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Accommodating Minority Shareholdings Within the European Union Merger Control Regime: Advocating a More Cooperative Way Forward

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Abstract The paper focuses upon a neglected area of EU merger control, the acquisition of minority shareholdings that have the potential to cause competitive harm at the European Union level, and which therefore should be vetted under EU law. Using economic theory and actual cases vetted by European Regulators, the paper demonstrates an EU regulatory enforcement gap in respect of the aforesaid minority shareholdings. The Commission's recent proposal to end this gap, the so-called targeted transparency system, is then critically explored, revealing that the proposed system suffers from the same problem as the EU merger control regime in respect of mergers with a potential community competition concern: neither can guarantee that nearly all the said mergers and minority shareholdings cases would be vetted under EU law. Therefore, an alternative more cooperative approach, which guarantees that virtually all such cases would come under EU law, is put forward. The more cooperative approach concerning mergers is discussed first, as the approach toward minority shareholdings is an extension of it, establishing an integrated approach. The paper demonstrates how this approach would guarantee that virtually all mergers with a potential community competition concern would come under EU law, leading to a number of positives: the near elimination of the misallocation problem and associated issues, in addition to streamlining the operation of the said architecture. Thereafter, the paper reveals how the more cooperative approach ensures that virtually all minority shareholdings with a potential to cause competitive harm at the EU level would be vetted under EU law, not only ending this enforcement gap but also leading to an architecture that is more streamlined than would be the case if the Commission's proposal became law. It is, of course, recognised that the more cooperative approach does not address the

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minority shareholdings' enforcement gap that exists at the national level, excluding the three member states which already have this vetting capability.

Keywords European Union Law · Minority shareholdings · EU merger control · Architecture of separate jurisdictional zones · Targeted transparency system · More cooperative approach

Introduction

The publication of the Commission's proposal concerning minority shareholdings[1] forming an integral part of an amended European Union Merger Regulation[2] (EUMR) makes it timely to explore this neglected area of EU merger control. Initially, using economic theory and actual cases vetted by European regulators, the paper reveals an enforcement gap in respect of minority shareholdings which cause competitive harm at the EU level. Thereafter, the Commission's proposal to end this gap, known as the targeted transparency system,[3] which intentionally fits with the EUMR's established architecture of separate jurisdictional zones, is explored. However, the paper reveals that the inability of the architecture of separate jurisdictional zones to guarantee that nearly all merger cases with a potential Community competition concern would be vetted under EU law is echoed by the Commission's targeted transparency system in respect of minority shareholdings. Therefore an alternative more cooperative approach which guarantees the aforementioned in respect of both mergers and minority shareholdings is advanced.

The more cooperative approach in relation to mergers[4] is explained first, as the approach toward minority shareholdings is an extension of it, creating an integrated approach within the architecture of separate jurisdictional zones. The paper demonstrates how this approach will guarantee that virtually all mergers with a potential Community competition concern would come under EU law, and that this leads to a number of positives: the near elimination of the misallocation problem and associated issues, in addition to streamlining the operation of the said architecture. Thereafter, the paper reveals how the more cooperative approach ensures that virtually all minority shareholdings with a potential to cause competitive harm at the EU level would be vetted under EU law, not only ending this enforcement gap but also leading to an architecture that is more streamlined than would be the case if the Commission's proposal became law. However, the paper also recognises that the more cooperative approach does not resolve the enforcement gap at member state level, with only three member states—Germany, Austria and the UK—currently having the capability under national law to vet minority shareholdings, although it may spur others to act. Of course, in the light of the referendum, the UK in the near future will no longer be a member state of the EU.

[1] European Commission White Paper COM (2014) 449 final.

[2] Council Regulation (EC) No. 139/2004 OJ L 024, pp. 1–22 (2004).

[3] *Supra* n. 1, European Commission White Paper COM(2014) 449 final, Sects. 3.2.2 and 3.2.3.

[4] Davison (2015, pp. 33–48).

The Enforcement Gap

The current EUMR, which dates from 2004, gives the Commission exclusive power to vet mergers notified to it but only if they meet certain conditions. It is one of these conditions, the concentration condition, which means that the majority of minority shareholdings with a potential Community competition concern do not fall within the remit of EU merger control, and hence EU law. Specifically, the concentration condition requires the acquisition of control whereby a person(s) or undertaking(s) acquire control, on a lasting basis, over one or more other undertakings, or parts thereof.[5] Further, the aforesaid control must confer on the acquirer the possibility of decisive influence over the target entity.[6] The classic example of this is when an undertaking acquires a majority shareholding which gives it the necessary voting rights to control the acquired undertaking. The acquisition of control under the 2004 EUMR also encompasses the situation when two undertakings establish a joint venture which performs on a lasting basis all the functions of an autonomous economic entity.[7] However, what it fails to encompass is the acquisition of a minority shareholding unrelated to control in the above sense, even though the shareholding could have the ability to cause competitive harm.

In these cases, the Commission has no legal authority to investigate the matter on competition grounds. The only exception to this relates to a merger notification to the Commission concerning a separate acquisition of control. In such a notification, the Commission can investigate a minority shareholding already held by a party to the proposed merger, be it held in a competitor or acquired in an up-stream or down-stream firm. However, this possibility is restricted by EU merger law to notified concentrations that have been implemented (see below). Moreover, once a merger has been approved under EU law, the Commission has no power to investigate subsequent minority shareholdings acquired by the merged entity, even if they are likely to give rise to competition concerns.

Hence it appears that there is an enforcement gap in relation to the aforesaid minority shareholdings causing competitive harm at the EU level. This is also true at the member state level. In fact, only three member states have acted to address this form of competition concern within their own national merger control regimes, specifically Austria, Germany and the UK,[8] although the UK will soon not be a member state. Outside the Union, the Commission notes that many jurisdictions, such as the US, Canada and Japan, have the competence "to review similar structural links under their respective merger control rules."[9] However, the Commission's case for ending the aforesaid enforcement gap does not simply rest on the fact that other jurisdictions have this competence and apply it, although this is undoubtedly supportive of EU merger law being amended to encompass minority

[5] *Supra* n. 2, Council Regulation (EC) No. 139/2004 OJ L 024, (2004), Article 3.

[6] Case T-411/07, Aer Lingus Group plc v European Commission, paragraph 63.

[7] *Supra* n. 2, Council Regulation (EC) No. 139/2004 OJ L 024, (2004), Recital 20.

[8] European Commission Commission Staff Working Document SWD (2014) 221 final, paragraph 47.

[9] *Supra* n. 8, European Commission Commission Staff Working Document SWD (2014) 221 final, paragraph 47.

share acquisitions with a potential Community competition concern. Nor does it purely rest upon economic theory, which demonstrates how minority shareholdings are causally linked to various forms of competitive harm. The Commission's case also crucially rests upon actual EU and member state cases which evidence the existence of the said competition concern at the EU level,[10] and hence the need to address this enforcement gap. The paper also adopts this approach.

Economic theory demonstrates that the acquisition of control in a merger is causally linked to at least three forms of competitive harm: unilateral effects, coordinated effects and vertical effects. It has been asserted that the same holds true for certain minority shareholdings as well. In general, unilateral or non-coordinated effects, as the term suggests, arise from the merged entity having the ability, for example, to increase price and/or reduce choice based on its own market power. However, the unilateral effect is not just about the merged entity increasing price but also whether this increase leads to price increases on the part of competitors as they respond to the increased demand caused by consumers switching to them on account of the said price increase by the concentration.[11] In the case of a minority shareholding in a rival, the unilateral effect could arise when the shareholding enables the acquirer to materially influence the Board of the other company—say in respect of strategic decisions concerning the raising of capital and/or in terms of joint ventures or other forms of collaboration with third companies—which weaken its ability to compete effectively.[12]

A merger in an oligopolistic market, especially if the actions of the players in the market are transparent, and therefore quickly knowable, may increase the likelihood of coordinated anti-competitive effects. The absorption of the rival, reducing the number and relative strength of remaining competitors, as well as the said market transparency, may change the dynamic so that the incentive to coordinate behaviour transcends the willingness to engage in competitive rivalry. Such coordination may manifest as an explicit agreement between firms but it may also take the form of tacit collusion. Similarly, an undertaking acquiring a significant minority shareholding in a close competitor could increase the ability and willingness of the two involved undertakings to explicitly or tacitly engage in coordinated behaviour—particularly if the minority shareholding gave the acquirer access to the commercial secrets of its rival—so as to maximise profitability.[13] Of course, should the target undertaking seek to deviate from the said collusive behaviour, the minority shareholding may enable the acquirer to punish its rival and weaken its effectiveness as a competitor.

