively basic and the BKartA will clear the acquisition within 1 month in most cases, and often even quicker. In this sense, even if the purported lack of certainty on the question of whether parties are obliged to notify pursuant to No. 4 of § 37(1) GWB may add to the administrative burden because parties notify more transactions which are not problematic for competition, this additional burden is kept to a minimum.

As for the introduction of a targeted transparency system at EU level, concerns were voiced that such a system may not work in practice, as it would not effectively deal with the relevant theories of harm. There was, however, some ambivalence among practitioners. One concern was that the parties may be left to self-assess whether there was a “competitively significant link” without clear guidance from the Commission. Other concerns were the 15 day waiting period and the amount of information required to be submitted under the targeted transparency system.⁷⁷ The system should be premised upon such information requirement being kept to a minimum. One interview participant noted that he would not be opposed to such a system if the information required were kept to a minimum, in order to be substantially less burdensome than a full notification and subject to time periods being as short as possible.

⁷⁷ It was noted by one interview participant that the German information requirements are regarded as being low relative to other countries or to the European Commission, citing publications from the International Competition Network, as well as the Merger Working Group.

2.4 Austria

2.4.1 Jurisdictional Criteria

According to Section 7, Paragraph 1(3) of the Cartel Act, a concentration arises when an undertaking acquires, directly or indirectly, shares in another undertaking, if the shareholding held after the acquisition reaches or exceeds 25%, regardless of whether this leads to a change in control.⁷⁸ This provision does not specify whether this amount of shareholding must confer certain rights and the Cartel Act does not contain any other provision dealing with this question.

The same notification procedure, regulated by Section 10, paragraph 1 of the Cartel Act, applies to all transactions defined as concentrations in section 7 of the Cartel Act. A simplified procedure is possible if there are no "affected" markets within the meaning of Article 5 of the Merger Notification Form⁷⁹ published by the Federal Competition Authority ("Austrian FCA"), and it is applicable regardless of the amount of shares acquired or the type of concentration.⁸⁰

The Cartel Court specified in case 26Kt 132/04 that acquisitions of less than 25% of capital shares or voting rights could also be caught by the Cartel Act if the acquired shares, due to the target undertaking's atypical statute provisions, confer on the acquirer rights which a holder of more than 25% of shares would normally be able to exercise.⁸¹ The Cartel Court clarified in the same decision that an ownership interest comprises all rights of financial nature, such as claims on income and on a share in liquidation proceeds, control rights, especially the right to attend the general meeting and to vote at it, and various other individual and minority rights. According to a publication of the Austrian FCA, acquisitions of 25% of capital shares that do not confer 25% of voting rights are also caught by the Cartel Act.⁸²

In case Rewe/Adeg, the Austrian FCA concluded that the mere acquisition of a 24,9% shareholding in another undertaking (with participation rights) did not constitute a concentration under Austrian law.⁸³ Therefore, for acquisitions which do not confer additional rights, the notification threshold of 25% would have to be reached each time, as opposed to acquisitions conferring certain (control) rights, where less than 25% shares would suffice.

⁷⁸ The Supreme Cartel Court clarified in case 16 Ok 9/01 Wolters Kluwer/Linde that mere acquisition of 25 % of shares in another undertaking, regardless of whether this leads to a change in control, is sufficient for establishing jurisdiction. https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Justiz&Dokumentnummer=JJT_20081217_OGH0002_01600K00012_0800000_000

⁷⁹ Merger Notification Form, <http://www.bwb.gv.at/Zusammenschlusse/Seiten/default.aspx#Formblatt>
This notes an affected market as being one in which the parties have a 15% market share (in the case of horizontal relationship) or 25% market share (in the case of a vertical relationship) or a market on which the merger would create or strengthen a dominant position.

⁸⁰ Merger Notification Form, <http://www.bwb.gv.at/Zusammenschlusse/Seiten/default.aspx#Formblatt>, Point 2.

⁸¹ Cartel Court case *Morawa Pressvertrieb GmbH/Mediaprint Zeitungs- und Zeitschriften Verlag GmbH & Co KG*, https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Justiz&Dokumentnummer=JJT_20040805_OLG0009_0260KT00132_0400000_000.

⁸² Heinrich Kühnert, Anastasios Xeniadis, 'Die wettbewerbsrechtliche Kontrolle von Minderheitsbeteiligungen', p.126.

⁸³ Report of the Federal Competition Authority on *Rewe/Adeg* deal, http://www.bwb.gv.at/Aktuell/Archiv2006/Seiten/rewe_adeg_041206.aspx; Annual Report of the Federal Competition Authority for the second half of 2007, p. 6.

There is no statutory requirement that the acquirer and the target have a competitive relationship. The notification has to take place when the 25% shareholding threshold is reached. However, the Merger Notification Form requires more detailed information (i.e. definition relevant market, market share...) when the merging parties are in a competitive relationship (i.e. horizontal or vertical).

Although the Cartel Act requires no competitive relationship for jurisdiction to be established, the Federal Competition Authority normally defines the relevant market at the stage of ascertaining jurisdiction and publishing the notification. According to Section 10, Paragraph 1 of the Cartel Act, parties are required to provide in their notification accurate and complete information on the circumstances that could lead to the establishment or strengthening of a dominant position, and in particular information on:

- a) their structure, especially their ownership structure including links to other undertakings, and on the turnover achieved in the business year preceding the notification, separately for specific goods and services,
- b) the market shares of each party for goods and services listed under letter a), and
- c) the general market structure.

2.4.2 Past decisions and enforcement trends

The Austrian FCA has required remedies in two cases involving minority shareholdings in the past 10 years: case BWB/Z-2121 *Saubermacher Dienstleistungs-AG/Kärntner Restmüllverwertungs GmbH*⁸⁴ in the waste management activities sector and case BWB/Z-2660 *Funke Mediengruppe GmbH & Co. KGaA/Axel Springer Media Impact GmbH & Co. KG*⁸⁵ in the media sector. In the first case, the main competition concern was a significant strengthening of the acquirer's position on the market and the potential creation of obstacles to non-discriminatory access to the waste incineration plant of the target undertaking. In the second case, the concern was possible negative effects on media diversity.

In these two cases where the Austrian FCA intervened (both concerning acquisitions of just above a 25% shareholding), it did not specify what rights were associated with the shareholdings. In several cases where it did not intervene, the rights most commonly associated were voting rights⁸⁶ and veto rights (without specifying in relation to what matters).⁸⁷ In *Saubermacher*, the Austrian FCA's decision refers to the

⁸⁴ <http://www.bwb.gv.at/Zusammenschlusse/Zusammenschlusse_2013/Seiten/BWB_Z-2121.aspx>.

⁸⁵ <<http://www.bwb.gv.at/Aktuell/archiv2015/Seiten/Z-2660-Funkemediengruppe-GmbHCoKG--Axel-Springer-SE.aspx>>.

⁸⁶ For instance in cases:

1) BWB/Z-2620, *CA Immobilien Anlagen AG/O1 Group Limited; IMMOFINANZ AG*, <http://www.bwb.gv.at/Zusammenschlusse/Zusammenschlusse_2015/Seiten/BWB_Z-2620.aspx>,

2) BWB/Z-2392, *KKR & Co. L.P./Scout24 Schweiz AG/Omnimedia AG*, <http://www.bwb.gv.at/Zusammenschlusse/Zusammenschlusse_2014/Seiten/BWB_Z-2392.aspx>,

3) BWB/Z-1765, *América Móvil, S.A.B. de C.V./Telekom Austria AG*, <http://www.bwb.gv.at/Zusammenschlusse/Zusammenschlusse_2012/Seiten/BWB_Z-1765.aspx>,

4) BWB/Z-938, *Republik Irland/Bank of Ireland*, <http://www.bwb.gv.at/Zusammenschlusse/Zusammenschlusse_2009/Seiten/BWB2fZ-938.aspx>.

⁸⁷ For instance in cases:

1) BWB/Z-946, *The Coca-Cola Company/Fresh Trading Limited*, <http://www.bwb.gv.at/Zusammenschlusse/Zusammenschlusse_2009/Seiten/BWB2fZ-946.aspx> and

2) BWB/Z-507, *DZ Equity Partner GmbH/Clean Car AG*, <http://www.bwb.gv.at/Zusammenschlusse/Zusammenschlusse_2007/Seiten/BWB2fZ-507.aspx>.

acquisition as a “non-controlling minority acquisition”, and does not proceed to discuss control, while in *Funke Mediengruppe*, the issue of control is not discussed.

In *TPG/Servco/Fender*, the acquisition concerned less than 25% of capital shares, but 25% of the voting rights, the right to veto appointments of senior managers, the right of each party to appoint part of the board of directors and their joint right to appoint a certain number of board members. This was found to be a controlling minority acquisition.⁸⁸

Overall, there does not seem to be a correlation between the amount of shares transferred via the transaction and the adoption of remedies by the Austrian FCA. The Austrian FCA analyses in the same manner all the acquisitions which involve a non-controlling minority shareholding of 25% and the transactions and mergers which trigger a change of control.

There are no cases where the national authority intervened in respect of an acquisition of a “passive shareholding”.

In case *EnBW/EVN*, concerning the acquisition of a shareholding of 30%, the Austrian FCA found that the acquisition of a minority interest that does not allow exercising any influence on the target undertaking was not likely to lead to competition restrictions through, for example, strategic behaviour.⁸⁹ The Austrian FCA added that any future minority shareholding acquisitions that, due to other circumstances, would lead to an acquisition of control, would have to be subject to additional merger proceedings.⁹⁰

The issue of “passive shareholding” was analysed by the Supreme Cartel Court in the case 16 Ok12/08. Contrary to the conclusion of the Cartel Court (acting as the court of first instance in the case), the Supreme Cartel Court concluded that the transaction did not constitute a concentration under Section 7 of the Cartel Act. The Supreme Cartel Court justified this conclusion on the basis that there was evidence that the acquiring company would only exercise its voting rights to maintain the value of the investment, rather than influencing the business activities of the acquired company.⁹¹

There have been 363 notifications of minority shareholding acquisitions (i.e. acquisitions of less than 50% of shares in another undertaking) in the past 10 years,⁹² which represent around 12,2% of all notifications. The number of notifications of minority shareholding acquisitions has been steady throughout the past 10 years, ranging between 33 and 40 notifications per year,⁹³ with the exception of year 2010, when there were 19 notifications, and year 2014, when there were 53 notifications. The Austrian FCA did not specify in most of the 363 cases whether the minority shareholdings which were being acquired conferred control or not to the acquirer. Only

⁸⁸ Cartel Court case 29 Kt 159/13, <[http://www.ediktsdatei.justiz.gv.at/edikte/ek/ekedi17.nsf/suchedi?SearchView&subf=vek&SearchOrder=4&SearchMax=4999&retfields=~\[BetSchlag\]=TPG%20Slowhand~\[Beteiligte\]=TPG%20Slowhand~\[Schlagworte\]=TPG%20Slowhand&ftquery=&query=%28\[Beteiligte\]%3D%28TPG%20Slowhand%29%29%20OR%20%28\[Schlagworte\]%3D%28TPG%20Slowhand%29%29#1459614154536](http://www.ediktsdatei.justiz.gv.at/edikte/ek/ekedi17.nsf/suchedi?SearchView&subf=vek&SearchOrder=4&SearchMax=4999&retfields=~[BetSchlag]=TPG%20Slowhand~[Beteiligte]=TPG%20Slowhand~[Schlagworte]=TPG%20Slowhand&ftquery=&query=%28[Beteiligte]%3D%28TPG%20Slowhand%29%29%20OR%20%28[Schlagworte]%3D%28TPG%20Slowhand%29%29#1459614154536)>.

⁸⁹ Announcement of the Federal Competition Authority in case *EnBW/EVN*, <<http://www.bwb.gv.at/Aktuell/Archiv2005/Seiten/EnBW-EVN.aspx>>.

⁹⁰ Annual report on the activities of the Federal Competition Authority for 2004/2005, p. 64.

⁹¹ Supreme Cartel Court case 16 Ok12/08, <https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Justiz&Dokumentnummer=JJT_20081217_OGH0002_01600K00012_0800000_000>, paragraph 3.3.

⁹² In the period from 1 January 2006 to 1 April 2016.

⁹³ There were 34 notifications in 2006, 40 in 2007, 38 in 2008, 39 in 2009, 34 in 2010, 36 in 2011, 33 in 2012 and 33 in 2013.

in 40 cases there was an explicit mention to the non-controlling nature of the shareholdings acquired, 9 of them in 2009 and 12 in 2014.⁹⁴

No industry records a substantially higher number of merger cases involving minority shareholding. The cases notified to the Austrian FCA are equally divided among the following industries:

- financial services (35 notifications or 9,6% of all minority shareholding acquisitions and about 1% of all notifications in the past 10 years⁹⁵);
- energy (27 notifications or 7,4% of all minority shareholding acquisitions in the past 10 years, of which 17 notifications in relation to energy supply);
- motor vehicles and motor vehicle parts (19 notifications or 5,2% of all minority shareholding acquisitions in the past 10 years);
- manufacture of metals (17 or 4,6% of all minority shareholding acquisitions in the past 10 years);
- food products (16 notifications, or 4,4% of all minority shareholding acquisitions in the past 10 years);
- media and publishing (14 notifications or 3,8% of all minority shareholding acquisitions in the past 10 years);
- real estate (13 notifications or 3,5% of all minority shareholding acquisitions in the past 10 years); and
- construction materials (13 notifications or 3,5% of all minority shareholding acquisitions in the past 10 years).

The two cases where the Austrian FCA intervened in the past 10 years concerned waste management activities and the media sector, so none of the sectors appears to be particularly prominent in this respect either.⁹⁶ Neither of these two cases involved a prohibition. The low number of interventions matches the Authority's generally very low rate of interventions (between 95 and 99% of all concentrations are either cleared in phase I or notifications are withdrawn.⁹⁷).

2.4.3 Stakeholder experiences

All the consulted stakeholders, including representatives of the Austrian FCA, private practitioners and notifying companies, accept the 25% shares threshold as appropriate and satisfying and seem to prefer it over a more general concept of control.

Even though the threshold is "lower" in comparison to the criterion of change of control applicable under the Merger Regulation, it provides a clear-cut rule for the merging parties and guarantees legal certainty in relation to their duty of notification when at the same time simplifies the assessment of the Austrian FCA.

One practitioner argued that transactions involving the acquisition of non-controlling shareholdings often generate issues of inter-locking directorates and exchange of information between competitors and that it is thus appropriate for the Austrian FCA to be informed of them in order to facilitate its general task of monitoring the market.

