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WELL-FUNCTIONING MARKETS

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WHEN COMPETITORS OWN (PARTS OF) EACH OTHER

Impact of minority shareholdings on effective competition

A merger, where a company acquires control of a competitor, can impede effective competition and, for example, result in higher prices and poorer product offering. Big mergers are therefore subject to merger control.

When a company buys a non-controlling shareholding in a competitor, however, this may also harm competition.

In some countries, therefore, in addition to merger control, the competition authorities are able to assess the impact of, and take action against, non-controlling minority shareholdings and cross-ownership between competitors. Neither Denmark nor the EU have regulations covering such minority shareholdings.

The competitive issues which minority shareholdings may cause have been relevant in i.a. several Danish merger cases.

With this in mind, this article describes the potential adverse effects on competition of competitors owning minority shareholdings in each other.

Read the full article[1] on the next page →

In Denmark and most other countries, mergers are subject to merger control, meaning that big mergers between companies have to be approved by the competition authorities[2], before they can be carried out.[3] In Denmark and the EU, for example, a merger is only required to be notified if the merging companies' turnover exceeds certain thresholds.

Merger control should be seen in light of the fact that some mergers may significantly impede effective competition. This particularly applies to mergers between competitors.

In assessing a merger, competition authorities must also take into account possible efficiency gains from the merger and whether these will benefit consumers.

International research studies analysing specific mergers in various industries have shown that the merging companies have often been able to increase profit margins by raising prices on their products. For example, this applies to mergers in aviation, dishwashers and other industries, where significant price increases have been observed following mergers (see respectively Kwoka and Shumilkina[4] and Ashenfelter et al.[5]).

Studies have also been done assessing the impact of mergers by looking across many different mergers in various industries (see e.g. Weinberg [6], Gugler et al[7], Ashenfelter et al[8] and Blonigen and Pierce[9]). The studies relate to various countries, particularly the United States, and generally indicate:

- mergers between competing businesses have typically led to higher consumer prices
- often, mergers between competitors do not lead to significant productivity or efficiency improvements
- mergers between non-competing companies are more frequently associated with efficiency gains.[10]

According to the studies, the mergers which have led to price increases and impeded competition include both mergers which have not been reviewed by a competition authority and mergers which a competition authority has decided not to oppose.[11]

In most cases, competition authorities approve a merger after a brief processing.[12]

In Denmark, however, there is no similar control of e.g. a company's purchase of a non-controlling minority shareholding in a competitor that also establishes a structural link between previously independent companies.

This article examines the potential effects of minority shareholdings and cross-ownership between companies.

Change of control and minority shareholdings

As regards merger control in Denmark and the EU, a merger entails a change of control. This may be a company which acquires control of another company by purchasing all or most of the shares in said company. In case of a change in control, the acquiring company acquires the option to influence the other company's operation.

A company can also buy a non-controlling minority shareholding in another company. This is the case if the company buys a smaller proportion of the shares in the other company, and if this shareholding does not allow the company to exercise decisive influence on the other company's operation. For example, a company may acquire 25 percent of the shares in another company, without this necessarily entailing a change of control (see Box 1).

However, there may also be cases where a minority shareholding involves a change of control with respect to merger control. This may be the case if the minority shareholding gives the acquiring company a controlling influence over the other company's operations, e.g. because the shareholding affords certain rights to veto strategic decisions in the company. In such a situation and provided that the relevant turnover thresholds are met, the company must notify the transaction as a merger with the competition authorities.

A non-controlling minority shareholding, however, does not trigger merger control, even though it creates a structural link between companies that may be competitors and that have previously acted independently of each other.[13]

Box 1

The difference between independence, change of control and a minority shareholding.

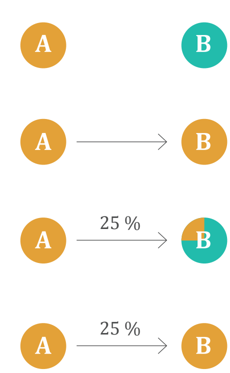
The figure illustrates total independence, a merger (i.e. a change of control), a non-controlling minority stake and a controlling minority stake between two companies (A and B), respectively.

Total independence

Change of control
(subject to merger control)

Minority stake
(Non-controlling)

Minority stake
(Controlling)



The transaction can thus be executed without the competition authorities being required to first assess and approve it.

