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COMMISSION STAFF WORKING DOCUMENT

IMPACT ASSESSMENT

Accompanying the document

WHITE PAPER

Towards more effective EU merger control

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Why? What is the problem being addressed?
1. Minority shareholdings: Acquisitions of minority shareholdings can result in significant competitive harm, particularly those in competitors or vertically related companies. Competitive harm may arise, for example, from the influence acquired over strategic decisions of a competitor or access to a competitor's confidential business information. The Merger Regulations does not currently give the Commission jurisdiction to review such acquisitions, because it only captures acquisitions of control. Accordingly, even though the same competition concerns may arise, the Commission has to date only been able to intervene against pre-existing minority shareholdings when reviewing an acquisition of control. 2. Referral system: Although the experience since 2004 has shown that the referral system works well in general, there is scope for improvement. The reform proposal for pre-notification referrals to the Commission under Article 4(5) Merger Regulation involves abolishing the requirement for two separate submissions (a referral request and a subsequent notification) to make the procedure quicker and less burdensome. Regarding post-notification referrals to the Commission (Article 22 Merger Regulation), the proposal aims at preventing parallel reviews by the Commission and the National Competition Authorities by giving the Commission jurisdiction for a referred case for the whole EEA-territory.
What is this initiative expected to achieve?
1. Minority shareholdings: Prevent harm to consumers resulting from acquisitions of minority shareholdings. 2. Referral system: Improve the case referral system by reducing the administrative burden on business and the Commission, and ensuring further adherence to the principles of a one-stop-shop and the allocating cases to the more appropriate authority.
What is the value added of action at the EU level?
With regard to acquisitions of minority shareholdings, currently three Member States (Austria, Germany and the United Kingdom) are competent to review them, but are limited to assess effects their territory. Experience has shown that these cases however can have EEA-wide effects which are currently not tackled. In addition, competence at the Commission level would reduce the risk of multiple reviews in these countries. Also, other Member States are likely to introduce such a competence in the future, further enhancing this added value. With regard to the referral system, the proposed reform strengthens the principles of one-stop-shop and the allocation of a case to the more appropriate authority. This is only possible through legislative changes at the EU level.
B. Solutions
What legislative and non-legislative policy options have been considered? Is there a preferred choice or not? Why?
The proposals discussed in the White Paper require an amendment to the existing Merger

Regulation. Non-legislative options would not be able to address the problems identified. 1. <u>Minority shareholdings:</u> The Impact Assessment sets out three procedural options for reviewing acquisitions of minority shareholdings: (1) a self-assessment system; (2) a targeted notification system requiring notification of acquisitions of minority shareholdings which meet certain criteria and (3) a targeted transparency system requiring an information notice to be submitted for acquisitions of minority shareholdings meeting the same criteria as under Option 2, but leaving the Commission free to selectively investigate the cases it considers problematic. Option 3 is preferred given that it would capture problematic transactions without resulting in an excessive administrative burden on business, the Commission and national competition authorities. 2. <u>Referral System:</u> The Impact Assessment sets out one reform option for both Article 4(5) and Article 22. The proposals address specific shortcomings and are therefore preferred as compared with no action.
Who supports which option?
1. <u>Minority shareholdings:</u> The three options were developed following the comments received in the public consultation and discussions with stakeholders. While acknowledging the underlying competition concerns, many stakeholders were concerned about a too far-reaching system which would create a disproportionate burden on business in view of the limited number of problematic cases. This concern has been taken into account in the preferred option by targeting it to the potentially problematic cases. 2. <u>Referral System:</u> The proposals on the referral system are almost unanimously supported by stakeholders.
C. Impacts of the preferred option
What are the benefits of the preferred option (if any, otherwise main ones)?
1. <u>Minority shareholdings</u>: Under the targeted transparency system, the potentially problematic transactions would be brought to the Commission's attention through the submission of an information notice, which would require less information than a full notification. On the basis of the parties' information notice, the Commission would choose the transactions which it wants to investigate further. 2. <u>Referral system</u>: The preferred options would streamline the current referral system and further ensure adherence to the principles of EU merger control.
What are the costs of the preferred option (if any, otherwise main ones)?
1. <u>Minority shareholdings</u>: Given the expected small number of transactions for which an information notice would need to be submitted, the costs of the preferred option (the targeted transparency system) are expected to be limited. They include the cost for the parties to prepare the information notice, and a full notification where required, and limited public enforcement costs. 2. <u>Referral system:</u> The proposal for Article 4(5) would not result in additional costs for businesses or the public authorities. The proposal for Article 22 might involve some costs in preparing a notification due to the EEA-wide competence. However, these costs are mitigated by the fact that multiple reviews by various authorities are avoided.
How will businesses, SMEs and micro-enterprises be affected?

SMEs and micro-enterprises are not directly affected by the proposals as the Merger Regulation would continue to apply only to transactions where parties meet the turnover thresholds set out in Article 1. SMEs and micro-enterprises do not meet these thresholds

1. Minority shareholdings: Other businesses would only be affected by the proposals if their turnover is above the thresholds and they envisage acquiring a minority shareholding in a competitor or a vertically related company which meets certain criteria. Parties to such an acquisition would face the one-off cost of informing the Commission, and, if the Commission decided to investigate the transaction, the cost of an investigation (internal cost and external advisors). The Commission estimates that only a limited number of transactions (around 20-30 per year) would be captured by the extended competence. The cost to business is therefore limited.

2. Referral system: Other businesses will benefit from the streamlined referral system.

Will there be significant impacts on national budgets and administrations?

No.

Will there be other significant impacts?

No.

D. Follow up

When will the policy be reviewed?

The current initiative consists in the publication of a White Paper. Based on the feedback on the White Paper and on its on-going dialogue with stakeholders, the Commission will decide whether it will take further steps towards a legislative proposal to amend the Merger Regulation.

1. THE SUBJECT-MATTER OF THE IMPACT ASSESSMENT

1. The aim of the EU merger control system is to ensure effective competition in the internal market or parts of it. Since 1989, the Council Regulation on the control of concentrations between undertakings ("the Merger Regulation")[1] has been regularly reviewed to improve the system and to take into account evolving practice. Nearly 10 years after the most recent reform, and in line with the Commission's goal of ensuring better regulation, it is an appropriate moment to reflect on possible further improvements and ascertain whether merger control at EU level can be made even more effective in the interest of European businesses and consumers.

2. The initiative follows up on the report adopted in 2009 by the Commission on the operation of the Merger Regulation ("the 2009 Report")[2], which stressed that, even if the jurisdictional thresholds and the system for the referral of cases between the Commission and Member States worked well, there would still be room for improvements to render case referrals less cumbersome and time-consuming. In addition, the initiative covers the issue of the possible application of the Merger Regulation to acquisitions of non-controlling minority shareholding as well as further technical improvements.

3. The initiative consists in the publication of a White Paper, focussing on the issues presented in the Staff Working Paper "Towards more effective EU merger control" which has been published for comments on 20 June 2013. In light of the comments received by stakeholders during the consultation and the dialogue with stakeholders, it is proposed to publish a White Paper which will mainly explore the two initiatives (minority shareholdings and referrals), but also take stock of the application of the Merger Regulation in the last 10 years. The Commission will decide, at a later stage, whether it will take further steps towards a legislative proposal to amend the Merger Regulation.

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[1] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 24, 29.1.2004, p. 1. The Merger Regulation was first adopted as Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ L 395, 30.12.1989, p. 1). Council Regulation (EEC) No 4064/89 was later amended by Council Regulation (EC) No 1310/97 of 30 June 1997 (OJ L 180, 9.7.1997, p. 1). The re-casting of the Merger Regulation in 2004 led to the adoption of Council Regulation (EC) No 139/2004, the current Merger Regulation.

[2] Communication from the Commission to the Council, Report on the functioning of Regulation No 139/2004, 18 June 2009, COM(2009) 281 final. Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0281:FIN:EN:PDF

2. PROCEDURAL ISSUES AND CONSULTATION OF INTERESTED PARTIES

2.1. Background

4. From the adoption of the original Merger Regulation in 1989, EU merger control has always applied only to "concentrations" involving a change in control over undertakings but not to acquisitions of non-controlling minority shareholdings.

5. In its 2001 Green Paper on the Review of Council Regulation (EEC) No 4064/89 ("the 2001 Green Paper"),[3] which preceded the adoption of Council Regulation (EC) No 139/2004 (the current Merger Regulation), the Commission briefly addressed the issue of the most appropriate treatment of minority shareholdings but did not propose to subject all acquisitions of minority shareholdings to the ex-ante control of the Merger Regulation. The 2001 Green Paper also discussed the issue of the delineation of jurisdiction referrals of cases between the Commission and national competition authorities, which led to significant modifications to the referral system in Council Regulation (EC) No 139/2004.

6. In 2009, the Commission, in accordance with Article 1(4) of the Merger Regulation and following a public consultation, submitted the 2009 Report.[4] With regards to referrals of cases, the 2009 Report concluded that the referral system overall worked well but that stakeholders had nonetheless raised certain concerns regarding the timing and cumbersomeness of the referral procedures.

7. In 2011, Vice-President Joaquín Almunia announced publicly that he had instructed his services to look into the issue of minority shareholdings to see whether there existed a significant enforcement gap that would merit to be closed in EU merger control.[5]

8. In 2012, Vice-President Almunia stated that he had identified such an enforcement gap and that he intended to launch a public consultation to discuss options to address it.[6]

9. The Commission's services also met with representatives from Member States during meetings of the Merger Working Group (15 March 2013, 14 June 2013 and 13 September 2013), at the General Meeting of the European Competition Authorities (30 May 2013, Bucharest), at the European Competition Network's ("ECN") plenary meeting (6 June 2013) and at the ECN Director General Meeting (25 June 2013) where the project was presented. Representatives of the EFTA Surveillance Authority and the EFTA States were present.

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[3] Green Paper on the Review of Council Regulation (EEC) No 4064/89, 11 December 2001, COM(2001) 745 final. Available at: http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001_0745en01.pdf

[4] Communication from the Commission to the Council, Report on the functioning of Regulation No 139/2004, 18 June 2009, COM(2009) 281 final. Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0281:FIN:EN:PDF

[5] J. Almunia, EU merger control has come of age, Brussels, 10 March 2011, SPEECH 2011/166. Available at: http://europa.eu/rapid/press-release_SPEECH-11-166_en.htm

[6] J. Almunia, Merger review: past evolutions and future prospects, Cernobbio, 2 November 2012, SPEECH 2012/773. Available at: http://europa.eu/rapid/press-release_SPEECH-12-773_en.htm

10. Furthermore, Commission staff has participated in a large number of events (conferences, expert panels, workshops, etc.) to discuss the initiative. Commission staff has also repeatedly met with a wide range of stakeholders and experts, in particular business representatives and lawyers.

2.2. Public consultation on the Staff Working Document

11. On 20 June 2013, the Commission published the Staff Working Document entitled "Towards more effective merger control" ("the Staff Working Document")[7], which put forward several suggestions for a possible improvement of the Merger Regulation. The possibility for submitting comments to the public consultation was open from 20 June to 12 September 2013. The Commission has received a large number of replies (70 to date). Various groups of stakeholders submitted comments, namely businesses and business associations, law firms, lawyers' and other law associations, academia, economic consultancies, international organisations, NCAs, national governments and private citizens.[8]

2.3. Inter-service consultation/Impact Assessment Steering Group

12. The Directorate-General for Competition is the lead service on the current initiative, with the involvement of the Secretariat-General, the Legal Service, DGs CNECT, ENTR, MARKT, ECFIN and SANCO.

13. An Impact Assessment Steering Group ("IASG") was set up on 26 July 2013. It met on 4 September, 8 November and 27 November 2013. In the meeting of 27 November 2013, a draft of the present Impact Assessment Report was discussed.

2.4. The Impact Assessment Board

14. A draft of the present Impact Assessment, together with an executive summary, was submitted to the Impact Assessment Board on 6 January 2014, followed by a meeting of the Impact Assessment Board on 5 February 2014.

15. The Impact Assessment Board issued a positive opinion on 7 February 2014, with further suggestions for improvement. The Board expressed the following main recommendations, which were considered in the present report: (1) better explain the need for EU action; (2) improve the presentations of options; (3) strengthen the assessment of impacts; (4) better reflect stakeholders' views.

16. The Impact Assessment has been revised in line with the Board's comments. In particular: (1) the need and added value of action at EU level regarding the question of minority shareholdings in comparison with existing scrutiny of such transactions in certain Member States is explained more specifically. (2) Options 1 and 2 are presented in more detail to match the level of detail with which Option 3 is explained. (3) In the assessment of impacts, the added value of the targeted transparency option in comparison to a self-assessment system is explained more clearly. (4) Stakeholders' views are referred to and – where the position taken in the

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[7] SWD(2013) 239. See also http://europa.eu/rapid/press-release_IP-13-584_en.htm

[8] See Annex 6.

White Paper diverges from them – discussed in greater detail throughout the document. A separate annex also summarises comments made by stakeholders in the public consultation.

3. ACQUISITIONS OF NON-CONTROLLING MINORITY SHAREHOLDINGS

3.1. Problem definition

17. Effective and efficient competition policy requires having appropriate and well-designed means to tackle all sources of harm to competition and consumers. The following subsections will address the problems concerning non-controlling minority shareholdings and the enforcement gap they are currently falling into at EU level.

3.1.1. Scope of the problem

18. Under the Merger Regulation, the Commission has exclusive jurisdiction to examine concentrations meeting certain turnover thresholds in order to assess whether they lead to a significant impediment of effective competition in the internal market or a substantive part of it (the "SIEC" test). All concentrations falling under the Merger Regulation must be notified to the Commission and may not be implemented before the Commission has cleared them. The Commission's examination of mergers is subject to strict, legally binding time limits. Operations that do not constitute a concentration within the meaning of the Merger Regulation, as well as all concentrations that do not meet the turnover thresholds of the Merger Regulation may be subject to competition scrutiny under national law. However, under certain conditions, a case may be referred either from Member States to the Commission or *vice versa*, both before or after notification to the competent authority.

19. Until now the Merger Regulation only applies to "concentrations". These are defined as acquisitions of control by one or more person(s) or undertaking(s) over one or more other undertakings or parts of undertakings, for example one firm acquiring a majority stake in another firm, or two firms creating a joint venture. The Commission has exclusive jurisdiction to examine concentrations meeting certain turnover thresholds in order to assess whether they lead to a significant impediment of effective competition in the internal market or a substantive part of it.

20. The Commission's experience, the experiences of Member States and third countries, but also economic research show that in some instances the acquisition of a non-controlling minority stake, such as one firm acquiring a 25% stake in a competitor, can harm competition and consumers. 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.

21. In the European Union, Austria, Germany and the United Kingdom currently have national merger control rules that give them the competence to review structural

links.[9] In all three Member States, the national competition authorities have intervened against acquisitions of structural links that raised competition concerns.[10] Equally, many jurisdictions outside the EU such as Canada, the United States or Japan examine structural links under merger control rules. In addition, in the public consultation and in media reports other recent transactions of minority shareholdings at EU and Member State level have emerged which were not reviewed by NCAs.[11]

22. There are several types of anti-competitive concerns that can result from the acquisition of minority shareholdings. The economic effects of minority shareholdings on competition in the market significantly depend on the financial interests flowing from them and the corporate rights conferred by them. While financial interests refer to the acquiring firm's entitlement to a share of the profits of the target firm, corporate rights refer to the acquiring firm's ability to influence the target firm's strategic decisions.[12]

23. Structural links among competitors may lead to unilateral anti-competitive effects, since they may increase the ability and incentives of firms to unilaterally raise prices or restrict output. Intuitively, if firms have a financial interest in their competitors' profits, they 'internalise' the positive effects on their competitors' profits of a reduction in their own output or an increase in their own price. As a result, a firm with minority stakes in a competitor will have less of an incentive to compete vigorously and so will tend to reduce its competitive pressure, which will lead to price increases and output reductions in the market. This may occur irrespective of whether the minority shareholding is "passive", i.e. the minority shareholder has no influence on the target firm's decisions, or whether it is "active" and its holder may have some influence on the target firm's decisions.

24. In case of "active" minority stakes the potential anti-competitive effects can also occur when the acquirer gains material influence over the outcome of special resolution decisions in the shareholders' meeting which are needed to approve certain strategies, for example in relation to significant investments, product lines, geographical scope, raising capital, engaging in mergers and acquisitions. As regards the ability to implement such as strategy, this depends on the specificities of the market and notably on the market position of the companies involved. The practice of the Commission and the Member States has shown that competition concerns are more likely to be serious when a minority shareholding grants some degree of influence over the target firm's decisions, as can be seen from the case studies described below.