⁹⁴ This last number should be taken with caution, since the Authority publishes summarised notifications, while actual decisions are normally not published, and so details on transactions could have been omitted.

⁹⁵ In the period 1 January 2006 to 1 April 2016.

⁹⁶ BWB/Z-2121 *Saubermacher Dienstleistungs-AG/ Kärntner Restmüllverwertungs GmbH* <http://www.bwb.gv.at/Zusammenschlusse/Zusammenschlusse_2013/Seiten/BWB_Z-2121.aspx> and BWB/Z-2660 *FUNKE MEDIENGRUPPE GmbH & Co. KGaA/Axel Springer Media Impact GmbH & Co. KG*, <<http://www.bwb.gv.at/Aktuell/archiv2015/Seiten/Z-2660-Funkemediengruppe-GmbHCoKG--Axel-Springer-SE.aspx>>.

⁹⁷ Annual Report of the activities of the Federal Competition Authority for 2014, p. 37.

Another practitioner specifically mentions that even though the transfer of 25% shares does not necessarily trigger a change of control, it might grant veto/blocking rights in the target company when the latter is listed in the stock market, and thus characterized by dispersed shareholding. These rights would affect the competition in the market in case the acquiring and acquired company are in a competitive relationship. Therefore, another advantage of the current regime is that it has the ability to capture such transactions, which would escape from the duty of notification under the threshold of change of control.

It is important to mention though, that back in 2011, the representatives of trade unions and the chamber of commerce submitted to the Austrian Government a proposal to reform the 25% shareholding threshold by introducing the duty of notification to every concentration that raised a “competitive significant link” between the parties. This new rule would mean that even acquisitions of less than 25% shares could also trigger a notification if the acquiring and acquired company were in a competitive relationship, but it was rejected by the Austrian FCA which considered that such a reform would undermine legal certainty and would result in an excessive number of notifications to be handled by it.

The rule based on the 25% threshold is generally believed to achieve a fair balance between the burden of notification and the need to control anti-competitive effects. Additionally, the effectiveness of the whole system is integrated through the combination of the approach of the authority, which does not take into account whether there is a change of control in the target firm, as long as the 25% threshold is met, and analyses the impact of the transaction on competition in accordance through a standard competition law analysis, with the role of the Cartel Court. Specifically, in case the authority wishes to impose remedies or block a transaction it has to refer the case to the Court, which will appoint an independent economist expert who will among others assess if the transaction generates a change of control in the target company. Even if this process does not usually take place, as the authority most commonly settles the case with the parties, through this process the criterion of change of control is taken in consideration in the Austrian system of merger control, although it is not expressly mentioned in the competition law.

A practitioner actually commented that the Austrian system of merger control “fills the gap” in the Merger Regulation, as most of the cases of minority shareholding notified to the Austrian FCA fulfil the turnover threshold of the regulation but not the requirement of the change of control and therefore are “missed” by the European Commission even if some of them raise issues of interlocking directorates.

According to a representative from the Austrian FCA, there are also two other reasons which justify the current system of control of minority shareholdings: (i) the authority should keep a system of control over such transactions as the acquisition of 25% shares of another company gives to the acquirer a number of minority rights (e.g. veto rights, access to internal information and right to appoint a certain number of board members), which in case the two companies are competitors might generate competitive concerns and (ii) since the information submitted on a shorter information notice may not be sufficient, it is likely that the parties would be asked for a full notification at a later date. Thus, in order to achieve legal certainty, the parties may decide to submit a full notification in the first place.

As concerns the aspects of the current minority merger control regime to benefit from clarification, different ideas are presented. One practitioner focuses on the need to

bridge the different approach between Austria and the Commission regarding the notification of transactions involving the establishment of joint ventures.⁹⁸ Another practitioner believed that the main issue generated by the Austrian system of control of minority shareholdings concerns its relation with Article 101 TFEU.⁹⁹

It was also voiced that, due to the low turnover threshold established, the Austrian FCA has to deal with a large number of merger notifications (300 per year) which may not be justified by the Austrian economy and is not easily handled by the limited available human resources. One option would be to keep the 25% shareholding threshold in force, but increase the turnover thresholds/abolish worldwide turnover thresholds, in order to decrease the number of notified multi-jurisdictional mergers which have a limited impact on the Austrian market.

Interviewees were generally critical of the proposed targeted transparency system at the EU level, stressing that the parties would face the cost and burden of additional information obligations (i.e. an information notice for potentially problematic acquisitions of non-controlling minority shareholdings), which would be surrounded by some degree of uncertainty as a full notification might be requested at a later stage. Moreover, in their view, the “competitively significant link” threshold does not work adequately (i.e. broad margin of discretion left to the Competition Authority; legal uncertainty for the merging parties; excessive number of transactions notified).

Another problem to be addressed is the added value of the brief information notice mentioned by the EU Commission in relation to the “targeted transparency system” as in Austria no pre-notification contacts exist and the information asked by the parties is “light”, covering 8-10 pages. On the other hand, the EU merger notification form is much more burdensome for the merging parties in relation to the amount and types of information required with pre-notification contacts usually needed. As a consequence, the new system would increase the burden of notification for the merging parties and increase the workload of the EU Commission as the parties would be likely to submit from the beginning a full notification to the EU Commission due to reasons of legal certainty.

It was also noted that a further problem may exist, in so far as the EU Commission may be unlikely to identify the potential anti-competitive effect of a concentration involving the acquisition of minority shareholding only on the basis of the information included in the proposed information notice. Since notification to the Austrian FCA would be prevented, this might reduce the overall degree of control vis-à-vis minority shareholding in Austria.

Additionally, the introduction of a brief information notice for the acquisitions of minority shareholdings would create two different notification models at the EU level, for majority and minority shareholdings acquisitions; in borderline cases, it would be

⁹⁸ Austria, as opposed to the EU, requires notification to the Austrian FCA every time 25% share threshold is satisfied, even in case a mother company acquires these shares in a non-full function joint venture.

⁹⁹ When a change of minority shareholding is cleared by the Austrian Competition Authority, the potential competition restrictions which are closely linked to the transaction are considered as “ancillary restraints” to the transaction (e.g. corporate information concerning the target company is communicated to the minority shareholder, although the latter is a competitor of the target company). The Austrian FCA will not open investigations concerning such ancillary restraints under the national equivalent of Article 101 TFEU. On the other hand, the clearance of the minority shareholding by the Austrian FCA does not prevent the EU Commission to investigate such ancillary restraints as a potential breach of Article 101 TFEU. Similarly, the decision of the Austrian FCA to clear the transaction does not prevent stand-alone action under Article 101 TFEU. In practice, this issue has never arisen, but the stakeholder was of the view that the possibility of it arising is a source of uncertainty.

difficult for the merging parties to decide which notification procedure to follow. It is proposed for the EU Commission to not differentiate the notification procedure for majority and minority shareholding acquisitions in case it decides on an extension of the current regulation.

An advantage of the extension of the scope of the Merger Regulation, mentioned by a practitioner, would be the lower number of cases to be notified to the Austrian FCA, as a large number of transfers of minority shareholdings are notified to this authority because, even though they fulfil the turnover thresholds of the Merger Regulation, they do not trigger a change of control.

Overall, interviewees agree on the extension of control of minority shareholding under the Merger Regulation but through the introduction of the 25% threshold or a similar straightforward criterion which would create legal certainty for the merging parties, and which would clearly define the scope of application of the Austrian and the EU system of merger control.

2.5 United States

2.5.1 Jurisdictional Criteria

Under the Hart-Scott-Rodino Act ("HSR Act")¹⁰⁰ all acquisitions of voting securities (or assets) in another company that meet the HSR Act monetary thresholds must be notified (unless qualifying for a notification exemption). The HSR Act exempts from the obligation to notify acquisitions which are:

- 10% or less; and
- 'solely for the purpose of investment'

Voting securities are held or acquired "solely for the purpose of investment" if the person holding or acquiring such voting securities has no intention of participating in the formulation, determination, or direction of the basic business decisions of the issue.¹⁰¹

Acquisitions above 10% need to be reported unless the acquirer is an "institutional investor." In that case, the 10 % exemption is effectively raised to 15 % when:

- (i) the acquisition is made in the ordinary course of business of the institutional investor;
- (ii) the acquisition is made "solely for the purpose of investment";
- (iii) the issuer is not a competitor of the "institutional investor"; and
- (iv) the acquiring person does not include any entity that is not an "institutional investor" and that holds voting securities of the target issuer.¹⁰²

However the notification exemption is narrowly construed and the FTC Premerger notification office applies a rebuttable presumption against its use where the issuer whose stock is being acquired is a competitor of the acquirer.

The concept of control is not a pre-requisite for establishing jurisdiction of US merger control. The notification period does not differ from the standard notification period for a transaction leading to control. However, the notification procedure for any type of transaction is relatively basic; only basic corporate and financial information is required.

All acquisitions above 10% (or 15% for some categories of institutional investment) - or all acquisitions not solely for investment purpose – need to be notified (provided they meet the monetary thresholds). For acquisitions below 10%, acquisitions solely for investment purpose are thus exempt. Therefore the requirement to notify entails that some sort of corporate rights are attached to the acquisition which enable influence over the target company. Voting rights in themselves do not establish such influence. Examples of the rights that are inconsistent with pure investment purpose (negative definition) are summed up by the Federal Trade Commission ("FTC") thus:

[M]erely voting the stock will not be considered evidence of an intent inconsistent with investment purpose. However, certain types of conduct could be so viewed. These include but are not limited to: (1) Nominating a candidate for the board of directors of the issuer; (2) proposing corporate action requiring shareholder approval; (3) soliciting proxies; (4) having a controlling shareholder, director, officer or employee

¹⁰⁰ 15 USC § 18a

¹⁰¹ HSR Rule 801.1

¹⁰² HSR Rule 802.64

*simultaneously serving as an officer or director of the issuer; (5) being a competitor of the issuer; or (6) doing any of the foregoing with respect to any entity directly or indirectly controlling the issuer.*¹⁰³

As all acquisitions that meet the HSR Act monetary thresholds shall be notified (unless qualifying from a notification exemption), there is no explicit requirement of a competitive link to exist between parties for merger control to apply (though the existence of such a competitive link may exclude the application of the exception for transactions “solely for the purpose of investment” for acquisitions of stakes below 10/15%). The assessment will then be based on whether the transaction has the capacity to lessen competition. As no competitive link is required, market definition is not a necessary preliminary step before establishing jurisdiction. The HSR Act filing seeks fairly high-level financial and corporate information, as well as copies of the agreement, financial documents, and internal company documents discussing the transaction. Unlike other jurisdictions, the filing does not require the parties to describe the industry or take positions on market definition or competitive effects.

The Supreme Court has confirmed that the acquisition of control is not necessary for a breach of Section 7 of the Clayton Act.¹⁰⁴ What is important is that there is an acquisition of part of the stock of the other company, and where the effect of such acquisition may be to substantially lessen competition. The acquirer is not required to exercise control over the target for there to be a breach. This is confirmed in the FTC and DoJ Guidelines:

Partial acquisitions that do not result in effective control may nevertheless present significant competitive concerns and may require a somewhat distinct analysis from that applied to full mergers or to acquisitions involving effective control.

Acquisitions ‘solely for investment’ purposes are also exempted from the prohibition laid down in Section 7 of the Clayton Act:

*This section shall not apply to persons purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition.*¹⁰⁵

2.5.2 Past decisions and enforcement trends

Below is a quasi-exhaustive list of past decisions involving non-controlling minority shareholdings:

Infringement of the Section 7 prohibition (i.e., the merger would substantially lessen competition) was found in the following cases:

- Nemours & Co 353 US 586, 592 (1957).602-11 (1957): 23% stock acquisition breaches Section 7 of the Clayton Act;
- Denver & Rio Grande 387US 485, 501-04 (1967): 20% stock acquisition warrants ICC assessment of anticompetitive effects under § 7);
- American Crystal Co v Cuban-American Sugar Co 259 F2d 524 (1958): 23% stock acquisition infringes Section 7 of the Clayton Act; and

¹⁰³ Premerger Notification; Reporting and Waiting Period Requirements, 43 Fed. Reg. 33,450,33,465 (July 31, 1978)

¹⁰⁴ US v El. du Pont de Nemours & Co 353 US 586, 592 (1957)

¹⁰⁵ Section 7 of the Clayton Act

- US v Dairy Farmers of Am, Inc 426 F.3d 850, 852–55 (6th Circuit 2005). 50% acquisition of downstream company infringes Section 7.

Consent orders were issued in respect of:

- U.S. v. Gillette Co., Proposed Final Judgement, Stipulation and Competitive Impact Statement, 55 Fed. Reg. 12,567, 12,569 (1990) (imposing restrictions to sterilize acquisition of 23% non-voting shares);
- U.S. v. MCI Communications Corp., Proposed Final Judgement, Stipulation and Competitive Impact Statement, 59 Fed. Reg. 33,009 (1994) restrictions imposed on 20% stock holding);
- Time Warner Inc., Proposed Consent Agreement with Analysis to Aid Public Comment, 62 Fed. Reg. 67,868, 67,871(1996) (requiring divestiture of 7.5% equity position or acceptance of capped non-voting shares);
- U.S. v. AT&T Corp., Proposed Final Judgement, Stipulation and Competitive Impact Statement, 64 Fed. Reg. 2506 (1999) (full divestiture of 23.5 percent stock holding); and
- U.S. v. TC Group, L.L.C, Decision and Order, 72 Fed. Reg. 4508 (2007) (challenged the acquisition of a 22.6 percent equity interest in KMI by private equity funds managed by the Carlyle Group and Riverstone Holdings LLC because of KMI's ability to appoint board members in two competitors and by exchanging competitively sensitive non-public information.

Based on the above cases, it can be seen that there is no correlation between the degree of shareholding and the remedial action. Similar levels of shareholdings are found in both categories. Rights typically associated with the shareholdings are those which may be able to confer some control/influence over the target (or those likely to be gained via the shareholding). See for example *Nemours & Co.*¹⁰⁶ In the context of a vertical acquisition, du Pont representatives sat on General Motors' Board of Directors (even as Chairman at some stage);¹⁰⁷ the Court pointed to the fact that the importance of a 23% shareholding is increased when 92% of the remaining shareholders held less than one hundred shares each.¹⁰⁸ In *American Crystal Co v Cuban-American Sugar Co*,¹⁰⁹ the possibility of Cuban American gaining control (through board representation and voting stock) would make the acquisition of 23% anticompetitive. In *U.S. v. TC Group*,¹¹⁰ the Court referred to board representation in competing firms, and veto powers.