The aforesaid unilateral and coordinated anti-competitive effects are more associated with horizontal mergers where the firms had been competitors at the same level in an industry. Yet anti-competitive effects can also arise from vertical

[10] *Supra* n. 8, European Commission Commission Staff Working Document SWD (2014) 221 final, Sect. 3.1.1.

[11] ICN Report on Merger Guidelines (2004) Chapter 3 April 2004, Sect. 1.2. http://www.internationalcompetitionnetwork.org/uploads/library/doc561.pdf.

[12] *Supra* n. 8, Commission Staff Working Document SWD (2014) 221 final, paragraph 51.

[13] *Supra* n. 8, Commission Staff Working Document SWD (2014) 221 final, paragraph 58.

mergers, where the merger takes place between complementary undertakings, one downstream and the other upstream in an industry (an electricity generator and a distributor, for example). A concern here is that the merger could lead to either input or customer foreclosure.[14] The former is when an undertaking acquires a downstream supplier and then limits or prevents the supplier selling inputs to the acquirer's rivals. The latter is when the acquired upstream company is no longer allowed to be a customer of the acquirer's competitors. Likewise, acquiring a significant minority shareholding in either an upstream or downstream undertaking could give the acquirer the ability and incentive to seek, respectively, customer foreclosure or input foreclosure regarding competitors.

Ryanair/Aer Lingus and Other Cases

Of course, using economic theory to demonstrate that certain minority shareholdings can theoretically lead to competitive harm is one thing; using EU and national competition cases is another. The latter are important for several reasons: in confirming the limited scope of the EUMR in relation to the said minority shareholdings; in demonstrating how these shareholdings are able in practice to cause competitive harm at the EU level; and in establishing that the enforcement gap at the EU level is not just a theoretical possibility but a reality. This in turn supports the Commission having powers under an amended EUMR to vet such cases, thereby ending the stated gap. Within this context, the Ryanair/Aer Lingus case is arguably the most prominent example of a minority shareholding giving rise to horizontal unilateral effects of competitive harm.[15]

Ryanair started buying a substantial number of Aer Lingus shares on the 27th September 2006 and by the 5th October 2006 it held a 19.1% stake in its rival.[16] On that same day, Ryanair announced its intention to make a public bid for the remainder of Aer Lingus's share capital,[17] which, if successful, would give Ryanair control of its rival. As part of its plan to acquire control, Ryanair continued to purchase shares during the bid period. Therefore, the Commission treated Ryanair's shareholding bought just prior to and during the bid process and the public bid itself as a single concentration under EU merger law.[18] Moreover, because the public bid would give the proposed merger a community dimension, as it met certain sales thresholds as specified by the EUMR,[19] Ryanair was required to notify the concentration with the Commission, which it did on the 30th November 2006. In the meantime, Ryanair continued to purchase shares in its rival so that it held 25.17%

[14] Miguel de la Mano Vertical and Conglomerate Effects undated Chief Economist Team, European Commission, slide 11. http://ec.europa.eu/dgs/competition/economist/delamoni.pdf.

[15] Koppenfels (2015, p. 13).

[16] Competition Commission Ryanair Holdings plc and Aer Lingus Group plc 28 August 2013, Summary, paragraph 4.

[17] *Ibid* n. 12, p. 11.

[18] Commission Decision of 27/06/2007 Case No COMP/M. 4439 – Ryanair/Aer Lingus, paragraph 12.

[19] *Supra* n. 2, Council Regulation (EC) No. 139/2004 OJ L 024, (2004), Article 1.

by the 28th November 2006,[20] and this remained the position until August 2007. In June 2007, the Commission, on competition grounds, prohibited the merger as incompatible with the common market.

The Commission prohibited Ryanair's takeover of Aer Lingus because it would have led to the creation of a monopoly or high market shares (above 60%) on routes between 35 European destinations and Ireland[21] that would have significantly impeded effective competition, especially as on many of these routes the two airlines were the competitive constraint on each other. However, the issue of Ryanair's minority shareholding remained, also the claim by Aer Lingus that it caused significant unilateral negative effects on competition between the two rivals,[22] and, because of these claimed effects, it wanted to know if the Commission had the power to order Ryanair to divest or dissolve this shareholding. In fact, in the prohibition decision, the Commission had not investigated the minority share issue, precisely because it believed it lacked the power to do so under EU merger law.[23] Aer Lingus brought the matter before the EU's General Court (GC), whose ruling of the 6th July 2010 was supportive of the Commission's interpretation of the law.

The GC confirmed that the Commission's regulatory power is restricted to concentrations as defined by EU law. More precisely, a concentration is deemed to exist when there is a change of control on a lasting basis, which confers the possibility of exercising decisive influence on the acquired, particularly in relation to the strategic decisions of the latter.[24] Therefore the Commission can only assess minority shareholdings when associated with such a change of control. According to the court, Ryanair's minority shareholding, at the time of the Commission's decision, did not give rise to such a change, and hence the ability to have a decisive influence.[25] Moreover, given that the takeover was prohibited, it could not result in a change of control on a long term basis. On this matter in relation to the minority shareholding, the GC declared that, "from the moment when the decision finding… was adopted, it was no longer possible for Ryanair, *de jure* or *de facto*, to exercise control over Aer Lingus or to exercise decisive influence on the undertaking."[26]

However, the matter is more complicated than the above suggests, for it also requires an understanding of the scope of dissolving share ownership within a concentration under EU merger law, and this was addressed in the aforesaid case by the GC. It ruled that the Commission has the power to require an undertaking to dissolve a concentration through the divestment of shares purchased in the other company, but only after the concentration has been deemed incompatible with the common market and that it has also been implemented, so that the acquired undertaking has ceased to be independent of the acquirer.[27] The scale of the

[20] *Supra* n. 14, COMP/M. 4439 – Ryanair/Aer Lingus, paragraph 11.

[21] European Commission Press Release 1P/07/893 Brussels, 27th June 2007.

[22] *Supra* n. 6, Case T-411/07, paragraph 46.

[23] *Supra* n. 6, Case T-411/07, paragraph 19.

[24] *Supra* n. 6, Case T-411/07, paragraph 63.

[25] *Supra* n. 6, Case T-411/07, paragraph 69.

[26] *Supra* n. 6, Case T-411/07, paragraph 61.

[27] *Supra* n. 6, Case T-411/07, Paragraph 59.

minority shareholding Ryanair held in Aer Lingus meant the implementation condition was not satisfied—Ryanair never gained a controlling share interest, so in that sense, Aer Lingus remained independent—and hence the Commission lacked the power to dissolve the aforesaid minority shareholding. Despite the prohibition decision, Ryanair has continued its efforts to acquire its rival, with its third attempt being prohibited by the Commission on the 27th February 2013.[28] On appeal before the GC, Ryanair is seeking to have this prohibition annulled, and the case is still pending.

UK law, contrary to the EUMR, does accept that a minority shareholding in itself can have material influence on the target, which leads to competitive harm.[29] In fact, on the 5th June 2012, the UK's Office of Fair Trading referred Ryanair's minority stake in Aer Lingus, which then stood at 29.82%, to the Competition Commission (CC), now the Competition and Markets Authority, to determine whether it would give Ryanair the power to materially influence (control) its rival, even though it lacked a controlling share interest, and if so, whether it had led to, or was expected to lead to, a substantial lessening of competition within markets in the UK encompassing the provision of scheduled airline services on a number of direct routes between the UK and Ireland.[30]

Indeed, with the CC answering in the affirmative to both questions, the case provides an important exemplar of how a minority shareholding can give the acquirer material influence that could cause unilateral competitive harm. In this particular case, the CC concluded that the factors that would give Ryanair material influence in respect of Aer Lingus's commercial policy and strategy could also give Ryanair the ability to use this influence to significantly lessen competition in the said market. The CC believed that of particular importance among the factors which could give Ryanair material influence was the airline's ability to block special resolutions at general meetings of Aer Lingus. This blocking power gave Ryanair the ability to influence its rival's commercial policy and strategy and this was deemed by the CC to be especially important in respect of Aer Lingus's ability to combine with another airline (other than Ryanair) and to optimise its portfolio of slots at Heathrow airport.[31]

The point concerning Aer Lingus's ability to combine with a third airline was that such a combination would boost scale and thereby reduce costs/improve competitiveness, thus enabling Aer Lingus to become a more effective competitor to Ryanair on the said routes. This, therefore, would not be in Ryanair's interest, a position reached by the CC.[32] However, the aforesaid blocking powers gave Ryanair the ability to impede or prevent such a cross-border merger with a third airline, as

[28] European Commission Press Release Mergers: Commission prohibits Ryanair's proposed takeover of Aer Lingus Brussels, 27 February 2013.

[29] Enterprise Act 2002, Chapter 1, 22(1), 23(1) and 26(3).

[30] [2015] EWCA Civ 83 Case Number: 1219/4/813: [2014] CAT 3, paragraph 7.

