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ANNEX

to the

COMMISSION STAFF WORKING DOCUMENT

Towards more effective EU merger control

Annex II

Non-controlling minority shareholdings and EU merger control

Contents

1. INTRODUCTION AND EXECUTIVE SUMMARY

1. This document illustrates, on the basis of examples, the importance of an adequate control of the anticompetitive effects that non-controlling minority shareholdings (hereafter "structural links") might give rise to, which are currently not covered by the EU Merger Regulation.

2. Under the Merger Regulation, the Commission can only take pre-existing minority shareholdings into account when it is competent to examine the effects of a separate acquisition of control. This document analyses the decisional practice of the Commission over the scrutiny of structural links in the context of merger notifications and the decisional practice of some national competition authorities that do review structural links. It provides a number of indicative examples of past merger cases where the Commission or national competition authorities found that structural links led to a negative impact on competition and therefore played a decisive role in the assessment of past transactions. In addition, this document summarises DG Competition's analysis of past transactions involving structural links based on the Zephyr database, an international dataset containing information on data on listed companies' ownership change transactions within the EU.

3. In particular, Section II ("Examples of transactions scrutinised by the Commission") contains an overview of the Commission's decisional practice with respect to the scrutiny of structural links in competitors in the context of merger notifications. At least 53 merger cases have been identified from 1990 where structural links were relevant for the competitive assessment of the transactions. Furthermore, structural links were found to create competition problems in at least 20 of these cases.

   This section also pays attention to certain situations in which the acquisition of a minority stake succeeds the acquisition of control and therefore the Commission has no competence under the Merger Regulation to deal with any competition concern that these structural links might lead to. These limitations under the current EU merger control regime became particularly apparent in the *Ryanair/Aer Lingus* case, where the Commission could not act against Ryanair's structural link in Aer Lingus in view of the limitations of the Merger Regulation – a reasoning which was subsequently confirmed by the General Court in 2010.

4. Section III ("Examples of transactions scrutinised by the national competition authorities") describes the decisional practice of the national competition authorities of some Member States that currently have the power to review structural links, namely Germany, Austria and the United Kingdom. In addition, the section describes the rules for merger control of structural links in other highly developed countries, notably the United States, Canada and Japan.

5. Finally, Section IV ("Zephyr database") summarises DG Competition's analysis of past transactions involving structural links based on the Zephyr database, a dataset containing information on listed companies' ownership change transactions within the EU, between the years 2005-2011. The aim of such analysis was to give a first understanding of the

frequency of structural link in the internal market. Furthermore, it could inform about the question whether certain relevant transactions, which are currently not being reviewed, would on a preliminary basis have been deemed worthy of competition scrutiny. DG Competition's analysis has identified a total of 91 transactions involving companies active in the same sector, of which a total of 43 transactions would potentially meet the Merger Regulation's turnover thresholds.

2. THE COMMISSION'S CURRENT PRACTICE WITH RESPECT TO CASES INVOLVING STRUCTURAL LINKS AND ITS LIMITATIONS

6. The Commission has dealt in many cases with structural links. However, the scrutiny of structural links under the Merger Regulation has important limitations and the Regulation does not allow the Commission to deal with all the transactions involving potentially problematic structural links.

7. Firstly, the Commission's scrutiny is limited because many transactions do not fall within the scope of the Merger Regulation as the Commission is limited to reviewing pre-existing structural links of the parties to a notifiable transaction. This is because the creation of a structural link itself without a change of control is not a notifiable transaction under the Merger Regulation. The cases discussed later on in this document concern cases where a party to a transaction has pre-existing structural links in competitors or other companies and where the parties frequently offered to divest these minority shareholdings in order to remedy the competition concerns raised by the transactions.

8. Secondly, as demonstrated by *Ryanair/Aer Lingus*, the Commission's power to order the unwinding of a concentration declared incompatible with the internal market is limited as the Commission has no means to request the undertakings to fully or partially divest a minority shareholding.

M.4439 Ryanair / Aer Lingus (2010)

9. The first type of limitation in the Commission's power to intervene became apparent in the *Ryanair/Aer Lingus* decision[1] and the following litigation at the General Court.[2] This case concerned the proposed acquisition of Aer Lingus by fellow Irish air carrier Ryanair, which was eventually prohibited by the Commission in June 2007 in view of the serious competition harm that would follow. Ryanair made several acquisitions leading to a 29.4% stake in Aer Lingus's share capital, which it kept also after the Commission's prohibition decision. The Commission could not act against this minority shareholding under the Merger Regulation, a reasoning that the General Court confirmed in 2010 by dismissing Aer Lingus's subsequent appeal against the Commission's refusal to order Ryanair to divest its minority stake.

10. Aer Lingus has been arguing that Ryanair's minority shareholding has significant negative effects on competition. It is being allegedly used by Ryanair to get access to Aer Lingus'

[1] M.4439 Ryanair/Aer Lingus.

[2] Judgment of the General Court in case T-411/07 Aer Lingus v Commission [2010] ECR II-3691.

confidential strategic plans and business secrets and to block special resolutions and request extraordinary general meetings to reverse adopted strategic decisions. As a result, Aer Lingus could be weakened as an effective competitor of Ryanair or, alternatively, Ryanair would have less incentive to compete with Aer Lingus since, as a shareholder, it wishes to maintain the value of its shareholding and ensure that Aer Lingus is profitable.

Following the termination of the Commission's investigation and the General Court's judgement, the UK Office of Fair Trading ("OFT") decided in September 2010 to begin a merger investigation into Ryanair's minority shareholding in Aer Lingus under UK law, which – unlike the Merger Regulation – does apply merger control rules also to structural links. On 15 June 2012 the OFT referred the completed acquisition by Ryanair Holdings plc of a minority stake in Aer Lingus Group plc to the Competition Commission for further investigation, due to competition concerns.[3]

The Commission's practice in cases of pre-existing structural links

11. Apart from the Ryanair/Aer Lingus example there are many other cases where the Commission investigated minority shareholding and as early as in 1991, the Commission dealt with the issue of potentially problematic structural links held by the parties to a notified transaction in case *Alcatel/Telettra*[4]. As the Commission found, the minority participations of Telefónica in the capital of Telettra and a subsidiary of Alcatel constituted a barrier for other competitors, given the merging parties' strong position on the Spanish transmission markets. In order to remedy the situation, Alcatel committed to acquire, respectively to enter into good faith negotiations to acquire, Telefónica's minority shareholdings in its subsidiary as well as Telettra.