Furthermore, there is no clear definition of what the scope of “solely for investment” purpose falling within the Section 7 exemption is. The FTC gives an interpretation (a negative definition of the concept).¹¹¹ In the interpretation of this exception, the courts have generally focused on whether the acquisition was part of an effort to obtain control and have considered evidence of intent or capacity to obtain control. Evaluation of intent has been assessed based on direct evidence from a particular transaction, the historical behaviour of the acquiring company, and the commercial circumstances around the transaction.¹¹² Demonstrating that the acquisition will not give the acquirer formal control is necessary but not sufficient. The exemption is

¹⁰⁶ *Nemours & Co* 353 US 586, 592 (1957).602-11 (1957): 23% stock acquisition breaches Section 7 of the Clayton Act

¹⁰⁷ *Ibid*, para 604

¹⁰⁸ *Ibid*, para 607, fn 36.

¹⁰⁹ *American Crystal Co v Cuban-American Sugar Co* 259 F2d 524 (1958)

¹¹⁰ *U.S. v. TC Group, L.L.C, Decision and Order*, 72 Fed. Reg. 4508 (2007)

¹¹¹ See Chapter 2.5.1

¹¹² ABA Section of Antitrust Law, *Antitrust Law Developments*, 2007

available only when the stock acquired will not be used 'by voting or otherwise to bring about; or in attempting to bring about, the substantial lessening of competition'. In the Dairy Farmers case, the acquisition of 50% of non-voting rights, not conferring control, was still seen as causing anticompetitive effects (through other mechanisms such as by the significant influence as being the target's financier, and also in consideration of the reduced incentive of vigorous competition arising from the acquisition).¹¹³

2.5.3 Stakeholder experiences

The threshold for triggering jurisdiction appears to be considered neither too high nor too low, with the interest and the current debate focusing on the scope of non-reportable acquisitions, especially of the ones which are exempted from notification under the HSR Act, meaning the ones that are solely for the purpose of investment (provided that they are below 10%).

Concerning reportable transactions, a doubt was expressed about the correctness of imposing an obligation to notify in two scenarios: on the one hand, when a corporate executive acquires stocks of such high value that the monetary thresholds are met and therefore an obligation to notify arises; on the other hand when shareholders, holding up to 10% of the company, influence its decisions as a result of shareholder's activism and cannot benefit from the "solely for investment purposes" exception.

The practitioners put forward a general concern that the lack of clarity in how the "solely for investment purpose" condition should be interpreted may lead to the filing of acquisitions which should not be notified at all. As an example, they put forward the case of a hedge fund investor having to notify an acquisition just because it meets the value thresholds requiring the notification. Consequently, they believe that the scope of investment only acquisitions, benefiting from notification exemption, should be clarified.

In any case, it is important that the burden of filing is considered to be satisfactory, with the business community expressing no complaints. The whole notification procedure is recognised as lighter than the one in the EU with the main burden being a filing fee based on the purchase price, which must be submitted to the FTC at the time of filing. The corporate information requested by the authority is presented as basic and along with the financial data are expected to cover around ten pages. There is no need for pre-notification contacts, as well as no obligation to define the relevant market. In most cases, when there is no substantive concern, the mergers are cleared within two weeks.

Finally, the practitioners were asked to comment on the possible introduction of a "targeted transparency" system in the EU. They pointed out that the absence of a clear-cut threshold associated with the concept of competitively significant link (if based on the German model) will be highly burdensome for the companies, which would have to decide instead of the Commission, at their own risk, whether they have to notify the transaction.

¹¹³ United States v Dairy Farmers of America 2004 WL 2186215 (ED Ky 2004)

2.6 Japan

2.6.1 Jurisdictional Criteria

As a preliminary observation, it should be explained that notification of a transaction under the Japanese merger rules does not hinge on the concept of “control”, indeed there is no such concept (notwithstanding the fact that some members of the private bar and their clients would welcome its introduction in the Japanese context, in particular because it would imply a narrower scope for filing obligations;¹¹⁴ these filing obligations are described below). Rather, the criteria are relatively quantitative and formalistic.

As in most major jurisdictions, merger review in Japan is conducted according to a prior notification system. Merging parties whose turnover exceeds certain criteria must notify the Japanese Fair Trade Commission (“JFTC”) before they close the transaction. In the case of share acquisitions, the filing requirement is triggered where a company with total domestic turnover¹¹⁵ exceeding JPY 20 billion (EUR156m as of April 2016) acquires shares of a company whose domestic turnover, aggregated with the turnover of its subsidiaries, exceeds JPY 5 billion (EUR39m), and where the proportion of the acquirer’s voting rights increase to more than 20% or 50% of all the voting rights of the acquired company. For example: where company A and company B satisfy the turnover criteria described above and company A has no voting rights of company B, if company A then attempts to obtain 21% of the voting rights of company B, company A must notify the transaction to the JFTC – regardless of whether the transaction would make company A the leading shareholder in company B. On the other hand, an increase from 21% to 49% will not give rise to a filing obligation. However, this does not preclude an investigation by the JTFC on its own initiative.

Even where the filing obligation is not triggered because the above thresholds are not met, the JFTC has the power to review a transaction on its own initiative; thus, intervention post-consummation is a possibility. This possibility to intervene is not limited by time.

As indicated above, Japan’s notification system does not incorporate a concept of “control”. Regardless of whether or not a minority shareholding confers control (in the sense of the EU merger control regime) over the acquired company, any transactions meeting the relevant conditions must be notified.

This non-distinction between acquisitions involving control and those which do not, may be a factor which to some extent helps to explain the claim made by some (though not all) that the notification burden in cases where minority shareholdings are acquired is too onerous. The shareholding must confer voting rights in order for jurisdiction to be established. There is no requirement of a competitive relationship between the parties.

¹¹⁴ As one interviewee (a private practitioner) put it: “The introduction of the concept of ‘control’ would be advisable to deal with the criticism from those private practitioners who argue (as I do) that the 20% threshold is unreasonably low and that it increases the burden to notify in cases where there are no substantive competition issues.” However, the competition authority does not agree with the criticism to which this interviewee refers.

¹¹⁵ Total domestic turnover means the aggregate domestic turnover of companies belonging to a business combination group (a group consisting of “the ultimate parent company” of the notifying company and its subsidiaries).

In terms of the burden of filing, the notification form does not require a complicated or extensive assessment of the potential impact of transactions, and it does not require an extensive production of documents. Indeed, notifying parties are not required to concretely explain substantive competition issues or to submit extensive internal documents. The following documents are however required:

- A copy of the contract providing for the share acquisition or a document certifying the decision to carry out the share acquisition;
- A business report, balance sheet and profit and loss statement of the notifying company for the most recent business year. If the notifying company is listed on a stock exchange (in Japan or abroad), the company's Annual Report will normally contain the relevant information and so the JFTC will normally accept the Annual Report as satisfying this requirement;
- A copy of the record of a resolution of the shareholders meeting, or record of consent from all employees, with respect to the share acquisition, if there was such resolution or consent;
- A securities report prepared by the ultimate parent company of the group of combined companies to which the notifying company belongs, or any other document to show the assets and profit and loss situation of the group of combined companies to which the notifying company belongs.

2.6.2 Past decisions and enforcement trends

In the last 10 years, the minimum level of shareholding in respect of which the JFTC intervened was 20.9%. This occurred in the case of Oji/Chuetsu.¹¹⁶ In this case, Oji Holdings Corporation (whose subsidiaries, such as Oji Paper Co., Ltd., were active in the business of manufacturing and selling paper and pulp products) planned to acquire the shares of Chuetsu, a company operating in the same business, and specifically to obtain 20.9% of Chuetsu's voting rights. Since the transaction would result in the Oji group being a leading shareholder, it was considered that a joint relationship between the Oji group and Chuetsu would be created. With regard to the intensity of the joint relationship, the parties argued that the relationship would not be strong because, among other things, the objective of the transaction was not for the Oji group to obtain control of the management policies of Chuetsu. However, the JFTC concluded that the joint relationship would not necessarily be weak, in particular since: (i) as Oji Holdings itself indicated, an objective of the share acquisition was to clearly make Chuetsu an Oji group company, accounted for by the equity-method of accounting; and (ii) the share acquisition was aimed at establishing a business collaboration between the parties.

Following an in-depth ("Phase II") review, the JFTC found that the transaction would substantially restrain competition in 6 different types of paper markets, taking account of the parties' high market shares¹¹⁷ as well as the characteristics of the paper markets in Japan, such as coordinated conduct among paper manufacturers (including essentially identical and simultaneous price announcements). The parties therefore proposed remedies including an arrangement whereby one party would maintain its business operation independently from the other. The parties also undertook not to

¹¹⁶ See the JFTC's press release, "Share Acquisition of Shares of Chuetsu Pulp & Paper Co., Ltd. By Oji Holdings Corporation" (2015), <http://www.jftc.go.jp/en/pressreleases/yearly-2015/May/150526.html>

¹¹⁷ Oji Holdings had market shares ranging from approximately 30% to 70% on the relevant markets. Chuetsu's market shares ranged from approximately 5% to 30% on those markets. The post-transaction combined shares of the parties would have ranged from approximately 45% to 80% if the acquisition had been approved unconditionally.

share non-public information that would be useful for competition in relation to 6 different types of paper.

On the stipulated condition that Oji and Chuetsu must implement the proposed remedies, the JFTC concluded that the transaction would not substantially restrain competition. This was the only intervention involving a non-controlling stake in the last ten years.

2.6.3 Stakeholder experiences

In the JFTC's substantive review, any companies that are in a close relationship with an acquirer or a target will generally be deemed to be in a 'joint relationship'. However, as the representative of the authority stressed, the degree of the joint relationship (i.e., whether the relationship is fully formed or only partially formed) is assessed on a case-by-case basis. The JFTC reviews minority shareholdings considering the strength of the joint relationship, in the light of the background of the transaction, its purpose and other factors, also to be taken into account when deciding on an appropriate remedy. Nonetheless, as practitioners note, according to the JFTC's merger guidelines, a minority shareholding of over 20% and the absence of shareholders with larger shareholding ratios would suffice for a joint relationship to be found. Accordingly, these companies will generally be treated as a totally integrated group for purposes of the substantive analysis; for example, the Herfindahl-Hirschman Index, widely used by the JFTC as an indicator, will also be calculated based on the sales data of the integrated "joint relationship" group as a whole.

For practitioners, the handling of the Oji Holding's purchase of shares is an indicative example of JFTC's practice, showcasing that, at least under certain circumstances, the authority can be rather aggressive towards minority shareholding cases (acquisition of shares corresponding to 20,9% of the target's voting rights, in this particular case). Various objections were raised to the above practice, with a number of practitioners arguing that a threshold according to which acquisitions of more than 20% of the target company create an obligation to notify, regardless of whether the above percentage leads also to acquisition of control, is unreasonably low, encumbering the companies with the obligation to notify cases, which do not restrict competition. There are also practitioners who support the introduction of a generalized concept of "control" in the current regime aiming to narrow the scope of merger control.

On the other hand, there are also practitioners who agree with the application of the 20% threshold, pointing out that it is used to identify "equity method affiliate" companies in the sense that the acquirer of the 20% of its target's shares can recognize a part of the target's net assets in its financial statements. In this context, the 20% threshold can be constructed as a factor demonstrating that in the post-merger era the acquirer and the acquired company will share the same economic interest, and thus can be used to define the scope of merger review.

The representative from the JFTC mentioned that, in the context of the latest revision of its merger guidelines in 2011, the introduction of the concept of control had been proposed, in the sense that the jurisdiction should cover only shareholdings aimed at obtaining control over the acquired company, as in the case of an acquisition of a share exceeding 50%, but the argument was not considered sufficiently convincing to trigger the reform. In general, the authority remains in favour of the notification system as described above and believes that no undue burden is imposed on companies engaged in such transactions.

A practitioner expressed a view in favour of the current notification system and in agreement with the representative from the JFTC, mentioning as additional facilitating factors that: (i) no complicated or extensive assessment of the potential impact of each transaction is required, (ii) no production of original documents is needed (copies of transaction agreements, annual reports and other documents of the company are sufficient) and (iii) no internal corporate documents on the transaction are submitted (as in the US).

In relation to the possible introduction of a “targeted transparency” system in the EU, a private practitioner supports that such a system would not be burdensome for the parties as the information required such as information relating to the parties, their turnover, a description of the transaction, the level of shareholding before and after the transaction, any rights attached to the minority shareholding, and some limited market share information, have sufficient similarities to what has been required in the Japanese share acquisition report. Therefore, the parties would already have collected the information, the only difficulty being the translation of the documents.¹¹⁸

Another interviewee put emphasis on the interpretation of the “competitively significant link”, which would give rise to an obligation to notify, and reads it as a “prima facie problematic structural link”. Based on this, even though it recognises that this system could work for the authority and the parties, it raises a concern that it would be difficult for both to pre-define the basic characteristics of this link, as its strength can be decided only *ad hoc*. Therefore, in case a clear definition is not provided, the parties run the risk of confusion of whether they should notify and the agency might result in overlooking acquisitions of minority shareholdings, which should come under close investigation.

¹¹⁸ For a list of the documents to be provided, please refer to Chapter 2.6.1.

2.7 Brazil

During the study, a brief desk review of Brazilian merger rules concerning control of minority acquisitions was undertaken. No interviews were conducted.

The Brazilian system of merger control is regulated under Title VII of the Law 12.529/2011, which entered into force in May 2012. The Law 12.529/2011 introduced key changes in the system of merger control in Brazil. In particular, Art. 84 introduced a compulsory pre-merger notification, as well as new turnover thresholds of notification which cumulatively consider both the worldwide turnover as well as the turnover in Brazil of the firms involved in the concentration. The system of merger control is enforced by the Conselho Administrativo de Defesa Econômica (CADE), the Brazilian competition authority. CADE is an independent agency which includes a Tribunal composed of six commissioners and a president, the Superintendência-Geral and an economics department. In the field of merger control, parties have to submit a pre-merger notification to the Superintendência-Geral, which carries out the preliminary review of the transaction and it can directly authorize concentrations which do not raise competition concerns. On the other hand, the Superintendência-Geral can bring the case to the Tribunal if it wishes to impose remedies or block the concentration. The Tribunal acts as quasi-judicial body, assessing the case independently.