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9 See Annex I to the Staff Working Document "Towards More Effective Merger Control". Available at: http://ec.europa.eu/competition/consultations/2013_merger_control/

10 As described in Annex 4 – Examples of minority shareholding cases in the EU, Germany and the United Kingdom.

11 See for example the minority stakes recently acquired by Telefónica in Telecom Italia, by Air France in Alitalia or by Intel in ASML, a manufacturer of lithography systems for the semiconductor industry.

12 See Annex 1 of the Staff Working Document "Towards More Effective Merger Control". Available at: http://ec.europa.eu/competition/consultations/2013_merger_control/. See also "*Minority interests in competitors: A research report prepared by DotEcon Ltd*", prepared for the OFT in March 2010, OFT1218.

25. A prominent case for both the "financial incentive" theory of harm and the influence and voting rights gained by the acquisition was the Siemens/VA Tech case. Here, the Commission considered that information and voting rights granted to Siemens through the prior acquisition of a minority share in SMS Demag would lead to a reduction of competition in the metal plant-building market where VA Tech was active (see box below).[13]

> Example 1: M.3653 *Siemens / VA Tech* (2005)[14]
>
> This merger involved the acquisition of the Austrian engineering group VA Tech by Siemens. There was a horizontal overlap between SMS Demag, a company in which Siemens held a 28% (non-controlling) minority shareholding, and one of VA Tech's subsidiaries. Certain information, consultation and voting rights were granted to Siemens by SMS Demag's shareholders' agreement. The Commission found that the merger would reduce competition in the metal plant-building market due to a combination of financial incentives and information rights stemming from Siemens' 28% share in SMS Demag. Although Siemens had at the time of the Commission decision already exercised a put option to sell its stake in SMS Demag to the latter's main shareholder, that sale had not yet been put into effect due to on-going litigation about the purchase price.
>
> In order to resolve the concerns identified by the Commission, Siemens proposed, and the Commission accepted, a number of commitments that ensured that Siemens could not, until the sale of the minority shareholding, use its position in SMS Demag to obtain any strategic knowledge on the latter's business policy.

26. Competition concerns may also arise when the acquirer can use its minority shareholding position to limit the competitive strategies available to the target firm, thereby weakening it as a competitive force.

27. This type of competition concern was at the core of several recent European and UK minority shareholding cases, of which the Ryanair/Aer Lingus cases may be the best known example (see box below).

> Example 2: Ryanair had already acquired a significant minority shareholding in the share capital of its competitor Aer Lingus when it notified the proposed acquisition of control of Aer Lingus to the Commission in 2006. The Commission prohibited the acquisition of control in June 2007 due to very serious competition concerns but Ryanair maintained a minority shareholding of 29.4% in Aer Lingus.[15] A second attempt by Ryanair to acquire control over Aer Lingus was equally blocked by the Commission in February 2013.[16]

[13] For a larger case law overview, see ANNEX 4 – Examples of minority shareholding cases in the EU, Germany and the United Kingdom.
[14] http://ec.europa.eu/competition/mergers/cases/decisions/m3653_20050713_20600_en.pdf
[15] Case COMP/M.4439 – *Ryanair/Aer Lingus I*, decision of 27 June 2007.
[16] Case COMP/M.6663 – *Ryanair/Aer Lingus III*, decision of 27 February 2013.

The Merger Regulation did not allow the Commission to order Ryanair to divest the shareholding it already possessed in Aer Lingus, as was also confirmed by the General Court.[17] However, Aer Lingus argued that Ryanair's minority shareholding had significant negative effects on competition between the two carriers, as Ryanair used the minority shareholding to get access to Aer Lingus' confidential strategic plans and business secrets, to block special resolutions, and to request extraordinary general meetings with a view to attempting to reverse already adopted strategic decisions. As a result, Aer Lingus could have been weakened as an effective competitor of Ryanair or, alternatively, Ryanair's desire to maintain the value of its investment in Aer Lingus could have reduced Ryanair's incentives to compete. The United Kingdom's Competition Commission has examined Ryanair's minority shareholding in Aer Lingus on the basis of the UK merger control rules which allow for a review of such minority interests. In its findings issued on 28 August 2013[18], the UK Competition Commission states that the shareholding gives Ryanair the ability to influence the commercial policy and strategy of Aer Lingus, its main competitor on flights routes between the United Kingdom and Ireland. Ryanair was required to sell its 29.8% stake in Aer Lingus down to 5%. This is accompanied by obligations on Ryanair not to seek or accept board representation or to acquire further shares.

28. This competition concern was also the focus of the *Toshiba/Westinghouse* case (see box below). This case also demonstrates that the competition concerns identified by the Commission can be alleviated not only by a fully divestiture but also by non-structural remedies connected to voting rights and access to information.

Example 3: M.4153 *Toshiba / Westinghouse* (2006)[19]

This case concerned the acquisition of Westinghouse, active in the nuclear sector, by Toshiba. Toshiba held already a pre-existing minority shareholding in Global Nuclear Fuels ("GNF"), a joint venture active in the market for nuclear fuel assemblies. Accordingly, the notified transaction would have led to an overlap between Westinghouse's activities and Toshiba's non-controlling shareholding in the joint venture.

Toshiba held 24.5% of the voting rights in GNF, which was one of the two most important competitors to Westinghouse (alongside French company Areva) in both the EEA and world-wide markets for the design and manufacture of nuclear fuel assemblies. In addition, Toshiba had a number of veto rights that it could use to prevent GNF from expansions into fields in which they would compete with Toshiba/Westinghouse, as well as certain information rights and representation in various boards of GNF and its subsidiaries.

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17 See the judgment of the General Court in Case T-411/07 *Aer Lingus v Commission* [2010] ECR II-3691.

18 http://www.competition-commission.org.uk/assets/competitioncommission/docs/2012/ryanair-aer-lingus/130828_ryanair_final_report.pdf. Ryanair has appealed the decision, but the UK Competition Appeal Tribunal rejected the appeal on 7 March 2014.

19 http://ec.europa.eu/competition/mergers/cases/decisions/m4153_20060919_20212_en.pdf

The Commission found that the transaction could lead to a possible elimination of competition. In particular, the Commission found that Toshiba could use its veto rights in GNF and its subsidiaries to prevent GNF from expansions into fields in which they would compete with Toshiba/Westinghouse. Furthermore, through its information rights and its representation in various Boards of GNF and its subsidiaries, Toshiba would also have the opportunity to obtain sensitive confidential information which would help Toshiba to make GE's expansion more difficult.

The concern was addressed through remedies in the joint venture, in particular by relinquishing all of Toshiba's board and management representation in GNF, its veto rights under the joint venture agreement and all rights to obtain any confidential information, without however being prevented from receiving strictly limited information.

29. Also, the most obvious way a minority shareholder can gain a competitive advantage in the market is through the ability to increase a rival's costs. In an extreme situation, if the costs of the target firm are sufficiently raised, this firm may actually decide to stop competing with the acquirer in the relevant market.

30. Horizontal minority participations may also lead to coordinated anti-competitive effects as they may impact on the ability and incentives of market participants to tacitly or expressly collude to achieve supra-competitive profits. The acquisition of a minority stake may enhance transparency as it typically offers the acquiring firm a privileged view on the commercial activities of the target. It may also make the threat of future retaliation more credible and severe in case a minority shareholder deviates from the collusive behaviour as firms may revert to a less collaborative behaviour in the jointly owned firm. Both effects will impact on the ability and incentives of market participants to coordinate. [20]

31. Finally, non-horizontal transactions may lead to competition concerns, in particular in relation to input or customer foreclosure. The ability to implement a strategy based on foreclosing competitors from the target company's supply or demand depends on the influence resulting from the minority stake over business decision of the target company and on the ability to exercise this influence against the resistance of other stakeholders. Extensive information rights can also matter in this regard: The fear that commercially sensitive information ends up in the hands of a competitor, may deter companies from dealing with firms in which their competitors have minority stakes that entail such extensive information rights. In the case where the minority shareholding is purely "passive" and its holder has no influence on the target firm's decisions, the expected competition concerns will be more limited than in a full merger, given the smaller financial incentives to foreclose. On the other hand, when the minority shareholding is "active" and its holder has some influence on the target firm's decisions, the risk of foreclosure can actually be higher than what would occur with a fully-integrated firm. This is because, in some circumstances, input or customer foreclosure may be more likely to occur since the company acquiring the minority shareholding only internalises a part, rather than all, of the target firm's profits while it receives the full benefit of foreclosure.

[20] See also Annex 1 of the Staff Working Document "Towards More Effective Merger Control". Available at: http://ec.europa.eu/competition/consultations/2013_merger_control/

32. This concern is exemplified in the *IPIC / MAN Ferrostaal* case. Here, the acquisition of MAN Ferrostaal (a subsidiary of MAN) by International Petroleum Investment Company ("IPIC") was approved by the Commission in 2009 subject to conditions. The Commission found that the transaction gave rise to a foreclosure risk regarding the only existing non-proprietary technology for melamine production in the world (see below).

Example 4: M.5406 *IPIC / MAN Ferrostaal* (2009)[21] The acquisition of MAN Ferrostaal (a subsidiary of MAN) by International Petroleum Investment Company ("IPIC") was approved by the Commission in 2009 subject to certain conditions. The Commission found that the transaction gave rise to a foreclosure risk regarding the only existing non-proprietary technology for melamine production in the world. In fact, IPIC's subsidiary AMI was together with DSM the major producer of melamine, whereas MAN Ferrostaal had a 30% minority shareholding in Eurotecnica, the supplier of the said input technology. Although a minority stake, this participation of 30% gave MAN Ferrostaal significant influence on the decision making concerning Eurotecnica's melamine licensing and engineering business, since the shareholders' agreement foresaw a number of decisions to be taken by super-majority. Furthermore, the shareholders agreement gave all shareholders broad information rights. The Commission found that this was likely to have a substantial deterrent effect on the licensing practice for current and future customers of Eurotecnica, given the voluminous information exchanged between a prospective client and Eurotecnica which might end up in the hands of a competitor of these clients, namely AMI. In addition, a foreclosure strategy towards DSM or potential new entrants for the production of melamine, a one billion euro European market, could be expected. The Commission also found that due to the high concentration of the melamine market (two main producers with symmetric market shares – AMI and DSM) and its transparent nature (published contract prices, well-known costs), there was an increased risk of coordination between the two market leaders AMI and DSM. To remedy the situation, MAN Ferrostaal committed to divest its entire minority shareholding in Eurotecnica.

33. When the acquisition of a minority stake is unrelated to an acquisition of control, the Commission cannot investigate and possibly intervene against such an acquisition. Only already existing minority stakes held by one of the merging parties in a competitor or a company active in an upstream or downstream market can be taken into account by the Commission in the context of a notified merger concerning a separate acquisition of full control. If, however, the minority stake is acquired after the Commission examined the acquisition of control over another undertaking, the Commission will have no competence under the Merger Regulation to deal with possible competition concerns even though the competition concerns can be exactly the same.

21 http://ec.europa.eu/competition/mergers/cases/decisions/m5406_20090313_20212_en.pdf

34. In the public consultation, respondents across all groups of stakeholders generally agreed that non-controlling minority stakes may in certain instances lead to competitive harm.

35. Businesses, business associations, and to a lesser extent, law firms and law associations raised the question whether the limited number of problematic transactions could justify an extension of the scope of the Merger Regulation. These groups put forward that the competition rules on restrictive agreements laid down in Article 101 and the abuse of a dominant position laid down in Article 102 of the Treaty on the Functioning of the European Union ("TFEU"), respectively, should be used instead as they might capture many of the problematic transactions.[22]

36. However, there are only very narrow circumstances in which the Commission would be able to use Article 101 and Article 102 TFEU to intervene against anti-competitive minority shareholdings. On the one hand, it is unclear under which circumstances the acquisition of a minority stake may constitute or be based on an "agreement" having the object or effect of restricting competition within the meaning of Article 101 TFEU, especially in the case of the acquisition of a series of shares via the stock exchange. On the other hand, Article 102 TFEU requires that the undertaking acquiring a minority stake already holds a dominant position and that the acquisition constitutes an abuse of that dominant position. This would allow the Commission only in very narrow circumstances to deal with the competitive harm which may arise from minority shareholdings.[23]

3.1.2. *Magnitude of the problem*

37. The number of cases of potentially problematic acquisitions of minority shareholdings is estimated on the basis of: (i) information provided by Member States that have currently national merger control rules that also give them the competence to review minority shareholdings, (ii) the calculation of cases that would be brought to the Commission's attention under a targeted approach and (iii) an analysis of the so-called Zephyr database, as further explained below.

(i) Information from the Member States

38. Acquisitions of non-controlling minority shareholdings account for approximately 10-12% of all mergers notified in Germany and 5% in the United Kingdom, according to the data provided by these Member States.[24] It should be noted that the merger control regimes of Germany and the United Kingdom are different, which

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[22] Merger control concerns the prevention of the creation or strengthening of a dominant position and it is a forward-looking assessment of structural changes in the market. Antitrust assessment, on the other hand, concerns the existence of distortions of competition caused either by agreements between undertakings (Article 101) or the unilateral abuse of a dominant position (Article 102).

[23] See also Case T-411/07 *Aer Lingus v Commission* [2010] ECR II-3691, in particular para. 104, and Case 6/72 *Continental Can v Commission* [1973] ECR 216.

[24] These figures were not directly used in the estimation of the number of cases of minority shareholdings that would meet the turnover thresholds of the Merger Regulation but they just served as some "sanity check" for the estimations found by the Commission.

may explain the differences in the number of cases observed, since in the United Kingdom, mergers do not need to be notified before they are completed.[25]

39. Other Member States that do not have jurisdiction to review acquisitions of minority shareholdings have also reviewed and intervened against minority shareholdings where these pre-existed at the time of the merger, for example, in the Czech Republic[26], Italy[27], the Netherlands[28], Portugal[29], Romania[30], and Spain[31]. These cases often involved the telecoms, banking and energy sectors, and led to several commitment decisions including either a divestment of the minority shareholding or a removal of directors from the board of the company in which the minority shareholding was held. According to the Zephyr database[32], banking and energy are the sectors with the highest frequency of minority shareholding transactions with a Community dimension.[33]

(ii) Cases that would be brought to the Commission's attention under an approach which targets only potentially problematic cases

40. The Commission calculated the number of cases which would be brought to the Commission's attention if a targeted approach based on a criterion similar to the criteria used in the German and the UK systems (acquisition of a "competitively significant influence" or acquisition of "material influence"[34]) were to be adopted.[35] Taking the number of cases reviewed by the Bundeskartellamt ("BKartA") and the UK competition authorities, at least 12 cases per year which are currently notifiable in these jurisdictions would come under the jurisdiction of to the Commission (the equivalent to around 4% of the cases currently examined by the Commission each year). We consider this to be a robust lower bound for the total number of competitively significant influence cases with EU dimension per year.

(iii) Estimates from the Zephyr database[36]

41. The Commission conducted an analysis of the so-called Zephyr database to obtain an estimate of the number of structural link cases at EU level and found 43 minority stake transactions over a period of six years which potentially merited competition

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25 See Annex II to the Staff Working Document "Towards More Effective Merger Control", section 3.1. Available at: http://ec.europa.eu/competition/consultations/2013_merger_control/

26 See Cases Ref No S25/2002, Case Ref No S145/2002, Case Ref No S396/2011 and also the OECD Report mentioned in the previous footnote, DAF/COMP(2008)30.

27 See OECD Report "Antitrust issues involving minority shareholding and interlocking directorates" DAF/COMP(2008)30 for more details.

28 OECD Report, ibid.

29 See cases Ccent 06/2008 – EDP/EDIA, Ccent 38/2012 Arena Atlantida / Pavilhao Atlantico * Atlantico

30 See OECD Report, ibid.

31 See for example cases C-0098/08 Gas Natural (GN) / Union Fenosa, C/0231/10 Prisa / Telefonica / Telecinco / Digital +.

32 See below for a definition.

33 See Annex 3 for more details.

34 These criteria give Germany and the United Kingdom the competence to review cases regardless of their percentage of the minority stake acquired.