[31] *Supra* n. 12, Competition Commission Ryanair Holdings plc and Aer Lingus Group plc, paragraph 4.42.

[32] *Supra* n. 12, Competition Commission Ryanair Holdings plc and Aer Lingus Group plc, paragraphs 7.179 and 7.178.

well as Aer Lingus's capability to make capital changes that might be needed to acquire or merge with an airline other than Ryanair.[33] Furthermore, the CC found evidence that Ryanair's minority shareholding itself made merging or a joint venture with Aer Lingus less attractive to third airlines than would have been the case without the shareholding.[34]

The CC determined that Ryanair's incentive to carry out the aforesaid unilateral behaviour largely stemmed from the fact that the two airlines were close competitors, with Aer Lingus being Ryanair's only competitor on a number of the aforementioned routes, thereby providing the competitive constraint on Ryanair. In other words, it was in Ryanair's interest to use its minority shareholding to weaken the effectiveness of its close rival concerning the routes in question. Moreover, the CC argued that Ryanair had a further incentive to weaken its rival if it made it easier to take over the company, bearing in mind that Ryanair's declared intention was to fully acquire Aer Lingus.[35] The aforementioned helped the CC reach the conclusion that the said minority shareholding had led or was expected to lead to a substantial lessening of competition in the stated market.[36] The remedy required by the CC was that Ryanair must reduce its shareholding in Aer Lingus to 5%, not seek or accept Board representation or acquire further shares in its rival.[37] This therefore would prevent Ryanair having material influence over Aer Lingus.

Fortunately—though not for Ryanair—the UK is one of a small number of European countries whose regulator can vet such a minority shareholding on competition grounds under its merger law. Yet it could only vet the flights between Ireland and the UK, and not the routes between Ireland and mainland Europe on which Ryanair and Aer Lingus competed. In other words, this suggests that the case had a potential Community competition concern and that possibly the Commission would be the more appropriate regulator to make the assessment. Of course, and as already noted, the current EU merger law would not allow this.

However, EU merger law has allowed the vetting of minority shareholdings when linked to separate concentrations that have been notified to the Commission and, in some instances, the minority shareholdings have raised or contributed to vertical, unilateral or coordinated effects of competitive harm. One such shareholding, which potentially could have led to vertical input foreclosure regarding the only non-propriety technology for melamine production, was associated with IPIC's (International Petroleum Investment Company) acquisition of MAN Ferrostaal. IPIC's subsidiary AMI (Agrolinz Melamine International) was a high grade melamine producer whose main rivals in the EU market were DSM and ZAP;

[33] *Supra* n. 12, Competition Commission Ryanair Holdings plc and Aer Lingus Group plc, paragraph 7.32.

[34] *Supra* n. 12, Competition Commission Ryanair Holdings plc and Aer Lingus Group plc, paragraph 7.80.

[35] *Supra* n. 12, Competition Commission Ryanair Holdings plc and Aer Lingus Group plc, paragraph 7.20.

[36] *Supra* n. 12, Competition Commission Ryanair Holdings plc and Aer Lingus Group plc, paragraph 7.188.

[37] *Supra* n. 12, Competition Commission Ryanair Holdings plc and Aer Lingus Group plc, paragraph 8.121.

however, unlike DSM and AMI, ZAP and smaller producers lacked their own propriety technology.[38] Eurotecnica was the licensor of the only non-propriety high—pressure technology available[39] and MAN Ferrostaal held a 30% stake in the company which, if the concentration was approved, would belong to IPIC.

The Commission concluded that the 30% stake would give IPIC both the ability and the incentive for input foreclosure of Eurotecnica's said technology to AMI's competitors.[40] This ability stemmed in part from Eurotecnica's majority voting provisions that, going beyond the normal scope to protect minority rights,[41] IPIC could invoke to influence Eurotecnica's licensing of the said technology to AMI's rivals,[42] potentially limiting their capacity expansion or deterring entry,[43] or requiring them to enter a joint venture with AMI. Furthermore, the Commission determined that the minority shareholding was likely to have a substantial deterrent effect on potential licensees as they would have to provide Eurotecnica with "voluminous information"[44] that could end up in the hands of their rival, AMI.

The Commission declared that the incentive to foreclose was premised on whether it would increase profitability for IPIC.[45] The Commission estimated that it would, with the loss of profit to IPIC from Eurotecnica's foreclosure of its technology licensing in the upstream market being more than matched by the resulting extra profit gained by AMI in the downstream market for melamine. This was because the upstream profit loss was relatively small, given that the return on each project would be rather limited; moreover, IPIC's share would only be a fraction of this loss, based on its 30% stake in Eurotecnica.[46] In contrast, the downstream profit gain could be significant on account of AMI's large presence in the market combined with the impact of the said upstream foreclosure[47]: the impact being a reduction of potential competitors in the downstream market, enabling AMI to increase either price or sales.

The Commission determined that similar but coordinated effects were likely from the creation of a symmetrically dominant duopoly in the German wholesale electricity market, arising from the merger of VEBA and VIAG, notified to the Commission, and the merger of RWE and VEW, which was vetted under German merger law by the Bundeskartellamt. A contributing factor or structural link facilitating coordination was the duopoly's holding of controlling and non-controlling shareholdings in other regional and local power concerns, leading the Commission to conclude that "Meaningful competition is not therefore to be

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[38] Commission Decision 13.03.2009 Case No COMP/M. 5406 – IPIC/MAN FERROSTAAL AG, paragraph 30.

[39] *Ibid* n. 34, paragraph 34.

[40] *Ibid* n. 34, paragraph 47.

[41] *Ibid* n. 34, paragraph 37.

[42] *Ibid* n. 34, paragraph 38.

[43] *Ibid* n. 34, paragraph 41.

[44] *Ibid* n. 34, paragraph 39.

[45] *Ibid* n. 34, paragraph 43.

[46] *Supra* n. 34, paragraph 45.

[47] *Supra* n. 34, paragraph 45.

expected from these interconnected power companies."[48] Hence, in order to give approval to the VEBA/VIAG merger, the Commission sought the divestment of many of these shareholdings, both to reduce the likelihood of coordination and to encourage and enable competition in the sector. An exemplar of this was the position of VEAG, with RWE Energie AG holding 26.52% of its shares, VEBA 26.25% and VIAG22.5%.[49] The Commission therefore sought the divestment of these three minority shareholdings, dissolving a link between the said companies that potentially encouraged parallel behaviour and, of course, enabled VEAG to become an independent competitor.[50]

These cases evidence the need for minority shareholdings with a potential Community competition concern to be vetted under a suitably amended EUMR, thereby ending this particular enforcement gap. The next section examines such a proposal put forward by the Commission.

The Commission's Proposal

In order to be able to vet minority shares causing competitive harm at the EU level, the Commission has proposed to incorporate this capability into an amended EUMR. In other words, the vetting of the aforesaid minority shareholdings would fit into the already established architecture of separate jurisdictional zones which has underpinned the EU merger control regime from when it became law in 1990.[51] Its amendment in 1997[52] and the current 2004 EUMR have sought to improve the working of the architecture in practice. The architecture of separate jurisdictional zones requires those mergers—and, if the Commission's proposal became law, those minority share holdings—with a potential cross-border or Community competition concern to be vetted under EU law, while those with a potential competition concern isolated within a national market would be the responsibility of the relevant member state. Moreover, as is the position now for EU merger cases, future minority shareholdings caught under EU law would be vetted by the Commission alone, subject to review by EU courts.

Therefore the architecture of separate jurisdictional zones appears to meet the valued one-stop shop approach whereby a case is vetted either by EU or member state law but not by both, so that the involved parties do not face the burden and uncertainty of multiple regulatory notification and assessment. Moreover, the architecture appears to satisfy the EU's subsidiarity principle as it seems to guarantee that a case with a potential EU competition concern comes under EU law and is vetted by the Commission, while those with an isolated competition concern within a member state will be vetted under that state's law. Furthermore, the architecture appears to meet the Commission's more appropriate authority goal,

[48] Commission Decision of 13 June 2000 Case No COMP/M. 1673-VEBA/VIAG, paragraph 96.

[49] *Ibid* n. 44, paragraph 215.

[50] *Ibid* n. 44, paragraph 229.

[51] Council Regulation (EEC) No 4064/89 OJ L 395, pp. 1–12, Article 25. (1989).

[52] Council Regulation (EC) No 1310/97 OJ L 180, pp. 1–6. (1997).

whereby the Commission's Competition Directorate, having the resources and experience, vets the major cross-border cases while a national regulator, with its local expertise and knowledge, vets this type of case.