12. Since then, in at least 53 merger cases scrutinised by the Commission, structural links were relevant for the assessment of the competitive effects of the transaction. Out of them, in 20 cases[5] a concentration as a result of structural links held by either party to the transaction led to or strengthened competition problems.

13. Structural links created competition harm across the whole range of unilateral[6], coordinated[7] and foreclosure effects[8] and they sometimes raised concerns about potential entry.[9] Remedies (typically consisting in the divestiture of shareholding and/or relinquishment of board representation and/or other rights) were necessary to restore effective competition in the markets at stake.

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3 For further information see: http://www.competition-commission.org.uk/our-work/ryanair-aer-lingus.

4 M.42 *Alcatel/Telettra*.

5 Such as cases M.42 *Alcatel/Telettra*, M.833 *Coca Cola/Carlsberg,* M.873 *Bank Austria/Creditanstalt,* M.1080 Thyssen*/Krupp,* M.1383 *Exxon/Mobil*, M.1453 *AXA/GRE,* M.1673 *VEBA/VIAG,* M.1684 *Carrefour/Promodes,* M.1712 *Generali/INA,* M.1940 *Siemens/ Framatome Cogéma,* M.1980 *Volvo/ Renault,* M.2050 *Vivendi/Canal+/Seagram,* M.2431 *Allianz/ Dresdner,* M.2567 *Nordbanken/Postgirot,* M.3653 *Siemens/VA Tech,* M.3696 *E.ON/MOL,* M.4150 *Abbot/Guidant,* M.4153 *Toshiba/ Westinghouse,* M.5096 *RCA/MAV CARGO,* M.5406 *IPIC/MAN Ferrostaal.*

6 E.g. M.3653 *Siemens/VA Tech*, M.1980 *Volvo/Renault*.

7 E.g. M.1383 *Exxon/Mobil*, M.1673 *VEBA/VIAG*.

8 E.g. M.2050 *Vivendi/Canal+/Seagram*, M.5406 *IPIC/Man Ferrostaal*.

9 E.g. M.4153 *Toshiba/Westinghouse*.

14. Under the EU Merger Regulation, the Commission has had the opportunity to scrutinise structural links in a number of transactions. However, this was only possible when a case of acquisition of control was notified to the Commission and a pre-existing structural link was part of the competitive picture analysed by the Commission; the acquisition of non-controlling minority shareholdings itself cannot be assessed under the current rules. Selected examples of such transactions are presented in this section:

M.6541 Glencore / Xstrata (2012)

15. This transaction concerned the acquisition of Xstrata, the world's fifth largest metals and mining group, by Glencore, the world's leading metals and thermal coal trader. At the same time, Glencore was the largest supplier of zinc metal in the EEA on the basis of an exclusive off-take agreement with Nyrstar, the world's largest zinc metal producer, in which Glencore also had a 7.79% minority shareholding.

16. The Commission's investigation found that the merger, as initially notified, gave rise to competition concerns through unilateral effects, increasing the merged entity's ability and incentive to control the level of zinc metal supplies in the EEA.

17. In order to remove these concerns Glencore committed *inter alia* to terminate its exclusive long-term off-take agreement with Nyrstar, in so far as the agreement relates to commodity zinc products produced by Nyrstar in the EEA, and to divest its minority shareholding in Nyrstar, thereby maintaining Nyrstar as an independent supplier of zync.

M.6662 Andritz / Schuler (2012)

18. This case concerned the acquisition of the German press manufacturer Schuler by the Austrian plants and equipment manufacturer Andritz. Prior to the notification, Andritz already held a 24.99% shareholding in Schuler.

19. Although the Commission ultimately cleared the merger in Phase I on the basis that the market structure would not be significantly altered, it carried out a thorough investigation into the effects of the merger before concluding that there were no relevant competition concerns. Such a competition scrutiny by the Commission was, however, only possible once Andritz notified the acquisition of control and not at the time when the initial structural link of 24.99% was created, although the latter might have raised very similar competition issues.

M.5406 IPIC / MAN Ferrostaal (2009)

20. This case involved the acquisition of MAN Ferrostaal (a subsidiary of MAN) by International Petroleum Investment Company ("IPIC"). 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.

21. In addition, a foreclosure strategy towards DSM or potential new entrants for the production of melamine, a 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.

22. To remedy the situation, MAN Ferrostaal committed to divest its entire minority shareholding in Eurotecnica.

M.4153 Toshiba / Westinghouse (2006)

23. 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.

24. 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.

25. 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 also would have the opportunity to obtain sensitive confidential information which would help Toshiba to make GE's expansion more difficult.

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

M.3696 E.ON/ MOL (2005)

27. This case concerned the acquisition of MOL WMT and MOL Storage, two subsidiaries of MOL, the incumbent oil and gas company in Hungary, by E.ON Ruhrgas ("E.ON"), a large integrated German energy supplier.

28. Under the agreements concluded, E.ON would acquire an interest of ca. 75 % in both MOL WMT and MOL Storage. The agreements provided for a 5-year put option under which MOL could sell its remaining non-controlling ca. 25 % interests in MOL WMT and MOL Storage to E.ON. Furthermore, MOL would also be granted a 2-year put option under which it could require E.ON to purchase either a minority or a majority interest in another MOL subsidiary, MOL Transmission.

29. After an in-depth inquiry, the Commission found that the deal would have given rise to vertical foreclosure effects in the gas and electricity wholesale and retail markets in Hungary. The minority stakes which MOL would have retained in MOL WMT and MOL Storage and the existence of MOL's put option to sell the shareholding of MOL Transmission to E.ON would create structural links between E.ON and MOL, providing the ability and the incentive for MOL to discriminate against the parties' competitors for access to domestic gas, gas transmission services and new gas storage facilities. Furthermore, because of MOL's remaining shareholding in MOL WMT, the transaction would also maintain structural links between MOL's domestic gas production and MOL WMT, giving MOL an incentive to discriminate against MOL WMT's downstream competitors when granting access to the transmission network.