35 This "targeted approach" is further explained in Sections 0 and 0 of this Impact Assessment.

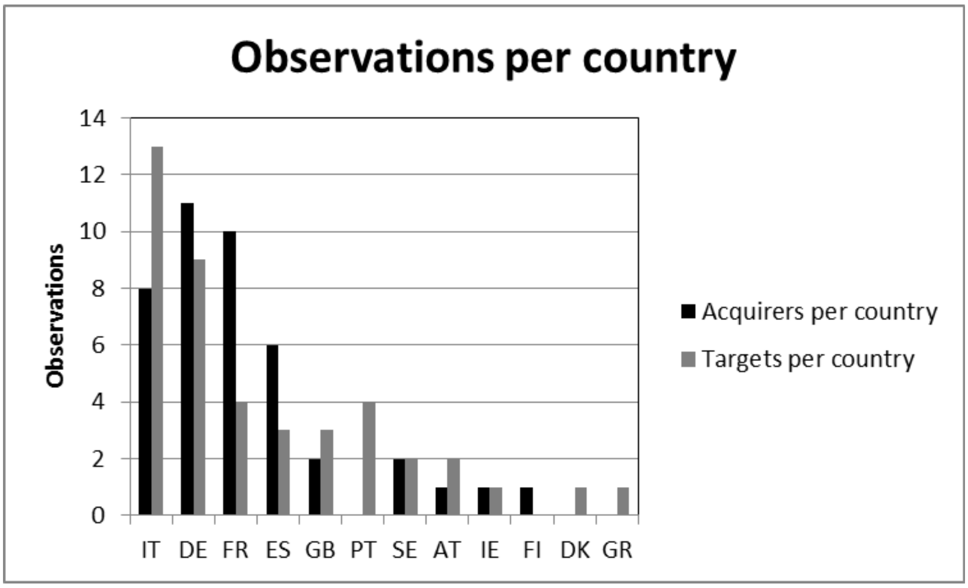
36 The Zephyr database is a database containing information on the total number, the value and the corresponding participation percentages of ownership transactions in listed companies registered in 27 EU Member States.

scrutiny and were likely to have an EU dimension, thus falling under the Merger Regulation if the latter were to cover acquisitions of non-controlling minority shareholdings.[37] Due to limitations of the data and the methodology applied, the analysis of the Zephyr database is likely to underestimate the actual number of relevant acquisitions of minority stakes. The reason for this is that the database only covers a sub-sample of the EU economy: it only includes transactions involving both a buyer and target registered in the EU and transactions between publicly listed companies.[38]

42. Frequency by country of origin is relevant to detect how the practice of acquiring minority shareholding is distributed over the European Union.[39] As the graph below shows, the five Member States with the highest number of transactions are Italy (13 targets, 8 acquirers), Germany (9 targets, 11 acquirers), France (4 targets, 11 acquirers), Spain (3 targets, 6 acquirers) and the United Kingdom (3 targets and 2 acquirers).

43. The graph below shows the distribution of the transactions across Member-States.[40]

Graph A - Number of transactions per country



44. On this basis it is possible to conservatively estimate that out of these 43 cases at least 12 would have had to be notified in Germany, in other words that at least 28% (12 out 43) of the transactions identified through analysing the Zephyr database

37 See Annex II of the Staff Working Document in Annex I to this Impact Assessment report. This data covered the period 2005-11. Available at: http://ec.europa.eu/competition/consultations/2013_merger_control/

38 See Annex 3 for more details.

39 There are a number of factors that can explain differences in the number of deals across Member States: (i) the number of companies with more than EUR 10 million annual turnover; (ii) the degree of activeness of capital markets, (iii) whether or not there is specific legislation on minority shareholdings, and (iv) whether or not the markets have an oligopolistic configuration.

40 For simplicity, transactions are listed according to the nationality of the target: all the values (except those directly referring to information on acquirers) refer to the target's country. Some of the Member States are not represented at all.

would have been notified in Germany. By applying this proportion to the average number of competitively significant influence cases with EU dimension per year notified to the Bundeskartellamt (estimated to be around 11, see above) it can be found that the total number of additional EU cases per year would most likely be below 40.[41] However, this calculation presupposes that the extent of non-controlling minority shareholding in other countries is similar to the extent in the German economy. It cannot be excluded that the situation might be different in other countries.

3.1.3. *Conclusion on the magnitude of the problem and number of additional cases*

45. Given the information obtained on Member States and the analysis of the Zephyr database, it may be roughly estimated that the number of cases of minority shareholdings that would meet the turnover thresholds of the Merger Regulation should be around 20-30 (or 7-10% of the merger cases currently examined by the Commission each year).

46. It is difficult to estimate in how many minority shareholding cases the Commission would intervene under a new competence. However, the intervention rate of the German Bundeskartellamt for "competitively significant influence" cases could be used as a rough proxy. Applying the German intervention rate for this type of cases of 4.6% to the estimated 20-30 minority shareholding cases that would meet the turnover thresholds of the Merger Regulation, it could be estimated that the Commission would intervene in another 1-2 cases per year. This is in line with the present intervention rate of the Commission of 5-8% for cases concerning concentrations.

47. This would, in any event, not have any impact on small and medium sized enterprises as the jurisdiction of the Commission would only be triggered if the turnover thresholds [42] of the Merger Regulation are met.

3.2. Objectives

3.2.1. *General objectives*

48. The objective of this part of the initiative is to prevent the harm to competition and consumers caused by acquisitions of non-controlling minority shareholdings as described above.

3.2.2. *Specific objectives*

49. The specific objective is to design a system that would allow the Commission to examine and, where necessary, intervene against potentially anti-competitive

[41] This should only be seen as a theoretical maximum of cases, given that that the estimated number of cases to be notified in Germany is most likely under-estimated as more than the 12 cases would be probably notifiable in Germany due to a significant turnover of the parties in Germany.

[42] The main turnover threshold is: more than EUR 5 000 million for the combined worldwide turnover of the undertakings concerned and a Union-wide turnover of more than EUR 250 million for at least each of two undertakings concerned, see Article 1(2) Merger Regulation. The turnover thresholds are not met by small and medium-sized enterprises.

acquisitions of non-controlling minority shareholdings. In view of the comments received in the public consultation, but also in discussions with Member States and other stakeholders, such a system should catch the potentially problematic cases while avoiding any unnecessary administrative burden on companies and the Commission. Finally, it is essential that the system is designed to ensure that the current smooth interaction of the EU and national merger control regimes is maintained. The system should therefore be designed to interact with, and where appropriate fit alongside, the merger control regimes already in place at the EU and national levels.

3.3. Policy Options

50. The baseline scenario for the proposed options entails no action at the EU level (*i.e.*, no change). The assessment of the impact of this baseline scenario examines the *status quo* and likely developments in the absence of a reform of the Merger Regulation. The analysis of impact and comparisons (see Sections 3.4.and 3.5) will be assessed against this baseline scenario.

51. In the Staff Working Document, stakeholders were invited to comment on three options to extend EU merger control to minority shareholdings:

- a <u>notification system</u>, which would extend the current system of prior notification of mergers to non-controlling minority shareholdings;
- a <u>self-assessment system</u>, where there would be no obligation to notify non-controlling minority shareholdings but the Commission would have the power to selectively open an investigation on its own motion or following a complaint; and
- a <u>transparency system</u>, which would result in an obligation for parties to file a short information notice that would be published on the Commission's website and would serve to inform the Commission, Member States and potential complainants about the transaction and where the Commission would have the power to selectively open an investigation.

52. The proposed options were each intended to capture acquisitions of minority shareholdings which may cause competitive harm. The Staff Working Document did not set out in detail the procedure which would apply to each option. However, the balance of capturing all potentially harmful transactions and the administrative burden imposed by each option differed, intending to seek stakeholders' views on the appropriate balance.

53. In the public consultation, most private stakeholders (companies, industry associations, law firms and law associations) stated that, if the Commission were to introduce a system for the control of minority shareholdings, they would favour a self-assessment system with the possibility of voluntary notifications without a stand-still obligation for reasons of legal certainty. This system is also preferred by the United Kingdom (which has a similar system for merger control in place under its national law). A few respondents favoured the transparency system, again with the possibility of voluntary notifications and no stand-still obligation. The

notification system was considered by the vast majority of private stakeholders (businesses, business associations, law firms, etc.) to be disproportionately burdensome; for that reason it was disregarded following the public consultation and will not be dealt with further below.

3.3.1. Options for assessment

3.3.1.1. Self- assessment system (Option 1)

54. Under the self-assessment system, the acquirer of a minority shareholding would not be obliged to notify the transaction in advance and could proceed without prior approval from the Commission. The Commission would rely on its own market intelligence or on complaints to become aware of transactions that may raise competition issues and would then be free to select the potentially problematic cases and investigate them.

55. In order to achieve greater legal certainty and to avoid capturing innocuous cases, the Commission could introduce "safe harbours", for example for acquisitions of shareholdings below 5%, which would be precluded from the Commission's jurisdiction. The Commission would also publish guidance in order to set out what types of transaction the Commission would be likely to select for investigation.

56. Member States would in principle have the opportunity to request a referral if and when they acquire knowledge of the transaction. If the case remains with the Commission, the Commission would issue a decision within the normal time limits of the Merger Regulation.

3.3.1.2. Targeted notification system (Option 2)

57. Under the targeted notification system, the existing system of ex-ante merger control would be extended to cover acquisitions of certain non-controlling minority shareholdings. However, in contrast to the notification system which was clearly considered to be too burdensome by stakeholders, in particular by businesses, business associations, law firms and law associations, this system would target only those transactions which are potentially anti-competitive, e.g. transactions which would meet the following cumulative criteria:

- The shareholding is acquired in a competitor or a vertically related company (such as a supplier or customer).

- The shareholding is (i) 5% or more and combined with certain rights including, but not limited to, board representation, the right to block special resolutions and information rights giving access to strategic information, or (ii) above a certain higher level of, for example, 20%.[43]

[43] Put differently: acquisitions of minority shareholdings between competitors and vertically linked companies below 5% would never fall under the Merger Regulation, between 5% and 20% they would be within the scope of the Merger Regulation if other elements are presents (board seat, special rights below control, information rights) and above 20% they would be within the scope of the Merger Regulation without the need to look at other elements. The acquisition of a minority shareholding below 20% which is not accompanied by additional elements would not be subject to the Merger Regulation

58. These criteria would be laid down up-front either in the Merger Regulation itself or in a guidance document.[44] The normal standstill obligation, which is intended to ensure the effectiveness of a possible future prohibition or remedy decision, would apply. Parties would therefore not be able to close the transaction before obtaining a clearance decision from the Commission, which would be issued within the normal time limits of the Merger Regulation.

59. Similarly to the current system for acquisitions of control, Member States would be able to request a referral within 15 working days of receipt of the forwarded notification.

3.3.1.3. Targeted transparency system (Option 3)

60. During the public consultation, several stakeholders highlighted the importance of designing a system that is focused on potentially anti-competitive transactions, given the large number of innocuous transactions which would otherwise be caught. Although Option 2 (the targeted notification system) deals with these concerns to a certain extent, stakeholders considered that the system may need to be further refined and targeted. In some instances, even where a transaction meets the criteria set out in paragraph 57 above, the Commission's concerns may be resolved with some basic information relating to the minority shareholding being acquired. The Commission therefore developed Option 3, the targeted transparency system, under which a full notification would only be required for transactions which the Commission intends to investigate further.

61. Under the targeted transparency system, the parties would only be required to submit an information notice (as opposed to a full notification) for potentially anti-competitive transactions. Such transactions would be identified using the same criteria as described above in paragraph 57 for the targeted notification system.

62. The information notice would contain information relating to the parties, a description of the transaction, the level of shareholding before and after the transaction as well as some market information. The information would be sufficient to allow the Commission to decide whether to further investigate the transaction and to allow the Member States to consider if they want to request a referral. In order for the parties to have legal certainty, and as requested by almost all stakeholders, such a targeted transparency system would be combined with a possibility for the parties, if they so wish, to voluntarily submit a full notification from the outset.

63. In order to maintain the functioning of the referral system, it might be also considered to introduce a waiting period of, for example, 15 working days, within which the competent Member States would also be able to request a referral and within which the Commission could decide to initiate an investigation, and hence

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such as, for example, the potential acquisition by KKR and Blackstone of a stake in Versace. See: http://online.wsj.com/news/articles/SB10001424052702304500404579125490697726098. See Section 3.2.4.1 of the Staff Working Document accompanying the White Paper for an explanation why these thresholds are proposed.

44 It is currently considered preferable for these criteria to be incorporated into the Merger Regulation itself in order to enable those shareholdings falling below 5% to fall outside the scope of Article 21(3) Merger Regulation.

request a full notification from the parties. Where the Commission decides not to investigate, the parties would be free to implement the transaction.

64. In order for the Commission not to take an overly cautious approach to initiating an investigation within in the 15 workings days following the information notice, it could also take up the case in a limited period of time after the waiting period (e.g. within four to six months, similar to the period in which the Office of Fair Trading ("OFT") has to act in the UK system). In these circumstances, the transaction may already be either fully or partially implemented before the Commission decides on an investigation. In this case interim measures could be used to ensure that there is no exercise of special rights, and that the acquirer would not be able to vote its shares, until the Commission has approved the transaction.

65. Should the Commission request a notification or the parties notify voluntarily, the suspension obligation would apply to ensure that any future prohibition or remedy decision is not prejudiced.[45]

66. While the waiting period does lead to some cost to businesses as they cannot implement the transaction immediately, it might also directly benefit consumers and save costs for companies where the acquisition does raise competition concerns. [46]

67. The following table presents an overview of the different parameters within the three options assessed.

Table 1: Overview of the options on minority shareholdings

Parameter	Option 1 Self-assessment	Option 2 Targeted notification	Option 3 Targeted transparency system
Scope of the Commission's competence	Any acquisition above safe harbour (e.g. 5%), guidance on what type of transaction could be considered harmful	Acquisition of a minority stake in a competitor or vertically related company above e.g. 5% if certain rights are present or above e.g. 20% (no further rights required)	Acquisition of a minority stake in a competitor or vertically related company above e.g. 5% if certain rights are present or above e.g. 20% (no further rights required)
Obligation to notify the transaction to the Commission	no	yes	no
Obligation to submit an information notice about the transaction to the Commission	no	n/a	yes

45 Article 7(1) of the Merger Regulation.

46 Experience from the UK and Germany has shown that prolonged litigation may lead to a delay in the divestment of a minority shareholding, and hence any anti-competitive harm arising from it may persist over a long period of time. An example of such a case is the *Ryanair/Aer Lingus* transaction, where the initial stake was acquired by the end of 2006 and is still held by Ryanair. German law initially did allow the immediate acquisition of a minority stake and investigated the transactions only ex-post. However, the law was amended in 1998 due to the damaging effect of anti-competitive minority stakes which continued to be held during litigation. Under German law acquisitions of minority shareholdings are now subject to the same system (i.e. ex-ante control with stand-still obligation) as concentrations.

Possibility to submit a voluntary notification	n/a	n/a	yes
Stand-still obligation (no implementation before clearance decision)	no	yes	no
Waiting period (e.g. 3 weeks) before the parties can implement the transaction	no	n/a	yes
Obligation of the Commission to issue a decision	No, only in case of a voluntary notification or ex officio investigation	yes	No, only in case of a voluntary notification or ex officio investigation
Possibility for the Member States to ask for a referral	yes	yes	yes

68. It should be noted that, under Options 2 and 3, the suspension obligation or waiting period would have no or limited impact for two important types of acquisitions of minority shareholdings:

– First, the suspension obligation and/or waiting period under Options 2 and 3 would not apply to acquisitions of shares via stock exchanges as it would be envisaged to extend Article 7(2) Merger Regulation also to minority shareholdings. Under Article 7(2) Merger Regulation, it is foreseen that acquisitions via stock exchanges do not infringe the stand-still obligation unless the voting rights attached to the shares are exercised, meaning that the shares can be acquired at the point in time (and a certain price) planned by the acquirer.

– Similarly, it would also be foreseen to adapt the so-called "banking clause" under Article 3(5)(a) Merger Regulation to minority shareholdings. In short, this clause exempts acquisitions of control by financial institutions in the normal course of their business from the scope of the Merger Regulation as long as they do not exercise the voting rights and only temporarily acquire control, and dispose of their shareholding within one year. In the public consultation some stakeholders, in particular, financial institutions had voiced concerns that a control of minority shareholdings should not make restructuring transactions, such as debt-for-equity swaps, more difficult. Following an amendment of the banking clause such transactions would fall outside the scope the Commission's competence and the suspension obligation or waiting period under Options 2 and 3 would therefore not apply.

3.4. Analysis of impacts

69. This section explains a set of specific economic assessment criteria that make it possible to measure to what extent the various policy options considered are capable of contributing to achieving the general and specific objectives pursued as set out in

Section 3.2. As the initiative has no significant environmental and social impacts,[47] these factors will not be further addressed in this Impact Assessment.