The Commission's proposed amendments, which would see the EUMR gaining a new capability in respect of the said minority shareholdings, are unsurprisingly in tune with the architecture of separate jurisdictional zones. Indeed, given this, it was to be expected that the three principles concerning the design and operation of this new capability, put forward in the 2014 White Paper, *Towards more effective EU merger control* (hereafter the 2014 White Paper) substantially reflect or fit in with this architecture. The first principle requires that operationally this new capability must be able to capture minority shareholdings which have the potential to cause competitive harm at the EU level,[53] and therefore are to be vetted under EU law; the second principle requires that the administrative requirements associated with the new capability should be neither unnecessary nor disproportionately burdensome for either the companies involved, the Commission or national competition authorities (NCAs)[54]; and the third principle requires that the working of this capability must fit with the merger control regimes currently in place at the EU and member state levels,[55] in line with the above mentioned architecture.

Of course, for the architecture of separate jurisdictional zones and principles one and three to work in practice, an accurate jurisdictional subsidiarity test is necessary. The EUMR has two primary jurisdictional subsidiarity tests,[56] termed the Community Dimension tests (CD tests), and if a merger is caught by either CD test, it is deemed to have a potential Community competition concern and hence comes under EU law. Those merger cases that are not caught by either of the two CD tests are deemed to lack a Community impact and are therefore of member state interest. However, past experience has revealed that the two CD tests, on account of their form-based numerical nature, lack the diagnostic sensitivity to almost always capture those mergers with a potential Community competition concern, and some of the merger cases they have caught turned out to have not a Community but a member state competition concern.[57] Such misallocation—hence termed the misallocation problem—therefore inverts the principle of subsidiarity and runs counter to the Commission's more appropriate authority goal. Moreover, some of the missed merger cases with a potential Community concern have then notified with two or more national merger regimes which runs counter to the one-stop shop approach. In fact, the Commission has not only acknowledged the existence of this misallocation problem but, through the use of two referral mechanisms—the pre and post-notification correctives (see below)—has also sought to prevent misallocation or have the merger cases correctly reallocated.

Yet despite the CD tests' deficiency as an accurate allocative system, the Commission's proposal for an amended EUMR would see their employment as a

[53] *Supra* n. 1, European Commission White Paper COM (2014) 449 final, paragraph 42.

[54] *Supra* n. 1, European Commission White Paper COM (2014) 449 final, paragraph 42.

[55] *Supra* n. 1, European Commission White Paper COM (2014) 449 final, paragraph 42.

[56] *Supra* n. 2, Council Regulation (EC) No. 139/2004 OJ L 024, pp. 1–22 (2004), Article 1.

[57] For a fuller treatment see: Davison (2015, pp. 31–46) *supra* n. 4.

jurisdictional test when determining the allocation of minority shareholding cases to either EU or member state law, but only as the first part in a two part jurisdictional sequence to determine which minority shareholdings have a potential Community competition concern. In other words, the 2014 White Paper recognises that a second jurisdictional test, operating in conjunction with the CD tests, is a necessity to judge more accurately which minority shareholding cases have a Community concern. Procedurally, therefore, minority share cases satisfying one of the two CD tests would not, as is usual in similar merger cases, automatically notify with the Commission; but instead the involved parties (the acquirer and target) would face a "competitively significant link"[58] assessment to determine if the case had a potential Community competition concern, in line with principle one.

This assessment is at the heart of what the Commission terms the targeted transparency system, with a competitively significant link requiring the meeting of two elements. First, and shaped by the aforementioned theories of competitive harm and the past experience of the Commission and NCAs, a strong competitive link between the acquirer and the target is a necessity, be it horizontal or vertical.[59] Second, to help ensure that this link is indeed significant in these cases, only minority shareholdings of around 20% or above, or between 5 and 20% but tied to associated factors which give the acquirer special rights such as a blocking veto on board decisions, a seat on the board of directors or access to business sensitive information, will meet the jurisdictional test.[60] The importance of these factors in enabling the acquirer to achieve decisive influence over its target has already been demonstrated and clearly such channels of influence can be just as important for minority shareholdings of 20% or above as they are for those between 5 and 20%. Holding below 5% is viewed as a safe harbour, with such minority shareholdings not being viewed as a competitively significant link and therefore falling outside the jurisdictional capture of the test.[61]

Under the proposed targeted transparency system, the potential acquirer has to decide if the minority shareholding qualifies as a competitively significant link and, if so, would be legally required to submit an information notice to the Competition Directorate.[62] The notice has two important dimensions. First, it would enable the Competition Directorate to determine whether further investigation of the proposed transaction was warranted, and, if it was, then the concerned parties would have to submit a full notification (i.e., submit a full Form CO). Second, as the information notice would be communicated to member states, it would enable a member state to action a referral request if appropriate (see below). In addition to this, the Commission was also considering a fifteen working day waiting period once an information notice had been submitted, during which the proposed transaction would be on standstill and therefore could not be implemented.[63] Of course—such

[58] *Supra* n. 1, European Commission White Paper COM (2014) 449 final, paragraphs 45 and 46.

[59] *Supra* n. 1, European Commission White Paper COM (2014) 449 final, paragraph 47.

[60] *Supra* n. 1, European Commission White Paper COM (2014) 449 final, paragraph 47.

[61] *Supra* n. 8, European Commission Commission Staff Working Document SWD (2014) 221 final, paragraph 79.

[62] *Supra* n. 1, European Commission White Paper COM (2014) 449 final, paragraph 49.

[63] *Supra* n. 1, European Commission White Paper COM (2014) 449 final, paragraph 50.

as in a case when a minority shareholding fails to submit the required information notice, and irrespective of whether or not it has been implemented—the Commission could initiate an investigation or respond to complaints.[64]

As its name indicates, and as the Commission intended, the targeted transparency system is highly transparent and targeted in line with the above-stated three principles. If notification was simply based upon meeting one of the two CD tests, as is the case with mergers (unless the pre-notification referral mechanism is triggered), then it would be highly transparent but not sufficiently targeted, as the tests would capture all types of minority shareholdings—including those that lacked a competitively significant link, as well as some whose competition concern was within a member state—and therefore not just those that had a potential Community competition concern. Moreover, in capturing all types of cases, a pointless administrative burden would be placed both on those aforesaid minority shareholdings that obviously lacked a Community competition concern and on the Commission, whose resources would be wasted in reviewing these cases to reach a conclusion that no such concern existed. This, of course, runs counter to principle two, which aims to avoid such unnecessary burdensome administrative tasks.

This is intentionally not the situation with the targeted transparency system. Specifically, the two elements of the competitively significant link test are transparent as well as designed to work together to target and capture primarily those minority shareholding cases with a Community competition concern (in line with principle one) and thereby eliminate needless administrative tasks related to those not deemed suitable for capture, and of course the Commission will not have to review them (in line with principle two). In addition, and again in line with principle two, those cases that meet a CD test and satisfy the competitively significant link test will complete an information notice that is pared down to the essential information that the Commission needs to determine whether the case requires further investigation under EU merger procedures.[65] If so, then the parties will have to complete the more informationally demanding Form CO. Such cases, in satisfying the said jurisdictional tests, would therefore be vetted under EU law. Of course some of those not caught under EU law may still be captured by those member states that have a minority shares component as part of their merger regimes and hence be dealt with under their respective law (in line with principle three). This therefore appears supportive not only of the valued one-stop shop approach but also of the EU's principle of subsidiarity and the Commission's more appropriate authority goal.

Yet the Commission's proposal regarding minority shareholdings is not concern-free in relation to its operational effectiveness. One concern is whether the proposed pared down information notice—pared down in terms of the range and depth of information required from the involved parties—would provide the Commission with the information it required to be able to determine if a case warranted further investigation and which a member state required to reach a conclusion as to whether

[64] *Supra* n. 1, European Commission White Paper COM (2014) 449 final, paragraph 51.

[65] *Supra* n. 1, European Commission White Paper COM (2014) 449 final, paragraph 57.

or not to request referral to its jurisdiction. The Commission must therefore ensure that the information notice does indeed provide all the required information. A possibly more significant concern is regarding the operational ability of the proposed two stage jurisdictional tests to fulfil their function. The concern is twofold: first, that the tests will capture not only minority shareholdings with a Community competition concern, but also a few that have an isolated competition concern within a member state; second, that they will miss some minority shareholdings that have a potential Community competition concern.

The Commission has estimated that between twenty and thirty minority share cases per year will be caught by the CD tests and the competitively significant link test,[66] and if this turns out to be accurate, it is likely that a small number of these would have a purely national competition concern and therefore should be dealt with at the national level under member state law. This relatively small scale matter is recognised by both the 2014 White Paper and the associated Commission Staff Working Document and their common solution is that a decentralisation corrective would apply in these cases (the latter explicitly states it is the Article 9 EUMR referral route[67]), whereby a member state, acting on the information notice provided by the parties, would request referral to its jurisdiction. This process would not add any further administrative burden on the parties providing the information notice and therefore is in line with principle two. Moreover, the proposed fifteen working days waiting period (see above) would also act as the time period within which a request for referral could be made. Furthermore, as the referral cases are not implemented, the NCAs will not face the potential problem of unscrambling them. Thus, in line with principle three, the operation of the referral mechanism is intended to fit with and support member state merger regimes.