30. To remedy the situation, MOL agreed to divest its remaining shareholdings in MOL Storage and MOL WMT. In addition, MOL agreed not to acquire direct or indirect minority stakes in MOL WMT and MOL Storage for a period of 10 years as long as E.ON was a majority shareholder of those companies. MOL also committed not to exercise the put option to require E.ON to buy a minority stake in MOL Transmission in order to alleviate the concerns that could stem from E.ON's further integration in the gas transmission market.

M.3653 Siemens / VA Tech (2005)

31. This merger involved the acquisition of 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. 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. As a result, the Commission found that, given Siemens' 28% share in SMS Demag, the merger would reduce competition in the metal plant-building market.

32. In order to resolve the concerns identified by the Commission, Siemens proposed the following commitments:

    – to appoint an independent trustee as Siemens' representative in SMS Demag's shareholders' committee,

- to do its utmost that Siemens' seats in SMS Demag's Supervisory Board were to be assumed by two independent trustees,

- to ensure that only the trustees would receive confidential information from SMS Demag.

33. The Commission considered that these commitments were sufficient to remove the competition concern identified, since they ensured that Siemens could no longer use its position as a minority shareholder in SMS Demag to obtain any strategic knowledge on the latter's business policy.

M.1673 VEBA/VIAG (2000)

34. This case concerned the merger between German energy operators VEBA and VIAG, which was examined by the Commission in parallel to the merger between RWE and VEW (assessed by the German Bundeskartellamt). Both mergers together would have resulted in creating a dominant duopoly on the German wholesale electricity market. In this context, the Commission also examined the complex web of interconnected (controlling and non-controlling) minority shareholdings that VEBA/VIAG and RWE/VEW held, which consisted of the following links:

    - LAUBAG, the largest lignite producer in eastern Germany and VEAG's supplier, which was owned by VEBA (30%), VIAG (15%) and BBS (55%), a subsidiary of RWE.

    - Rhenag, a regional supplier of gas and electricity and holder of numerous minority shareholdings in local utilities, was owned at 54.1% by RWE and 41.3% by Thüga, a majority-held subsidiary of VEBA. Given also VEBA's representation on Rhenag's supervisory board and, thus, the possibility of acquiring inside knowledge of its corporate strategy, the Commission acknowledged that VEBA had a "substantial interest in the success of this RWE subsidiary".

    - BEWAG, the Berlin electricity company jointly controlled by VIAG (26%) and US-based Southern Company (26%), and in which VEBA had 20% of the voting rights.

    - VEAG, the east German wholesale electricity supplier controlled jointly by VEBA (26.25%), VIAG (22.5%) and RWE (26.25%).

    - STEAG, a generator of electricity that sold most of its output to RWE and VEW, was owned by 26% by a joint venture of RWE (49.7%) and VEBA (50.3%).

    - Envia, a member of the RWE group, held several minority shareholdings in municipal electricity undertakings in Saxony in which Thüga, a member of the VEBA group, also had a minority shareholding.

35. These various controlling and non-controlling shareholdings between the duopoly and virtually all other wholesale supply companies, could – in combination with high market shares – increase the duopoly's market power and lead to coordinated behaviour.

36. To remedy the situation, the parties *inter alia* committed to divest several of their controlling and non-controlling minority shareholdings, in particular:

- divest both VEBA's and VIAG's controlling minority shareholdings in VEAG.
- divest both VEBA's and VIAG's shareholdings in LAUBAG, and transfer their rights in LAUBAG to the same acquirer of the shares in VEAG.
- divest both VEBA's non-controlling shareholding and VIAG's controlling shareholding in BEWAG, thus rendering the company into an independent supplier and reducing VIAG's competitive potential that would post-merger pass to VEBA.
- divest VIAG's shares held directly and indirectly in VEW (and RWE should the RWE/VEW merger be completed before the divestment).
- divest VEBA's direct shareholding in HEW, thus strengthening the (independent) position of the company.

M.1383 Exxon/Mobil (1999)

37. This case concerned the merger of the worldwide activities of US oil companies Exxon and Mobil. The merger combined the parties' activities in the German gas market, which was already prone to coordination through a complex network of controlling or non-controlling stakes among the major wholesale suppliers of gas in Germany, similar to the German electricity market in the VEBA/VIAG case. The merger would have further reduced the already weak competition between Ruhrgas, BEB, EGM and Thyssengas and others by bringing together Exxon's and Mobil's respective pre-existing (controlling and non-controlling) links in some of these competing gas suppliers. The merger between the parties would have led to the strengthening of individual dominant positions in some regional markets and coordinated effects in others.

38. The concerns were addressed through remedies by which the parties had to divest a number of their pre-existing controlling and non-controlling links to create independent gas supply players.

M.1453 AXA/ GRE (1999)

39. This transaction concerned the acquisition by insurance group AXA of UK-based insurer Guardian Royal Exchange ("GRE"). The Commission raised concerns for the market for non-life insurance products in Luxembourg and segments thereof, in which AXA was present alongside Le Foyer, a leading Luxembourg insurer in which GRE held a 34.8% interest. Another 34.8% in Le Foyer was held by "Groupe L", a bloc consisting of several individuals, and 14.4% by Luxempart, another company in which le Foyer held cross-shareholding of 33%.

40. The Commission ultimately left open the question of control, as it was evident that the take-over of GRE's shares and voting rights in Le Foyer by AXA would produce important structural links between the competitors. AXA would have had an important financial interest in Le Foyer. In addition, AXA would have been represented in the

management bodies of its rival, and thus involved in the strategic business decisions of the latter.

41. The Commission found that this link between GRE and Le Foyer would result in anticompetitive effects in wider non-life insurance market in Luxembourg and any sub-segments thereof, as the transaction would result in a situation where in a in a highly concentrated market (AXA, Le Foyer and La Luxembourgeoise held on average 70-80% of the total non-life insurance market), two of the three largest competitors (AXA and Le Foyer) would have been closely linked. The decision found that there would be a risk that these players would have a strong interest to refrain from competing against each other, thereby reducing competition between the three leading companies.