The Law 12.529/2011 does not clarify the grounds for change of control which trigger a merger notification to CADE. The concept of change of control has been broadly interpreted by CADE in its Resolution 2/2012, as amended by the Resolution 9/2014. Art. 10 of Resolution 2/2012 clarifies that the acquisition of minority shareholding may cause a change of control in the target company, and thus it is subject to pre-merger notification to CADE, in the following circumstances:

- When the transaction grants to the purchaser the status of main individual investor in the target company;
- In situations where the activities of purchaser and target company do not overlap, either horizontally or vertically:
 - 1) In case the transaction grants to the purchaser control of at least 20% of the shares of the target company;
 - 2) In case the purchaser already had a participation of at least 20% in the shares of the target company before the transaction;
- In situations where the activities of purchaser and target company do overlap, either horizontally or vertically:
 - 1) In case the transaction grants to the purchaser control of at least 5% of the shares of the target company;
 - 2) In case the transaction increases of at least 5% the participation of the purchaser in the shares of the target company.

Thus, the notion of control in the Brazilian regime appears to be different to the notion of control under the Merger Regulation, and national systems in the EU more generally.

Resolution 2/2012 provides two forms of merger notification: a standard pre-merger notification and a shorter one, applicable to concentrations subject to a fast-track procedure. The latter procedure is applicable to concentrations which *prima facie* are considered less likely to generate anti-competitive concerns, and thus they are more

likely to be authorized by the Superintendência-Geral during the first phase of the investigations.¹¹⁹ Unlike the standard merger notification form, the notification form of concentrations subject to fast track procedure does not require information concerning the competitive dynamics in the market (e.g. entry barriers, buyer power...) On the other hand, both the standard and the fast track notification form require the same information concerning the existence of a minority shareholding and change of control in the target company in accordance with the criteria mentioned under Art. 10 of Resolution 2/2012. In particular, the forms require the parties to indicate whether the purchaser controls at least 20% of the shares of the target company, as well as specifying the changes in the shareholding structure of the target company caused by the transaction.

¹¹⁹ Under 8 of the Resolution 2/2012, the following concentrations are subject to fast-track procedure: joint-ventures, concentrations which lead to a new entrant in the market, horizontal mergers concerning less than 20% of the relevant market, vertical mergers concerning less than 30% of the relevant market and concentrations which cause an increase of Herfindahl–Hirschman Index (HHI) index below 200 points.

3. Rights attached to different levels of minority shareholding

3.1 Introduction

This section sets out the rights which are granted both automatically by law and also in practice in relation to varying levels of shareholding of private and public limited companies in the United Kingdom, Germany, the United States, France and the Netherlands.

The sub-sections setting out the rights granted automatically by law are based on desk research by the Study Team, which involved an assessment of the company laws of the respective jurisdictions. The sub-sections describing the rights which tend to be granted in practice are based on a series of stakeholder interviews conducted with lawyers and investors in the various jurisdictions. The stakeholders interviewed were asked about the type of rights which are generally associated with different levels of shareholdings, ranging from 5% up to 33%. An attempt has been made, where possible, to present the descriptions of the rights granted in practice in ascending order of percentage shareholding. However, as it was not always possible to group the rights into such neat categories, it was sometimes necessary to deviate from this structure of reporting.

3.2 United Kingdom

The main legislative instrument which enshrines the rights granted automatically to shareholders is the Companies Act 2006, as amended (“CA 2006”). It deals with both private limited companies and public limited companies and the shareholders rights in both forms of companies are substantially the same. While in the UK there are statutory instruments concerning the implementation of Regulation 2157/2001, the rights attaching to varying levels of shareholdings in a *Societas Europaea* whose registered office is in the UK will essentially be the same as those for the other company forms considered.

3.2.1 Rights granted by law

Generally, shareholders have the right to receive such documents as the annual report and annual accounts of the company, both when they are issued and upon request, as well as the right to receive a copy of proposed written resolutions. Shareholders with 5% of the shares or 5% of the voting rights in a public or private company can request the directors to call a General Meeting.¹²⁰ They can also require the company to circulate a statement to its members of not more than 1,000 words with respect to a matter to be dealt with in a proposed resolution at the General Meeting, or with respect to other business to be dealt with at that meeting.¹²¹ Shareholders, upon reaching a threshold of 10% of the issued share capital, or of any share class may require a company, otherwise exempt from audit, to undergo an audit.¹²² There are no additional rights which arise by law upon reaching a shareholding of 15% or 20%.

The most significant threshold provided for by the CA 2006 in respect of minority shareholdings is 25%. The following are the important actions which the CA 2006 states require a special resolution requiring support of 75% of the votes, and by corollary can be blocked with a 25% shareholding:

- amending the articles of association (S. 21(1) of the CA 2006),
- changing the name of the company (S. 77(1) of the CA 2006),
- reducing the share capital of the company (S. 641(1) of the CA 2006),
- changing the nature of the company (i.e. re-registering private company as public company, or limited company as an unlimited company) (S. 90 & 97 of the CA 2006).

In addition, S. 84 of the Insolvency Act 1986 provides that a special resolution is required for voluntary dissolution of the company. There are no additional rights which arise by law upon reaching a shareholding of 33%. The next significant threshold is 50%, at which point the shareholding ceases to be a minority one.

It should be noted that, aside from the rights mandated by law, there is a large scope for varying the rights of shareholders in the articles of association, and in shareholders agreements.

3.2.2 Rights granted in practice

It was noted during stakeholder interviews that there were no hard and fast rules as to when certain rights would be granted, it can depend on the transaction. However,

¹²⁰ S. 303(a) of the CA 2006, as amended by Regulation 4(2) of S.I. 2009/1632.

¹²¹ S. 314(2)(a) of the CA 2006.

¹²² S. 476 of the CA 2006.

while the grant of certain rights might be observed or expected in relation to sizes of shareholdings, it is not necessarily the case that they can be neatly fitted to rising 5% slices. Investors interviewed were particularly keen to emphasise this point, noting that the percentage of shareholding which an investor was likely to take depends on a variety of factors, such as the valuation of the company, the existence of other investors, the round of investment involved, etc. The investors interviewed were expressing the views of venture capital investors, with one noting the tendency to take a shareholding of 10%-20%, and another noting that 15%-25% was preferable. However, both indicated that the rights which would be attached to the shareholding would be set out in the term sheet, and that different rights would not necessarily be sought if the shareholding taken was at the upper or lower end of these ranges. Notwithstanding the inherent differences in trying to group the likelihood of certain rights being granted in neat percentage slices, set out below is a summary which attempts to reconcile the observations of the various stakeholders interviewed.

The general consensus from the company lawyers interviewed was that there is not a lot which a shareholder can expect to be granted when acquiring a 5% shareholding. However, it was noted that special requirements arise in relation to funds managing ERISA plan assets.¹²³ One such requirement is that the fund manager must “manage” investments. The need to satisfy this requirement leads to the inclusion of an observer right when such a fund is acquiring a shareholding of as little as 5%. However, it should be noted that this issue was only mentioned in one interview, and the Study Team has not yet found any other evidence of this issue having a major impact on the rights granted upon acquisition of shareholdings.¹²⁴

The general view was that at around 10%, the shareholder might expect a seat on the board, but if not a board seat, he would certainly expect an observer right. Essentially, the expectation at this threshold is that the shareholder will generally be able to inform itself of the internal matters in the company. There are no hard and fast rules, however, and it is conceivable that a shareholder may negotiate a veto right on certain “nuclear” issues, such as winding up the company, or changing its tax structure, depending on the nature of the transaction. The rights typically granted upon reaching a 15% shareholding are the same as those at 10%. Additional rights would not generally be expected until hitting at least around the 20% mark.

At 20%, the shareholder begins to be regarded as more serious. At the least, the shareholder would certainly expect more board representation (however, one practitioner noted that it would only be at 20% that the first board representation would arise). In addition, the shareholder might expect vetoes in relation to certain material issues, such as:

- Change in direction of the company,
- Embarking on material litigation,
- Disposal or acquisition of certain assets.

In essence, the shareholder is arriving at a percentage where it expects to play a role in the general direction of the business, but not the day-to-day issues. It may also be the case that the shareholder at 20% negotiates the rights which would accrue to it under the Companies Act at 25% (in other words, the ability to prevent certain actions which would require a special resolution). However, it was noted by one stakeholder

¹²³ The Employee Retirement Income Security Act of 1974 (ERISA) is a US federal law that sets minimum standards for most voluntarily established pension and health plans in private industry to provide protection for individuals in these plans.

¹²⁴ Nor was it mentioned in any of the interviews in Germany.

that, due to the limited number of issues for which special resolutions are needed, negotiating this would not be very useful in practice.

At 25%, the ability to block special resolutions (for which the Companies Act requires a 75% vote, in order to pass) arises. In addition, in a private equity context, the investor would expect a right to block decisions relating to:

- Certain nuclear issues, such as changing its tax structure;
- Constitutional issues (i.e. issues concerning the memorandum of association, share right amendments, amending pre-emption rights, etc.);
- Operational issues (such as incurring capital expenditure above a certain level, taking on employees with salaries above a certain threshold or taking on certain types of premises, decision to initiate material litigation, etc.). One shareholder noted it would be uncommon for an investor to have a veto on such issues in relation to a shareholding below 25%.

There would not be much difference between 25% and 33% shareholdings, barring possible increased board representation to reflect the higher shareholding. In the event that rights listed above as coming into play at 25% are however not granted at 25%, they would certainly be granted once the shareholding hits 30%.

Societas Europaea are generally not encountered in practice.

3.3 Germany

The main legislative instruments setting out the rights granted to shareholders in German companies are the Limited Liability Companies Act ("GmbHG"), which establishes rights in relation to shareholdings of private limited companies, and the German Stock Corporation Act ("AktG") which sets out the rights in relation to public limited companies. In addition, certain provisions of the German Societas Europaea Implementation Act ("SEAG") are applicable in the context of Societas Europaea.

3.3.1 Rights granted by law

In respect of private limited companies, there are no significant rights arising automatically by law upon the acquisition of a 5% shareholding. Once the shareholding reaches the 10% threshold, an entitlement to request the convening of a general meeting arises, as well as a request that matters on which decisions are to be taken in the meeting are made known. A shareholder at this level may also bring proceedings for a judicial resolution against the company, and has a right to request a court-appointed liquidator. Each shareholder has a right to request information, and to inspect the books and company documents. However, this request may be refused, if the directors are concerned that it may be used for purposes that place the company at a disadvantage (e.g. sharing with competitors).¹²⁵

The next significant threshold under the GmbHG is 25%. As certain decisions are required to be taken by way of a special resolution (75%), a shareholder who surpasses 25% can block these actions. Such actions include amending the articles of association (unless the articles themselves provide for the possibility of being changed with a smaller majority), and winding up of the company.

With respect to public limited companies, the rights to convene a shareholders meeting, and to place items on the agenda, arise upon the acquisition of a 5% shareholding. Upon the acquisition of a 10% shareholding, other rights arise, including: the right to object to the waiving of claims for damages; the right to table a motion for the removal of a member of the supervisory board; the right to request separate ratification of the acts of an individual member, etc.

As with private limited companies, the next important threshold for shareholders of public limited companies is 25%. Again, the fact that certain things are required to be done via a special resolution (75%) allows the shareholder who exceeds a 25% holding to block certain proposed actions of the company, namely:

- Changes to the articles of association (unless the articles themselves provide for the possibility of being changed with a smaller majority);
- Acquisitions of more than 10% of the share capital;
- Removal of members of the supervisory board (unless otherwise provided for in the articles);
- Approval of management decisions which have not been approved by the supervisory board (under the AktG, where the supervisory board does not approve a management decision it can only be approved by special resolution);
- Dissolution of the company;
- Increasing or reducing share capital;
- Integration of the company into another German-domiciled stock company;
- Exclusion of subscription rights;

¹²⁵ S.51(a) GmbHG.

- Creation of enterprise agreement;
- Establishment of bylaws for shareholders' meetings.

For *Societas Europaea*, certain provisions of the SEAG are relevant, such as § 50, which provides that a 5% shareholding entitles the shareholder to convene a shareholders meeting, and § 51, which provides that the articles of association may stipulate that a simple majority is sufficient for them to be amended, except for the purpose of the company. However, these provisions have the same effect as those applying to public limited companies, and the *Societas Europaea* for the purposes of this study does not present any significant differences to a public limited company.

3.3.2 Rights granted in practice

During the stakeholder interviews, no significant differences were noted between the rights which tend to be granted in practice when acquiring a shareholding in a private limited company and those which tend to be granted in respect of a public limited company.

It was noted during the interviews with lawyers that while there is no automatic linear relationship between the level of shareholding and the rights acquired and it can vary from case to case, it can generally be said that the higher the shareholding, the more rights one would expect to be granted. That said, the venture capital investors interviewed highlighted that they would rarely acquire more than 25% of a company and would generally acquire 10%-20% and 10%-25%, respectively. They would generally seek certain rights when investing within this range. This would include certain information rights, although one investor (from an investment arm of a large German conglomerate) noted that strict Chinese walls with the trading arm of the company would be maintained. One investor noted that veto rights would be sought in relation to certain issues, such as changing the object of the business, while the other investor emphasised the need to avoid vetoes where possible, due to the possibility of impeding the functioning of the investment. Both investors noted the likelihood of a board seat, whereas one investor noted that this would not be sought in the case of a public company.

In the interviews with lawyers, it was noted that at 5%, stakeholders would typically not expect any rights to be granted, but there may be certain rights depending on the case, such as exit rights. The situation would often be similar at 10%, with certain strategic vetoes being granted only in exceptional cases. However, an observer seat on the board might be granted.

While stressing the case-by-case nature of such transactions, a shareholder acquiring 15% might expect a right to nominate a board member on a supervisory board (if there is one). Similarly, certain limited veto rights might be negotiated, such as those relating to decisions regarding liquidation or moving the company seat, or changing the constitution or management.

At 20%, the possibility of nominating a board member might be regarded as crystallising into an expectation on the shareholder's part. The same goes for the veto rights regarding liquidation and moving the company seat. Information rights are important to investors, where they have less than 25% of the shares, and they may seek to acquire some rights, although some of these rights will also be provided for by company law.

It should be stressed that, for acquisitions of less than 25%, the expected rights may differ on a case-by-case basis. It is likely that, between 10-25%, some strategic veto

rights come into play, but the exact level of shareholding at which they do is not set in stone. Such veto rights may concern: significant business transactions; appointment or removal of management; or the business plan or budget. As the rights granted may differ on a case-by-case basis, it is not impossible that in certain cases, vetoes may be granted upon the acquisition of relatively low levels of shareholding which could confer control. Priority voting rights are rare in practice, but may be granted depending on the scenario.