However, and this is understood by the Commission, the referral system is only operable with the three member states whose merger regimes allow the capture of minority share cases—Germany, Austria, and currently the UK. Thus, the system is flawed in that the majority of NCAs are not in a position to make referral requests. Given this, will the Commission vet these cases that should be decentralised if this were possible, or are they to go unregulated? The former, of course, runs counter to principle three, the principle of subsidiarity, and fails to sit with the current interpretation of the more appropriate authority goal; but this may be more acceptable than the latter which is the failure to regulate. Indeed, this is the position taken by the more cooperative approach, as explained below.

The above relates to minority share cases caught by the two stage jurisdictional tests but which have an isolated national competition concern. However, past experience in relation to merger cases reveals that the more serious issue was the volume of cases with a potential Community competition concern that were missed by the two CD tests, often for them to be vetted by two or more NCAs under their respective domestic law, running counter to the one-stop shop approach and the

[66] *Supra* n. 8, European Commission Commission Staff Working Document SWD (2014) 221 final, paragraph 85.

[67] *Supra* n. 8, European Commission Commission Staff Working Document SWD (2014) 221 final, paragraph 83.

principle of subsidiarity. This too could be a serious issue in relation to minority shareholdings, although neither the 2014 White Paper nor the associated Commission Staff Working Document estimate the likely scale of the problem. However, the outcome would be different from that of mergers in this situation, because as the great majority of member states have no capability in the field of minority shareholdings, many would escape vetting at this level, having already been wrongly missed at the EU level.

Of course, a few of the aforesaid minority shareholdings with a potential Community competition concern but missed by the CD tests might be caught by one or more of the three member states that have the necessary vetting capability under their domestic law. Although this runs contrary to principle one and the subsidiarity principle, the Commission has not proposed a preventative or corrective to ensure that these cases are duly vetted under EU law by the Competition Directorate. This might be viewed as puzzling, for not only has the Commission advocated the Article 9 EUMR decentralisation corrective for minority shareholdings with a member state competition concern caught by the CD tests and the competitively significant link assessment, but it also has considerable experience in pioneering centralisation referral mechanisms, in particular the post-notification Article 22 EUMR route and the pre-notification 4(5) EUMR route in respect of mergers.

The material point is that the more cooperative approach, unlike the Commission's proposal, would guarantee that virtually all mergers and minority shareholdings with a potential Community competition concern would be vetted under EU law, and that the need for the current EUMR referral mechanisms would be ended. The next section therefore turns its attention to the more cooperative alternative.

The Original, More Cooperative Alternative

As the paper argues for the recently proposed more cooperative approach in respect of mergers[68] to be extended and modified to encompass minority shareholdings, creating an integrated approach to the regulation of both at the EU level, it is necessary to articulate the key workings of this approach as originally proposed for mergers, and hence why it should be adopted. It will be seen that the more cooperative approach does not in fact replace the architecture of separate jurisdictional zones but aims to make it more operationally effective in relation to mergers. Specifically, by nearly eliminating the misallocation problem and associated issues, it would be supportive of the principle of subsidiarity, the one-stop shop and a reinterpreted more appropriate authority goal. A further positive is that the need for cumbersome referral correctives is brought to an end, thereby streamlining the working of the said architecture. Thereafter, in the following section, it will be explained why the more cooperative approach has to be modified, whilst retaining a high level of commonality with the original cooperative approach, in order to create a system that will virtually guarantee that minority shareholdings

[68] See Davison (2015) *supra* n, 4. See also Davison (2013, pp. 105–122).

with a potential Community competition concern will be vetted under EU law and, of course, the positives which flow from this.

Under the original, more cooperative approach, the retention of the two CD tests may appear puzzling as they are the source of the misallocation problem that has dogged the architecture of separate jurisdictional zones from the outset. In this context, misallocation occurs when a merger with an isolated national competition concern is not vetted under the law of the relevant member state but under EU law. Similarly, misallocation occurs when a merger with a potential Community competition concern is not vetted under EU law but under the national law of one or more member states. However, the advantage of retaining the two CD tests is that they have an acknowledged record of principally capturing merger cases with a potential Community competition concern,[69] which therefore should be vetted under EU law. However, while the tests principally capture such cases, a few cases with only a potential isolated national competition concern have also been caught and centralised to Brussels and EU law, when they should be vetted under national law. Even more worrying, however, is that the CD tests have failed to capture a considerable volume of merger cases that had a potential Community competition concern, which should been vetted under EU law but ended up under the law of one or more member states, creating the so-called multiple notification issue.[70]

In fact, the misallocation problem was a direct consequence of the form-based nature of the two CD tests. Because they are purely based on the merging parties meeting or failing to meet specific sales turnover thresholds, including Community–wide and global, the CD tests lack the necessary diagnostic capability to nearly always accurately determine whether a merger has a potential Community or national competition concern, and hence whether it should come under EU or member state law.[71] In addition, a small number of cases with a potential Community concern were misallocated to member state level jurisdiction because they met the two-thirds rule of the Community–wide sales turnover threshold, a version of which is found in both tests.[72] In the original or first CD test, for example, even when the other thresholds for a CD are met, for a merger to become a national concern, not only must two of the parties in the proposed merger each have a Community-wide turnover that exceeds Euro 250 million but also two-thirds of this turnover should be in one and the same member state.[73]

The misallocation problem is a serious matter because, in such cases, the principle of subsidiarity is inverted and the Commission's more appropriate authority goal is not met. Moreover, in those cases with a potential Community concern that have been missed by the tests, a significant number will face the cost and burden of multiple notifications—and hence multiple investigations—at member state level, which clearly runs counter to the one-stop shop approach.

[69] European Commission Staff working paper {COM (2009) 281 final}/*SEC/2009/0808 final/2*/, paragraphs 34 and 43.

[70] *Ibid* n. 65, paragraphs 51–53.

[71] *Supra* n. 4, Davision (2015, p. 36).

[72] *Supra* n. 2, Council Regulation (EC) No. 139/2004 OJ L 024, pp. 1–22 (2004), Article 1.

[73] *Supra* n. 2, Council Regulation (EC) No. 139/2004 OJ L 024, pp. 1–22 (2004), Article 1(2).

Indeed, the Commission has taken the misallocation and notification problems so seriously as to amend the architecture of separate jurisdictional zones twice, first in 1997 and again in 2004, in order to resolve these issues.

The 1997 amendment of the then European Merger Control Regulation (MCR) saw the introduction of the second CD test and the completion of the post-notification referral mechanism or corrective[74]: the second CD test to address—and thus capture—those mergers with a potential Community competition concern missed by the original CD test, and the post-notification referral mechanism to correct any remaining misallocations made by the two CD tests. Specifically, the Article 9 MCR referral route was designed to decentralise to member states cases with only an isolated national competition concern that had been wrongly captured by a CD test; while the Article 22 MCR referral route was to centralise to the Commission mergers that had a potential Community competition concern which had been missed by the two CD tests. In each, the referral request came from the concerned member state(s). In practice, however, both the second CD test and the post-notification corrective underperformed,[75] and this was especially true in respect of merger cases with a potential Community competition concern that had been missed by the original CD test.

This underperformance was recognised by the Commission and its solution, incorporated in the new 2004 EUMR,[76] was the pre-notification corrective. As its name suggests, the referral request, this time initiated by the merging entity itself, takes place prior to notification with either the Commission or NCAs. Operating prior to notification makes the pre-notification corrective the primary corrective, with the post-notification sweeping up cases that the former had missed, and this was the Commission's intention. Moreover, it would be wrong to state that the pre-notification corrective has not prevented the misallocation of some merger cases.[77] However, it is also equally clear that the misallocation problem is far from resolved, particularly in relation to merger cases lacking a CD but having a potential Community competition concern.[78] A factor behind this is that the referral request under both the pre and post- notification correctives is not mandatory but voluntary. Moreover, the Commission has found that some merging entities did not use the pre-notification corrective because of the mechanism's cumbersome and time-consuming nature.[79] Furthermore, the specification of the jurisdictional test contained within the Article 4(5) centralisation route of the pre-notification corrective meant that some merger cases with a potential Community competition but lacking a CD fell outside the reach of the corrective.[80]

[74] *Supra* n. 48, Council Regulation (EC) No 1310/97 OJ L 180, pp. 1–6. (1997), Article 9 and 22.

[75] *Supra* n. 4, Davison (2015, pp. 38–39).