42. In order to remedy the concern identified, the parties put forward two alternative remedies, by which either GRE would sell a part of its minority shareholding in Le Foyer or AXA would divest certain of its portfolios.

3. EXAMPLES OF TRANSACTIONS SCRUTINISED BY NATIONAL COMPETITION AUTHORITIES

3.1 Control of structural links by Member States

43. Among the Member States, currently Germany, Austria and the United Kingdom apply merger control also to structural links. The following section summarises the applicable national rules and gives some examples of cases where the national competition authority intervened against structural links.

3.1.1 Germany

44. Under the German merger regime codified in the Act against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen, "GWB"), the Bundeskartellamt can assess the acquisition of both of controlling and non-controlling minority shareholdings which qualify as a "concentration" within the meaning of §37 GWB.

45. "Concentrations" within the meaning of §37 GWB are subject to an obligation to notify under §39 GWB. Whereas §37(1) no 2 GWB addresses the acquisition of "control" along the lines of the EU Merger Regulation, the scrutiny of minority shareholdings below the level of "control" is possible on the basis of the following two provisions:

- § 37(1) no 3 GWB, laying down 25% and 50% notification thresholds for the acquisition of (minority) shares, and
- § 37(1) no 4 GWB, laying down the qualitative criterion of an acquisition of a participation providing the acquirer with a "competitively significant influence" on the target.[10]

[10] I.e. if other provisions, notably §37 (1) Nr. 1-3 are applicable, no. 4 will not apply.

46. Minority shareholding transactions account for approximately 10-12% of all mergers notified to the Bundeskartellamt. However, while for transactions involving the acquisition of a 25% participation (§ 37(1) no 3 GWB) account for about 10% of both notifications and prohibition, transactions notified under the "competitively significant influence" criterion (§ 37(1) no 4 GWB) account for only ca. 0.6% of all notified cases but of about 11% of all mergers prohibited. This clearly shows that both provisions are important in practice.

47. The German energy and media sectors in particular are characterised by a high degree of cross-ownership in the form of both controlling and non-controlling minority shareholdings. These sectors have therefore been a subject to considerable scrutiny by the Bundeskartellamt.[11] 34% of cases notified under § 37(1) no 4 GWB ("competitively significant influence") affect the energy sector and 19% the media sector.

48. A number of cases from the Bundeskartellamt are set out in the following paragraphs:

A-Tec Industries/ Norddeutsche Affinerie (2008)[12]

49. In this case, the Bundeskartellamt prohibited the acquisition of a 13.75% participation by A-Tec Industries AG ("A-Tec") in Norddeutsche Affinerie, a copper producer, which would have granted A-Tec a competitively significant influence over Norddeutsche Affinerie, and ordered the dissolution of the already implemented merger. Given the continuously low presence in Norddeutsche Affinerie's shareholders meetings, A-Tec's 13.75% share would have granted it a *de facto* blocking minority under corporate law comparable with the legal position granted by an acquisition of a 25% stake. Furthermore, apart from A-Tec, no other shareholder disposed over any know-how in the copper industry sector, or had any strategic long-term objectives directed at the competitive behaviour of Norddeutsche Affinerie. A-Tec, to the contrary, was active itself in all of Norddeutsche Affinerie's essential business segments.

50. The Bundeskartellamt considered that the transaction would have led to the creation of a dominant position on the market for oxygen-free copper billets. A-Tec and Norddeutsche Affinerie were the largest competitors in the manufacture and distribution of oxygen-free copper billets in the EEA with a combined market share of well over 85%. Pre-merger, buyers of oxygen-free copper billets could choose between two equal suppliers independent of one another. Post-merger, the Bundeskartellamt expected the two parties to co-ordinate their behaviour in the market place as a result of the transaction, with customers having no real alternatives to switch to another supplier.

DuMont Schauberg/Bonner Zeitungsdruckerei (2004)[13]

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[11] Energy sector: including, but not limited to, in EnBW / EWE, EnBW / VNG, E.ON / Stadtwerke Lübeck, E.ON / Stadtwerke Eschwege, RWE / Wuppertaler Stadtwerke, Stadtwerke Straubing / E.ON Bayern AG, E.ON / Ruhrgas, Stadtwerke Viersen, Neckarwerke Stuttgart AG / Fair Energie, Contigas / Stadtwerke Heide, Stadtwerke Neuss and Stadtwerke Bremen. Media sector: including, but not limited to, in DuMont Schauberg/Bonner Zeitungsdruckerei and Springer/Stilke.

[12] B5- 198/07 - A-Tec Industries AG / Norddeutsche Affinerie AG.

[13] B6- 27/04 – M. DuMont Schauberg/Bonner Zeitungsdruckerei.

51. This case concerns a prohibition by the Bundeskartellamt of a minority participation in the newspaper sector that was later annulled on appeal by the competent court.

52. The original transaction notified by DuMont Schauberg ("DMS"), a publisher of local daily newspapers in Cologne (such as "Kölnische Rundschau", "Kölner Stadtanzeiger", "Express"), in 2003 consisted primarily in the acquisition of 18.03% of the shares in Bonner Zeitungsdruckerei, the publisher of the leading daily newspaper in neighbouring Bonn ("General-Anzeiger") and a 100% subsidiary of H. Neusser Besitz- und Verwaltungs GmbH & Co. KG, Bonn ("HN KG"). In addition, the parties agreed through "silent partnerships" to grant DMS an 18% share in the profits of HN KG's subsidiaries and in return to grant HN KG a 1.5455% share in the profits of DMS's business in Cologne. Furthermore, DMS was given pre-emption rights regarding all remaining participations of HN KG. Finally, the package foresaw advertising placement agreements between Bonner Zeitungsdruckerei and DMS.

53. The parties subsequently reduced the planned capital increase to 9.015%, cancelled DMS's pre-emption rights and set up a mechanism to limit DMS's access to business information of HN KG.