At 25%, aside from statutory rights, shareholders might expect the right to nominate board members commensurate with the size of their shareholding. In addition, they may expect more extensive, albeit still limited, governance rights. Priority voting rights are very rare in practice, and therefore would be unexpected.

Societas Europaea are not commonly dealt with in practice by the stakeholders interviewed.

3.4 France

3.4.1 Rights granted by law

When considering shareholder rights in France, it is important to begin by distinguishing between 3 corporate forms. The Société à Responsabilité Limitée (SARL) is the equivalent of the limited liability companies discussed elsewhere in this report, while the Société Anonyme (SA) is the equivalent to the public limited company. However, there is a third company form, Société par Actions Simplifiée (SAS), which is a public company similar to the SA, but with more freedom being left to the participants in the company to provide for its governance in the articles of the company.

Certain rights are granted by law to all shareholders. In respect of private companies this includes the right to vote and the right to participate in general meetings. In relation to the SARL and the SA, special resolutions are required to amend the articles, and this requires a 2/3rds majority.¹²⁶ In addition, some key actions require unanimity (rather than majority or qualified majority voting), so it is possible for any single shareholder to veto certain issues, irrespective of his level of shareholding. Unanimous voting is required for issues such as changing the legal form of the company, increasing shareholders' obligations or liabilities, or (in the case of the SARL) moving the company seat abroad. With respect to SAS, the law does not provide for a 2/3rds majority to amend the articles. As the participants in the company have a large degree of freedom to determine how the company is to be governed in the articles, which can set a majority different to 2/3rds, certain modifications to the articles require unanimity.¹²⁷

10% of the shareholders with 10% of the shares in a SARL can request the convocation of a general meeting (in other words, the 10% threshold applies to both the percentage of shareholders and the percentage of shares – the thresholds are cumulative rather than alternative).¹²⁸ For public companies, the law provides that shareholders with a 5% holding can have the general meeting called.¹²⁹ They can also request an item or resolution to be put on the agenda.¹³⁰ In addition, a 5% shareholding entitles the shareholder(s) to forward a written request to the Chairman or Managing Director in relation to any activities which may compromise the continuation of the company.

In respect of a SA, shareholders who can prove that they have held nominal shares for at least two years may, if they represent at least 5% of the capital, gather in an association to represent their interests within the company. However, above a capital of 750 000 €, the percentage is reduced gradually from 4% until 1% of the capital.¹³¹

In relation to information rights, shareholders of a SARL are entitled to the management report, annual accounts, etc.,¹³² while shareholders of public companies are entitled to the same, but are also entitled to other information such as the full list of shareholders in the company.¹³³

¹²⁶ article L223-30, article L225-96 Code de Commerce.

¹²⁷ article L227-19 Code de Commerce.

¹²⁸ article L223-27 Code de Commerce.

¹²⁹ article L225-103 Code de Commerce.

¹³⁰ article L225-105 Code de Commerce.

¹³¹ article L225-120 Code de Commerce.

¹³² article L223-26 Code de Commerce.

¹³³ article L225-116 Code de Commerce.

3.4.2 Rights granted in practice

What is notable in France is that SARL is not often used by large companies or start-ups, with stakeholders noting that public limited companies (SA) and simplified joint-stock companies (SAS) being preferred, on the basis that they give a greater deal of freedom to shareholders, particularly regarding the grant of enhanced rights.

In France, as in other countries, the main rights sought fall into 3 categories; board representation, information rights, and veto rights. It was noted by one interview participant that at a very low level of shareholding, such as 5%, such rights would be rare, whereas if more than 15% were being acquired, they would be expected. Another interview participant noted that once 10% is being acquired, one might expect a board seat, but not veto rights, or possibly very limited veto rights. Another interview participant, who only deals with acquisitions in excess of 10%, noted that enhanced information rights would be systematically requested, as acquirers will often need updated information regarding, inter alia the debt, the turnover, clients, the cash management or major financial aggregates on a regular basis. In addition, the interview participant noted that two potential factors in deciding to request of veto rights were accounting obligations and competition law considerations (i.e. a desire to avoid control, as this would lead to a filing obligation). One interview participant mentioned the potential problem of cross-directorships, but did not elaborate on its practical relevance.

3.5 The Netherlands

3.5.1 Rights granted by law

The “besloten vennootschap met beperkte aansprakelijkheid” (BV) is the Dutch equivalent to a private limited company, while the “naamloze vennootschap” (NV) is the equivalent to a public limited company. For the purposes of this study, significant differences were noted between the rights granted by law for BVs and NVs.

Every shareholder in a BV has at least one vote¹³⁴ - even though the articles of association can make voting rights dependent upon adherence to requirements stipulated in law or in the BV’s articles. Moreover, the articles can attribute specific voting rights to a certain class of shares or shares with a certain indication. However, the voting rights of a shareholder cannot be altered or restricted against the will of any such shareholder.¹³⁵

When the articles of association of a BV exclude the authority of the General Meeting (GM) to amend the articles, amendments are nevertheless possible by unanimous vote at the GM at which all issued capital is represented – in effect providing every shareholder with a veto right in such situations.¹³⁶ The GM may under the law request the board for information, which the board is then required to provide unless an overriding interest of the company is at stake.¹³⁷ However, although every shareholder has the right to ask questions at the GM and the board must – to the extent possible – answer these questions, a single shareholder or group of shareholders do not have the right to be provided with information.

Although not completely automatic, when a (combined) share of at least 1% of a BV is reached, shareholders acquire the right to convene a GM as well as request for certain items to be put on the agenda.¹³⁸ According to Dutch law, majority shareholders have a special duty of care toward minority shareholders. Should this right be violated by a decision made by a BV, such a decision will be nullified under the law.¹³⁹ For large BVs – which have issued capital worth more than €22.5 million – a shareholder may request an inquiry into its policies to be conducted by the Enterprise Chamber of the Amsterdam Court.¹⁴⁰ In order to rely on this right, however, a shareholder (or shareholders) must represent 1% or the issued capital, or a market value of at least €20 million. In addition, each shareholder has a right of pre-emption in proportion to the aggregate amount of his shares, although the articles of association of a BV can both overwrite and limit this right.¹⁴¹

A group of shareholders which represent at least 5% of a transferee company’s capital have the right to prevent a decision on a proposed merger being taken by the Board of Directors by requesting, within one month of the merger’s announcement by the Board of Directors, the convening of a GM to decide on the merger.¹⁴² With regard to

¹³⁴ Article 228(1), Book 2 of the Dutch Civil Code.

¹³⁵ Article 228, Book 2 of the Dutch Civil Code.

¹³⁶ Article 231.1, Book 2 of the Dutch Civil Code.

¹³⁷ Article 217, Book 2 of the Dutch Civil Code.

¹³⁸ Article 220, Book 2 of the Dutch Civil Code.

¹³⁹ Article 15, Book 2 of the Dutch Civil Code.

¹⁴⁰ Article 345, Book 2 of the Dutch Civil Code.

¹⁴¹ Article 206a, Book 2 of the Dutch Civil Code.

¹⁴² Article 331, Book 2 of the Dutch Civil Code. At the ensuing GM, the resolution to merge requires 2/3rds majority vote in order to carry. In that sense, shareholders with at least 5% of the shares have the ability to ensure that the decision to merge is made by shareholders, rather than solely by the directors. The ability to actually block the resolution, however, would require at least 1/3rd of the shares.

this right, the articles of association may prescribe a required percentage of shares lower than 5%. In the exact same manner, a group of shareholders which represent 5% of a transferee company's capital can prevent a decision on a division of the company being taken by the board of directors.¹⁴³ In takeover situations, when a shareholder (or shareholders) possesses both 95% of issued capital and 95% of voting rights in the GM, it can bring an action forcing the remaining shareholders to transfer their shares to it (or one of them).¹⁴⁴ In case a BV has issued no more than €22.5 million in shares, one or more shareholders that represent at least 10% of the issued capital, or possess shares which are worth at least €225,000, have the right to request an inquiry into the company's affairs to be conducted by an individual appointed by the Enterprise Chamber of the Amsterdam Court.¹⁴⁵ In order for a company to convert from one type of legal entity into another, nine out of ten of the votes cast by shareholders on the matter must be in favour of such a conversion.¹⁴⁶ This means once a shareholding level of 10% is reached, such a decision can be blocked (although conversion from BV to NV and the other way around is subjected to a different set of rules).

No specific rights are granted by law at 15%, 20% or 25%. However, when one or more shareholders hold at least one-third of a BV's issued capital, they can demand in court that another shareholder must give up his shares in the company when such a shareholder acts in a way which harms the company's interests to such an extent that their shareholding cannot be reasonably tolerated. Should such an action be successful, his shares must be sold to the shareholder (or shareholders) which commenced the proceedings.¹⁴⁷ Subject to the same conditions, a shareholder who holds one-third of the shares issued has the right to strip away the voting rights of another shareholder.¹⁴⁸

Although normally any decision taken by the GM requires a simple majority, for a number of decisions a two-thirds majority of votes is required, effectively giving any shareholder that possesses one-third of shares of a BV the power to block such a decision. This is the case, for example, for a decision to merge¹⁴⁹, a legal division of a company¹⁵⁰ and appointing a director.¹⁵¹

3.5.2 Rights granted in practice

Following the Flex-BV Act 2012, which allows for a wide range of provisions to be included in the articles of association, there are few rights which are absolute under Dutch law when it comes to BVs, which means it has become more attractive for companies to become a BV as opposed to an NV.

Indeed, as has become clear through the interviews conducted, most rights that minority shareholders of a BV have, have been established during the negotiation

¹⁴³ Article 334ff, Book 2 of the Dutch Civil Code. As for a decision to merge, a 5% shareholding enables the shareholder(s) to ensure that the decision is to be made at a GM, where a 2/3rds majority is required to carry the resolution to divide the company.

¹⁴⁴ Article 201a, Book 2 of the Dutch Civil Code.

¹⁴⁵ Article 346, Book 2 of the Dutch Civil Code.

¹⁴⁶ Article 18, Book 2 of the Dutch Civil Code.

¹⁴⁷ Article 336, Book 2 of the Dutch Civil Code.

¹⁴⁸ Article 342, Book 2 of the Dutch Civil Code.

¹⁴⁹ Article 330, Book 2 of the Dutch Civil Code. Note: In case less than half of the issued capital is represented at the GM.

¹⁵⁰ Article 334ee, Book 2 of the Dutch Civil Code. Note: In case less than half of the issued capital is represented at the GM.

¹⁵¹ Article 243, Book 2 of the Dutch Civil Code. Note: Two-thirds of the issued capital must be represented at the GM, and this right is held only in case of BVs.

process and laid down in the articles of association of the BV. The percentage of shares acquired are thus mostly relevant as factors in the level of power a shareholder or group of shareholders has during the negotiations, and even then other factors such as the preferences of the shareholder, the type of company and the risks involved in the acquisition may be equally relevant. Thus, the level of rights acquired do not necessarily correlate to the percentage of shareholding acquired. Indeed, one interview participant noted that the rights which he would negotiate at the shareholding range of 15-33% would depend on various factors, such as what the shareholder was looking to influence in the company (e.g. a veto on management team if that was his concern, or perhaps a veto on major decisions on the commercial direction of the company). However, the same interviewee noted that, before reaching 15%, he would not expect many rights. Indeed, among the other interview participants were a venture capitalist who noted that he tended to acquire 10-40% of the shares, a lawyer who noted that most minority acquisitions were in the range of 15-49%, and an equity capital investor who preferred majority acquisitions.

According to the stakeholders, rights they would typically look to acquire during such negotiations are veto or voting rights regarding important decisions concerning, for example, the company's management team, investments and acquisitions, as well as protection when it comes to possible dilution, dividend policy and exit scenarios. However, one investor interviewed believed minority shareholders should not be granted any rights not already provided for under Dutch law, as doing so impacts on the rights of majority shareholders.

The principles of reasonableness and fairness are important not just as they bestow rights on all shareholders; they may also in practice restricts their rights. For example, even in cases where a shareholder under Dutch law might have the right to convene a GM, doing so without the consent of the board of directors can in practice be seen as a deed of mistrust which can harm the interest of the company.

Once the negotiation starts, in practice, the circumstances deciding the rights shareholders in an NV have do not differ from those for a BV. None of the stakeholders interviewed indicated they saw any difference concerning minority shareholder rights when it comes to the acquisition of shares in a BV and in an NV. However, when it comes to NVs there is no possibility of issuing shares without voting or economic rights as there is for BVs, which led one stakeholder to comment this made them the less attractive legal entity.

3.6 United States

3.6.1 Rights granted by law

It should first be noted that, in the United States, company laws can differ from State to State. However, since the most common State in which companies are incorporated is Delaware, the research was conducted on the basis of Delaware law, with notable deviations in other major States mentioned. Few rights are granted automatically by law, but it is common practice to depart from the traditional corporate structure by way of shareholder agreements or special provisions in the charter or the bylaws (similar to the memorandum or articles of association). It should be noted that in respect of private companies, a 2/3rd majority vote (for each class of share) is required in order to change the legal form of the company, essentially granting a veto to shareholders with more than 1/3rd of the voting rights for any share class. Voluntary dissolution requires (unless the charter provides otherwise) unanimity among shareholders, meaning that any shareholder can veto voluntary dissolution.

As a general matter, any shareholder of a private company has the right to inspect the corporate books and be informed about the corporation's business under state corporate law. In Delaware, for corporate books and documents other than the corporation's stock ledger or stockholder list, the shareholder exercising his/her inspection rights must show a "proper purpose", i.e. a purpose reasonably related to such person's interest as a stockholder. Essentially, shareholders do not have a general right to information but can only access and inspect certain basic corporate documents (e.g. charter, bylaws, board meeting minutes, shareholder list). In California, all shareholders have a general right to examine the corporation's accounting books and records and minutes of board proceedings, but holders of at least 5% (individually or in the aggregate) of outstanding voting shares have an absolute right to inspect the corporation's shareholder list. In theory, any minority shareholder(s) may petition the court for an involuntary dissolution of the company in a case where there is no other exit option for the oppressed minority shareholder(s), where the company is deadlocked and/or negotiations between the oppressed minority and the controlling majority for the latter to buy out the shares of the former fail. This is, however, an extraordinary remedy and rare in practice. Apart from the above, there are no relevant automatic legal rights which apply at different levels of shareholding in private companies.