Various types of minority shareholdings
When assessing the effects of a merger, competition authorities typically distinguish between companies which are competitors (horizontal mergers), and companies which have a potential or current customer/supplier relationship with each other (vertical mergers).[14]

The risk of an adverse impact on competition is often greatest in the case of mergers between competitors, but vertical mergers can also, in some cases, impede effective competition.

In an analysis of the effects of non-controlling minority shareholdings, it may be useful to employ the same distinction between horizontal and vertical minority shareholdings, cf. Box 2.

In fact, the structural links between companies can be extremely complicated and opaque. As a term, cross-ownership describes a situation where companies are linked through ownership shared between several companies or through competitors holding shares in each other – be this directly or indirectly through subsidiaries, etc.

The following sections describe, at a general level, some of the anti-competitive effects that can occur in the event of horizontal and vertical non-controlling minority shareholdings.

Horizontal minority shareholdings
A company's non-controlling minority stake in a competitor will usually entail a greater risk of anti-competitive effects than if the company owns a minority stake in e.g. a customer, a supplier or a company that produces other, non-competing products.

A minority stake in a competitor may significantly impede effective competition and harm consumers by, for example, leading to higher prices.[15] This can happen in different ways, including in particular:

- Change of economic incentives for previously independent companies
- The minority stake gives the shareholder the opportunity to influence decisions and behaviour in the company which it partly owns
- The minority stake gives access to information on business matters which would not otherwise be available to the shareholder

Each of the three mechanisms are elaborated below.

Changing in economic incentives
As a rule, it is assumed that a company acquiring a minority stake in a competitor, even before acquiring the stake, has attempted to fix a price (and/or e.g. product quality) which is generally expected to provide the greatest possible profit.

Box 2
Horizontal and vertical minority stake.

Figure a shows an example of a horizontal minority stake, i.e. where one company (A) owns a stake in a competitor (B), and where both companies sell products and compete for consumers in the same market. A's ownership interest in B is 25 percent, and is a non-controlling minority stake.

Figure a
Minority stake in a competitor (horizontal)

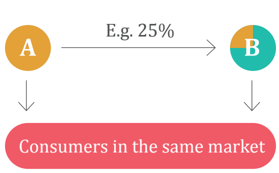
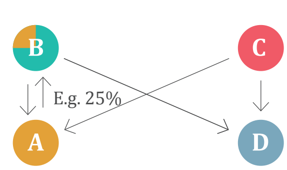


Figure b shows an example of a vertical minority stake, i.e. where one company (A) has an ownership interest in a current or potential supplier (B) and are therefore not competitors.

In contrast, B competes with C to sell products to A and D in the same market. Customers A and D thus compete with each other in the same way, and therefore want to get the best products and prices from suppliers.

A's ownership interest in B is 25 percent, and is a non-controlling minority stake. It will also be a vertical minority stake if the supplier, e.g. B, owns an interest in a potential or current customer, e.g. A.

Figure b
Minority stake in a supplier (vertical)



Following the acquisition of a minority stake in a competitor, the company will not only be concerned with its own profits, but also have an interest in the competitor achieving high profits as, through its stake, the company receives a share of the competitor's profits.

The company can thus have an (greater) incentive to e.g. increase its prices or reduce product quality. Usually, a price increase will thus cause some of the company's customers to switch to products from the competitor, in which the company now owns a stake. The minority stake in the competitor, however, means that the company gets a share of the competitor's profits from the customers which it loses to its competitor.

Following the acquisition of the minority stake, the company is thus likely to factor in a share of the profits from the competitor which a higher price may result in. The horizontal minority stake may therefore ultimately mean higher prices for consumers.

The company's incentive to raise prices will depend on two factors in particular:

- What percentage of the competitor's profits will the company get?
- How close is the competition between the two companies?

If, for example, the stake in question is a minority stake of 25 percent, the company will typically receive 25 percent of the competitor's profits, while a larger stake will yield a correspondingly greater share of the compet-itor's profits.16 The closer the competition between the two companies, the more likely it is that the customers which a minority shareholder loses through price in-creases will be won by the competitor.

If the minority stake is of a certain size, and if the two companies are relatively close competitors, the minority shareholder will thus be able to recover a substantial part of the loss from a price increase through its stake in the competitor's profits. This mechanism is illustrated with an example in Box 3.