54. The Bundeskartellamt considered that despite these modifications, the transaction still conferred competitively significant influence under § 37(1) no 4 GWB. It prohibited the transaction as modified, as it considered that the transaction would reinforce the dominant position of Bonner Zeitungsdruckerei both on the regional reader and advertising markets. Concerning the reader market, it identified DMS as the only credible potential competitor and stated that the transaction would have further reduced the probability of DMS extending its activity, for instance, by way of putting in place local editorial teams in the neighbouring areas covered by Bonner Zeitungsdruckerei.

55. DMS and Bonner Zeitungsdruckerei appealed the prohibition decision to the Court of Appeal (Oberlandesgericht) of Düsseldorf. The court considered that a competitively significant influence did not result from the 9.015% shareholding or any other factual circumstances and, as a result, annulled the Bundeskartellamt's prohibition decision.

Mainova / Aschaffenburger (2004)[14]

56. The Bundeskartellamt found that German regional gas supplier Mainova AG's planned acquisition of a 17.5% stake in Aschaffenburger Versorgungs GmbH ("AVG"), a local gas retailer (previously wholly municipally owned), would have led to (1) vertical foreclosure of upstream suppliers (customer foreclosure), and (2) stifled potential competition in regional and local gas supply markets. As E.ON – a wholesale supplier of a much larger scale than the parties – indirectly held a 24.4% stake in Mainova, the vertical foreclosure effects would be further reinforced through the risk of favouring supply through the E.ON group to the detriment of other suppliers.

57. The minority participation would have conferred *de facto* influence reinforcing Mainova's existing supplier position towards AVG and increasing its chances to conclude new supply contracts with AVG. AVG's incentives to give Mainova a privileged supplier position would have discouraged potential upstream competitors of Mainova, especially

[14] B8-27/04 –Mainova AG / Aschaffenburger Versorgungs AG.

given the latter's information advantage and its possibility to compensate losses (for charging lower prices to AVG) through participation in AVG's profits. The moderate level of the shareholding at 17.5% was no obstacle to this finding, in particular given Mainova's superior knowledge of the energy sector (AVG's majority shareholder, the City of Aschaffenburg, lacked any sector-specific know-how). The link with Mainova would also have reinforced AVG's already dominant position in the local retail gas market by reducing Mainova's incentive to enter downstream. In the absence of suitable remedies, the transaction was prohibited.

EWE AG, E.DIS AG / Stadtwerke Eberswalde (2002)[15]

58. Stadtwerke Eberswalde GmbH had four significant shareholders: its gas supplier EWE AG and its electricity supplier E.DIS AG (a subsidiary of E.ON) holding 22.5% each, the City of Eberswalde with 51% and Stadtwerke Remscheid GmbH with 4%. The Bundeskartellamt had to decide on the proposed share increase by EWE and E.DIS to 37% each, combined with the exit of Stadtwerke Remscheid GmbH as shareholder, while the City of Eberswalde would have retained a reduced stake of 26%. As a result of the new shareholder structure EWE and E.DIS would have also had 6 out 8 representatives on the board.

59. As EWE and E.DIS would have jointly had the majority on the board and since the conclusion of supply contracts would have been subject to the approval by the board on the basis of a simple majority vote, EWE and E.DIS would have been in a position to jointly approve these contracts. The same was true for a number of other decisions. The acquisition of a further 14.5% stake each would have increased EWE's and E.DIS' legal and *de facto* influence on Stadtwerke Eberswalde, notably with regard to its purchasing decisions.

60. Regarding the market for the wholesale of electricity, although the transaction was seen to have little reinforcing effect on the collective dominance by E.ON (which controlled E.DIS) and RWE, the Bundeskartellamt stated that where a high level of concentration already exists, competition needs to be protected against further restrictions, even by way of small reinforcing effects.

61. The Bundeskartellamt cleared the transaction after EWE and E.DIS offered remedies limiting their respective influence on the appointment of Stadtwerke Eberswalde's management as well as the conclusion of energy supply contracts. It considered these remedies sufficient to prevent a reinforcement of the existing dominant position.

E.ON/Ruhrgas (2002)[16]

62. E.ON AG was the largest electricity firm in Germany, while Ruhrgas was the largest German gas supplier and dominant in the German gas market with about 60% of supply.

[15] B8- 107/02 EWE, E.DIS/Stadtwerke Eberswalde.

[16] B8- 109/01 - E.ON/Gelsenberg and B8-149/01 – E.ON/Bergemann; Federal Ministry for Economic Affairs and Technology, decision of 18 September 2002, I B 1 – 22 08 40/129 – E.ON/Ruhrgas.

E.ON's acquisition of Ruhrgas started in July 2001 when it proposed to acquire a controlling stake in Gelsenberg AG, which held a 25% share in Ruhrgas. Later E.ON also notified the intent to acquire a controlling interest in Ruhrgas by buying Bergemann GmbH, which held 34.8% of Ruhrgas.

63. In January 2002, the Bundeskartellamt prohibited E.ON's purchase of a controlling interest in Gelsenberg, thus aiming to prevent its acquisition of the 25% stake in Ruhrgas, because it considered that it would have strengthened the latter's dominant positions in both the gas and electricity sales markets. In February 2002, the Bundeskartellamt also prohibited E.ON's acquisition of Bergemann.

64. Following the Bundeskartellamt's prohibition, the companies concerned applied to the Federal Ministry for Economic Affairs and Technology for a ministerial authorisation under § 42 GWB, which was granted on 5 July 2002, subject to obligations. The Ministry's decision was accompanied by a series of obligations for E.ON/Ruhrgas, notably a number of divestitures of shareholdings, including minority shareholdings, in vertically related companies, such as the divestiture of its 27.4% stake in EWE AG, its 80.5% stake in Gelsenwasser AG, its 22% capital interest/24.1% voting rights in swb AG, and its 22% stake in Bayerngas GmbH. Furthermore, E.ON was obliged to ensure that Ruhrgas would effectuate legal unbundling of its gas transmission network by 1 January 2004 and put in place a gas release program of a volume of 75 billion kWh.