[76] *Supra* n. 2, Council Regulation (EC) No. 139/2004 OJ L 024, pp. 1–22 (2004), Article 4(4) and 4(5).

[77] *Supra* n. 65, European Commission Staff working paper {COM (2009) 281 final}, paragraph 122.

[78] *Supra* n. 65, European Commission Staff working paper {COM (2009) 281 final}, paragraphs 124–125. See also Davison (2015, pp. 40–41).

[79] *Supra* n. 65, European Commission Staff working paper {COM (2009) 281 final}, paragraph 123.

[80] *Supra* n. 4, Davison (2015, pp. 40–41).

The goal of the original more cooperative approach is to virtually eliminate the misallocation problem and associated concerns in respect of mergers, and in so doing, to streamline the architecture of separate jurisdictional zones by removing the need for the existing unwieldy correctives. For the aforesaid goal to be achieved, the more cooperative approach would require the following three linked changes to the current architecture of separate jurisdictional zones: a three or more member state notification rule, a new effects-based jurisdictional subsidiarity test,[81] and the ability of national regulators to apply EU merger law in limited circumstances. Arguably, a fourth change is the Commission having a very restricted power to vet merger cases with an isolated national competition concern under EU law; in fact, this already happens from time to time under the 2004 EUMR.

It has already been noted that a few of the mergers caught by the two CD tests lack a potential Community competition concern but instead have one that is isolated within a national market. Hence, and in line with the principle of subsidiarity, they should be decentralised to the national law of the relevant member state to be vetted. However, under the more cooperative approach such decentralisation will no longer happen because, given the small number of cases which are with Brussels anyway, it is more convenient for the Commission to vet them under EU law rather than to employ the cumbersome and time-consuming decentralisation correctives.[82] Indeed, this has the positive benefit of reducing the demand for the decentralisation routes of the pre and post-notification correctives, respectively Article 9 and Article 4(4) EUMR. This will also guarantee the one-stop shop approach in these cases.

Moreover, it is important to note that the Competition Directorate has the capability to vet the said merger cases. Because it has a history of vetting mergers that impact on a wide part or all of the Union, and thus national markets therein, the Directorate has the required experienced specialists to vet the stated mergers. Yet, when vetting such a case, the Directorate should consider seeking assistance from the relevant NCA. Indeed, such cooperation is to be encouraged, as the NCA's local experience and knowledge should complement that of the Directorate, thereby aiding effective decision-making and hence the protection of competition. Such cooperation therefore represents a reinterpretation of the Commission's more appropriate authority goal[83] and it could represent the first step toward a formalised cooperative architecture, delivering more effective decision-making than is the case under the current architecture of separate jurisdictional zones. The cooperation theme is further explored in the conclusion of this paper.

This then leaves the more serious problem of merger cases with a potential Community competition concern but lacking a CD being misallocated to member state law. The great majority of these cases are simply not caught by the two CD tests but a few are the result of the operation of the above explained two-thirds rule. In a recent review, the Commission found that, although the majority of mergers

[81] In fact Davison (2015, p.41) would employ the distinct market test as this jurisdictional test. It has the necessary effects based capabilities to carry out this function.

[82] *Supra* n. 4, Davison (2015, pp. 41–42).

[83] *Supra* n. 4, Davison (2015, p. 42).

decentralised under the two-thirds rule had a competition concern that was of national interest, a few had a potentially significant Community competition concern.[84] Under the more cooperative approach, the latter will now be vetted under EU law, following EU merger procedures, not by Brussels, but as part of an NCA's limited ability to apply this law. Similarly, mergers that lack a CD but which have a potential Community competition concern and have been notified with one or two NCAs will be vetted under EU law, again by a national regulator following the said procedures. This is in line with the principle of subsidiarity and it will also end a major source of the misallocation problem. Moreover, as these cases will no longer be misallocated, they will not require either the Article 4(5) or Article 22 EUMR centralisation routes.

To ensure the above happens in practice, all mergers decentralised by the two-thirds rule or notified to one or two national merger regimes would mandatorily be assessed by an effects-based test, like the distinct market test, to guarantee that cases with a Community competition concern are vetted under EU law, and those with an isolated national concern are dealt with under member state law. Moreover, during the 25 working days allowed for this initial assessment, echoing the time-period allowed for such investigations under EU merger law, the application of national law would be suspended.[85] This assessment is likely to lead to one of three outcomes. First—and this will probably apply to the majority of cases—no appreciable competition concern is found and the merger is deemed compatible with the common market and member state law. Second, an isolated national competition concern is found and the case is therefore vetted under the law of the relevant member state. Third, mergers with a cross-border competition concern will be vetted under EU law using EU merger procedures.

This therefore leaves those mergers which lack a CD but have a potential Community competition concern that are notified to three or more national merger regimes to have their misallocation resolved by the more cooperative approach. The solution, albeit an imperfect one, is the three or more member state notification rule, which has previously been advocated by the Commission itself,[86] reflecting its position that such a scale of notification indicates the likelihood that these mergers have a significant Community competition concern. Therefore a merger notified to at least three national merger regimes would be mandatorily centralised to Brussels and EU law.[87] Moreover, not only is this in line with the principle of subsidiarity but it also means that these mergers would now face a one-stop shop approach, ending what otherwise would have been the uncertainty and cost arising from multiple investigations at member state level. Furthermore, as these mergers relate to markets that are wider than national, often EU-wide, and occasionally global, their investigation is more suited to the expertise and experience of the Competition

[84] *Supra* n. 65, European Commission Staff working paper {COM (2009) 281 final}, paragraph 68.

[85] *Supra* n. 4, Davison (2015, p. 45).

[86] See, for example, the Green Paper on the review of the merger regulation COM(96) 19 final, 31.1.1996, paragraphs 78–80.

[87] *Supra* n. 4, Davison (2015, p. 43).

Directorate, rather than an NCA, thereby satisfying the revised, more appropriate authority goal.

Furthermore, the very fact that the rule would centralise the aforesaid cases means that the Article 4(5) and Article 22 EUMR centralisation routes would not be required in relation to this type of merger. In fact, in such cases, the adoption of the rule would streamline the working of the architecture, as a mandatory and automatic system would replace those that are voluntary and cumbrous. Indeed, combined with the fact that cases under the two-thirds rule and those caught by one or two national merger regimes will no longer be misallocated, the rule would bring to an end the need for the Article 4(5) and Article 22 EUMR centralisation referral routes. Yet the three or more member state rule is a less than a perfect solution because a few of the centralised cases may only have an isolated national competition concern, and hence should be vetted under the relevant member state law. However, as in the few similar cases caught by the CD tests, and based on the same grounds of convenience and capability, they will be vetted by the Competition Directorate under EU law,[88] accepting that this runs counter to the principle of subsidiarity, although it is supportive of the one-stop shop approach as well as the reinterpreted more appropriate authority goal. Of course it also means that such cases would not require the Article 4(4) and Article 9 EUMR decentralisation referral routes; indeed, they would be redundant. In fact, this brings to an end the need for the current EUMR correctives.

Extending a Modified Cooperative Approach to Minority Shareholdings

It is revealed in this section that a modified cooperative approach, rather than the proposal advanced by the Commission, is the more effective solution in terms of capturing and regulating minority shareholdings with a potential Community competition concern, thereby ending this enforcement gap. Specifically, the more cooperative approach, operating within the established architecture of separate jurisdictional zones, will guarantee that virtually all these cases are vetted under EU law, in line with the principle of subsidiarity. This therefore prevents the situation that would otherwise arise if the Commission's proposal became law: a number of these cases would be missed by the CD tests and therefore either avoid jurisdictional vetting entirely or be misallocated to the national law of one or more of the three member states that have this jurisdictional capability in respect of minority shareholdings (UK, Germany and Austria). Moreover, it is made evident that the design and operation of the modified cooperative approach is in tune with the Commission's three principles requirement, and it is further demonstrated that this approach, like the original in respect of mergers, has no need of the current cumbersome correctives.

The more cooperative approach concerning minority shareholdings is a modified extension of the approach outlined in the previous section concerning mergers. Hence, this approach to minority shareholdings is not standalone but intentionally

[88] *Supra* n. 4, Davison (2015, p. 44).

fits as part of an integrated architecture which encompasses both mergers and minority shareholdings. Therefore, because this is an integrated architecture and because the more cooperative approach to minority shareholdings is an extension to that proposed for mergers, they share a high degree of commonality. However, the modifications to the minority shareholdings approach, designed to enhance its operational effectiveness, mean that there are some differences too. The high degree of commonality lies in the fact that both would employ the two CD tests, enable national regulators to employ EU law in similar limited circumstances and have a three or more member state centralisation rule. A significant difference, however, is that the minority shareholdings' cooperative approach, as distinct from the case of mergers, would adopt the Commission's proposed competitively significant link assessment to help ensure its effective working. Indeed, to be in a position to guarantee that virtually all minority shareholdings with a potential Community competition concern are vetted under EU law, both the Commission and NCAs would be legally empowered to apply the competitively significant link assessment, albeit in different circumstances.