A company's minority stake in a competitor can also change the competitor's incentive to compete with his (new) partial owner. That will be the case if the competitor seeks to

Box 3
Minority shareholdings and economic incentives

Suppose that company A buys 25 percent of the shares in its closest competitor, company B. A is then entitled to a proportionate share of B's profits, i.e. 25 percent.

Before acquiring the minority stake, company A has fixed a price that maximises its own profits. At this price, A earns DKK 10 for each of its 1,100 customers. A has previously experimented with increasing its price by DKK 1. It turned out that the price increase would mean A losing 100 of its 1,100 customers as well as the profit it earns from them. Conversely, A would still have 1,000 loyal customers who would be happy to pay DKK 1 extra for its product. A's calculation of a price increase of DKK 1 therefore looks like this:

- Lost earnings from lost customers: DKK 100 x 10 = DKK 1,000
- Additional earnings from loyal customers: DKK 1 x 1,000 = DKK 1,000
- Net earnings from price increase: DKK 1,000 – DKK 1,000 = DKK 0

Thus, A does not increase its profits by raising its price and so does not have an incentive to go through with the increase in price. Following the acquisition of the minority stake in its nearest competitor, B, A will receive, as stated, 25 percent of B's profits. B, like A, makes a profit of DKK 10 per customer. A knows that B is a close competitor, and that many consumers consider A's and B's products as substitutes for each other. To investigate further, A has commissioned a market study showing that 50 percent of A's customers who will move away from A in the event of a price increase will switch to B.

If, for example, A raises its price by DKK 1, the company will lose 100 customers. And A now knows that 50 of these customers will switch to B and thus increase B's profits, which A are entitled to a share of. Following the acquisition of the minority stake in B, A will take into account that the calculation for a price increase of DKK 1 has changed:

- Lost earnings from lost customers: DKK 100 x 10 = DKK 1,000
- Additional earnings from loyal customers: DKK 1 x 1,000 = DKK 1,000
- Share in earnings from customers switching from A to B: 25 percent x 50 x DKK 10 = 125 kr.
- Net earnings from price increase: DKK 1000 – 1000 DKK + DK 125 = DKK 125

Overall, A now increases its earnings when the company raises the price by DKK 1. Thus, following the acquisition of the minority stake in B, A will have an incentive to raise its price.

accommodate its new owners by e.g. targeting campaigns etc. at other competitors' customer segments.

These kinds of anti-competitive effects of horizontal minority shareholdings are described in several places in the economic literature (see e.g. O'Brien and Salop[17], Reynolds and Snapp[18] and Bresnahan and Salop[19], and see also Dubrow [20] for a critique of this[21]).

Empirical studies conducted in this area have identified significant price increases and impeded competition following acquisitions of minority shareholdings in competing companies (see e.g. Nain and Wang[22] for a cross-sectoral analysis and Trivieri[23] for an analysis of the impact on competition of cross-ownership between Italian banks). For example, Nain and Wang demonstrate that a minority stake in a competitor leads to higher prices and increased profit margins. This is especially true in industries with high entry barriers which make it difficult for new competitors to enter the market.

Opportunity to influence decisions and behaviour
The ownership of a non-controlling minority stake in a competitor can also give the new co-owner the opportunity to influence the competitor's decisions and behaviour. A minority stake may afford influence over the election of board members, and certain business decisions may require a qualified majority of e.g. 2/3 or 3/4 of the owners' votes.

If, whether *de facto* or *de jure,* a minority stake involves a change of control, it will be subject to the rules on merger control as mentioned. Whether this is the case will depend on a specific assessment.[24] It must also therefore be emphasised that the given examples of a minority shareholder's opportunity to influence the decisions and behaviour of a competitor may, depending on the circumstances, be deemed a change of control.

The company which owns shares in a competitor may affect the competitor's decisions in a manner which weakens the competitive pressure the competitor generally applies in a market. That will be the case if, for example, the company limits the competitor's opportunities for growth by opposing the competitor raising capital. The company can also work against an expansion of the product portfolio or certain investments made by the competitor.

Furthermore, the company, as a co-owner, can seek to influence decisions and behaviours which particularly weaken the competitive pressure on the company itself. This may be the case if, for example, the company, through its non-controlling minority stake, limits the competitor's possibilities to establish themselves with a product type or in a geographical area, where the company itself holds a significant position. Such behaviour will limit the dynamics and impede competition in the market to the detriment of consumers.