Springer/Stilke (2000)[17]

65. In the case at hand, Axel Springer Verlag ("ASV") intended to acquire a 24% participation combined with extensive information rights in the Hamburg news agent Stilke, also an owner of numerous bookshops located in train stations. The remaining 76% were to be acquired by Valora, an undertaking active in the Swiss kiosk business. The Bundeskartellamt found that that the transaction would result in a "competitively significant influence" by ASV over Stilke and prohibited the acquisition of the 24% stake by ASV in Stilke.

66. The Federal Court of Justice (Bundesgerichtshof) confirmed the Bundeskartellamt's finding that the transaction would have reinforced the dominant position of ASV on the Hamburg newspaper and newspaper advertisements markets. In this regard, the Court highlighted that newspaper publishers were currently not involved in the press retail business, guaranteeing a certain neutrality of the retail side towards the publishers. Under this aspect, the entry of ASV into the press retail level would have changed competitive conditions to the disadvantage of ASV's competitors.

3.1.2 Austria

67. In Austria a 25% shareholding threshold applies for a notification requirement to be triggered and there is thus no need for a participation to confer control in the sense of the EU Merger Regulation. Unlike Germany, there is no additional legal provision foreseeing the possibility to review transactions on the basis of a "competitively significant influence" test. However, the Austrian courts have developed jurisprudence under which a transaction falls under the definition of a notifiable "concentration" if in circumvention

[17] BGH, judgment of 21 November 2000 - KVR 16/99.

of the law, the stake acquired, although not reaching the level of 25% in either capital interest or voting rights, confers rights normally only held by a shareholder owning a 25% stake.

68. In 2011, the Austrian competition authority (Bundeswettbewerbsbehörde) examined 226 notified merger transactions, of which 34 were minority acquisitions with a final stake below 50%. Minority shareholding transactions account therefore for approximately 15% of all mergers notified in Austria, irrespective of whether or not they conferred (*de facto*) control. In two of those cases, the competition authority initiated Phase II proceedings before the Competition Court (Kartellgericht): newspaper publisher Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG's proposed acquisition of a 30% stake in Niederösterreichische Gratismedien GmbH, a provider of free newspapers, and Mr. Heinz Hermann Thiele's proposed acquisition of 25% of the shares of rail vehicle manufacturer Vossloh AG. In the first case, the notification transaction was ultimately withdrawn. In the second case, the competition authority withdrew the referral of the case to the Competition Court, resulting in the clearance of the merger.

3.1.3 The United Kingdom

69. In the United Kingdom, the relevant statute for merger control, including for minority shareholdings, is the Enterprise Act (2002).

70. Jurisdiction to scrutinise minority shareholdings arises where they confer "material influence" on the acquired business (thus a lower threshold than "decisive influence" which confers control under the Merger Regulation). The assessment of material influence is based not only on percentage shareholding (to date at least 15% or more) but on a portfolio of factors similar to those applied under the Merger Regulation when assessing decisive influence (i.e. distribution of the remaining shares, patterns of attendance and voting at shareholders meeting, the existence of any special veto rights etc.). Just as for "full mergers", minority shareholdings are scrutinized with a view to assess whether they will lead to a significant lessening of competition.

71. Minority shareholding transactions account for approximately 5% of all scrutinised mergers. Besides the already mentioned Ryanair / Aer Lingus case, an example of a transaction involving structural links examined by the UK authorities is the following:

<u>BSkyB / ITV (2007)</u>

72. This case concerned the acquisition of a 17.9% stake in ITV, a leading commercial free-to-air broadcaster, by BSkyB, the leading pay-TV provider in the United Kingdom. The UK authorities found that the minority shareholding would substantially lessen competition in an all-TV market through BSkyB's ability to influence the strategic decision making of ITV, a close competitor. Although BSkyB would be unlikely to be able to get board representation, it would through veto rights be able to limit the strategic options of ITV.

73. The UK authorities therefore found it likely that the acquisition would result in a substantial lessening of competition and identified the following possible effects: reduction in the quality of offer, in innovation or an increase in the price of audio-visual

services in the all-TV market. The case was cleared subject to divestiture of the shareholding down to 7.5%, which would eliminate the key veto rights of BSkyB.

3.2 Control of structural links in other jurisdictions

74. Structural links are also subject to competition review under merger control rules in a number of other industrial countries, such as the United States, Canada or Japan. The following section contains a brief overview of the existing rules applicable to structural links in these jurisdictions.

3.2.1 United States of America

75. In the United States, Section 7 of the Clayton Act prohibits acquisitions of assets or shares where "the effect of such acquisition may be substantially to lessen competition or to tend to create a monopoly". Consequently, such prohibition may apply to structural links as well as to full mergers, regardless of whether the acquisition is sufficient to acquire control and regardless of whether it appears to be a step towards control.

76. The US courts have clarified the scope of Section 7 in a number of cases. The courts have not set a standard in case law for how large a percentage of share capital must be acquired in order to raise concerns about the impact of the acquisition on competition, although in cases where structural links have been held to violate Section 7, the acquisitions of shareholdings were at least 15%. However, there are cases where remedial action has been ordered for smaller minority acquisitions than 15%.[18]

77. A notification requirement is triggered in the US for any acquisition of voting securities or assets that meets the transaction-size threshold (and the person-size threshold, if applicable), provided that no exemption set forth in the Hart-Scott-Rodino ("HSR") Act is met. Therefore, a structural link may have to be notified even if the acquired amount represents a very small percentage of the total outstanding share capital of the target. However, the HSR Act contains a safe harbour for acquisitions of 10% or less of a company's share capital "solely for the purpose of investment", which are exempted from such pre-merger notification obligation.

78. Once the proposed transaction has been notified, it cannot be executed until the filing is completed and the 30-day waiting period (or 15-day in the case of a cash tender offer or a transfer in bankruptcy) has expired. In the US there is no scheme for voluntary filings as such, but parties to non-reportable transactions can bring their transaction to the attention of the agencies. Also, if the agencies take no action after the transaction has been notified, it may be consummated when the waiting period has expired. In any case, the agencies do not issue a formal decision clearing a transaction.