70. The impact assessment is to a large extent qualitative as a quantification of the effects of the proposed policy options is only partially feasible. For example, the reduced administrative burden on an undertaking is easy to determine but very difficult to quantify. This holds even more for effects on macro-economic variables like preventing harm to competition and consumers, economic growth and innovation.

3.4.1. Assessment criteria

3.4.1.1. Preventing harm to competition and consumers

71. This category assesses whether an option contributes to the objective of the Merger Regulation to ensure effective competition in the internal market and, thus preventing consumer harm.[48] The theories of harm which would be applied in minority shareholding cases are explained above in the problem definition section (section 3.1.1).

72. Comparing the assessment under this criterion with the assessment under the criteria "administrative burden on businesses" and "public enforcement costs" will also allow evaluating the efficiency of each option.

73. An option will score positively if it contributes to more effective competition enforcement. In particular, an option will score high if the system captures the potentially problematic cases. The indicator used to measure this criterion is therefore the number of cases captured by the different options. Over the past few years, DG COMP has estimated consumer welfare savings resulting from corrective merger decisions adopted by the Commission. For the years 2009-2011, the Commission estimated the (observable) benefits derived from horizontal merger decisions to be between EUR 4,000 – 6,000 million per year[49].

74. In 2012, the Commission introduced a new methodology where the benefits derived from horizontal merger decisions were obtained from estimating the consumer savings related to price increases on the set of markets where there was an intervention. These ranged from EUR 2,200 million to EUR 5,600 million and the report assumed consumer savings preventing a 3% to 5% price increase for three to five years in the affected relevant markets (depending on market structure and barriers to entry in each case).[50]

75. While this same methodology could be applied to each minority shareholding case, it is not possible to reliably predict this overall benefit by extrapolating from the general 2012 figure since: (i) if we decided to apply a targeted approach that selects

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47 See Impact Assessment Guidelines, chapter 8 and annex.

48 Competitive markets will also contribute to stimulating economic growth and innovation. This impact relates directly to the competitiveness of markets as a result of the enforcement of competition law and will therefore not be assessed independently.

49 See the Annual Activity reports of DG COMP for 2009, 2010 and 2011.

50 See the 2012 Annual Activity report of DG COMP.

the potentially problematic cases it would not be possible to assume a similar rate of intervention for minority shareholding cases as for cases with acquisition of control because the intervention rate for the former cases should be higher than for "full mergers" currently assessed under the Merger Regulation; and (ii) this general figure only relies on horizontal merger cases.

3.4.1.2. Legal certainty

76. This category assesses whether the proposed options are clear and precise, and their legal implications foreseeable. It is clear from the results of the public consultation that great majority of stakeholders, in particular law firms and law associations, regard legal certainty as very important in the context of merger control, so that businesses know clearly under which conditions and at what point in time an envisaged transaction may be carried out. Legal certainty concerns, first, the question of whether or not a transaction would fall under the Commission's competence, and, second, guidance on when a transaction would be considered harmful. Legal certainty can be ensured by clear legal criteria, but also through soft-law instruments, such as guidance.

77. The different options will be assessed according to the degree of legal certainty, for example, by assessing the criteria to establish competence, whether the option foresees a Commission decision, or whether prescription periods exist.

3.4.1.3. Administrative burden on businesses

78. During the public consultation, respondents across all groups of stakeholders, expressed concern that the proposed reform would greatly increase the administrative burden which they face, and that this would be disproportionate given the low number of problematic acquisitions of minority shareholdings. The administrative burden imposed on businesses by each option therefore forms one of the assessment criteria, which is also important for evaluating the overall efficiency and proportionality of each option.

79. This category includes costs incurred by businesses to meet legal obligations to participate in procedures, to keep information and to provide it. Only the net costs are taken into account, i.e. excluding those costs that would be incurred anyhow, even without any legal obligation.

80. Given that the proposed policy options regarding minority shareholdings are being compared with the baseline scenario, options will score less negatively to the extent that they require businesses to participate in less complex and/or lengthy procedures.

81. The responses obtained in the public consultation focused only on the external costs of notification or provision of information but not on the internal costs borne by the companies themselves. However, it is safe to assume that both types of costs will increase together so that the ranking of systems will not be affected by the absence of these costs. It should be factored in, though, that those costs are limited compared to the size of such transactions and to other transactional costs.

82. Regarding the costs of filing a full notification, most respondents estimated that these would be broadly similar to the costs of filling a Form CO. Their estimated figures for this cost ranged from a low end around EUR 50,000 - 75,000 to a high end around EUR 500,000.

83. The costs of providing information under the transparency system were universally projected to be significantly lower than the costs of notification provided that the information required was limited to the identity of the parties, their turnover, as well as a description of the transaction and details of the economic sectors concerned. There were few actual estimates but these ranged from as low as EUR 5,000 to as high as EUR 50,000.[51]

84. It should also be noted that the proposed reform would have no direct impact on small and medium-sized enterprises ("SMEs") as transactions involving SMEs would not fall under the competence of the Commission due to the turnover thresholds of the Merger Regulation.[52]

3.4.1.4. Public enforcement costs

85. Regarding public enforcement costs, some stakeholders also expressed concern that these might also be disproportionate to the benefit of capturing a small number of problematic minority shareholdings. These have therefore also been taken into account in the assessment criteria and are important for assessing the overall efficiency of each option.

86. This category assesses whether an option affects competition authorities and especially the Commission in the sense of an increase or decrease of workload. The number of transactions[53] that are likely to be affected by the proposed option is used as a general proxy for the enforcements costs. In addition, the relative workload to review an information notice or a notification was also considered.

87. An option achieves a higher score when the number of captured transaction cases is lower.

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[51] However, some responses noted that if this system is applied solely for complicated cases, the individual cost might be much higher. Even a communication under the transparency system might be quite expensive if indirect shareholdings and a wide definition of "competitive impact" are brought into play.

[52] The turnover thresholds of Article 1(2) and 1(3) Merger Regulation would be applicable also the acquisition of non-controlling minority shareholdings. They foresee that (1) the combined turnover of all undertakings concerned is more than EUR 5 000 million and the Union wide of at least two of the undertakings concerned is at least EUR 250 million or (2) the combined turnover of all undertakings concerned is more than EUR 2 500 million, the combined turnover in each of at least three Member States is EUR 100 million, and in each of at least three Member States at least each of two undertakings concerned have a turnover of EUR 25 million the Union wide and at least two of the undertakings concerned have an turnover at least of EUR 100 million. Given that the Commission recommendation on the definition of micro, small and medium sized enterprises (OJ L124/36 of 20.5.2003) defines medium-sized enterprises as those having turnover of equal or less than EUR 50 million or a balance sheet total of equal or less than EUR 43 million, in addition to requirement of a certain number of employees, the likelihood that a transaction concerning SMEs would fall under these thresholds is small.

[53] As estimated in Section 3.1 above.

3.4.1.5. Consistency with the merger control systems at national and EU level and allocation to the more appropriate authority

88. This criterion assesses whether an option fits with the existing procedures at EU and Member State level. Consistency with the systems at Member State level means in particular that, if an option allows the referral system currently in place for "full mergers" to be applied also to minority shareholdings, the referral system allows for an allocation of a case to the more appropriate authority (e.g. a transaction with Union dimension would be better dealt with by a Member State if the effects are limited to the territory of this Member State).

89. The different options will score positively if they can be smoothly integrated into the existing system of EU merger control and do not make that system more complicated, for example, through introducing procedures different from those already in place. Regarding the Member States, three Member States already have jurisdiction to review acquisitions of minority shareholdings. However, these three regimes differ in their nature, for example the UK regime is voluntary while the German and Austrian regimes involve a mandatory notification. An option will therefore score positively if it fits with each of the existing regimes at the Member State level, and adequately allows those Member States to request a referral of cases.

3.4.2. Identifying and assessing the impact of each option

90. This section sets out, in the form of tables, the conclusions of the Commission's assessment of the likely positive and negative impacts that options 1 to 3 would have. Each option is assessed on its own merits against the baseline "no policy change" scenario.

91. The impact of the option against the baseline is summarised in the tables under the following scoring system:

+ + + / - - - Very positive / negative impact

+ + / - - Moderate positive / negative impact

+ / - Negligible positive / negative impact

0 No Impact

92. However, it is important to point out that, in merger control policy instruments, it is not possible to quantify the positive and negative impact evaluations as the distance between the different scores is not equal and neither are the weights equal. These different scores can therefore not be aggregated in a meaningful manner.

93. The tables below contain the assessment of the different policy options on the basis of the assessment criteria described in Section 3.4.1.

3.4.2.1. Self-assessment system (Option 1)

Table 3: Minority shareholdings option 1 – self-assessment system with the possibility of a voluntary notification		
Criteria	**Impact compared to baseline scenario (- - - to + + +)**	**Explanation of rating and aspects of the policy option most relevant**
1. Preventing harm to competition and consumers	+	Option 1 will capture some anticompetitve transactions, however it scores lower than a notification system or transparency system since it is not ensured that the Commission or the NCAs become aware of problematic transactions. Practically, it would be very difficult for the Commission to keep track of all minority shareholding acquisitions in the internal market; and secondly, economic theory suggests that the Commission could not rely on competitors to alert it to potentially harmful shareholdings.
2. Legal certainty	+ +	Option 1 receives a medium to high score for the criterion of legal certainty. As was evident from responses to the public consultation, bsuinesses, business associtations and law firms widely support the possibility of a voluntary notification as it gives legal certainty to those parties who are concerned about the legality of the transaction. It provides greater legal certainty than under the current system (baseline scenario) where the parties have to assess themselves under Article 101 and 102 TFEU if the envisaged transaction is anticompetitive without any possibility to obtain legal certainty.
3. Administrative burden on businesses	-	Option 1 receives the least negative score as it imposes the lowest administrative burden on the parties compared to the other options. The parties, or their legal advisors, will have to assess themselves if the transaction is likely to result in a significant impediment to effective competition. For this self-assessment it will be necessary to gather and assess the relevant economic data, such as market shares. This option would also implement the one-stop-shop principle as the parties would have to assess themselves if the envisaged transaction creates a significant impediment to effective competition. Compared to the baseline scenario the option scores positively since currently transactions may have to be notified or may be reviewed in three Member States (Austria, Germany, the United Kingdom).
4. Public enforcement costs	- - -	Regarding option 1, the public enforcement costs are higher than under the other two options (targeted notification system and targeted transparency system) as the Commission would have to screen not notified transactions to discover potenially problematic transaction which involves an extensive fact finding up-front to gain sufficient information to ascertain if a transaction falls within the scope of the merger regulation and merits an investigation. Similar to anti-trust proceedings, the parties would have limited incentives to coperate with the Commission on the investigation as they are free to close the transaction without any waiting period. In contrast to the targeted transparency system, the Commission would have to screen a much larger number of transactions.
5. Ensuring consistency with the existing merger control system on an EU and Member State level and allocation to the more appropriate authority	-	Option 1 is not in line with the existing system of ex-ante merger control on the EU level, as it introduces a very different enforcement system for acquisitions of non-controlling minority shareholdings. Option 1 does not fit with the existing Member State merger control regimes. First, the option does not ensure that the Member States know about a transaction which might affect their territory and therefore lack the information on the basis of which they could request a referral. Second, even if the Member States would learn about a transaction, the transaction may be already implemented before the Member States can request a referral. The Member States which have an ex-ante control system (Austria and Germany) would not be able to investigated the transaction under their legal framework, but would

		only be able assess the transaction ex-post, i.e. after it has been implemented. Option 1 is therefore not consistent with the allocation of a case to the more appropriate authority: While cases which meet the turnover thresholds would generally be reviewable by the Commission, a referral to a Member States would not be possible as they would not know about a transaction and would not be able ask for a referral.

3.4.2.2. Targeted notification system (Option 2)

Table 4: Minority shareholdings option 2 – Targeted notification system		
Criteria	**Impact compared to baseline scenario (- - - to + + +)**	**Explanation of rating and aspects of the policy option most relevant**
1. Preventing harm to competition and consumers	+ + +	Option 2 would capture the potentially problematic transactions as they would have to be notified to the Commission. The Commission would then assess these transactions. The Member States and the general public would be aware that the transaction has taken place and could come if they consider the transaction problematic. Harm to consumer and competition by an anti-competitve minority shareholding is more effectively prevented if a stand-still obligation exists, as in this case an anti-competitive shareholding does not persist over the years during which the litigation about a divestiture is taking place.
2. Legal certainty	+ +	Option 2 receives a medium to high score for the criterion of legal certainty. The parties would receive a Commission decision indicating whether or not the Commission opposes the envisaged transaction. However, as highlighted by some stakeholders in the public consultation, the criteria for notification are less clear than under the formal notification system. For this reason the option receives a lower score than the formal notification system. Nevertheless, based on the experiences in Germany and the United Kingdom, together with appropriate guidance and given that the parties also have the option to consult the Commission, these criteria are workable and ensure a sufficient degree of legal certainty.
3. Administrative burdens on businesses	-	Option 2 receives a lower score than Option 1 since companies must submit a notification to the Commission if they fall under the targeted competence.
4. Public enforcement costs	-	Public enforcement costs under Option 2 would be more limited than under the Option 1 as only the relatively limited number of potentially problematic cases notified will have to be examined by the Commission and a formal decision be issued.
5. Ensuring consistency with the existing merger control system on an EU and Member State level and allocation to the more appropriate authority	+ +	Option 2 is consistent with the existing system of ex-ante merger control on the EU level, which it extends to pre-defined set of "potentially problematic transactions". However, the criteria for defining notifiable cases include a limited substantive assessment, which is different from applying the formal turnover thresholds for concentrations. Option 2 is fully consistent with the different merger control systems for the acquisition of minority shareholdings on a Member States level and fully preserves their functioning, since Member States are informed of an envisaged transaction by way of the notification and, thanks to the standstill obligation, can request a referral before the transaction is implemented. Option 3 is therefore consistent with the aim to allocate a case to the more appropriate authority. The current referral system which is guided by the principle of a case allocation to the more appropriate authority would be applicable also

		minority shareholdings. Since the Member States are informed of an envisaged transaction by way of the notification, they can request case referrals as appropriate.

3.4.2.3. Targeted transparency system (Option 3)

Table 5: Minority shareholdings option 3 – Targeted transparency system with the possibilty of a volunatry notification and waiting period		
Criteria	**Impact compared to baseline scenario (- - - to + + +)**	**Explanation of rating and aspects of the policy option most relevant**
1. Preventing harm to competition and consumers	+ + +	Option 3 would capture the potentially problematic transactions. The parties would have to inform the Commission of it. The Commission would then assess whether to investigate it. The Member States and the general public would be aware that the transaction has taken place and could come if they consider the transaction problematic.
2. Legal certainty	+ +	Option 3 receives a medium to high score for the criterion of legal certainty. Since the Commission is informed about the transaction and can only act within a certain time period – which the parties have the possibility to shorten by filing a voluntary notification – the parties obtain legal certainty about the legality of the transaction. The criteria for determining the cases falling under the Commission's jurisdiction are not as clear as they would be under a formal notification system, however based on the experiences in Germany and the United Kingddom, together with appropriate guidance and the option to voluntarily notify in case of doubt, these criteria are workable and ensure a sufficient degree of legal certainty.
3. Administrative burdens on businesses	-	Option 3 gets a similar grade to Option 1 (self-assessment system). It is not significantly more burdensome than a self-assesment system in terms of information required for competitive assessment of the transaction (e.g. market share data for the parties and competitors, understanding of market dynamics). Although Option 3 is at first sight more burdensome than the self-assessment system (Option 1) due to the mandatory submission of the transparency notice, the information notice would not demand any additional information than what is anyway necessary to assess the transation under the self-assessment system. Therefore, the targeted transparency system is graded within the same range than Option 1. Compared to the targeted notification system Option 3 is less burdensome as the parties do not have to submit a notifcation, but only an information notice.
4. Public enforcement costs	-	The public enforcement costs under Option 3 are estimated to be lower than in Option 1 and Option 2. Compared to Option 1 (self-assessment) the enforcment cost are lower as the Commission would not have to screen and investigate which transactions are taking place and might fall under the Commission's competence. Compared to the targeted notification system the Commission would further select the cases which merit a full investigation and where a decision would have to be issued amongst the large sample of cases it is informed about by an information notice.
5. Ensuring consistency with the existing merger control system on an EU and Member State level and	+	Option 3 is only partially consistent with the existing system of ex-ante merger control on the EU level, as it introduces a different procedure for minority shareholdings and the criteria for defining the cases that would fall under the Commission's competence partly include a substantial assessment, which is different from the formal notification thresholds applicable for concentrations.

allocation to the more appropriate authority		Option 3 is fully consistent with the different merger control systems for the acquisition of minority shareholdings on a Member State level and fully preserves their functioning, since Member States are informed of an envisaged transaction by way of the information notice and, due to the waiting period, can request a referral before the transaction is implemented. Option 3 is therefore consistent with the aim to allocate a case to the more appropriate authority as the current referral system which is guided by the principle of a case allocation to the more appropriate authority would be applicable also minority shareholdings. Since the Member States are informed of an evisaged transaction by way of an information notice, they can request case referrals as appropriate.