Box 4 illustrates a minority shareholder's opportunity to influence the policies and decisions of a competitor.

This type of anti-competitive impact is also described in the economic literature (see e.g., O'Brien and Salop[26]and Li et al[27]). For example, Li et al demonstrate that cross-ownership between companies which are not currently competitors, but which have the potential to become competitors, may influence strategic decisions.

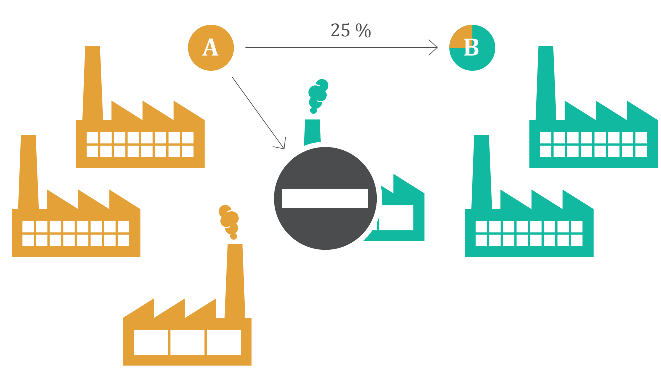
Access to information on business matters
A company's minority stake in a competitor may give the company access to information about the competitor, which is not publicly available and which it would therefore not

Box 4
Influence over a competitor's strategic decisions

Inspired by a specific case (Toshiba/Westinghouse)[25], the figure illustrates an example of a horizontal minority stake where Company A has a non-controlling stake of 25 percent in the competitor, company B. Both companies have a number of factories which produce competing products.

B is now planning to establish a new factory, where B can expand its product portfolio with a *new* product. Up until now, only A has had this type of factory. A, therefore, has not previously been subjected to competition from B in the production of that product.

A realises that, with the new factory, B will also be able to exert competitive pressure on A. By means of the non-controlling minority stake in B, however, A can block



B's ability to establish the new factory. This can be done e.g. by limiting B's ability to raise necessary capital or by preventing B from entering into a joint venture with a third company that could provide necessary know-how.

otherwise have access to. This may be the case if e.g. the company, through its minority stake, acquires the opportunity to appoint a member of the competitor's board.

The company may, for example, access business-sensitive information about the competitor's strength, position and strategies. This knowledge can be used by the company, when it makes decisions on e.g. its own future strategies and pricing. Following a specific assessment, however, such an exchange of information may violate the prohibition on anti-competitive agreements in the Danish Competition Act's section 6 and Article 101 of the Treaty on the Functioning of the EU (TFEU).

Access to previously unknown information may also lead to a risk of so-called tacit collusion between competitors. Here, the companies involved make no actual agreement on i.e. raising prices or dividing a market amongst themselves. Rather, the behaviour consists in e.g. establishing and maintaining a higher price level, *without* businesses explicitly agreeing to do this.

An agreement or a concerted practice between competitors would be contrary to the prohibition on anti-competitive agreements in section 6 of the Competition Act and Article 101 of the TFEU, and exchange of information and consequent coordination between companies may also be illegal. Nevertheless, a minority stake increases the risk of coordination without there explicitly having been any coordination between the companies, i.e. tacit collusion.

Among other things, establishing and maintaining tacit collusion in a market requires the market to be characterised by a certain degree of transparency for competitors, allowing them to read each other's behaviour. Furthermore, the companies invoved in the coordination should be able to punish a company that decides to deviate from the coordination.

A non-controlling minority stake in a competitor may affect both of these matters.

Firstly, access to non-public information may increase competitors' ability to read each other's behaviour. The company which owns a stake in a competitor may, more often and at an earlier point, access information about the competitor's strategies, production levels and sales trends. Thus, the company will be able to better detect if the competitor was to deviate from a tacit, collusive behaviour. This may increase the risk of tacit collusion. The risk of coordination will also be greater if the competitor also gains access to similar information from the minority shareholder.

Secondly, a minority stake may change the ability and incentive to deviate from the coordination and "punish" an aberration.