Therefore, for a minority shareholding case to be vetted by Brussels, it has to satisfy not only one of the two CD tests but also the competitively significant link assessment, which has two elements. Reflecting economic theory and past experience, the first element is targeted to ensure that only minority shareholding cases with a potential competitive link, be it vertical or horizontal, are caught. The second element seeks to guarantee the significance of the competitive link by requiring that the acquirer has a minority shareholding in the target of around 20% or above, or between 5 and 20% when tied to factors that enable the acquirer to have decisive influence over the target. Thus the two elements operate together to meet the Commission's first principle, that those minority shareholdings captured should have a potential Community competition concern. Moreover, as a result of the exclusion of shareholdings that are unlikely to have such a concern, the companies in question will not face any unnecessary administrative burden associated with notification and investigation, in line with the second principle. A further positive is that it also appears to be in tune with the principle of subsidiarity and the reinterpreted more appropriate authority goal.

On the grounds of procedural simplicity, transparency and efficiency, minority shareholdings satisfying a CD test and meeting the competitively significant link assessment would face mandatory notification with the Commission, would not implement the transaction, and would submit a completed revised Form CO; revised, because the current form is necessarily focused on mergers, not minority shareholdings. Clearly, the questions asked by the revised Form CO must be carefully selected in order not only to provide the Competition Directorate (or NCAs in certain circumstances) with the information it requires but also to guarantee that the notifying parties do not face the needless burden of answering unnecessary questions, which is in line with the second principle. The required information would necessarily include the scale of the acquired shareholding and if it involves a horizontal competitor or an upstream or downstream firm. In turn, this further requires the notifying parties to provide information about the affected markets before and after the proposed share acquisition, thereby helping the

regulator to determine if the impact on competition is significant, and its geographical scope. Moreover, so as to enable the making of a significance assessment, the acquirer would be required to provide information on special rights that accrue to it from the minority shareholding—such as a blocking veto on the target's Board—which might give it decisive or material influence over the target, and hence the ability and incentive to engage in competitive harm.

Of course, and operating within the 25 working days allowed by EU procedures, the Competition Directorate may find that a notified minority shareholding does indeed have a significant competition concern but one that is isolated within a national market. Clearly such cases have been misallocated and should be decentralised to the relevant member state for vetting under their domestic law, in line with the principle of subsidiarity. Yet the difficulty here is that the great majority of member states currently lack this vetting capability and hence decentralisation of cases to their NCAs is not a viable option, which in turn rather undermines the point of having the Commission's proposed Article 9 -type decentralisation corrective. Hence, for cases where decentralisation is not feasible, the only possibility for vetting them is if the Commission does this under EU law, and as they are already with Brussels, this is what would happen under the more cooperative approach. Given this, it is also logical for Brussels to vet the very few cases that could be decentralised to the three member states that have the said capability. Indeed, even if decentralisation were universally possible, given that the number of these cases would be small, that they are already with Brussels and that the decentralisation procedure is cumbrous, it would be more appropriate as well as convenient if the Competition Directorate regulated them.

This then leaves the issue of minority shareholdings with a potential Community competition concern that are either missed by the two CD tests or inappropriately decentralised by the two-thirds rule. The Commission's proposal is silent on guaranteeing that these minority shareholdings would be assessed under EU law, in line with the principle of subsidiarity and principle one. In fact, these shareholdings would either not be vetted at all or would be misallocated to national law. The former would happen if the concerned member state lacked the necessary domestic legal capability to assess them, which is true of the great majority, while the latter would be the case when the minority shareholdings were misallocated to the national law of one or more of the three member states that have this vetting capability. The strength of the modified cooperative approach, as is true of the original in respect of mergers, is that virtually all these minority shareholdings would in fact be vetted under EU law, and hence EU merger procedures, and this is because of the cumulative effect of three key factors: all member states adopting the stated competitively significant link test, NCAs to apply the amended EU law using EU merger procedures[89] in limited circumstances, and lastly the adoption of a three or more member state centralisation rule.

[89] There is undeniable logic in the fact that EU level merger and minority shareholding cases should come under EU merger procedural rules, irrespective of whether the vetting regulator is the Commission or an NCA. The benefit is that this helps to create a regulatory level playing field across the Union that is supportive of the SEM. The alternative, when an NCA vets the aforesaid cases under EU law, is that national rules are used, but, given that they differ from member state to member state, the outcome would

In order to guarantee that minority shareholdings with a potential Community competition concern that have been either missed by the two CD tests or are decentralised by the two-thirds rule would be caught at the national level, each member state would adopt the competitively significant link assessment as part of its national merger regime. This is in addition to each member state, other than Luxembourg, already having a sales thresholds test that to some degree reflects the CD tests,[90] although a key difference is that these national tests naturally focus upon sales concerning the national territory of the state concerned, rather than the Union. Hence, and like the two stage assessment the Commission would employ under this approach, member states would capture the aforesaid minority shareholdings using their respective thresholds test and the competitively significant link assessment. Notification would then take place with the relevant NCA(s), and the transaction would not be implemented. This then raises the question of whether it would be the relevant NCA or the Competition Directorate that makes the assessment. Under the cooperative approach, as is the case with mergers, a minority shareholding notifying with one or two NCAs would be investigated by the relevant national regulator under EU law. However, a minority shareholding notifying with three or more member states would automatically be transferred to Brussels, and the Competition Directorate would apply EU law (see below).

Hence, the competitively significant link assessment would not only meet the Commission's third principle that this assessment should fit with national merger regimes, but would also play a crucial part in enabling a member state to fulfil its limited role in the vetting of minority shareholdings with a potential Community competition concern under EU law, in line with the principle of subsidiarity—bearing in mind that these cases would otherwise be unregulated or misallocated to national law. Moreover, as these minority shareholdings notifying with one or two member states would now be correctly vetted under EU law by an NCA, their need for an Article 22 or Article 4(5) type centralisation route would be redundant. Furthermore, and importantly, the application of a standardised competitively significant link assessment by all NCAs as well as the Commission would help create a level playing field in respect of regulating the said minority shareholdings, thereby supporting the SEM.

However, it is possible that a few of the aforesaid minority shareholdings still may go unregulated, as notification under the UK merger regime, unlike that of any other member state, is voluntary,[91] not mandatory. Of course this would also be true in respect of mergers with a potential Community competition concern in the same situation. Arguably, this problem will be solved when the UK leaves the Union in

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Footnote 89 continued
be divergence and fragmentation. Indeed, there is evidence of this in respect of decentralised Article 101 and 102 TFEU cases vetted by NCAs, precisely because the procedures and sanctions are largely governed by national law. See Commission Staff Working Document Accompanying the document Communication from the Commission to the European Parliament and the Council Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives, SWD(2014) 231/2, Sects. 3 and 4.

[90] Slaughter and May (2016, Annex 1).

[91] Slaughter and May (2009, p. 1).

the near future, as it will no longer be a member state. In the unlikely event that the UK changes its mind and decides to stay in the Union, it should consider moving from a voluntary to a mandatory notification system for mergers and minority shareholdings, thereby catching the said few cases as well as helping to achieve a more level playing field across the EU on this matter.

NCAs, like the Commission, would have up to 25 working days to make the initial assessment in respect of minority shareholdings with a potential Community competition concern that come within their ambit to apply EU law. Moreover, in order for the NCAs to be in a position to make the assessment, they will require the notifying parties to provide them with certain information, and this means the latter would complete an equivalent to the earlier mentioned revised CO Form. In fact, by NCAs working together as well as with the Commission, a standardised Form could be devised and applied by all regulators, establishing a harmonised EU-wide approach that helps safeguard the SEM. The required information to be provided by the notifying parties has already been outlined and would necessarily include information on the geographical scope of the affected markets. This is key to determining if a competition concern has a Community or national dimension, and therefore if the case comes under EU or member state law. Clearly this is important for the three NCAs that have this vetting capability under their own domestic law.

For the rest—the great majority of NCAs—an investigation to determine if a captured minority shareholding had a Community competition concern would automatically reveal if the concern was in fact isolated within a national market. It is hoped that this ability to determine which cases should come under domestic law will act as a spur to the concerned member states to amend their respective domestic merger laws to encompass minority shareholdings. Yet, which member states will do so, and the varying rate of those that decide to make this amendment, remains unknown. Obviously, all member states must make this amendment to their respective merger regimes for this particular enforcement gap to be ended.