3.5. Conclusion on non-controlling minority shareholdings

3.5.1. Comparing the policy options

Table 6: Comparision of minority shareholding options

Criteria	**Impact compared to baseline scenario (- - - to +++)**		
	Option 1	**Option 2**	**Option3**
	Self-assessment system	**Targeted notification system**	**Targeted transparency system**
1. Preventing harm to competition and consumers	+	+ + +	+ + +
2. Legal certainty	+ +	+ +	+ +
3. Administrative burdens on businesses	-	- -	-
4. Public authorities / Enforcement costs	- - -	- -	-
5. Consistency with the existing merger control system on an EU and Member State level and allocation to the more appropriate authority	-	+ +	+

3.5.2. The Preferred Option

94. Based on the above assessment, the preferred option is Option 3, the targeted transparency system as it fully meets the three criteria which were emphasized by stakeholders in the public consultation and in contacts with stakeholder at conferences, workshops, etc. (as set out in Section 4.2.1).

95. Under Option 3, it is likely that the potential harmful transactions are caught and brought to the Commission's attention and also the Member States' attention. On the other hand, transactions which are most likely innocuous, such as acquisitions for investment purposes, do not fall under the Commission's competence under this option. Accordingly, as was considered important by all stakeholders, Option 3 limits

the number of cases to strictly what is necessary under the overall aim of preventing harm to consumers.

96. Option 3 limits the administrative burden on businesses and enforcement costs for the public authorities involved (Commission and NCAs), first, by capturing only the potentially problematic cases, and second, by limiting the amount of information to be submitted to the Commission at the initial stage. Only if the Commission decides to investigate a case, the parties would have to submit a full notification. Such a system would therefore resolve the concerns of many stakeholders, in particular, businesses, business associations and law firms, that a system should not be disproportionately burdensome on parties.

97. Lastly, Option 3 fits with the existing systems for the control of minority shareholdings on a national level. The transparency notice informs the Member States of the transactions and allows them to request a referral. The three weeks waiting period also ensures that the Member States with a notification system and stand-still obligations are not faced with already implemented transactions before they start their investigations.

98. Since Option 3 achieves the objective pursued with only limited administrative burden and public enforcement costs, it may be considered the most efficient of the options considered.

3.5.3. Proportionality and EU added value for the Preferred Option

3.5.3.1. Subsidiarity: European added value

99. Regarding the possible extension of the Merger Regulation to minority shareholdings, it is considered that action at EU level along the lines of the preferred option would respect the principle of subsidiarity since there is a clear need for and added value in such action compared to action on Member State level. The examples of cases examined by Member States which currently apply merger control to minority shareholdings show that a number of these cases (such as Ryanair/Aer Lingus or General Motors/PSA) clearly have a dimension going beyond one Member State and therefore the Commission would have been the more appropriate authority to investigate the impacts of these transactions on competition, as the competence of the competition authorites of the individual Member States is limited to assessing the effects of the transaction in their respective territory. On the other hand, the Commission would be able to assess the effects of transaction for the territories of all Member States.

100. For example, in *Ryanair/Aer Lingus* the UK authorities were limited to reviewing the transactions only as regards the routes out of the UK where both Ryanair and Aerlingus were competing, while the transaction would have affected many more routes between Ireland and destinations in other Member States. The UK authorities were not able to look at these routes. Similarly, as regards General Motors/PSA, any effects between this transaction between a U.S. and French company which are both active gloablly, would not have been limited to Germany, but might have had effects also on other Member States, and the Commission rather than the German

Bundeskartellamt would have been the more appropriate authority to look at this case.

101. Looking at the competitively significant influence cases of the Bundeskartellamt over the last few years, roughly 40-45% of these cases would have an EU dimension, i.e. would have met the turnover thresholds of the Merger Regulation. Therefore, it appears that, in general, the Commission would be better placed to investigate a sizeable proportion of minority shareholding cases currently analysed in Germany.

102. It should be noted that also in 1989 when merger control was introduced for the first time at the EU level, only very few Member States had a merger control regime in place. In the meantime 27 out of 28 Member States apply merger control. Therefore, the fact that currently only 3 out of 28 Member States have the competence to review the acquisition of non-controlling minority shareholdings does not mean there is no need to tackle the enforcement gap. In addition, the large majority of Member States that introduced merger control legislation only after the first EU Merger Regulation was adopted in 1989 largely designed their rules following the EU model. Therefore, in most cases the choice not to extend merger control to non-controlling minority shareholdings was not based on an in-depth analysis of the potential anti-competitive harm that might be caused by such transactions.

3.5.3.2. Proportionality

103. The preferred option is also fully in line with the principle of proportionality, both as regards its general approach and the content of the individual measures envisaged.

104. As demonstrated through the evaluation against the assessment criterion "preventing harm from competition and consumers", the preferred option of a targeted transparency system is suitable to achieve the objective of ensuring that those acquisitions of minority shareholdings that could possibly cause anticompetitive harm can be examined by the Commission (or by an NCA requesting a referral). By contrast, a self-assessment system (Option 1) would not be sufficient to guarantee that such cases are brought to the attention of the Commission and/or NCAs.

105. On the other hand, as shown through the evaluation against the assessment criterion "administrative burden on businesses", the targeted notification system does not impose any burden on businesses that goes beyond what is necessary to achieve the objective. First, it does not extend to all transactions involving the acquisition of non-controlling minority shareholdings but only to those between competitors or vertically related companies, thereby excluding the large majority of from the outset unproblematic transactions from any scrutiny. Second, it does not impose a fully-fledged obligation for ex-ante notification (such as for full mergers) on all transactions covered but, as a first step, only an obligation to file a much shorter information notice (and possibly to observe a limited waiting period); only in case the Commission decides to investigate the case (or it is referred to an NCA) the normal procedure under the Merger Regulation (or the relevant national legislation) applies. By contrast, a targeted notification system (Option 2) would partly go beyond what is strictly needed to attain the objective, since it would subject all relevant transactions between competitors or vertically related companies to a full ex-ante notification obligation.

4. CASE REFERRAL BETWEEN NATIONAL COMPETITION AUTHORITIES AND THE COMMISSION

4.1. Problem definition

106. The 2009 Report found that a significant number of cross-border cases are still subject to multiple review in three or more Member States (100 cases in 2007 resulting in overall more than 360 investigations by NCAs). To some extent, the reason for this could be the procedural burden associated with a referral as companies and their advisors criticised the referral procedures as cumbersome and time consuming.[54] In some cases, where the Commission might have been the more appropriate authority, companies may also have opted against a referral to the Commission in order to avoid the Commission's jurisdiction for reasons of "forum shopping".[55] Companies may have decided not to opt for an Article 4(5) referral as the process was too long and/or considered that the NCAs would be more lenient than the Commission. This is of particular relevance for referrals based on Article 22 that need to be better streamlined in order to avoid a patchwork of competences where the Commission looks at part of a transaction, while some national competition authorities investigate the effects of that same transaction in their territory.

107. Considering the above, further improvements appear to be required of the referral system between the Commission and national competition authorities, especially concerning referrals from Member States to the Commission based on Article 4(5) or Article 22 (referral from MS) of the Merger Regulation.

4.1.1. Pre-notification referral from Member States to the Commission, Article 4(5)

4.1.1.1. Scope of the problem

108. Article 4(5) of the Merger Regulation allows the merging parties to request, before they notify a transaction to the competent national authorities, the referral of a merger to the Commission that does not fall under the thresholds of the Merger Regulation and has to be notified in at least three Member States. Under the current system, parties have to submit a "reasoned submission" ("Form RS") which requires the information necessary in particular to allow Member States to assess whether or not they accept the referral request. Under the current system, the competent Member States have 15 working days to oppose the referral to the Commission (in which case the review stays with the Member States). In case no competent Member State opposes, the Commission obtains jurisdiction for the entire EEA and the parties have to submit a notification to the Commission ("Form CO"). Article 4(5) therefore

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[54] See e.g. paragraph 19 of the 2009 Report.

[55] 1. As far as case referrals are concerned, 12 merger cases were referred in 2012 from the Commission to one or more Member State before notification on request of the merging parties. 22 cases were referred from the Member States to the Commission before notification on request of the parties. Two cases were wholly or partially referred by the Commission to one or more Member States after notification on request of the respective Member State(s). Two cases were referred after notification, on request of one or more Member States to the Commission; in one case the Commission did not accept a referral requested by Member States.

allows the parties to opt for a one-stop-shop, as they only have to notify the transaction to the Commission, instead of submitting notifications to several NCAs.

109. However, companies consider this procedure of two separate submissions ("Form RS" and "Form CO") and the 15 working day consultation period burdensome and time-consuming[56] and may have therefore opted against using the Article 4(5) referral procedure in some cases in the past. This view has also been confirmed quasi unanimously by the replies of stakeholders to the Staff Working Document.

4.1.1.2. Magnitude of the problem

110. Since the introduction of Article 4(5) in 2004, in total 261 requests for pre-notification referral to the Commission were made; on average roughly 26 a year.[57] This represents around 8% of all cases notified to the Commission and several of these were significant cases which posed competition problems or allowed the Commission to look into nascent markets[58]. Out of these 261 cases, only 6 were vetoed by a Member State and therefore not referred to the Commission.

111. If the procedure for referral under Article 4(5) were less cumbersome and time-consuming for the parties, it would potentially become a more attractive option and this would allow the Commission to examine a larger number of potentially significant cases that are currently notified to three or more national competition authorities. Data with regard to concentrations which would meet the conditions in Article 4(5) but are as yet reviewed at the national level are not readily available. However, the figure of 100 cases of parallel review in three or more Member States in 2007 reported in the 2009 Report indicates that the potential scope is significant. In the same vein, a number of respondents to the public consultation indicated that the revised system would make it a more attractive option.

4.1.2. Post-notification referral from Member States to the Commission Article 22

4.1.2.1. Scope of the problem

112. In line with the general principles for case allocation among the Commission and Member States, Article 22 is currently used to allow national competition authorities to refer those cases for which the Commission is the "more appropriate/better placed" authority to deal with to the Commission even if parties did not or could not request a referral of the case before notification under Article 4(5). Most appropriate for such a referral are cases which raise serious competition concerns in markets that are broader than national markets or where the cross-border remedies could be envisaged.[59] The Commission should be able to appropriately deal with the cases referred under Article 22.

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56 Ibid.

57 Figures include cases until October 2013. Source: http://ec.europa.eu/competition/mergers/statistics.pdf

58 For instance COMP/M.4854 - *Tom Tom/Tele Atlas*, COMP/M.4731 - *Google / Double Click*, COMP/M.5669 - *Cisco/Tandberg*, COMP/M.6690 - *Syniverse/Mach*, *COMP/*M.6576 – *Munksjö / Ahlstrom* or COMP/M.6857 – *Crane/MEI.*

59 See Commission Notice on case referral in respect of concentrations, OJ C 56, 5.3.2005, p. 2 ("Notice on Case Referral"), paragraph 45. According to the Notice, a case displays such cross-border effects in particular if it gives rise to serious competition concerns in markets which are wider than national in

113. Currently, Article 22 allows for one or more Member States to request the referral of a case to the Commission; if the Commission accepts the referral, it will gain jurisdiction only for the territory of the Member State(s) that have requested the referral or explicitly joined the referral request made by another Member State. This means that even though such cases have cross-border effects, the Commission does not have the possibility to examine the effects of the merger for the whole of the EEA. The current system of Article 22 is therefore not in line with the "one-stop-shop" principle that generally governs case allocation under the Merger Regulation and under which cases that must be notified to the Commission should not have to be notified at the same time to any national competition authority within the EEA. The current system of Article 22 referrals can lead to a patchwork of competences where the Commission looks at part of a transaction, while some national competition authorities investigate the effects of that same transaction in their territory.

For example, in case COMP/M.5675 - *Syngenta/Monsanto*,[60] referred to the Commission on the request of Spain joined by Hungary, the Commission was able to examine the European-wide upstream market for licences for sunflower hybrids and the closely related national markets for the distribution of such hybrids in Spain and Hungary; however, since France had not joined the referral request, the Commission could not look into the French distribution market which may have potentially raised equally serious competition concerns.

114. The majority of replies to the Staff Working Document as well as all national competition authorities support the view that the current system of Article 22 referrals is not optimal as it does not give the Commission competence for the whole of the EEA and may lead to parallel investigations contrary to the "one-stop-shop" principle. However, some private stakeholders questioned the relevance of maintaining post-notification referrals under Article 22 altogether.

4.1.2.2. Magnitude of the problem

115. 30 Article 22 referral requests were made since 2004.[61] The table attached as annex 5 shows all transactions for which an Article 22 referral has been accepted since Article 22 entered into force in 2004. As is apparent from this annex, a decision of referral was adopted in cases which either concerned EEA-wide markets or multiple affected national markets and for which the Commission was considered the more appropriate authority to handle the investigation.

A remarkable case in that respect is COMP/M.5828 – *Procter & Gamble / Sara Lee*. Although the transaction was notifiable in 10 Member States, namely Bulgaria, Italy, Austria, Poland, Portugal, Slovak Republic, Spain, Hungary, Cyprus and Germany, P&G had decided against the possibility of a pre-notification referral pursuant to Article 4(5) of the Merger Regulation and had notified the concentration to the

geographic scope or in a series of national or narrower than national markets in a number of Member States in circumstances where coherent treatment of the case (regarding possible remedies, but also, in appropriate cases, the investigative efforts as such) is considered desirable.

60 COMP/M.5675 - *Syngenta / Monsanto's Sunflower Seeds Business.*

61 Figures include cases until September October 2013. Source: http://ec.europa.eu/competition/mergers/statistics.pdf.

German Bundeskartellamt, as well as to other NCAs. Following a referral request made by Germany pursuant to Article 22(1) of the Merger Regulation, and later joined by seven other Member States[62], the Commission accepted the requests of Belgium, Germany, Portugal, Spain and the United Kingdom.[63]

4.2. Objectives

116. This section sets out the general policy objectives pursued, along with several more specific underlying objectives.

117. Based on these objectives, Section 4.4 sets out and explains a set of specific assessment criteria.

4.2.1. General objectives

118. The initiative aims at making European competition policy in the field of merger control more effective and more efficient by:

(a) reducing administrative burden of existing procedures, in particular relating to case referrals between Member States and the Commission; and

(b) simplifying existing procedures, in particular relating to case referrals between Member States and the Commission.

119. This initiative should be seen in the context of the Commission's commitment to regularly review the functioning of existing legislation under the new Regulatory Fitness and Performance Programme ("REFIT-programme") launched in December 2012.[64] In addition, the initiative should be seen in the overall framework of the Commission's Europe 2020 strategy for growth, in particular with a view of enhancing industrial competitiveness.

120. The initiative also relates to the Commission's package of measures for the simplification of certain procedures under the Merger Regulation adopted on 5 December 2013.[65] The simplification package (including an amendment to the Implementing Regulation[66] and a revised Commission Notice on the simplified procedure) aims at reducing and streamlining the information requirements for merger control proceedings and at widening the scope for the so-called simplified

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62 The United Kingdom, Belgium Portugal, Spain, Slovakia, Hungary and Poland.

63 The Commission dismissed the request of Hungary as it did not meet the requirements laid down in Article 22(3). Slovakia and Poland withdrew their request.

64 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: EU Regulatory Fitness, COM(2012)746 final. Available at: http://ec.europa.eu/commission_2010-2014/president/news/archives/2013/10/pdf/20131002-refit_en.pdf

65 Commission Implementing Regulation (EU) No 1269/2013 of 5 December 2013 amending Regulation (EC) No 802/2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ L 336, 14.12.2013, p. 1; Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004, C 366, 14.12.2013, p.5.

66 Commission Regulation (EC) No.802/2004 implementing Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings, OJ L 133, 30.4.2004, p. 1.

procedure for non-problematic merger cases. It did not involve an amendment of the Merger Regulation itself. While the simplification package aims at alleviating the administrative burden within the framework of the existing Merger Regulation, the current initiative goes further and aims at assessing the proper scope and functioning of the Merger Regulation itself.