Theoretically, a minority stake may both increase and reduce the incentive for tacit collusion (see e.g. Gilo et al[28] and Malueg[29]). Malueg notes that, in some cases, increased cross-ownership may reduce the likelihood of coordination, and that, among other things, the overall result depends on a balancing of mechanisms which pull in different directions:

- A reduced incentive to deviate from tacit collusion increases the likelihood of coordination
- A reduced incentive to "punish" a deviation reduces the likelihood of coordination.

A structural connection between two competitors can make the "penalty" for a deviation from the coordination more credible. If the coordinating companies are completely independent, they will primarily be able to "punish" a departure from the tacit collusion by initiating a price war with the company that has breached the coordination. If the minority shareholder holds influence on the decisions of the competitor, the company may use this influence to damage the competitor in other ways. The increased risk of a stricter "penalty" can, seen in isolation, reduce the competitor's desire to deviate from the tacit collusion.

The minority shareholder may also have less incentive to deviate from the tacit collusion than if said shareholder had been entirely independent of its competitor. This is due to the company taking into account that it will receive a share of the competitor's profits. If the company itself deviates from the coordination, it will on the one hand gain customers from the other coordinating firms. But with a minority stake in a competing company, it will also bear part of the losses which the competitor experiences as a result of the deviation from the coordination.

Conversely, the minority shareholder may have less of an incentive to "punish" a deviation from the tacit collusion. This is because a "penalty", e.g. in the form of a price war, would also reduce the competitor's earnings and the minority shareholder, as stated, receives a share of the competitor's profits.

Thus, it is an empirical question whether a minority stake increases or decreases the risk of tacit collusion. In a study of actual minority shareholdings among competing automakers, Alley[30] found examples of coordinated behaviour among both Japanese and American automakers, where cross-ownership is widespread. For Japanese automakers, he also finds that they do not, to the same extent, seem to exhibit coordinated behaviour on the export market, where the competitive landscape for the manufacturers is different.[31]

When assessing a merger, the Danish Competition Council has also considered an existing minority stake's impact on the risk of coordinated effects as a result of the merger (see Box 5).

Vertical minority shareholdings

A company's non-controlling minority stake in a customer

Box 5
Minority stake and tacit collusion in a merger

In the Competition Council's decision on the planned merger between J-F. Lemvigh-Müller Holding A/S and Brødrene A&O Johansen A/S in 2008, the importance of the competitor Sanistål's minority stake in Brødrene A&O Johansen was addressed in depth.[32]

Among other things, it was found to be of interest whether Sanistål's minority stake in its competitor had an impact on the company's incentive to e.g. deviate from tacitly collusive behaviour with Brødrene A&O Johansen.

In the Competition Council's decision, it was assessed that the minority stake reduced Sanistål's incentive to compete with Brødrene A&O Johansen.[33]

or supplier may also impede effective competition. If a company owns a minority stake in a supplier, it may for example lead to the risk of foreclosure, where a competing company will have its access to a substantial input from the relevant supplier limited.

A company that owns a minority stake in an actual or potential supplier may thus, among other things, have the opportunity to influence the supplier's behaviour and decisions in such a way that sales to the company's competitors are restricted and/or more expensive. Conversely, a company that owns a minority stake in an existing or potential customer can have the opportunity and incentive to favour that customer over its competitors.

In the former situation, the competitors are foreclosed from input to their production and the mechanism thus corresponds to input foreclosure in a merger. Given this foreclosure, competitors' ability to compete effectively with the owner of the minority stake will be reduced.

A company that owns a minority stake in a supplier may even have a greater incentive to work for input foreclosure than would be the case in a merger. The reason for this is that the company – unlike in a situation where it fully owns the supplier – does not bear the full loss that the supplier suffers by implementing foreclosure. Yet, the company can reap the full benefits of the weakened competition among its competitors.

Vertical integration between companies, including mergers and minority shareholdings, can also provide efficiency gains. An ownership between a customer and a supplier can e.g. enhance and facilitate the trade relationship, just as a vertical ownership may also lead to lower prices, to the extent a so-called double marginalisation problem is avoided (see e.g. Motta[34] for a description).

Assessment of minority shareholdings
For both horizontal and vertical minority shareholdings, the potential effects – as is the case for mergers – depend on the given case and the conditions in the specific market, including:

- market structure
- special regulatory factors
- potential entry barriers
- the general proliferation of cross-ownership between competitors, etc.