79. Finally, regarding the competitive assessment of structural links, the US agencies apply the same level of scrutiny in the case of structural links as in full mergers, i.e. whether there is a reasonable probability of a substantial lessening of competition. Indeed, the competitive concerns arising from structural links are qualitatively the same as in a full merger; i.e. by giving the acquirer the ability to influence the target firm to compete less aggressively or to coordinate its conduct with that of the acquiring firm; by reducing the

[18] *Time Warner Inc*., 61 Fed. Reg. 5,0301 (25 September 1996).

incentive for the acquiring firm to compete, by giving rise to unilateral competitive effects (although the effect is likely attenuated since the ownership is partial); and, by giving the acquiring firm access to sensitive information in the target, which, even in the absence of any ability to influence the conduct of the target, can lead to adverse unilateral or coordinated effects.

80. From 1996 until June 2011 there were 18 cases involving minority acquisitions in which the Department of Justice ("DOJ") raised concerns. In some cases the minority acquisition was regarded as having the effect of "transforming" a strong competitor into an investor, and thus eliminating potential or actual competitors, to the detriment of competition. Primestar and Dairy Farmers are good examples of this effect.

Primestar/ASkyB's satellite services (1998)

81. In this case Primestar wished to acquire the high-power broadcast satellite services of ASkyB, a joint venture owned by News Corp and MCI. In exchange News Corp/MCI would receive a 20% non-voting equity share in Primestar. The DOJ alleged that this would transform ASkyB from a possible entrant to the relevant market to an investor to the detriment of competition.

Dairy Farmers / Southerns Bell (2003)

82. In this case Dairy Farmers of America (a dairy cooperative) acquired 50% of the equity stake in Southern Belle, which competed head-to-head with Dairy Farmers already held a 50% stake in the company that owned and operated the Flav-O-Rich dairy, having the effect of eliminating the already small competitive pressure on the market.

3.2.2 Canada

83. In Canada, the relevant statute for the control of mergers is the Federal Competition Act (the "FCA"). Structural links might be caught by the substantive provisions of the Act because it defines a merger to include any transaction by which a party acquires a 'significant interest' in the business of another person. In this regard, the Merger Enforcement Guidelines ("MEGs") contemplate that the acquisition of a 'significant interest' could occur at as low as a 10 % ownership interest or indeed without an equity interest if contractual or other circumstances allow material influence to be exercised over the business of another person.

84. The FCA's pre-merger notification regime does not require that control be acquired to trigger a filing obligation. If the party-size and transaction-size thresholds are met, a notification obligation is triggered for structural links in Canada when they entail the acquisition of more than 20% of the shares of a public company (50% if the acquirer already owned 20% or more before the proposed transaction), or more than 35% of the shares of a private company or interests in a combination (more than 50 per cent if 35 per cent or more was owned before the proposed transaction).

85. The Act does not set out deadlines for filing and it is therefore for the parties to decide when to submit a notification. However, a transaction that is notifiable may not be

consummated until a 30-day no-close waiting period (which is extended if a supplementary information request is required) has expired.

86. Cases where interlocking directorships and minority interests were examined and assessed in detail by the Competition Bureau include the acquisition of Fairmont Hotels by Kingdom Hotels International and Colony Capital, and Torstar Corporation's acquisition of a partial interest of 20% in Bell Globemedia, both in 2006 During the investigation of both cases, the Bureau initially assessed each transaction as a full merger, but also took into account the nature of the interlocking directorships and minority interests to assess whether the transactions were likely to result in unilateral and/or coordinated effects. In each case, the Bureau concluded that the transaction was not likely to result in a substantial lessening of competition.

3.2.3 Japan

87. Japan is another example of a jurisdiction where structural links may be subject to merger control. The Antimonopoly Act ("AMA") stipulates that no corporation shall acquire or hold shares of any other corporations where the effect of such an acquisition or holding of shares may be to "substantially restrain competition" in any particular field of trade.

88. Notification in Japan is mandatory if the thresholds are met. In this regard, the AMA provides thresholds defined by percentages, without using the concept of 'control' as in some other jurisdictions. In particular, it requires a corporation whose assets and total assets exceed certain thresholds to submit a written report to the Fair Trade Commission ("FTC") within 30 days after it acquires or holds the shares of another corporation whose total assets exceed certain thresholds, if the voting right-holding ratio exceeds 10%, 25% or 50% by this shareholding.

89. After the filing, which must be made 30 days prior to the closing of the transaction, the FTC issues an acceptance notice to confirm the filing date, and the parties are subject to a 30-day waiting period (Phase I). However, once the waiting period lapses the parties can close the transaction legally even if the FTC has not completed its substantive review.

90. A second phase (Phase II) may be opened if the FTC requires one or more parties to the transaction to submit additional materials or information before the expiry of the waiting period. The FTC issues a written confirmation of its clearance at the end of both Phase I and Phase II.

4. ZEPHYR DATABASE

91. This section summarises an analysis carried out by DG Competition of certain information contained in the Zephyr Database, which is a dataset containing information on transactions resulting in changes of ownership in listed companies ("ownership transactions") within the EU for the years 2005 to 2011. The aim of this analysis was to get a first understanding of the frequency of the creation and changes of structural links in the internal market. Furthermore, it could inform about the question whether certain transactions that are currently not subject to merger control would on a preliminary basis have been deemed worthy of competition scrutiny.

4.1 Introduction to the database and methodology

92. The Zephyr database contains information on the total number, the value and the corresponding participation percentages of ownership transactions in listed companies registered in all 27 EU Member States. Moreover, it contains information on the buyer and target companies (e.g. name, code, nationality, country code, legal status, turnover, sectorial activity), permitting for the identification of intra-sector and inter-sector transactions. Thereby, the database allows to make a rough but conservative approximation of the number of cases of structural links that are above the turnover thresholds of the Merger Regulation and might potentially merit competition scrutiny.

4.1.1 Scope of analysis

93. The Zephyr database only covers a sub-sample of the EU economy and the relevant structural links. For the most part, only listed companies are covered by this database. Transactions between listed and private companies are included, but transactions between two private companies are not. 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. However, if a non-EU buyer purchases the stake through its EU-based subsidiary, the transaction is selected. DG Competition furthermore analysed only those transactions occurring between the years 2005-2011. For these reasons, the dataset and the methodology used certainly underestimates the actual number of transactions. Despite this shortcoming, the analysis of the database gives a useful first indication of the magnitude of relevant structural links, in particular by indicating a confirmed minimum number of structural links between competitors.