With respect to public companies, there are two sources of law: State corporate law (this report, as indicated, focuses on Delaware as more than half of US public companies are incorporated there); and federal securities law. Under the default rule in the US, insurgent shareholders (e.g. a qualified minority) cannot place their own nominees on the company's proxy or on the agenda of the shareholders' meeting as of right. In practice, however, such proxy contests in director elections are typically rare. In more recent years, Delaware allows a proxy access by-law to facilitate access to the corporation's proxy materials and provide reimbursement of the nominating shareholder's expenses, in which case the by-law provides the specific minimum share ownership level required or ownership duration and other conditions. Under federal rules, holders of 1% of voting stock for at least a year are entitled to submit shareholder proposals for proxy access by-laws regarding director nominations (but not direct nominations) to be included in the corporation's proxy materials under specific circumstances (§ 14a-8 CFR). Shareholders with 1% of voting stock for at least a year are entitled to submit non-binding recommendations in the form of shareholder proposals to be presented at an annual or special shareholder meeting, subject to specific procedural requirements under SEC Rule 14a-8 CFR. Importantly, once the strictly prescribed legal requirements are met, "proper" shareholders'

proposals must be included into the company's proxy mechanism at the company's expense).

Any shareholder of a private company has the right to inspect the corporate books and be informed about the corporation's business under state corporate law. In Delaware, for corporate books and documents other than the corporation's stock ledger or stockholder list, the shareholder exercising his/her inspection rights must show a "proper purpose", i.e. a purpose reasonably related to such person's interest as a shareholder. Essentially, shareholders do not have a general right to information, but may only access and inspect certain basic corporate documents (e.g. charter, bylaws, board meetings' minutes, shareholders' list). In California, all shareholders have a general right to examine the corporation's accounting books and records and minutes of board proceedings.

A 25% shareholding in a public company gives a right to call a special meeting (Revised Model Business Corporation Act, which is similar to Delaware law when it comes to shareholders' rights), but this may be lower in practice (but not higher), as it can depend on the statutes of the company. However, there are no other relevant automatic rights which kick in once a 15%, 20%, 25% or 33% shareholding in a public company is acquired. That being said, there often tend to be deviations in practice which boost the position of shareholders. In addition to the information rights which a shareholder in a private company enjoys, a shareholding in a public company enjoys certain information rights due to federal securities law, and is entitled to "current reports" regarding certain material corporate events, that shareholder should know about, as they occur such as charter or bylaws amendments, changes in control, bankruptcy, completion of acquisition or disposition of assets.

3.6.2 Rights granted in practice

During the interviews with US stakeholders, the common theme was that the rights which they seek do not necessarily reflect the level of shareholding being acquired. The rights sought would depend on several factors such as the governance structure of the target, the business strategy pursued, and the overall structure of the deal. More than one stakeholder noted a tendency to avoid acquiring more than 20% shareholdings, due to US accounting requirements (regarding the need to consolidate revenues). Very few rights were noted by the stakeholders who were hesitant to acquire board seats. One stakeholder, who acquires between 5% and 18% shareholdings, noted that a board seat might be taken at the higher end of that scale, but usually an observer seat would suffice. Another stakeholder noted a hesitance to take on a board seat due to potential liability issues. Another noted that while board seats may be a way for shareholders to safeguard investment, other rights can do this. However, it was noted that it was difficult to give specific examples of such rights, as the rights sought are case-specific.

4. Analysis and conclusions

4.1 Analysis of national merger regimes for review of non-controlling minority acquisitions

The following sub-sections present an overview of the characteristics of the various national merger regimes for review of acquisitions of non-controlling minority acquisitions (described in detail in section 2), as well as an assessment of their functioning in relation to a number of criteria.

In particular, the Study Team analysed the enforcement record across the national regimes, and the administrative burden on the legal and business community, but also on the national authorities. The Study Team also briefly reviewed the targeted transparency system proposed at EU level in view of the existing systems at national and EU level, and set out a number of conclusions and suggestions in this regard to allay stakeholder concerns regarding legal clarity and administrative burden.

4.1.1 National models of enforcement

There is some disparity in the approach that the examined EU NCAs follow in the review of acquisitions of non-controlling minority shareholdings. For example, there are some differences as to the consequences of the threshold established based on the level of shareholding acquired (the acquisition of a 25% shareholding in the UK triggers a rebuttable presumption of material influence, whereas a 25% shareholding constitutes an unambiguous threshold for determining jurisdiction in Germany and in Austria). Another notable difference between the UK regime and the German and Austrian ones is that the UK has a system of voluntary notification.

However, there are some similarities for example as to the level of shareholding where review could/should in principle take place, which tends to be set at 25%. There are also similarities in UK and Germany in relation to the concepts of “material influence” (in the UK) or “material competitive influence” (in Germany) that the acquirer can have on the target and in particular in relation to the (additional) factors that need to be in place for such influence to exist.

The analysis below summarises the key points of the interviews that showcase how the various competition authorities compare and contrast.

United Kingdom

In the UK, the CMA lays down that an acquirer is presumed to have the ability to exercise material influence if it has acquired 25% or more of the shares of the target company. However, this presumption is rebuttable depending on the case. There is no formal requirement that the shareholding confers specific rights on the acquirer. An overview of the relevant decisional practice reveals that the CMA has found that the acquirer may exercise material influence over the target company notably in cases where it has the ability to block a special resolution and/or appoint a director to the board. On certain occasions, the CMA has also taken into account the status and expertise of the acquirer in order to determine whether it may exercise material influence over strategic and commercial decisions. Overall, as a result of a very limited amount of cases that have been scrutinized by the CMA in this field, no discernible trends can be identified, with intervention taking place only occasionally over any period.

Stakeholders are of the opinion that the UK merger control regime for the acquisition of non-controlling minority shareholdings is fair and balanced due to the fact that i) notification is voluntary; ii) clear guidance has been provided by the CMA on the normative concept of “material influence”; iii) the 25% presumption of “material influence” is deemed to be reasonable; and iv) the CMA (and its predecessors) have intervened restrictively in this area, cautiously avoiding over-enforcement.

Germany

In Germany, under provision § 37(1) No. 3(b) GWB, jurisdiction is established where the acquiring party reaches a 25% shareholding in the target with a single or multiple successive transactions. Acquisitions of shareholdings of less than 25% are covered by provision No. 4 of § 37(1) GWB, which refers to the concept of “material competitive influence” on another undertaking. Material competitive influence may exist in the case of a shareholding of less than 25% if certain “plus factors” are present, such as the conferral of specific rights. In the practice, however, blocking decisions on acquisitions of less than 10% are extremely rare for the BKartA.

Austria

In Austria a concentration arises when an undertaking acquires, directly or indirectly, shares in another undertaking, if the shareholding held after the acquisition reaches or exceeds 25%, regardless of whether or not this leads to a change in control. Acquisition of less than 25% of capital shares may fall under merger control if they lead to the acquisition of more than 25% of voting rights. There is no statutory requirement that the acquirer and the target have a competitive relationship and there are no cases where the national authority intervened in respect of an acquisition of a “passive shareholding”. In Austria, the 25% shares threshold is considered appropriate and preferable to a vague concept of “control”. The regime in Austria provides a clear-cut rule for the merging parties and guarantees legal certainty in relation to their duty of notification while at the same time simplifying the assessment of the FCA. Overall, the Austrian regime is perceived to achieve a fair balance between the burden of notification and the need to control anti-competitive effects.

Non-EU countries (US and Japan)

Looking into the regime of jurisdictions outside the EU, in the US the concept of control is not a pre-requisite for establishing jurisdiction of US merger control. The notification period for minority shareholding acquisitions does not differ from the standard notification period for a transaction leading to control. The notification procedure for any type of transaction is relatively basic; only basic corporate and financial information is required (though including submission of some internal company documents). All acquisitions above 10% (or 15% for some categories of institutional investment) - or all acquisitions not solely for investment purposes – need to be notified (provided that they meet the monetary thresholds). Acquisitions below 10% are exempted if they occur solely for investment purposes. Therefore, notification is due only when some sort of corporate rights are acquired, enabling the purchasing company to exercise influence over the target company. There is no requirement of a competitive link to exist between parties for merger control to apply. In the US, the burden of filing is considered to be satisfactory, with the business community expressing no complaints. The whole notification procedure is recognised as lighter than the one in the EU. The US practitioners commenting on the “targeted transparency” system proposed for the EU pointed out that the absence of a clear-cut threshold associated with the concept of competitively significant link (if such a system were to be based on the German model) will be highly burdensome for the

companies, which would have to decide, at their own risk, whether they have to notify the transaction.

Nor does the notification of a transaction hinge on the concept of “control” under the Japanese rules. In the case of share acquisitions, the filing requirement is triggered where a company with total domestic turnover exceeding a particular threshold acquires shares of a company whose domestic turnover exceeds a certain threshold, and where the proportion of the acquirer’s voting rights accounts for more than 20% or 50% of all the voting rights of the acquired company. There is no requirement of a competitive relationship between the parties. There are a number of practitioners arguing that a threshold according to which acquisitions of more than 20% of the target company create an obligation to notify, regardless of whether the above percentage leads also to acquisition of control, is unreasonably low, encumbering the companies with the obligation to notify cases which do not restrict competition. However, this view is not unanimous amongst practitioners with some advocating in favour of the current regime.

4.1.2 Enforcement record at national level

A review of the enforcement record of the NCAs shows very few cases of intervention in respect of minority shareholdings. To our knowledge, only 5 acquisitions of minority shareholdings have fallen under the scrutiny of the UK authorities in the last 10 years.

In Germany, the BKartA received 1,188 merger notifications in 2014, of which 22 were examined at the second phase.¹⁵² It has been estimated that between 1990 and 2010, non-controlling minority acquisitions accounted for roughly 10% of all notifications.¹⁵³ The number of cases in which the BKartA intervenes to scrutinise more closely is low, but proportionately in line with the overall figures for merger notification.¹⁵⁴ In Austria there have been 363 notifications of minority shareholding acquisitions (i.e. acquisitions of less than 50% of shares in another undertaking) in the past 10 years,¹⁵⁵ which represent around 12,2% of all notifications. However, the Austrian Federal Competition Authority has only intervened in 2 cases involving acquisitions of non-controlling minority shareholdings in the past 10 years. In Japan, the JFTC has only ever intervened in respect of 1 case, while the US FTC has not intervened in a case since 2007.

As the above analysis shows, in all the EU and non-EU countries examined, there were very few problematic cases. An initial reading of these data would suggest that the minority shareholding issue is a minor one when it comes to competition enforcement. Generally, the number of merger cases remedied or prohibited by the European Commission is only 6.5%.¹⁵⁶ Thus, it should be noted that the problematic cases in merger control are always a small subset of those which are notified. Even accounting for this, the number of problematic minority acquisitions identified at national level is

¹⁵² Annual report of the BKartA 2014, p.5

¹⁵³ A. Bardong, *The German Experience*, Concurrences no 3-2011, p. 34. See also the Activity Reports of the BKartA, published between 1999 and 2014, which note the annual figures for notification of non-controlling minority acquisitions as being between 102 and 139.

¹⁵⁴ The Activity Reports of the BKartA noted 21 such cases between 1999 and 2014.

¹⁵⁵ However, the Federal Competition Authority did not specify in all of the 363 cases whether the minority shareholdings which were being acquired were or not non-controlling. There have been 40 cases with an explicit mention of non-controlling shareholdings acquisitions in the past 10 years, 9 of which in 2009 and 12 of which in 2014.

¹⁵⁶ As of 31st May 2016. See <http://ec.europa.eu/competition/mergers/statistics.pdf>

particularly low. However, this does not change the reality that there are, from time to time, minority acquisitions which give rise to competition concerns. Of particular note are those which fell outside of the EU's jurisdiction such as was ultimately the case with Ryanair's acquisition of a minority shareholding in Aer Lingus. In addition, there have been problematic cases in the jurisdictions examined (albeit very few), which suggests that some form of control of non-controlling minority acquisitions may be desirable. To the extent that there are Member States that cannot address non-controlling minority shareholdings, as the national laws do not enable the competition authority to do so, the ability of the European Commission to assess some of these cases (the ones falling within its jurisdiction) could be welcomed. Furthermore, the European Commission might be better placed than one or several national competition authorities to assess the impact of minority shareholding acquisitions on EEA-wide or cross-border markets.

4.1.3 Administrative burden on stakeholders

As the number of problematic transactions involving non-controlling minority acquisitions is very low, and the overwhelming majority of transactions are unproblematic, it is essential that any system of control ensures that the problematic transactions are caught without imposing too high a regulatory burden on business and competition bodies. Below, we consider briefly the burden on stakeholders under the current national rules of the EU Member States, which is juxtaposed with the perception of the administrative burden which a targeted transparency system at EU level would entail.

Burden on business and legal community (in the Member States under the current national merger regimes)

In the UK, there exists a voluntary notification system, as well as guidance from the CMA on the normative concept of "material influence". Stakeholders thus expressed the view that the currently applicable rules achieve an adequate balance between the burden imposed on companies and the need to control acquisitions with possible anticompetitive effects. We should add here that the "merger intelligence" function of the CMA allows it to effectively monitor potentially anticompetitive transactions below the 25% shareholding level that may give rise to concerns. From the perspective of administrative burden, the current UK system is regarded as satisfactory.

In Germany, some concerns were expressed by several competition law practitioners about a perceived lack of legal certainty in relation to the test set out in No. 4 of § 37(1) GWB. The guidance as to what plus factors will impact on an assessment of "material competitive influence" stem from past BKartA decisions and decisions of courts. Some practitioners would like to see the BKartA issue clear guidelines in relation to these plus factors, perhaps setting out the relative importance of each factor, or surrounding considerations. Admittedly, however, numerous decisions and judgments have tackled these issues. The other factor which was of some concern to several practitioners was the lack of a safe harbour below a certain percentage. In reality, however, it is extremely rare that the BKartA will regard a transaction of below 10% as being caught by No. 4 of § 37(1) GWB. The purported lack of legal certainty as to when notification is necessary could represent a burden to businesses, as they must decide themselves if the transaction is notifiable (as non-notification of a notifiable transaction represents a breach, they generally err on the side of caution, and notify if in doubt). On the other hand, the notification itself is quite unburdensome for the parties in Germany. The information to be provided is relatively basic and the BKartA will clear the acquisition within 1 month, and often even quicker.