The effects may also depend on whether a minority stake provides an opportunity for efficiency gains which may benefit consumers. As a rule, this kind of gain, however, must be expected to be smaller in case of a minority stake than in an ordinary merger.

This is due to a minority stake not giving control and decisive influence on the operations of the company in which the stake is owned. With a minority stake, for example, there will not be the same opportunity to achieve cost savings by consolidating production, distribution and administration, as there is for a merger.

Minority shareholdings in Denmark
In Denmark, the competition authorities have in several cases encountered minority shareholdings which have had an impact on the effective competition.

For example, the Danish competition authorities have in several cases assessed the impact of existing minority shareholdings among competitors. This was the case, as mentioned, in the Competition Council's decision on the planned merger between Lemvigh-Müller and Brødrene A&O Johansen.

In a number of mergers among agribusiness companies, non-controlling minority shareholdings have played a part in the Competition Council's assessment of the mergers' impact on competition. Among other things, the Competition Council found that competitors' ownership interests in a single supplier may increase the competitors' insight into and understanding of each other's behaviour and costs. This can make it easier to establish and maintain tacit collusion.[35] In another case, the Competition Council assessed the impact of an agribusiness company's existing minority stake in a competitor in connection with the decision on a merger between the two companies.[36]

The theme of minority shareholdings was last made relevant in connection with the competition authorities' processing of the proposed merger between JP/Politikens Hus A/S and Dagbladet Børsen A/S. Before a decision was made in the matter, the merging parties opted to abandon the merger,[37] and instead, JP/Politiken Hus A/S acquired a non-controlling minority stake of 49.9 percent in Dagbladet Børsen A/S.[38]

Minority shareholdings and the Competition Act
In Denmark, the competition authorities can only take action against non-controlling minority shareholdings if it is deemed that, overall, there has been an infringement of the prohibition on anti-competitive agreements or the prohibition on abuse of a dominant position, as per sections 6 and 11, respectively, of the Danish Competition Act – Articles 101 and 102, respectively, of TFEU.

As regards the examples of the potential adverse effects of minority shareholdings, as presented above, it will thus require an individual assessment to determine whether they represent a breach of the Competition Act.

As regards the prohibition on anti-competitive agreements, it depends on a concrete assessment whether the acquisition of a minority stake in a competitor can be said to be an agreement which has as its object or effect to restrict competition.[39]

As regards the prohibition regarding abuse of a dominant position, the acquisition of the minority stake and/or the resulting behaviours must constitute abuse of such a dominant position, before the competition authority can intervene. In such cases, cross-ownership between competitors increases the probability of the existence of a collective, dominant position.

At EU level, there are examples of cases where a minority stake has been assessed in relation to the prohibition on anti-competitive agreements or possible abuse of a dominant position.[40] These cases, however, date from the period before merger control was implemented at EU level.

Some other countries assess minority shareholdings
While non-controlling minority shareholdings are not covered by merger control in Denmark, at the EU level or in several other countries, Norway, the UK, Germany and Austria as well as Canada, Japan and the US do have the option of assessing this type of acquisition from a perspective of competition law.[41]

There are several examples of competition authorities in these countries intervening if it was considered that a non-controlling minority stake would impede effective competition significantly.

In a 2014 White Paper on merger control – i.a. focusing on minority shareholdings – the EU Commission also described a number of cases where the anti-competitive effects of minority shareholdings have been significant.[42]

From the UK, mention should be made of cases concerning Ryanair's acquisition of a minority stake in rival Aer Lingus and broadcaster BSkyB's purchase of shares in its competitor ITV.

In both cases, it was assessed that the minority stake would give the owner the opportunity to influence some of the competitor's major decisions, which would reduce the competitor's ability to compete effectively. For example, by means of its shares in Aer Lingus, Ryanair could influence the company's decisions on e.g. route collaborations with other airlines. That way, Ryanair could shield itself from effective competition from Aer Lingus on routes where Ryanair itself was active. Both Ryanair and BSkyB ultimately divested a significant proportion of the shares in their competitors.[43]

In a blog post from 2016, the US competition authorities de-scribe possible adverse effects of minority shareholdings.[44] Among other things, they mention specific cases in the energy and pharmaceutical sectors. Here, it was found that the structural links would impede effective competition, as the minority shareholdings would e.g.:

- change the economic incentives
- provide an opportunity to influence certain decisions
- give access to sensitive competitive information.