4.2.2. Specific objectives

121. With respect to case referrals, in line with the comments received in the public consultation and discussions with Member States and other stakeholders, the specific objectives are:

- to simplify the procedure for pre-notification referral of cases from Member State to the Commission pursuant to Article 4(5) of the Merger Regulation, in particular by avoiding the need for merging parties to file both a reasoned submission for referral and a subsequent notification, in order to generate savings both in terms of time and costs;

- to make the procedure for post-notification referral of cases from Member States to the Commission pursuant to Article 22 of the Merger Regulation more effective, in particular by ensuring that, following a referral, the Commission is in a position to examine the effects of the merger on competition for the whole territory of the EEA, in order to strengthen the "one-stop-shop" principle.

4.3. Policy Options

122. This section describes the option for a possible modification to the Merger Regulation that are considered to adress the problems discussed in Section 4.1 taking into account the objectives set out in Section 4.2.

123. The baseline scenario for the proposed options entails no action at all at EU level. The assessment of the impact of this baseline scenario examines the *status quo* and likely developments in the absence of a reform of the Merger Regulation. As regards Article 4(5), the baseline scenario implies a two-step process with, first, the submission of a "reasoned submission" (Form RS) and, second, a notification to the Commission in the absence of veto. As regards Article 22, the baseline scenario can lead to a patchwork of competences where the Commission looks at part of a transaction, while some national competition authorities investigate the effects of a transaction in their territory; this situation is not in line with the the "one-stop-shop" principle.

4.3.1. Introduction

124. In contrast to the options presented above concerning minority shareholdings, the proposed options presented below concerning case referrals would not involve a fundamental change of the Merger Regulation and should be seen as an improvement of the referral provisions which have proven their usefulness in the last ten years. The two options (regarding Article 4(5) and Article 22) are essentially identical to the options already discussed in the Staff Working Document, which have received

very strong support from different groups of stakeholders (public authorities, businesses, business associations, law firms, etc.) in the public consultation.

125. Given that both proposals involve a procedural amendment to improve the referral provisions in line with the principles of EU merger control and given that they received such strong support in the public consultation, only one single option is put forward against the baseline scenario for both Article 4(5) and Article 22. For the same reason, no other alternatives have been considered and assessed.

4.3.2. Options for assessment

4.3.2.1. Pre-notification referrals from Member States to the Commission pursuant to Article 4(5)

126. The policy option to amend the procedure of pre-notification referrals to the Commission under Article 4(5) consists in abolishing the requirement for the parties to file a "reasoned submission" ("Form RS") to the Commission while maintaining the other requirements for a referral (the case has to be notifiable in at least three Member States and no veto from a Member State). The parties would therefore be allowed to notify directly to the Commission which would immediately forward the notification to the Member States. The Commission would have jurisdiction unless a competent Member State opposes the jurisdiction of the Commission within 15 working days of receiving the notification. In case at least one competent Member State opposes the jurisdiction of the Commission, the Commission would have to renounce jurisdiction and Member States retain their original competence. As before, a referral would only be possible upon request of the notifying party.

127. It should be noted that Article 4(5) does not impose a substantive test for transactions in order to qualify for a referral. This is currently the case for pre-notifications referrals from the Commission to the Member States, under Article 4(4), which requires that to qualify for a referral the case "may significantly affect competition in a market within a Member States which presents all the characteristics of a distinct market […]". Given this discrepancy between Article 4(4) and 4(5) it is currently contemplated to adapt the substantive test in Article 4(4) so that parties do not have to claim the possibility of a "significant effect in a market" in order for a case to qualify for a referral. Article 4(4) might become more used in the future if it does no longer contain a perceived "element of a self-incrimination".

4.3.2.2. Post-notification referrals from Member States to the Commission pursuant to Article 22

128. The policy option is to amend the procedure of post-notification referrals to the Commission under Article 22 (in line with the Staff Working Document) along the following lines:

- One or more Member State(s) competent under their national law to review a merger would have the possibility to request a referral to the Commission within 15 working days.

– The Commission would maintain its discretion whether or not to accept a referral, unless one competent Member State opposes the referral.

– The Commission's decision to accept a referral would give it jurisdiction for the whole of the EEA.

– In case at least one Member State opposes the referral, all Member States retain their jurisdiction.

129. An early coordination between the Commission and the Member States would ensure to avoid the scenario of one Member State having already cleared the transaction when another Member State requests a referral to the Commission. It is envisaged that a notice would be circulated when a NCA has to assess a transaction that is multi-jurisdictional and/or potentially concerns markets which are prima facie wider than national. The NCA would indicate in this notice if it is considering making a referral request because, on a preliminary basis, the Commission seems the more appropriate authority. In that case, the notice would trigger the suspension of the national deadlines of all Member States which are also investigating the case so that the suspension would occur at an earlier stage than under the current rules. Alternatively, if the Commission itself considers that it could be the more appropriate authority it would invite the Member State to request a referral under Article 22(5) and such an invitation would equally suspend all national deadlines.

4.4. Analysis of impacts

130. This section explains a set of specific economic assessment criteria that make it possible to measure to what extent the various policy options considered are capable of contributing to achieving the general and specific objectives pursued as set out in Section 4.2. As the initiative has no significant environmental and social impacts,[67] these factors will not be further addressed in this Impact Assessment.

131. The impact analysis is to a large extent qualitative as a quantification of the effects of the proposed policy options is only partially feasible. For example, reducing administrative burden of an undertaking is easy to determine but very difficult to quantify. This holds even more for effects on macro-economic variables like preventing harm to competition and consumers, economic growth and innovation.

4.4.1. Assessment criteria

4.4.1.1. Preventing harm to competition and consumers

132. This category assesses whether an option contributes to the objective of the Merger Regulation to ensure effective competition in the internal market and subsequently preventing consumer harm.[68]

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67 See Impact Assessment Guidelines, chapter 8 and annex.

68 Competitive markets will also contribute to stimulating economic growth and innovation. This impact relates directly to the competitiveness of markets as a result of the enforcement of competition law, and will not be assessed independently.

133. Options will score positively in case the option contributes to more effective competition enforcement, by allowing the Commission to investigate cases for which it is the more appropriate authority for the entire EEA.

4.4.1.2. Legal certainty

134. This category assesses whether the proposed options are clear and precise, and their legal implications foreseeable. This criterion will only be assessed with regard to the option for Article 22 as the option for Article 4(5) does not entail any change in the substantive criteria and the changes are limited to the procedure and stakeholders did not raise any problems with legal certainty in relation to Article 4(5). Options will score positively in case it provides higher legal certainty than the baseline scenario.

4.4.1.3. Simplification of procedures and reduction of administrative burden on business

135. This category assesses the coherence of the proposal with the objective of better regulation, i.e. EU legislation should be made simpler and more transparent. Any simplification of procedures will also alleviate the administrative burden on business, e.g. in terms of time savings or in terms of less information to be submitted.

136. Nearly all respondents to the public consultation indicated that the proposals would make the referral system less time consuming and cumbersome. The time needed to obtain merger approval would be reduced and cost savings in management and advisor costs would be incurred. While stakeholders, in particular law firms and law associations, estimated the time savings mostly at around 1-2 months. The cost saving were mostly not quantified, however, one law firm estimated them to be 20% - 30% lower than under the current procedure.

137. Options will score positively if they reduce the procedural burden.

4.4.1.4. Public enforcement costs

138. This category assesses whether an option affects competition authorities and especially the Commission in the sense of an increase or decrease of workload. Options score positively if a reduction of workload of enforcement authorities can be expected.

4.4.1.5. Coherence with the Merger Regulation

139. Based on the guiding principle of the referral system that cases should be dealt with by the more appropriate authority, the proposed reform of the referral system aims at ensuring that the Commission will deal with cases where it is more appropriate authority. In addition, if the Commission is considered the more appropriate authority, the reform aims at ensuring the one-stop principle, meaning that multiple and parallel reviews of the same transaction by the Commission and the Member States are avoided, so that the risk of diverging decisions and the administrative burden on companies is reduced.

140. Options will therefore score positively if they ensure a coherent treatment of a case displaying cross-border effects, avoid instances of forum-shopping, reduce the risk of diverging decisions and increase legal certainty.

4.4.2. Identifying and assessing the impact of each option

141. This section sets out, in the form of tables, the conclusions of the Commission's assessment of the likely positive and negative impacts of the option. Each option is assessed on its own merits against the baseline "no policy change" scenario.

142. The impact of the option against the baseline is summarised in the tables under the following scoring system:

+ + + / - - -	Very positive / negative impact
+ + / - -	Moderate positive / negative impact
+ / -	Negligible positive / negative impact
0	No Impact

143. The tables below contain the assessment of the different policy options on the basis of the assessment criteria described in Section 3.4.1.

4.4.2.1. Article 4(5) referral

Table 7: Article 4(5) referral		
Criteria	**Impact compared to baseline scenario (- - - to + + +)**	**Explanation of rating and aspects of the policy option most relevant**
1. Preventing harm to competition and consumers	+	The option contributes to a more effective competition enforcement as it makes it more likely that parties choose to refer cases to the Commission for which the Commission is the more appropriate authority.
2. Simplification of procedures and administrative burden on businesses	+ +	The abolition of the Form RS scores high as it entails a significant simplification of the referral process. The proposed revision score highs as it renders the referral system overall less-time consuming and cumbersome and entail significant time and costs savings compared to the baseline scenario. On the basis of the figures of last 10 years (only 6 out of 261 Article 4(5) referral cases were vetoed by a Member State) and since the substantive requirements for a referral request remain unchanged, it is not expected that the likelihood for vetoes would increase after the reform, instead it is expected that vetoes to referral request would remain the exception. The reform would thus lead to significant streamlining of the procedures in nearly all Article 4(5) referral cases.
3. Public enforcement costs	+ +	The abolition of the two-step procedure will trigger time and cost savings for the Commission, as it will no longer have to review the Form RS in the first place, before then going on to review the notification. This will decrease the workload spent on individual cases. Nevertheless the overall workload might increase if companies opt for a referral request more often. However, the possibly higher workload on the Commission's side would be off-set by a reduction of workload at national level as reviews in multiple. This is fully in line with the one-stop shop principle.
4. Coherence with the Merger Regulation	+	The option makes it more likely that parties choose to refer cases to the Commission for which the Commission is the more appropriate authority. In case a referral takes place, the one-stop principle would be then respected as the Commission is competent for the entire EEA and diverging decisions are avoided.

4.4.2.2. Article 22 referral

Table 8: Article 22 referral		
Criteria	**Impact compared to baseline scenario (- - - to + + +)**	**Explanation of rating and aspects of the policy option most relevant**
1. Preventing harm to competition and consumers	+ +	The proposed reform contributes to more effective competition enforcement as it enables the Commission to examine mergers referred to it for the whole of the EEA.
2. Legal certainty	+ + +	The option is clear and precise. Its legal implications are foreseeable. The fact that only Member States competent under their national law may request a referral increases legal certainty, as parties will be able to better predict both the likelihood and the procedural consequences of a post-notification referral.
3. Simplification of procedures and administrative burdens on businesses	+ + +	As the Commission would gain EEA-wide jurisdiction (unless a veto by one competent Member State occurs), this option scores high as it avoids a patchwork of competences and multiple filings. The fact that only Member States competent under their national law may request a referral removes the administrative burden on businesses currently created by merger investigations triggered by referral requests of Member States in which the transaction would not have had to be notified in the first place.
4. Public enforcement costs	+ +	The option rationalises public enforcement costs to the extent that it avoids parallel investigations of the same transaction by multiple authorities that are possible under the current regime of Article 22. The Commission's workload should not be impacted as the number of cases with cross-border effects are not expected to increase.
5. Coherence with the Merger Regulation	+ + +	The Commission would gain jurisdiction for the whole of the EEA for cases with cross-border effects. The option gives considerably more weight to the one-stop-shop principle and avoids the patchwork of competences where the Commission looks at part of a transaction, while some national competition authorities investigate the effects of a transaction in their territory.

4.5. Comparing the Options

4.5.1. Comparing the policy options

144. The scores attributed to each of the proposed provisions of the referral system in the tables above are based on a comparison of those proposals with the baseline option of no EU action in the field.

4.5.2. The Preferred Option

145. The proposals score positively compared to no action. Therefore, the proposals also constitute the preferred option for both Article 4(5) and Article 22.

4.5.3. Proportionality and EU added value of the proposed changes to the referral system

146. Regarding the proposed changes to the referral system, the changes are of a technical and procedural nature and they do not shift the competences between the Member States and the Commission.

147. For Article 4(5), the proposed changes do not alter the substantive requirements for a referral and there is no shift in the competences at all. The proposed changes only streamline and shorten the procedure for a referral. The EU-added value for Article 4(5) is inherent already in its current form as it provides a service to parties to avoid multiple national filings and implements the one-stop shop principle. Maintaining the right of each Member State to oppose a referral under Article 4(5) ensures, in line with the principle of subsidiarity, that cases for which the national competition authority is the better placed authority will also in future be examined at the national level.

148. The proposed reform of Article 22 ensures that the Commission would have jurisdiction for the whole of the EEA. Therefore, it will give considerable more weight to the one-stop-shop principle as it will enable the Commission to appropriately deal with cases that have cross-border effects. In addition, the proposal will ensure that there are no parallel proceedings, the Commission analysing part of a transaction while some national competition authorities investigate the effects of a transaction in their territory. Thus, the proposed reform will strengthen the principle of the better placed authority, which is an emanation of the principle of subsidiarity in the field of merger control.

149. Since all the proposed options regarding case referrals overall reduce administrative burden for businesses compared to the baseline scenario, they are also fully in line with the principle of proportionality.

5. MONITORING AND EVALUATION

150. The initiative consists in the publication of a White Paper, focussing on the issues presented in the Staff Working Paper "Towards more effective EU merger control" and evaluated in the present report. The White Paper will report on the current state of EU merger control and on its development since its broader overhaul in 2004. It will be accompanied by a Staff Working document outlining in more detail the various possible amendments to improve and streamline the EU Merger regulation.

151. The Commission will continue to monitor the application of the Merger Regulation based on market information from stakeholders and Member States. This will provide the Commission with opportunities to receive feedback from representatives from industry, consumer associations, law firms, economic consultants and public institutions to assess whether further amendments should be made to achieve the objective of a more effective and efficient EU merger control.

152. The Commission is also engaged in a continuous dialogue with the national competition authorities in the field of merger control, both on an EU level and on the Member States level, mainly during the meetings of the Merger Working Group.

This dialogue is a very important tool for the Commission not only to monitor the functioning of its own legislation but also to assess effectiveness of merger control in Member States.

153. Based on the feedback on the White Paper and on its on-going dialogue with all stakeholders, the Commission will decide whether it will take further steps towards a legislative proposal to amend the Merger Regulation.

ANNEX 1 – COMMISSION STAFF WORKING PAPER WITH ITS ANNEXES

The relevant documents are attached separately.

They are also available at: http://ec.europa.eu/competition/consultations/2013_merger_control/

ANNEX 2 - TECHNICAL AMENDMENTS

1. A reform of the Merger Regulation would also address some smaller, more technical points where experience has shown that some improvement is possible ("housekeeping"), in particular with a view of simplifying procedures. These modifications have not been impact assessed, since they are of a small and technical nature and their impact on business and the administration is expected to be limited They are however listed hereafter for information purposes.

Procedural simplification

Extra-EEA Joint Ventures

2. It is suggested to amend Article 1 of the Merger Regulation so that the creation of a full-function joint-venture located and operating outside the EEA that would not have any effects on markets in the EEA would fall outside the Commission's competence, even if the turnover thresholds are met.

Exchange of confidential information between Commission and Member States

3. Article 19(1) and (2) of the Merger Regulation provides that, for the purpose of close and constant liaison of NCAs with the Commission's merger proceedings, certain case-related information may be exchanged between them. It could be useful to refine this provision with a view to ensure that, in the case of a referral of a case from Member States to the Commission or vice versa under Article 22 or Article 9 respectively, the authority that continues the investigation is able to make use of the information already obtained by the authority or authorities from which the case has been referred. In addition, it could also be clarified that the possibility for the Commission to exchange case-related information with NCAs also includes information obtained by the Commission during the pre-notification stage.

Further simplification by extending the transparency system to certain types of simplified merger cases

4. A further possibility for simplifying the procedures of the Merger Regulation could be to exempt from the prior notification obligation certain categories of mergers (namely certain categories of cases currently falling under the simplified procedure, such as cases leading to no "reportable markets" due to the absence of any horizontal or vertical relationship between the parties). While the Merger Regulation could provide for this possibility through an empowerment of the Commission, the scope of this exemption could be defined by the Commission in the Implementing Regulation.