In Austria, all interviewees, including the representative from the Austrian FCA, private practitioners and the notifying companies, accept the 25% shares threshold as appropriate and satisfying and seem to prefer it from a more general concept of control.¹⁵⁷

Burden on NCAs (under current national merger regimes)

Due to the low turnover threshold established, the Austrian FCA has to deal with a great number of notifications (300 merger notifications per year), which, according to some opinions, may not be justified by the Austrian economy and may not be easily handled by the limited human resources of the authority. Therefore, one option would be to keep the 25% shares threshold in force, but increase the turnover thresholds/abolish worldwide turnover thresholds, in order to decrease the number of notified multi-jurisdictional mergers which have a limited impact on the Austrian market. An amendment in the Austrian regime that would mean that even acquisitions of less than 25% shares could also trigger a notification if the acquiring and acquired company were in a competitive relationship could result in an excessive number of notifications to be handled by the FCA.¹⁵⁸

In the UK, the burden on the CMA appears to be relatively low, due to the fact that notification is voluntary. Of course, the reduced burden due to fewer notifications needs to be considered in light of the additional burden which arises due to the operation of the merger intelligence function, which is tasked with identifying potentially problematic transactions. In Germany, meanwhile, the suggestion was made by certain stakeholders that some transactions which are not strictly notifiable are being notified due to the perceived uncertainty as to the application of No. 4 of § 37(1) GWB. This would naturally seem to add to the administrative burden of the BKartA. However, the fact that the BKartA can process cases in such a short timeframe is an indication that each notification is not particularly burdensome.

Perceived administrative burden under the targeted transparency system proposed at the EU level

In the 2014 White Paper, the Commission expressed its preference for a targeted transparency system, under which “an undertaking would be required to submit an information notice to the Commission if it proposes to acquire a minority shareholding that qualifies as a ‘competitively significant link’.”¹⁵⁹ In its 2014 Staff Working Document, it provided more details as to how such a targeted transparency system could be defined, elaborating on, inter alia, the scope of the information notice and the waiting period during which parties would not be able to close transaction.

Concerns were expressed by stakeholders over the amount of information that the undertakings involved in the transaction would be required to provide under a targeted transparency system. Stakeholders referred to the concept of “essential

¹⁵⁷ It was noted by one Austrian stakeholder that the Austrian system subjects the merging parties to “light” notification requirements, with a form that is 8-10 pages long. A key consideration is the lack of need for (or existence of) pre-notification contact, since the information required in the notification can easily be collected by the merging parties.

¹⁵⁸ It is important to mention though, that in 2011, there was a proposal to reform the 25% shares threshold through introducing the duty of notification to every concentration that raised a “competitive significant link” between the parties. This new rule would mean that even acquisitions of less than 25% shares could also trigger a notification if the acquiring and acquired company were in a competitive relationship, but it was rejected by the FCA which considered that such a reform would undermine legal certainty and would result in an excessive number of notifications to be handled by the FCA.

¹⁵⁹ See Chapter 1 for a brief discussion of the White Paper

market information” that, according to the European Commission, would need to be included in the information notice submitted by the parties. The general view was that the concept of “essential market information” should be strictly limited and clearly defined in order to avoid placing an excessive burden on the notifying firms. The system should be construed so as to keep such an information requirement to a minimum, in order to be substantially less burdensome than a full notification.

With respect to timing and suspension requirements, stakeholders in the UK and Germany questioned whether a 15 working day suspension period is justified in the case of acquisitions of non-controlling minority interests. UK stakeholders believe that the extent of the impact on companies of the introduction of a targeted transparency system would largely depend on the choice of the jurisdiction test, the scope of the information notice, and the timing and suspensory provisions. As regards the jurisdiction test, stakeholders stressed the importance to have clear guidance on: (i) the meaning of the term “competitively significant link” and whether the term also refers to “vertically integrated companies”; (ii) the thresholds at which jurisdiction would be triggered, otherwise the European Commission faces the risk of being overwhelmed with filings;¹⁶⁰ and (iii) the additional parameters under which a low threshold could trigger intervention.

German practitioners also expressed concerns regarding the vagueness of the notion of “competitively significant link” which will require clear guidance from the Commission. Austrian stakeholders noted that, as a consequence of the lack of certainty of the “competitively significant link” threshold, the workload of the European Commission will arguably increase because the parties would be likely to err on the side of caution by submitting from the beginning a full notification. Voices in Austria were critical of the “targeted transparency system”, stressing the risk that the parties would face the cost and burden of a further notification due to the uncertainty as to whether the information notice would trigger a full notification at a later stage.

4.1.4 Comments on the targeted transparency system proposed at the EU level in view of the current EU and national merger control regimes

When asked to assess the desirability of a “targeted transparency system”, most stakeholders at national level expressed reservations regarding the Commission’s initiative. Interviews showed major concerns regarding the level of legal certainty provided by the new system, the distribution of the administrative burden of the notification between the competition authority and the companies and the length of the procedure. UK stakeholders also expressed concerns regarding the attribution to the Commission of competence to review such transactions given the infrequency with which the latter create harm to competition and the chilling effect on European markets, most notably European equity and financial investment markets, that a disproportionate requirement to notify might generate. In Germany, it was voiced that such a “targeted transparency system” would not work in practice, as it would not effectively deal with the relevant theories of harm.

In the UK, stakeholders also noted that the introduction of a targeted transparency system would be inconsistent with the UK’s voluntary review process not least because mergers involving a higher level of control would not, under the present regime, require notification. While stakeholders broadly agree that, procedurally, a voluntary

¹⁶⁰ UK stakeholders noted that, unless there is clarity on the thresholds at which jurisdiction would be triggered, the European Commission would face the risk of being overwhelmed with notifications which parties may be tempted to submit in order to avoid penalties.

self-assessment regime would be the most appropriate and proportionate mechanism to address the 'enforcement gap' that currently exists at EU level, it was acknowledged by some that an extension of the Merger Regulation's scope of application would benefit from being implemented in a manner that fits well with all merger control regimes that are currently in place across the EU and that a mandatory notification system for acquisitions of minority shareholdings has proven effective in jurisdictions outside of the EU, including in the USA. Overall, UK stakeholders considered that several aspects of the "targeted transparency system" provide a good framework to progress the proposals with a view to reaching a solution that all Member States can support. However, it was considered that there are transactions, including unproblematic private equity and venture capital investments and investments in start-up businesses as well as full-function joint ventures located outside of the EEA, which should be excluded from the scope of the targeted transparency system.

An Austrian interviewee noted that a problem may arise as the European Commission would be unlikely to identify the potential anti-competitive effect of a "concentration" involving the acquisition of a minority shareholding only on the basis of the information included in the information notice. Since notification to the Austrian FCA would be prevented, it might reduce the overall degree of control vis-à-vis minority shareholdings in Austria. Some respondents added that the introduction of a brief "information notice" for the acquisitions of minority shareholdings would create two different notification models at the EU level for majority and minority shareholdings acquisitions; in borderline cases, it would be difficult for the merging parties to decide which notification procedure to follow. Austrian interviewees agree on the extension of control of minority shareholding under the Merger Regulation but through the introduction of the 25% threshold or a similar straightforward criterion which would create legal certainty for the merging parties, and which would clearly define the scope of application of the Austrian and the EU system of merger control.

4.1.5 Conclusions

Keeping in mind the differences between the systems for control of minority acquisitions currently existing at national level and the difficulty of making unitary observations for all the examined jurisdictions, the following can be observed:

- There is general consensus on the fact that the acquisition of a level of shareholding equal or above 25% may create a "concentration" and the same percentage of shareholding should trigger the establishment of jurisdiction on that specific transaction. Some countries use alternative concepts, such as the exercise of "material influence" over the target company (UK) or "material competitive influence" (Germany).
- Generally, in the practice it is extremely rare that acquisitions of less than 10% of the shareholding raise anticompetitive concerns and are thus blocked or cleared conditionally.
- Competition authorities in most of the examined countries tend to take into consideration particular factors, such as whether the acquisition enables the acquiring company to block special resolutions of the board, to exercise special voting rights, or to appoint board members.
- Notification is usually mandatory when a certain threshold requirement is met (the UK being the exception) but is generally considered not excessively burdensome by the stakeholders.
- Across the examined EU Member States, a reasonable level of legal certainty has been attained as regards what triggers the right/obligation of notification in their systems.

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- The amount of decisions across each of the jurisdictions has not been high, and generally not high enough to identify clear enforcement trends.
 - To date, no correlation can be established between the percentage of shareholding and the adoption of remedies; instead, a case by case approach is followed.
 - The national systems examined were generally considered to achieve a fair balance between the burden of notification and the need to control the anti-competitive effects of mergers.

Based on the results of the desk research and stakeholder interviews, a number of reservations concerning the introduction of a targeted transparency system have been identified. One concern identified by stakeholders across all the countries related to the meaning of a “competitively significant link”. Clarification on the precise meaning of this would need to be provided in the design of any potential regime.

The stakeholders generally expressed the view that a fixed threshold would be preferable in order to ensure legal certainty. There was a general consensus as to the fact that a threshold of 25% would strike a fair balance between the burden of notification and the need to control anti-competitive effects. The need for a soft harbour was also voiced, with German respondents arguing that at 15% or 20%, there could be a presumption that filing an information notice is not necessary unless certain extraordinary factors are present, and the UK ones suggesting a soft harbour at 15%.

Another issue identified was the length of the waiting period and the timing of the procedure. In general, stakeholders suggested shortening both the waiting period for implementation of the transaction and the time limit for initiating investigations. A potential way forward would be to either shorten these two periods, or as noted also below, to maintain only one of these two periods. A common concern also related to the amount of information to be disclosed, which, according to the stakeholders, should be kept to the minimum necessary for effective implementation, to make the notification less burdensome than a full Form CO notification.

As a concluding remark, it should be noted how important it is that any targeted transparency system which would be introduced seek to alleviate the reservations identified, in order to ensure a coherent and efficient system of controlling non-controlling minority shareholding acquisitions, which achieves an appropriate balance between catching anti-competitive transactions, avoiding unnecessary administrative burdens, and fitting seamlessly with the existing system of merger control on the European and national levels. Thus, should the European Commission decide to proceed with the targeted transparency system a potential way forward would be to adopt a regime that would address the above issues, by:

- Setting a threshold triggering the review of the acquisition of the minority shareholding (in the form of a legal threshold or presumption) for the purposes of legal certainty. A threshold established at the level of 25% appears appropriate given that according to our findings in the comparative analysis of the rights attached to minority shareholdings such a level is generally not considered to be passive. As to whether additional circumstances should be envisaged in cases where the shareholding level falls below 25%, taking into account the small number of problematic of minority shareholding cases across

the jurisdictions analysed in this study, such an approach could arguably be disproportionate.¹⁶¹

- A “safe harbour” could be explicitly provided, potentially at 15%, as suggested during some stakeholder interviews, or perhaps at 10%, given that according to our finding that such a shareholding is generally considered to be passive. However, the difficulties associated with identifying a clear threshold for demarcating active or passive minority shareholdings should be considered.¹⁶²
- Legal certainty would also be enhanced by ensuring that the administrative burden imposed on the companies in terms of time and costs of the procedure was significantly lighter than that required by a full notification.

Regarding the duration of the assessment, one option would be to maintain the period within which the European Commission may open a full assessment of the transaction, but not to incorporate a suspension period. This turns the regime from mandatory to semi-voluntary as the parties will still need to notify the transaction and provide relevant but limited information for this assessment step. This should help to alleviate the burden for the vast majority of transactions that do not induce any anticompetitive issues. The onus is on the parties and their advisors to ensure that any potential concerns are identified and assessed upfront; otherwise they could risk ex-post remedies. Should this approach not be possible, then a shorter suspension period with the same period within which the European Commission may open a full assessment of the transaction could also address the concerns raised.

Finally, the European Commission should provide some guidance on the concepts discussed above which could determine whether a minority shareholding transaction should require an information notice.

¹⁶¹ As mentioned above, the UK regime, like the German one, have the same 25% shareholding level. Germany can assert jurisdiction on lower shareholding levels than 25% but the existence of “plus” factors are required. In the UK, the UK regime has the “merger intelligence” function which allows it to effectively monitor potentially anticompetitive transactions below the 25% shareholding level that may give rise to concerns. The Austrian regime with a 25% shareholding level and a combination of factors for lower shareholding levels has had 363 minority shareholding mergers notified in the previous 10 years but concerns were raised on only 2 cases.

¹⁶² See Chapter 4.2.

4.2 Comparative analysis of the rights attaching to minority shareholdings

Rights provided by law

While there are some significant differences between the company law rules in the jurisdictions studied, certain commonalities can be observed. For example, in relation to the rights granted automatically by law, the following can be noted across the jurisdictions:

- There is usually a certain set of rights which applies to all shareholders, irrespective of their level of shareholding, which form the essence of the shareholder's relationship with the company. For example, each shareholder has the right to vote at a general meeting;
- There are often rights providing for the protection of minority shareholders, which usually apply once the shareholding reaches a non-negligible threshold, and which do not confer any influence on the company. An example of this is the ability of shareholders with 5% (UK, Germany, France) of the shares to request the calling of a general meeting (1% for the Netherlands, and 25% in the US). Sometimes, this is accompanied by a right to place an item on the agenda (10% for UK, Germany; 5% for France).
- The law usually provides for certain information to be made available to shareholders. Sometimes, this is not much more than what would be available publicly (for example annual accounts, annual report, etc.). In some countries, it is framed in terms of a right to request information, rather than a right to receive. For example, in Germany, such a request may be refused, if the directors are concerned that it may be used for purposes that place the company at a disadvantage.
- While the majority of decisions are taken upon a simple majority vote (>50%), there tend to be certain crucial issues for which the law requires a higher threshold of either a qualified majority/super-majority such as 2/3rd (Netherlands, US, France) or 75% (UK, Germany), or unanimity (France, in relation to certain very exceptional situations). This enables minority shareholders with a certain level of shareholding to prevent the passing of the resolution. However, company law tends to limit such instances to major issues such as the change of the legal form of the company (e.g. from a private to a public company), amending the constitutional documents of the company, etc. The instances in which such qualified majority voting is required varies between jurisdictions.
- It is generally the case that there are relatively few mandatory provisions provided by law in the jurisdictions studied, and a large scope is left to participants in companies to define their relationship with each other and with the company. Thus, the extent of the influence which a minority shareholder is likely to exercise depends on factors other than the statutory provisions of company law in each jurisdiction.