4.1.2 Methodology

94. From the information contained in the Zephyr database, DG Competition identified transactions involving structural links potentially meriting competition scrutiny according to the following methodology:

- Annual turnover of the target is at least EUR 10 million and the buyer acquires up to 49% of target. It should however be noted that this criterion does not allow to identify whether a participation of 49% or less leads to control within the meaning of the Merger Regulation (e.g. in the form of joint control or de facto sole control).

- Transactions already reviewed by DG Competition or by EU national competition authorities were excluded from the sample.

- The buyer and target are active in the same economic sector (as expressed by their respective NACE code). Non-horizontal transactions are therefore for the most part excluded from the analysis.

- The buyer and target were not financial investors, e.g. venture capitalists or investment funds. Acquisitions of shareholdings considered to be purely risk diversification investments are also excluded.

- Only those companies involved in an acquisition which are independent in the sense of the Zephyr data base were retained in order to exclude intra-group

transactions. This includes those companies with known recorded shareholders where none of the shareholders have more than 25% of direct or total ownership. However, a certain number of proxies were applied in order to exclude scenarios of de facto control to the extent possible. Information gathered from the database and from companies' annual reports was used to establish on a preliminary basis whether the shareholdings in question lead to situations of de facto control.

95. Finally, by adding another criterion, the sample was reduced to cases that would potentially have an EU dimension if structural links were covered by the Merger Regulation:

- The transaction is likely to fulfil the turnover thresholds of the Merger Regulation (according to the proxy of a combined global turnover of at least EUR 2.5 billion and individual turnover of at least EUR 100 million).

96. By applying the above methodology, DG Competition has attempted to identify those transactions that might warrant competition scrutiny and that would meet the turnover thresholds of the Merger Regulation. Notably, this potentially interesting sub-sample is only a sub-set of the sample of structural links meeting the jurisdictional filters only.

4.2 Main findings

97. According to the methodology described in paragraph 94, DG Competition identified 91 transactions of varying size and value potentially meriting competition scrutiny. The average value of the transactions is EUR 139 million, the average turnover of the buyer is EUR 7.2 billion and of the target EUR 3.2 billion. The average level of initial shareholding is 6.9% and of shareholding post-transaction 14.3%. Overall, final shareholdings range from 1% to 44.7%. in some industry sectors minority shareholding transactions appear to take place more often than in others. The table below shows how the 91 transactions are distributed across the different economic sectors.

Sector	**Number of transactions**	**Average value**
Financial services (Retail)	27	EUR 168 million
Electricity, gas, steam supply	8	EUR 152 million
Construction of buildings	6	EUR 22 million
Retail trade	5	EUR 870 million
Insurance, reinsurance and pension funding	4	EUR 111 million
Others	41	n.a.

98. Out of this sample of 91 transactions, 43 also fulfilled the additional criterion set out in paragraph 95, i.e. were likely to have an EU dimension and fall under the Merger Regulation if the latter were to cover structural links.

99. This represents about 5% of all cases decided by the Commission during the same period 2005-2011 under the Merger Regulation following the normal procedure (i.e. excluding cases dealt with under the simplified procedure). The largest number of transactions fall in the banking sector (14) and the gas, water and electricity sectors (7). Also given that the dataset and methodology used are designed to underestimate rather than overestimate the actual magnitude of transactions involving structural links, this result suggests that there is a significant scope of cases with a potential EU dimension that would warrant competition scrutiny but currently fall outside the scope of the Merger Regulation because they do not involve a change of control.

100. Among the transactions identified, two examples are further explained hereafter in order to illustrate the kind of potential competition issues raised by these cases:

LVMH / Hermès (2010/2011)

101. Through a series of subsequent transactions between 2010 and 2011, LVMH increased its shareholding in Hermès from 14.2% to 22.28% (16% of voting rights). The total value of these transactions amounted to EUR 1.6 billion. As a direct consequence, the Hermès family created a majority holding controlling 50.2% of the company's shares. LVMH is the world's biggest luxury group with an annual turnover of EUR 20.3 billion in 2010 and net profit of EUR 3.3 billion. Hermès is a smaller luxury player with a turnover of EUR 2.4 billion in 2010 and net profit of EUR 421.3 million. LVMH and Hermès are close competitors in luxury markets and, given the level of LVMH's shareholding, it cannot be excluded that the minority shareholding enables LVMH to influence decisions of Hermès in relation to key competitive parameters or obtain sensitive commercial information.

Salini Construttori Spa / Impregilo Spa (2011/2012)

102. Salini Construttori, an unlisted Italian construction group, bought through a series of transactions a minority stake in Impregilo. Impregilo is Italy's leading engineering and general contracting company in civil construction, active internationally. As of January 2013, this stake amounted to 29.83% of Impregilo's share capital. Being Italy's leading constructor, Impregilo has an annual turnover of EUR 1.1 billion, while Salini Construttori's turnover amounts to EUR 457.5 million.

103. The remainder of Impregilo's shareholding is widely dispersed between numerous companies, most of which are investment funds and banks. Other notable shareholdings include its largest shareholder IGLI Spa (29.96%), a holding company owned by the multinational steel, engineering and construction Technit group, Amber Capital LP (7.26%) and UBS AG (2.5%).

104. Given that both Salini and Impregilo operate in the Italian construction sector, they could be actual or potential competitors in construction tenders and thus a weakening of competition in those tenders cannot be excluded, in particular through access to information on the other tenderer's bid. This possible effect could even be reinforced by the presence (through IGLI) of other competitors in the construction sector in Impregilo's capital. The present case could also be indicative of a situation where a smaller competitor's stake in a much larger player could change the former's competitive behaviour in such a way so as to ultimately benefit from the larger operator's profits.

105. Whilst it is not alleged that the above examples would necessarily lead to competition concerns, they provide good real-world examples of cases where it would seem warranted to scrutinise the minority shareholding's impact on competition.