5. If such a step were to be taken, the question of the procedure to be adopted arises. One option would be to extend the targeted transparency system explained above in the minority shareholdings section to such transactions, so that the Commission would be informed by way of an information notice and would be free to investigate a case. If it decided not to, the transaction could be implemented after three weeks without the need for a clearance decision.

Other issues

Notification of share transactions outside the stock market (Article 4(1))

6. Article 4(1) of the Merger Regulation specifies the timeframe within which a merger notification may be submitted. The 2004 re-cast introduced some flexibility insofar as merging parties may now also notify a transaction before a binding sale and purchase agreement is concluded or a public takeover bid is launched, provided they demonstrate a "good faith intention" to do so.

7. It could be considered to modify Article 4(1) of the Merger Regulation in order to also provide more flexibility for notifying mergers that are implemented by way of acquisition of shares via the stock exchange without a public takeover bid. On the one hand, the current rules do not allow for notification of such transactions before the acquisition of control on the basis of good faith intention. On the other hand, they do not allow for an exercise of the voting rights once control has been acquired. For such cases, it may be useful to adapt the criterion of "good faith intention" in order to allow the parties to notify before the level of shareholding required to exercise (de facto) control is acquired. A clear commitment by the acquiring party to carry out the acquisition could be demonstrated if the notifying party has prepared everything what is internally as well as externally necessary to proceed immediately with such acquisition.

Clarification of methodology for turnover calculation of joint ventures

8. Article 5(4) of the Merger Regulation could be amended with a view to explicitly laying down the methodology for the calculation of a joint venture's relevant turnover currently set out, following the Commission practice, in the Commission Consolidated Jurisdictional Notice.[69] This would not entail any substantive change, but clarify the law as it is currently already applied.

Time limits

9. Merger review by the Commission is subject to strict, legally binding time limits.[70] While these time-limits in general attempt to strike an appropriate balance between the interest of the parties in a quick decision and the general interest in allowing the Commission to carry out a thorough investigation, the time-limits in Phase II can in some instances be challenging in cases which involve analysing complex economic data and/or a large number of internal documents.

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[69] Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ C 95, 16.4.2008, p. 1), section 5.2.

[70] In principle, the Commission has 25 working days during the initial Phase I investigation to decide whether the transaction may be cleared because it does not raise any serious doubts as to its compatibility with the internal market, or whether an in-depth Phase II investigation should be initiated. In Phase II proceedings, it must normally take a final decision within 90 working days (Article 10(1) of the Merger Regulation. If the parties offer commitments, the deadlines are extended to 35 working days (in Phase I) or 105 working days (in Phase II, unless the commitments are offered before 55 working days and not substantially modified thereafter). Furthermore, the Phase II deadline may be extended either on request of the notifying parties or in agreement between the Commission and the notifying parties by up to a maximum of 20 additional working days (Article 10(3) of the Merger Regulation).

10. The additional flexibility introduced by the 2004 review has therefore proven to be indispensable, in particular in the context of the Commission's effects-based approach and for carrying out a complex quantitative analysis. Deadline extensions according to Article 10(3) of the Merger Regulation either on request of the notifying parties or in agreement between the Commission and the notifying parties have been granted by the Commission in over 50% of Phase II cases over the past ten years. In some cases, even with an extension of the deadline the time available constitutes the very minimum of what is required for a quantitative analysis, in particular given the time needed to collect data from the parties and possibly third parties. It could therefore be considered to introduce further flexibility through a limited increase of the maximum number of working days by which the Phase II deadline may be extended under Article 10(3)(2) in agreement with the parties from 20 to for instance 30.

11. On the other hand, it should be clarified in Article 10(3)(1) that the automatic extension of the Phase II deadline by 15 working days triggered by the submission of commitments should take place in all cases where commitments are offered following a statement of objections. In other words, the exception that the deadline is not extended if the commitments are offered before 55 working days only applies if the parties offer commitments that are sufficient to remove the serious doubts identified without the need for the Commission to issue a statement of objections.

Unwinding of concentrations with regard to minority shareholdings (Article 8(4))

12. It could be considered to modify Article 8(4) of the Merger Regulation in order to bring the scope of the Commission’s power to require the dissolution of partially implemented transactions declared incompatible with the internal market in line with the scope of the suspension obligation (Article 7(4) of the Merger Regulation).

13. In case COMP/M.4439 Ryanair/Aer Lingus I in 2007[71], Ryanair's acquisition of a non-controlling minority shareholding in Aer Lingus and Ryanair's subsequent proposal to acquire control of Aer Lingus through the acquisition of additional shares were treated as one single concentration for the purposes of EU merger control.[72] However, although the Commission declared the proposed concentration incompatible with the internal market, the Commission could not order the divestiture of Ryanair's already acquired non-controlling minority shareholding in Aer Lingus pursuant to Article 8(4) of the Merger Regulation. A modification of Article 8(4) would address such a scenario by making it clear that in case a partially implemented concentration has been prohibited, the Commission may order full divestiture of the acquired stake even if it had not conferred control.

14. Such an amendment would first of all, in technical terms, constitute a logical extension of the current Article 8(4) to cases where the transaction has been partially implemented. However, it would also be in line with the proposed reform extending merger control to certain acquisitions of non-controlling minority shareholdings. If, following the complete dissolution of a prohibited concentration under Article 8(4), the acquirer were to acquire subsequently a minority stake in the target company, this

[71] COMP/M.4439 – Ryanair/Aer Lingus, decision of 20 February 2007.

[72] Case T-411/07 *Aer Lingus v Commission* [2010] ECR II-3691.

would need to be assessed under the proposed new regime for non-controlling minority shareholdings.

15. In this context, the question arises whether the divestment of a minority shareholding which forms part a single concentration should be limited to what is permissible under the rules of minority shareholdings. In other words, given that the acquirer would be free to acquire a minority stake after having to dispose of its shareholding, should the divestment then be limited to the shareholding above this threshold?

16. In order to follow the same logic inherent in the present Article 8(4) and to avoid a potentially complex assessment, it would seem preferable to re-establish the status quo ante and to allow the Commission to enforce the full divestiture of the minority shareholding insofar as it forms part of the single transaction assessed.

Staggered transactions under Article 5(2)(2) of the Merger Regulation

17. Article 5(2)(2) of the Merger Regulation sets down that for the purpose of the turnover calculation of the undertakings concerned, one or more transactions which take place within a two-year period between the same persons or undertakings are treated as one and the same concentration.

18. The purpose of this provision is to prevent staggered transactions aimed at circumventing EU merger control, by artificially splitting up the transactions. For such cases Article 5(2)(2) foresees the transactions are treated as one and the same concentration and have to be assessed as a single concentration. While the Commission generally then assesses the transaction as a whole, this has raised questions in particular with respect to cases where the first transaction was notified and cleared by a NCA.

19. It could therefore be considered how to amend the scope of Article 5(2)(2) to better target only those cases of "real" circumvention.

Qualification of "parking transactions"

20. According to Article 3(1) of the Merger Regulation, a concentration is defined as an operation bringing about a lasting change in the control of the undertakings concerned. In certain instances, however, an undertaking is "parked" with an interim buyer (such as a bank) on the basis of an agreement that the target will at a later stage be sold on to an ultimate acquirer. The interim acquirer thus acquires the shares or assets on behalf of the ultimate acquirer, who may also bear the financial risk, in order to facilitate the ultimate acquisition by the latter. The Commission has stated in the Consolidated Jurisdictional Notice that it considers such "parking transactions" as the first step of a single concentration comprising the lasting acquisition of control by the ultimate buyer.[73] The Merger Regulation itself could be clarified by stating that

[73] Consolidated Jurisdictional Notice, paragraph 35.

"parking transactions" should be assessed as part of the acquisition of control by the ultimate acquirer.[74]

Effective sanctions against use of confidential information obtained during merger proceedings

21. Article 17(1) of the Merger Regulation provides that information acquired in merger proceedings may only be used for the purposes of the relevant investigation. However, where private parties and their legal and economic advisors obtain from the Commission commercially relevant information of other private parties for the purposes of the merger proceeding (such as the notifying parties during access to the file or third parties taking part in an oral hearing for the purpose of being informed of the subject matter of the proceeding), currently the Commission does not have any effective means of sanction in order to compel private parties to comply with this obligation. Therefore, it could be considered to amend the Merger Regulation so as to ensure, notably through appropriate sanctions, that parties and third parties that are given access to non-public commercial information of other undertakings exclusively for the purpose of the proceeding do not use or disclose such information for other purposes.

Commission's power of revoking decisions in case of referral based on incorrect or misleading information

22. According to Articles 6(3)(a) and 8(6)(a) of the Merger Regulation, the Commission may revoke a decision clearing a merger if that decision is based on incorrect information for which one of the parties is responsible or if it has been obtained by deceit. However, no explicit possibility of revocation is currently foreseen in case a decision referring a case to a Member State pursuant to Article 4(4) is based on incorrect information for which a party is responsible. The Merger Regulation should be amended in order to clarify that also in this situation the referral decision may be revoked.

23. Finally, the overwhelming majority of the respondents welcome the various technical improvements to the current Merger Regulation discussed in the consultation paper, in particular the proposal to exclude from the scope of the Merger Regulation joint ventures exclusively operating outside the EEA and the modification of Article 8(4) provided that the Commission gets jurisdiction over structural links.

74 The Court of Justice has explicitly stated in Case C-551/10 P Editions Odile Jacob v Commission, judgment of 6 November 2012 (not yet reported in the ECR), that the question of qualification of the "parking transaction" was not relevant for deciding the case at hand.

ANNEX 3 – THE MAGNITUDE OF THE PROBLEM: ESTIMATES FROM MEMBER STATES AND THE COMMISSION

1. It is roughly estimated that the number of cases of minority shareholdings that would meet the turnover thresholds of the Merger Regulation should be around 20-30 (or 7-8% of the merger cases currently examined by the Commission each year). This is the middle point of the estimated minimum number of cases of 12 and the theoretical maximum of 38. The Commission has calculated this estimate on the basis of: (i) information provided by Member States that have currently national merger control rules that also give them the competence to review minority shareholdings, (iii) direct calculation of cases that would be brought to the Commission's attention under a targeted approach and (iii) an analysis of the so-called Zephyr database, as further explained below.

(i) Information from the Member States

2. Acquisitions of non-controlling minority shareholdings account for approximately 10-12% of all mergers notified in Germany and 5% in the United Kingdom, according to the data provided by these Member States.[75] It should be noted that these Member States have different merger control regimes. This may explain the differences in the number of cases observed, especially for the United Kingdom which does not require mergers to be notified in advance before they are completed.[76]

(ii) Cases that would be brought to the Commission's attention under a targeted approach

3. The Commission directly calculated the number of cases which would be brought to the Commission's attention if a targeted approach based on a criterion similar to criteria used in the German and the UK systems (acquisition of a "competitively significant influence" or acquisition of "material influence"[77]) were to be adopted.[78] Taking the number of cases reviewed by the Bundeskartellamt ("BKartA") and the UK competition authorities, at least 12 cases per year currently notifiable in these jurisdictions would come under the jurisdiction of to the Commission.

4. This is based on the following figures: Cases notified to the Bundeskartellamt:

- In the period from January 2011 until July 2013, 62 cases with a competitively significant influence where notified.

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75 These figures were not directly used in the estimation of the number of cases of minority shareholdings that would meet the turnover thresholds of the Merger Regulation but they just served as some "plausibility check" for the estimations found by the Commission.

76 See Annex II to the Staff Working Document "Towards More Effective Merger Control", section 3.1. Available at: http://ec.europa.eu/competition/consultations/2013_merger_control/

77 These criteria give Germany and the United Kingdom the competence to review cases regardless of their percentage of the minority stake acquired.

78 This targeted approach is further explained in Section 5.1.3 and 5.1.4 of this Impact Assessment.

- Out of these 62 known competitively significant influence cases of the last 2.5 years, we believe that at least 28 would likely have had EU dimension.

- This would result in ca. 45% of competitively significant influence cases of the BKartA having an EU dimension.

- On the basis that in the last 6.5 years between 154 competitively significant influence cases were reviewed by the Bundeskartellamt, this would mean and average of 23 such cases per year (2% of their notified cases). This, in turn, would translate into around 11 of such cases with EU dimension per year.

- If one further takes into account that in Germany the acquisition of any shareholding above 25% has to be notified to the BKartA regardless of whether or not it brings about a competitively significant influence, there might be some additional competitively significant influence cases which would have EU dimension and which do not show up in the German statistics as competitively significant influence cases.

5. Cases investigated by the UK competition authorities

- The OFT reviews between 1 to 3 material influence cases each year (based on figures from 2003 to 2013). Out of the 12 cases in this period, 2-4 cases would have had an EU dimension.79 This would result in one case with EU dimension every two or three years.

6. Therefore, we could consider that 12 cases a year (or 6% of total cases) would be a robust lower bound for the total number of additional competitively significant influence cases with EU dimension per year.

7. However, as mentioned,[80] we are aware of some cases that potentially would fall under such a new Commission competence, but which were examined neither by the German nor by the UK authorities.

8. To estimate an expected higher bound for this number, one could use the results from the Commission's analysis of the Zephyr database.

(iii) Estimates from the Zephyr database

9. The Commission conducted an analysis of the so-called Zephyr database to obtain an estimate of the number of structural link cases at an EU level.[81] The Zephyr database contains information on the total number, the value and the corresponding participation percentages of ownership transactions in listed companies registered in 27 EU Member States.[82]

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79 This is certain for *Ryanair/Aer Lingus* and *AP MollerMaersk/DFDS*. On the basis of public available turnover information we believe that also *Centrica/EDF* and *BSkyB/ITV* would have had Union dimension.

80 See section 0 of the Impact Assessment.

81 See Annex II of the Staff Working Document. Available at: http://ec.europa.eu/competition/consultations/2013_merger_control/

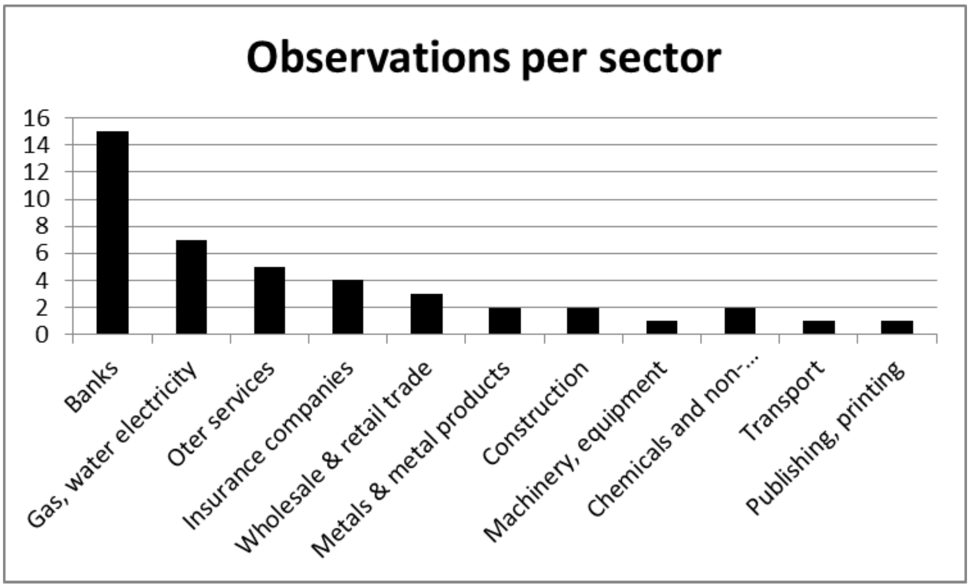
82 The analysis was done before the accession of Croatia on 1 July 2014.

10. Due to limitations of the data and the methodology applied, the analysis of the Zephyr database is likely to underestimate the actual number of relevant acquisitions of minority stakes. For example, the database only covers a sub-sample of the EU economy and therefore of the relevant number of cases of minority shareholdings. Only transactions involving both a buyer and target registered in the EU are covered by this database. This means that transactions involving, for instance, a non-European buyer and a European target are excluded. In addition, only transactions between publicly listed companies are covered by the database.

11. The Commission has analysed transactions occurring between the years 2005-2011. The Commission has identified 91 minority stake transactions in the Zephyr database of varying size and value potentially meriting competition scrutiny. Out of this sample of 91 transactions, 43 were likely to have an EU dimension and fall under the Merger Regulation if the latter were to cover acquisitions of non-controlling minority shareholdings. This represents about 2% of all cases notified to the Commission during the period 2005-2011.

12. Furthermore, this data can be classified per sector of activity. This can be seen in the figure below that shows the distribution of the above mentioned 43 transactions by sector.