Rights granted in practice

It was noted by many of the stakeholders interviewed across the various Member States and the US that it is not possible to neatly divide these rights by percentile and that the rights granted to minority shareholdings tend to vary on a case-by-case basis. It was also noted that there may be myriad reasons why a particular level of shareholding is acquired and why particular rights are obtained. Factors might include the valuation of the company, the existence of other investors, the existence of other obligations (such as accounting requirements in the US which arise upon reaching a

20% stake), the negotiating position of the parties, etc. Notwithstanding these very strong caveats against too simplified a categorisation, the Study Team has attempted in Table 2 to represent visually the rights which a minority shareholder might expect when acquiring various levels of shareholding in each of the jurisdictions examined.

These findings would support a proposal that a legal threshold or presumption of jurisdiction for the acquisition of non-controlling minority shareholdings could be set at 25% and a safe harbour at 10-15%.

Table 2 – Rights typically granted in practice in each jurisdiction

	0-5%	5-10%	10-15%	15-20%	20-25%	25%+
UK	Limited rights <i>(certain limited rights also granted by law)</i>		<ul style="list-style-type: none"> Above 10% → nomination of a board member, or observer seat, or rights to information. Other rights → possible in this range. However → important the case-by-case nature of acquisitions and also many other factors affect the rights granted (e.g. sometimes, the kinds of vetoes typically sought when acquiring more than 25% shareholding may be granted to shareholdings of less than 25%). 		<ul style="list-style-type: none"> Veto in relation to key constitutional or nuclear issues. Vetoes over certain limited operational issues, (e.g. embarking on material litigation, acquisition/disposal of key assets etc. <i>(ability to block special resolution provided by law)</i>	
DE	Limited rights <i>(certain limited rights also granted by law)</i>		<ul style="list-style-type: none"> Observer seat, information rights, full board seat. Possible veto rights → significant business transactions; appointment or removal of management; or the business plan or budget. 		<ul style="list-style-type: none"> Veto rights. <i>(ability to block special resolution provided by law)</i>	
FR	Limited rights <i>(certain limited rights also granted by law)</i>		<ul style="list-style-type: none"> Board seat. Vetoes (but may need to exercise caution not to trigger control, as this triggers filing obligation under competition law, and also accounting obligations, whereby consolidated accounts must be drafted). Information rights. 			
NL	Limited rights <i>(certain limited rights also granted by law)</i>			<ul style="list-style-type: none"> Limited correlation between percentages and rights (e.g. while in one case, a shareholder with only 15-20% might acquire a particular right, in another case, a shareholder with a higher percentage might not) Above 15% → rights to be granted (e.g. veto rights regarding important decisions concerning, for example, the company's management team, investments and acquisitions, commercial direction of the company). 		
US	<ul style="list-style-type: none"> Board seat (at higher end of this scale), observer seat. Other rights may be requested based on criteria other than the percentage of shareholding. <i>(certain limited rights also granted by law)</i>				<ul style="list-style-type: none"> Stakeholders noted a hesitance to acquire more than 20% due to accounting requirements 	

Defining a passive minority shareholding

Based on the shareholder rights arising automatically under the laws of the jurisdictions examined, as well as the rights which tend to be granted in practice, this study assessed whether it is possible to define a level of shareholding which typically constitutes a passive minority shareholding. In order to do this, it is necessary to first consider what is meant by a “passive minority shareholding”. The terms of reference for this study defined it as “one which is mainly held for investment purposes and where the company holding the minority shareholding does not have the possibility to interfere with the business strategy of the target company.”

The theories of harm identified in the White Paper concerned non-coordinated anti-competitive effects and coordinated anti-competitive effects.¹⁶³ The former is not concerned by the question of whether a minority shareholding is active or passive, because the anti-competitive effects do not require coordination,¹⁶⁴ and whether or not they arise will depend on whether the competitive externality can be internalised.¹⁶⁵ The definition of passive shareholding employed for the purpose of this study concerns the question of whether the company holding the minority shareholding has “the possibility to interfere with the business strategy of the target company”. It is necessary to consider what is meant by interference with the business strategy.

As noted above (Chapter 3), the shareholder rights which accrue automatically under the laws of the Member States and third countries examined generally concern basic rights such as the right to vote, rights to convene general meetings and to place items on the agenda thereof, and rights to certain information about the company. These types of rights tend to accrue either to all shareholders (such as the right to vote) or upon reaching a small percentage, such as 5%-10% (in the case of convening general meetings, or placing items on the agenda). In addition, minority shareholders of a certain level can block certain actions (which tend to require special resolutions) such as the change of legal form of the company, or the amendment of constitutional documents. Such an ability to veto arises at different levels of shareholding in different jurisdictions (e.g. 25% in the UK and Germany, 1/3 in the Netherlands and France, or with a single vote in France, where certain actions require shareholder unanimity in limited situations). It is clear that rights such as the right to vote or the right to convene general meetings or to place items on the agenda do not in themselves enable interference with the business strategy of the company.

Can the right to information granted under the laws of the countries studied enable interference with the business strategy of the company? The rights generally conferred automatically tend to relate to the inspection of the company books and constitutional documents such as the memorandum and articles of association or the receipt of the annual report and accounts. In Germany and the Netherlands, the right to information is framed as a right to request information from the directors, who can refuse if it is in the interests of the company to do so. However, there is also information which may be necessary for the acquirer to receive in order to comply with accounting requirements or reporting requirements in the case of a company listed on a regulated

¹⁶³ White Paper, Towards more effective EU merger control, COM(2014) 449 final, pp. 9s.

¹⁶⁴ It should be noted that the White Paper concluded that, while non-coordinated effects may result from mere passive shareholding, such effects are not significant enough to warrant scrutiny under merger control rules.

¹⁶⁵ See F. Russo, “Abuse of Protected Position? Minority Shareholdings and Restriction of Markets’ Competitiveness in the European Union,” Amsterdam Center for Law & Economics, Working Paper No. 2006-12.

market. Such information is essential to the acquirer, and it is likely that an acquisition would not proceed, if the information rights were not granted. It is unclear whether the granting of such information rights to minority shareholders would enable minority shareholders to influence the competitive behaviour of the target. Such an assessment may be better suited to a case study approach, whereby a number of minority acquisitions where information rights are granted are assessed, in order to determine whether they gave rise to such issues in practice. Such an assessment might also take into account the efficacy of Chinese walls, in order to determine whether they represent a useful tool to mitigate any potential competition issues which might be identified.¹⁶⁶

With regard to the ability of minority shareholders to block certain actions which require special resolutions, it is possible that some of these votes may impact on the company. For example, where the board of directors decide to change the purpose of the company, in order to exploit a new market, and such a change in purpose were to require a change to the constitutional documents of the company, a minority shareholder with a sufficient shareholding to block a special resolution could prevent this change to the constitutional documents being carried out. The ability of a minority shareholder to block a special resolution is specifically mentioned by the CMA as a factor conferring the ability to influence the corporate and strategic decisions of the target:¹⁶⁷

“Given the nature of the decisions that typically will require a special resolution – and which the holder could therefore block – a share of voting rights of over 25% is likely to be seen as conferring the ability materially to influence policy – even when all the remaining shares are held by only one person.”¹⁶⁸

However, company law generally leaves much scope for the parties involved to define the manner in which the company is set up, and the rights of the shareholders, via constitutional documents and shareholder agreements. In other words, the mandatory provisions of company law tend to be quite limited. A more important consideration when assessing the ability of shareholders to interfere with the business strategy of the company is the rights which the shareholder acquires in practice. Such rights have been discussed in Chapter 3, and include the right to nominate a board seat, or a board observer seat, information rights and vetoes in relation to certain actions of the company.

What the feedback received during stakeholder interviews, and the attempt to present this as coherently as possible in Table 2, demonstrate is that it is not possible to neatly identify precise rights which tend to arise upon the acquisition of certain levels of shareholding. However, certain basic observations can be made. The first is that, before reaching a shareholding of roughly 10%, it is generally unlikely that a minority shareholder will acquire any significant rights. In other words, it is rare that a shareholder with a shareholding of lower than 10% would be in a position to interfere with the business strategy of the company. On the other hand, there seems to be a point above which a minority shareholder would likely expect to be granted certain veto rights, which might enable such interference. It seems that the acquisition of a shareholding of more than (approximately) 25% would be expected to carry vetoes in relation to certain key issues, such as decisions to dispose of important assets.

¹⁶⁶ See generally F. Russo, “Abuse of Protected Position? Minority Shareholdings and Restriction of Markets’ Competitiveness in the European Union,” Amsterdam Center for Law & Economics, Working Paper No. 2006-12, p.18

¹⁶⁷ CMA Merger Guidance 2014

¹⁶⁸ Ibid, at para 4.19.

However, while it may be said that such vetoes might give rise to the possibility of interference in the business strategy of a company, whether it does so in practice will depend on the facts of the given case.

Aside from these upper and lower thresholds, it may not be appropriate to try to define with more precision which rights tend to be acquired at particular levels of shareholding. It was generally stressed that such rights depend to a large extent on the acquisition at hand, and it would be imprudent to attempt to define thresholds whereupon rights tend to be acquired with too much precision. Nonetheless, it seems common for rights such as the right to nominate a board member, the right to a board observer seat or other information rights, to be acquired at a relatively low level of 10-15%. Veto rights are sometimes granted in relation to certain important aspects upon the acquisition of less than 25%. However, the level of shareholding that such vetoes accompany, and the aspects which are regarded as important to have a veto over, may differ on a case by case basis. Similarly, different vetoes may have different effects depending on a particular situation. For example, a veto on major transactions, such as the acquisition or disposal of assets above a certain value, is a logical way for a shareholder to ensure that its investment is protected. It is arguably a means to ensure that major decisions which can have a significant impact on the value of their shareholding can be scrutinised. However, the situation may arise where the asset being acquired is a new factory, in order to increase output capacity. Should the veto be exercised in order to prevent this acquisition, it may be the case that competition concerns arise. However, an assessment as to whether such issues arise in practice is beyond the scope of this study. Nor would answering this question assist in the further definition of a threshold for passive/active shareholding, as there are no hard and fast rules as to which types of veto arise at each specific level of shareholding.

In any event, one of the purposes of this study was to “assess whether it is possible to define a certain level of shareholding which typically constitutes a passive minority shareholding,” with a passive minority shareholding being understood as one which (i) is mainly held for investment purposes, and (ii) does not give rise to the possibility to interfere with the business strategy of the target company. The study collected data on quantitative (i.e. percentage shareholdings) and qualitative (i.e. types of rights acquired with shareholdings) aspects of minority acquisitions.

In the United States, the HSR Act sets out a threshold of 10%, below which acquisitions are exempt from notification, if they are “solely for investment purposes”. Thus, 10% may be an appropriate level of shareholding with which to begin the assessment. It can be noted that it is very rare that a national competition authority would intervene in respect of a shareholding below this threshold.¹⁶⁹ Several of the stakeholders interviewed noted that they would not generally expect any significant rights to be granted when acquiring less than 10% of a company. For example, as noted above, it is quite rare for the right to nominate a board member to arise before acquiring a 10% shareholding. Similarly, it is unlikely that veto rights would be granted below this level of shareholding. Thus, the types of rights which might be interpreted as giving rise to the possibility to interfere with the business strategy of the company tend not to arise when a shareholding of less than 10% is acquired. With respect to rights granted automatically by law, the rights which tend to arise with respect to shareholdings up to 10% tend not to be the sort of rights which allow for such interference. Rather, such rights tend to concern issues such as ensuring a

¹⁶⁹ The only example referred to in this study was a BKartA intervention in respect of an acquisition of 9.015%, which was overruled by the courts. *OLG Düsseldorf, 06th July 2005, “Bonner Zeitungsdruckerei”, WuW/E DE-R 1581, 1583*

general meeting is called. The opportunity to block special resolutions tends to arise with much higher shareholdings, although a notable outlier in this respect is France, where certain actions require shareholder unanimity (although this is the case only in relation to very specific actions).

However, it should be noted that there is nothing in principle stopping a company acquiring 9% of a target being granted the sort of veto rights typically associated with higher shareholdings. The findings of this study are based on tendencies to grant such rights, and whether such rights are typically granted. Caution should thus be exercised when placing too much reliance on thresholds. Similarly, it is likely that many acquisitions of shareholdings of more than 10% satisfy the criteria of being mainly held for investment purposes and not giving rise to the possibility to interfere with the business strategy of the target. However, on the basis of the data collected during this study, it is difficult to identify a defined threshold at any point between 10% and 25% which one might say separates passive investment from active investment. Meanwhile, there is a general acceptance that a shareholding of 25% is unlikely to be passive, which is evidence by the law or practice concerning notification of minority acquisitions at national level. Table 3 shows that, in all the jurisdictions whose regimes concerning minority acquisitions were examined, a shareholding of 25% is regarded as notifiable:

Table 3: Notification thresholds under national law or applied by NCAs

	Threshold under law or applied by NCA
UK	≥25%; <25% in certain circumstances
DE	≥25%; <25%, depending on “plus factors”
AT	≥ 25% Only <25%, if the shareholding confers on the acquirer the same level of influence that a 25% shareholder would be able to exercise.
US	Need to notify unless: ≤ 10% (≤ 15% for institutional investors); and solely for investment purposes
Japan	20%

Thus, it is proposed that a threshold of 10% could be regarded as one below which a shareholding could generally be regarded as passive, absent any indications to the contrary. This is not to state that shareholdings above 10% are not passive. However, on the basis of the data collected during this study, it is not possible to identify an appropriate, higher threshold below which it can be said a shareholding could be regarded as passive.

Abstract

The study provides support for an impact assessment concerning the review of the Merger Regulation regarding minority shareholdings. In more precise terms, the study is broken down into two interrelated but discrete topics: (topic 1) the assessment of the features of a certain number of merger control regimes, which provide for the control of minority shareholdings' acquisitions; and (topic 2) research on rights attached to different levels of minority shareholdings. Examining competition and corporate rules of other legal systems may contribute to helping the Commission appraise whether the various criticisms made to its proposal to set up a targeted transparency system are valid.

Firstly, the study examined the conditions under which acquisitions of minority shareholdings are controlled in Austria, Germany, the UK, Japan and the US. In addition, a brief overview of the regime in Brazil has been provided. Secondly, the study examines the rights granted to minority shareholders in various EU Member States (Germany, the UK, France, the Netherlands) and the US, both in law and in practice. On the basis of the data collected, the study analyses the modalities of merger control of minority acquisitions in the various jurisdictions, in order to present important considerations which any EU regime being designed should consider. Finally, the study considers whether it is possible to define a level below which shareholding might be generally considered to be passive.

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