For the three existing member states which already have this capability—and accepting that the UK will leave the Union—and for those that adopt it in the near future, captured minority shareholdings that come under their jurisdiction, as with mergers in this position under the cooperative approach, face one of three probable outcomes: no appreciable competition concern and therefore approved under both EU and national law; a Community competition concern vetted under EU law and EU merger procedures; or an isolated national competition concern vetted under domestic law. Clearly, the last mentioned would not be available to an NCA where the member state has not enacted the said amendment to its national merger regime, with its minority shareholding cases that have a national competition concern continuing to be unregulated.

This then leaves to be addressed the matter of minority shareholdings with a potential Community competition concern that notify with three or more NCAs. In line with mergers in this situation under the more cooperative approach, and for the same reasons, these minority shareholdings will face mandatory and automatic centralisation to the Competition Directorate and EU law. This is because the scale of notification suggests that the likely competition concern is at a Community level, possibly EU-wide, or even global in some cases, and hence their investigation is

more suited to the resources and experience of the Competition Directorate, rather than an NCA, in line with the reinterpreted more appropriate authority goal. This therefore means that—with the exception of the few cases missed by the UK while it remains a member of the EU—all minority shareholdings with a potential Community concern that are missed by the two CD tests or wrongly centralised by the two-thirds rule will be vetted under EU law: those notifying with one or two member states by an NCA and those caught by the said rule by the Competition Directorate. This enforcement gap is de facto ended.

Furthermore, the three or more NCA notification rule appears to satisfy both the Commission's first principle and the principle of subsidiarity, as well as ensuring that the concerned parties face a one-stop shop approach, in line with the second principle. Moreover, because the rule is mandatory and automatic, it leads to a more streamlined architecture in practice than if the voluntary and administratively cumbersome Article 4(5) EUMR centralisation corrective were adopted. In fact, the three or more member state notification rule ends the need for either the Article 4(5) or Article 22 EUMR centralisation route for these cases. Indeed, when combined with the fact that minority shareholdings with a potential Community competition concern that are notified with one or two NCAs will now be vetted under EU law at member state level, the rule ends the need for either of the aforesaid centralisation correctives, as is also true of mergers under the more cooperative architecture.

Yet, and unsurprisingly, the three or more member state rule concerning minority shareholdings has the same flaw as the identical rule in respect of mergers under the more cooperative approach. Specifically, a small number of the minority shareholdings centralised to Brussels under this rule will not have a Community competition concern but one that is isolated within a member state. As with minority shareholdings with a national competition concern caught by the two CD tests, and for the same reasons (see above), these shareholdings will be vetted by the Competition Directorate under EU law. This, of course, is not consistent with the principle of subsidiarity but this is largely overridden by the fact that the great majority of member states have no capability to carry out the vetting of minority shareholdings under their own law. However, it is consistent with the vetting of mergers in this situation under the more cooperative approach. Moreover, it not only fits the reinterpreted more appropriate authority goal, but is also in tune with the one-stop shop approach. Furthermore, because the aforesaid minority shareholdings caught by either the CD tests or the three or more member state notification rule are to be vetted by the Competition Directorate, the Commission's proposed Article 9 EUMR decentralisation corrective is unnecessary. In fact, this ends the need for any of the current EUMR decentralisation and centralisation correctives, as is also true in respect of mergers under the more cooperative approach.

Conclusion

The paper has explained in detail how the envisaged extension of the more cooperative approach to the field of minority shareholdings would ensure that virtually all such shareholdings with a potential Community competition concern

would be vetted under EU law and EU merger procedures, thereby ending this enforcement gap. In particular, it has demonstrated how the various components of the more cooperative approach—including both the Commission and each member state merger regime adopting the targeted competitively significant link assessment, a standardised Form that will be used by all the aforesaid regulators, the three or more member state notification rule, as well as the Competition Directorate and NCAs applying EU law using EU procedures, albeit intentionally in different circumstances—cumulatively link to guarantee that the aforesaid minority shareholdings would be vetted under EU law, in line with the principle of subsidiarity. Moreover, as demonstrated, the Commission's minority shareholding proposal would be unable to achieve this.

Other positives would also arise: first, the adoption of the competitively significant link assessment by the said regulators will help guarantee that only minority shareholding cases with a likely Community competition concern are caught, thereby ensuring that the rest—the majority—do not face the burden of an unnecessary notification and initial investigation, and of course the regulators wasting time and resources in carrying it out. This therefore appears to satisfy the EU's Competition Commissioner, Margrethe Vestager's, condition that the jurisdictional minority shareholding test is able to get at the "needles, without toppling the haystack".[92] Second, because the Competition Directorate and NCAs would use a standardised competitively significant link assessment and a standardised Form, in addition to both using EU procedures in minority shareholding cases with a potential Community competition concern, consistency of approach across the Union is made all the more likely, supporting the SEM. Third, the more cooperative approach to minority shareholdings generally meets the reinterpreted more appropriate authority goal. Finally, and importantly, the more cooperative approach concerning minority shareholdings, as with mergers under this approach, would have no requirement for the current cumbersome correctives, thereby streamlining the working of the architecture of separate jurisdictional zones.

Yet for the more cooperative approach to work effectively in practice—and this is true of both mergers and minority shareholdings—greater cooperation between regulators is essential. Indeed, such cooperation is a necessity to ensure consistent decision-making in the application of EU law in this field, thereby helping to protect competition at the EU level, which in turn buttresses the SEM. In fact, this type of cooperation already successfully exists in a related field of EU competition law—the application of 101 and 102 TFEU.[93] The more cooperative approach envisages three strands of cooperation between regulators, and for this cooperation to work in practice, it is necessary for the involved regulators to be able to share information provided by the concerned parties. This right of access would therefore be enshrined in law.

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[92] Vestager. 2016. Refining the EU merger control system SPEECH *Studienvereinigung Kartellrecht,* Brussels, 10 March 2016.

[93] *Supra* n. 85, Commission Staff Working Document Accompanying the document Communication from the Commission to the European Parliament and the Council Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives, SWD(2014) 231/2, paragraphs 3–5.

The first strand of cooperation has already been explained and it relates to minority shareholding and merger cases centralised to Brussels by the two CD tests and the three member state notification rule that only have an isolated national competition concern. Clearly, the principle of subsidiarity requires that these cases should be dealt with under the relevant member state law. However, given that these cases are few in number and are already with the Competition Directorate, which has the specialists to vet them, albeit under EU law, there is a logic and convenience for having them remain with Brussels. This is reinforced in relation to such minority shareholding cases by the fact that the great majority of member states lack the domestic capability to vet them. However, the Competition Directorate, when vetting such a merger or minority shareholding case, would be expected to cooperate with the relevant NCA, benefitting from the latter's local knowledge and expertise. Moreover, this cooperation with the Competition Directorate would enable NCA staff to gain experience in applying EU law in minority shareholding cases, an experience that would aid them when applying this law in similar cases that came under their jurisdictional ambit as part of the more cooperative approach. This is clearly in tune with the reinterpreted more appropriate authority goal.

The second and third strands of cooperation concern those merger or minority shareholding cases captured by either the one or two member state notification rule or the two-thirds rule that are to be vetted by NCAs using EU law. When such a case has a serious cross-border competition impact, then the two concerned NCAs would act a single team in relation to its investigation and conclusion, in line with the one-stop shop approach. Further, as intended by the reinterpreted more appropriate authority goal, the accuracy of the decision in such a case will benefit from the local knowledge and experience of each of the involved NCAs. Cooperation is also important when the centre of gravity of the competition concern in such a case is principally, but not solely, in one member state. This is because the NCA which leads the investigation and makes the decision—the one from the member state experiencing the greatest competition impact—would not only take on board the concerns of the other NCA but also benefit from its local knowledge and experience, thereby helping to guarantee an effective decision. Of course, it is also supportive of the one-stop shop approach and fits with the reinterpreted more appropriate authority goal.

The third strand of cooperation would be between the Competition Directorate and NCAs, and relates to when the latter apply EU law in the aforesaid merger and minority shareholding cases. In respect of the merger cases, the Competition Directorate's considerable experience in vetting these cases means that it would be able to provide guidance and support to NCAs when applying the said law and this will aid consistent decision-making, which in turn buttresses the SEM. Concerning minority shareholding cases, as the Competition Directorate and NCAs have either little or no experience vetting these cases, then cooperation is absolutely essential to the establishment of a culture facilitating uniform decision making under EU law. Clearly this matter is of such importance as to require a much more detailed and considered treatment, but that is beyond the scope of the paper. Finally, in order to help guarantee consistent decision-making in the said merger and minority shareholding cases, the Commission would reserve the right to take a case from

an NCA if the latter, for whatever reason, was unable to effectively carry-out its regulatory obligation. Obviously, this would be a last resort safeguard and hopefully will not be required.

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