Graph A - Deals by sector[83]



13. Banking and Energy sectors have a relatively high frequency of transactions.[84] In most of the banking cases, the transaction involved cross border transactions.

14. Frequency by country of origin is relevant to detect how the practice of acquiring minority shareholding distributes over the European Union. There are a number of

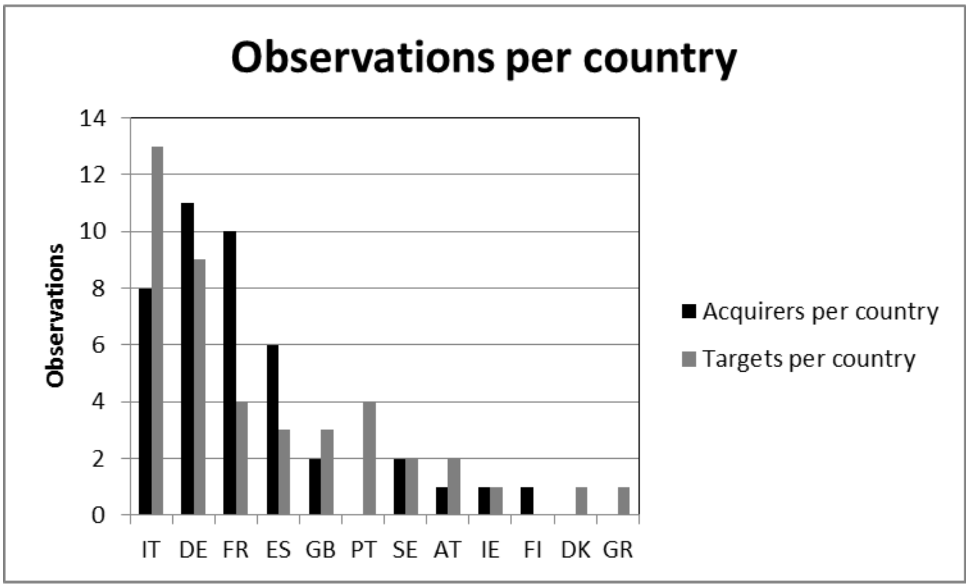
83 When the Acquirer and target's annual turnover is at least 100 million euro, their combined global turnover is at least 2.5 billion euro and the final stake is at least 10%.

84 . This is supported by findings in Member States that do not have jurisdiction to review acquisitions of minority shareholdings, but which have intervened because the minority shareholdings pre-existed at the time of the merger. These cases often involved the telecoms and energy sectors.

factors that can explain differences in the number of deals across Member States: (i) the number of companies with more than EUR 10 million annual turnover; (ii) the degree of activeness of capital markets, (iii) whether or not there is specific legislation on minority shareholdings, and (iv) whether or not the markets have an oligopolistic configuration.

15. The graph below shows the distribution of the transactions across Member-States.[85]

Graph B - Number of transactions per country



16. As the graph above shows, the five Member States with the highest number of transactions are Italy (13 targets, 8 acquirers), Germany (9 targets, 11 acquirers), France (4 targets, 11 acquirers), Spain (3 targets, 6 acquirers) and Great Britain (3 targets and 2 acquirers).

17. Now, the number of cases that would have been notified under German law should have been at least all the cases that have a target in Germany (9 transactions). We should also include the cases where the acquirer is German (3 transactions) since the target is most likely to breach the turnover threshold above which a transaction has to be notified in Germany. We reach a number of 12 cases that would have been notified in Germany. However, given the size of the German Economy and the relatively low thresholds for notification under German law, we would expect several of the remaining 31 cases to have been also notified in Germany, so this figure of 12 is most likely underestimates the number of cases that were notifiable in Germany.

18. On the basis of this conservative estimate of German cases (12 cases) we can say that at least 28% of these transactions would have been notified in Germany. We applied this proportion to the average number of German competitively significant influence cases with EU dimension per year (estimated to be around 11) to reach an upper bound for the estimated number of cases, resulting in 38 cases, which means that the

85 For simplicity, transactions are listed according to the nationality of the target: all the values (except those directly referring to information on acquirers) refer to the target's country. Some of the Member States are not represented at all.

total number of additional EU cases per year would most likely not exceed 38.[86] This is an estimated 13% of additional cases at EU level. This should only be seen as a theoretical maximum of cases, given that that the estimated number of 12 cases that were notifiable in Germany is probably under-estimated and given that some jurisdictions, like the United Kingdom do not require mandatory notification of mergers.

Conclusion on the magnitude of the problem and number of additional cases

19. Given the information obtained on Member States and the analysis of the Zephyr database, it may be roughly estimated that the number of cases of minority, it may be roughly estimated that the number of cases of minority shareholdings that would meet the turnover thresholds of the Merger Regulation should be around 20-30 (or 7-10% of the merger cases currently examined by the Commission each year), given the estimated minimum number of cases of 12 and the maximum of 38.

[86] This is assuming that the transactions captured by the Zephyr database are representative of the total number of transactions in the EU.

ANNEX 4 – EXAMPLES OF MINORITY SHAREHOLDING CASES IN THE EU, GERMANY AND THE UNITED KINGDOM

The following table presents a sample of minority shareholdings cases dealt with by the Commission, the Bundeskartellamt and the OFT/Competition Commission, categorized according to level of shareholding, the rights attached, market shares and theories of harm. The aim was to find out under which conditions the Commission or the NCAs found a minority shareholding to result in competitive harm.

Case	**Level of minority shareholding**	**Rights attached (board seat, veto rights, information rights)**	**Market shares in the problematic markets**	**Theory of harm pursued**
Commission cases				
M.3653 - *Siemens/ VA Tech*	Siemens held 28% minority stake in SMS Demag, a competitor to VA Tech	Certain information, consultation and voting rights were granted to Siemens by SMS Demag's shareholders' agreement; Two board seats	SMS Demag (30-40%), VA Tech (15-20%)	Non-coordinated effects due to access to commercial sensitive information
M.6662 - *Andritz/ Schuler*	24.99%	Not known		No intervention
M.6541 - *Glencore/ Xstrata*	7%	Off-take agreements, possibility to appoint board member	Combined market share in zinc metal of 30-40%.	Non-coordinated effects
M.6576 - *Munksjö/ Ahlstrom*	Post transaction: Ahlstrom 15% corporate shareholding in Munksjö, plus 50% indirect shareholding	No cross directorships, but several board members from Ahlstrom moved to Munksjö Board after closing	Combined market share of 70-80% on one market (PRIP), close to a monopoly on the other market (abrasive)	Input foreclosure concerns (incentive and ability to render divestment business less competitive) addressed in the remedies by a reverse carve-out
M.5406 - *IPIC/Ferrostaal*	30%	Broad information rights and veto rights on strategic decision below control (e.g. licensing of production technology)	Eurotechnica, subsidiary of Ferrostaal was the only supplier of high-tech production technology; IPIC, was active on the downstream market with a market share of [20-30]%	Input foreclosure (veto rights controlled the licensing of patents necessary for competitors downstream)
M.4153 – *Toshiba/ Westinghouse*	Pre-existing minority stake of 24.5% in GNF (a competitor to Westinghouse)	Veto rights on special resolution below control	Market share in PWR Fas (nuclear fuel assemblies): Toshiba [0-10%] and Westinghouse [0-40%]	Non-coordinated, horizontal effects

UK cases				
Ryanair/ AerLingus	29.4%	Minority shareholding gives right to block special resolutions	Combined market shares on certain routes up to monopoly	Non-coordinated effects, substantive lessening of competition due to reduced ability of AL to compete effectively with Ryanair, e.g. capital increase, joining of alliances or merge with other airlines
BSkyB/ITV	17.9%	Minority stake resulted in de facto blocking rights of special resolutions	ITV had 21.7% of viewing audience and BskyB (PayTV) had 7.8%.	Substantive lessening of competition due to expected weakened competition of ITV due to acquisition of corporate control. BSkyB required to reduce its stake to 7.5%
German cases				
A-Tec Industries/ Norddeutsche Affinerie	13.75%	Resulting in *de facto* blocking minority stake with similar rights as the legal position granted by a 25% stake	Combined market share above 85%	Non-coordinated effects
GM/PSA	7%	Extensive cooperation agreements in addition to the minority stake	Not known	Clearance
Du Mont Schauberger/ Bonner Zeitungs-druckerei	Initially 18%, but reduced to 9% during the procedure	Additional silent stake of 18% and pre-emption rights and advertising placement agreements	Not known	Court annulled the prohibition decision as it considered that the reduced 9% shareholding did not result in a competitively significant influence
Axel Springer/ Stilke	24%	Extensive information rights	Dominance	Prohibition decision due to reinforcement of a dominant position in the Hamburger newspaper and newspaper advertisements markets
E.ON/ Ruhrgas	Acquisition of 25% shareholding in Ruhrgas (via Gelsenberg AG), Second, distinct acquisition of 34.8% in Ruhrgas (held through Bergemann AG)	Acquisition of voting rights	E.ON dominant on electricity wholesales markets, Ruhrgas dominant on the gas market with 60% of supply	The Bundeskartellamt prohibited both transactions on the basis of a strengthening of a dominant position (dominant position in the gas and electricity markets, as well as the duopoly of E.ON and RWE in the electricity wholesale markets) However, both transactions were cleared by ministerial authorisation subject to obligations.

EWE, E.DIS/ Stadtwerke Eberswalde	Increase of 14.5% resulting in 37% for EWE and E.DIS each	Right to appoint 6 out of 8 board members	EWE: dominant position in the regional gas market E.DIS: transaction would lead to a strengthening of E.ON's dominant position in the duopoly with RWE on the electricity market (E.ON being EWE's parent company)	Prohibition decision on the basis of *de facto* influence on Stadtwerke Eberswalde, in particular on the appointment of management and on the conclusion of supply contracts leading to customer foreclosure.
Mainova/ Aschaffenburger (AVG)	17.5%	The transaction would lead to an information advantage	Not known	Vertical relationship: *de facto* influence reinforcing Mainova's existing supplier position towards AVG, risk of customer foreclosure. Prohibition.

ANNEX 5 – OVERVIEW OF TRANSACTIONS FOR WHICH AN ARTICLE 22 REFERRAL HAS BEEN ACCEPTED SINCE 2004

Case	Country	Decision date and type of decision	Geographic scope of affected market	Competition concerns
M.4980 - *ABF / GBI BUSINESS*	Spain, joined by France, Portugal and NL (NL later withdrew its referral request)	13/12/2007 Full referral	National markets for compressed yeast; EEA-wide (if not worldwide) market for dry yeast	Competition concerns for national markets for compressed yeast in Spain and Portugal
M.5020 - LESAFFRE / GBI UK	UK	04/02/2008 Full referral	National market for fresh yeast (liquid and compressed) in UK; EEA-wide/worldwide market for dry yeast	National market for liquid and compressed yeast in the UK
M.5109 - DANISCO / ABITEC	Germany, joined by UK	17/04/2008 Full referral	At least EEA-wide market for synthetic emulsifiers	No competition concerns
M.5153 - ARSENAL / DSP	Spain, joined by Germany	16/05/2008 Full referral	Various EEA-wide chemical markets	Competition concerns for EEA-wide markets for various chemicals
M.5675 - SYNGENTA / MONSANTO'S SUNFLOWER SEED BUSINESS	Spain, joined by Hungary	12/11/2009 Full referral	EEA-wide upstream markets for seed treatment, downstream national markets for commercialization of sunflower seed	Competition concerns for national and EEA-wide markets
M.5828 - PROCTER & GAMBLE / SARA LEE	Germany, joined by Belgium, Spain, Portugal, UK, Slovakia and Poland (Slovakia and Poland later withdrew their request) Hungary joined, but referral refused	31/03/2010 Full referral 31/03/2010 Refusal of referral request by Hungary	national markets for air fresheners in Belgium, Spain, Germany, Portugal, UK National market	No competition concerns Not applicable
M.5969 - SCJ / SARA LEE	Spain, joined by Belgium, France, Czech Republic, Greece and Italy Hungarian request to join after expiry of deadline	07/09/2010 Full referral No decision, as Hungary withdrew its request	Not assessed since notifying parties withdrew notification Not assessed since notifying parties withdrew notification	

M.6106-CATERPILLAR/ MWM	Germany, joined by Slovakia and Austria	26/01/2011 Full referral	Left open whether EEA-wide or worldwide market for generator sets	No competition concerns
M.6191 - BIRLA / COLUMBIAN CHEMICALS	Germany, joined by Spain, France, UK	02/03/2011 Full referral	At least EEA-wide carbon black market	No competition concerns
M.6773 - CANON / IRIS	Belgium, joined by Austria, France, Ireland, Italy, Portugal, Sweden	26/11/2012 Full referral	Markets for portable document scanners and office automation equipment: left open whether national or EEA-wide; EEA-wide market for capture software	No competition concerns
M.6502 - LONDON STOCK EXCHANGE GROUP / LCH CLEARNET GROUP	Portugal, joined by France and Spain	04/07/2012 Refusal of referral, as the UK as the centre of the transaction had not requested a referral	The merger concerns the trading market, compensation of equity, fixed interest securities and derivative instruments and must be notified in three countries: Spain, Portugal and UK.	Not applicable
M.6796 - AEGEAN / OLYMPIC II	Greece, Cyprus	13/12/2012 Full referral	National market for passenger air transport services in Greece	No competition concerns
M.7054 - Cemex/ Holcim	Spain	18/10/2013	Case ongoing	Case ongoing

ANNEX 6 – SUMMARY OF THE RESULTS OF THE PUBLIC CONSULTATION

The results of the consultation are divided between the Member States and private stakeholders. While the Member States are overall supportive of the Commission's proposal to extend the scope of the Merger Regulation, private stakeholders question whether the limited number of problematic transactions can justify the extension of the scope of the Merger Regulation. They put forward that Article 101 and Article 102 TFEU should be used instead as they might capture many of the problematic transactions. In their view, the scope of the Commission's suggestions in the Consultation Paper is too far reaching and would impose a high administrative burden on mostly benign transactions. In their view, the suggested reform is not targeted enough to capture only the small number of potentially problematic transactions.

Regarding the design of the system, three options were put forward in the Consultation Paper. However, they were not elaborated in detail and in particular did not further detail which minority shareholdings ("structural link" in the Consultation Paper) would fall within the Commission's competence. The three options were:

- a notification system which would extend the current system of ex-ante notification of mergers to non-controlling minority shareholdings above a certain safe-harbour. The option of a notification of cases above a certain safe-harbour has not been pursued further as it was clearly considered to be too burdensome by stakeholders. In light of these comments the notification system (Option 2 in the present Impact Assessment) has been instead further modified to target only potentially problematic transactions.

- the self-assessment system where there would be no obligation to notify non-controlling minority shareholdings but the Commission would have the power to selectively open an investigation on its own motion or following a complaint (set out as Option 1 in the present Impact Assessment); and

- the transparency system which would result in an obligation for parties to file a short information notice that would be published on the Commission’s website and which would serve to inform the Commission, Member States and potential complainants about the transaction and the Commission would have the power to selectively open an investigation. This option has been modified following the comments received, in particular, by targeting the Commission's competence to the potentially problematic cases only; the Option 3 as described in the present Impact Assessment is the result of this further reflection. The Commission had also asked stakeholders if the selective systems should offer the possibility for a voluntary notification and if a stand-still obligation should apply.

Regarding these designs and if the Commission were to introduce a system for the control of minority shareholdings, most private stakeholders would favour a self-assessment system with the possibility of voluntary notifications for reasons of legal certainty and without a stand-still obligation. A few respondents favour the transparency system, again with the possibility of voluntary notifications and no stand-still obligation. The notification system was seen mostly negative due to the high administrative burden.

As regards the Member States, they are largely in favour of extending the scope of the Merger Regulation to minority shareholdings. However, their views of how the system to control minority shareholdings should work differ. In particular, the Member States that already control the acquisition of non-controlling minority shareholdings (i.e., the United Kingdom, Germany and Austria) have different opinions depending on their national procedural systems. However, they made it clear that they would expect a system for the control of minority shareholdings on EU level to fit with their existing systems and that they maintain the possibility to obtain jurisdiction for cases which affect mainly their territory.

The United Kingdom has a self-assessment system with the possibility of voluntary notifications and advocates such a system also at EU level. On the other hand, Austria and Germany have an ex-ante control notification system and have a preference for a notification system. For the NCAs of Germany and Austria, it was important that transactions should not go unnoticed (as might be the case in a self-assessment system), they advocated also a waiting period, so that in case of a referral the NCAs would not have to investigate an already implemented transaction. Several NCAs pointed out that, at the minimum the system at EU level should foresee some obligatory information as a basis for the Member States whether or not to consider a referral.