The EU Commission and minority shareholdings
The European Commission White Paper offered various suggestions on how merger control rules may be extended to apply to non-controlling minority shareholdings.[45]

Among other things, the White Paper reflects the importance of balancing the potential anti-competitive effects of minority shareholdings against the burdens potentially imposed on business by the introduction of control with minority shareholdings.

Among other things, the White Paper proposed a so-called "targeted transparency system" where the competition authority must be informed of minority shareholdings above a certain size, but where an actual notification only has to be submitted if the Commission so determines.

The White Paper has been through public consultation, during which comments were obtained from authorities, organisations, companies, etc.[46] In the autumn of 2016, the European Commission launched a new hearing on merger control rules, i.a. focusing on simplifying the referral of cases between Member States and the EU Commission as well as on the effectiveness of thresholds for notification of mergers.[47]

Minority shareholdings were not part of the most recent consultation, and the 2014 White Paper has not yet resulted in a concrete, legislative proposal. Margrethe Vestager, EU Commissioner for competition, repeatedly explained that any system to control minority shareholdings must be carefully designed, and that there must be convincing evidence that such a system can operate at the EU level, before it will be pursued.[48]

1 Author Martin Molter West is an MSc in Economics and special advisor at the Danish Competition and Consumer Authority's centre for media, telecommunications and mergers, MTF.
2 Mergers in Denmark covered by the obligation to notify must be approved by either the Competition and Consumer Authority or the Competition Council.
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8 Ashenfelter, O., Hosken, D., and Weinberg, M. (2014). Did Robert Bork understate the competitive impact of mergers? Evidence from consummated mergers. *The Journal of Law and Economics*, 57(S3), S67-S100. DOI: 10.1086/675862
9 Blonigen, B. A., and Pierce, J. R. (2016). Evidence for the effects of mergers on market power and efficiency. *National Bureau of Economic Research*, Working Paper 22750.
10 Blonigen and Pierce (2016, p. 20-21) distinguish between mergers between companies in the same industry and other mergers. They find productivity gains for mergers between non-competing companies and a negative effect on productivity for mergers between competitors.
11 The decision not to oppose the merger in washing machines, etc. was by some considered controversial and represented a shift in the enforcement of merger control, cf. Ashenfelter et al. (2013). With regard to the airline merger, it was approved by the US Department of Transportation before the competence to analyse mergers in the area was transferred to the competition authority under the Ministry of Justice, cf. Kwoka and Shumilkina (2010).
12 For example, in 2015 the Danish competition authorities approved 41 mergers, 39 of which were approved immediately without the issuing of commitments. Among these, the vast majority were approved following a so-called simplified procedure. See https://www.kfst.dk/pressemeddelelser/kfst/2016/20160331-2015-var-rekordaar-for-fusioner/
13 A non-controlling minority stake may, however, entail other obligations and rights for the companies involved, including e.g. the protection of minorities in the form of the right to veto divestment or closure of the company in which a stake is owned, cf. para. 66 of the European Commission's Consolidated Jurisdictional Notice of April 16, 2008 under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01).
14 In addition, there are so-called conglomerate mergers A conglomerate merger is a merger that is neither horizontal nor vertical. This is the case if the merging companies each have activities that are not directly in competition with each other and where there is no potential or existing customer/supplier relationship between the companies. Instead, the companies may have activities that are closely related – e.g. the production of, respectively, shaving cream and razors or printers and printer paper Possible anti-competitive effects of minority shareholdings and structural links between companies with closely related activities are not discussed further in this article.
15 The term "higher prices" is used as a proxy for the different ways in which consumers can be harmed, including through reduced quality, reduced innovation, reduced supply, etc.
16 In a merger, where a company acquires 100 percent of the shares in a competing company, the acquiring company receives all the competitor's profits. The incentive to raise prices will always therefore be higher in such a case than with a minority stake. In the processing of merger cases, competition authorities may i.a. assess the incentive for price increases by means of the so-called Upward Pricing Pressure (UPP). See e.g. the Competition Council's decision of 25 September 2013, *JYSK's acquisition of sole control of Iddesign A/S*, for an example of the use of the UPP method in practice.
17 O'Brien, D. P., and Salop, S. C. (2000). Competitive effects of partial ownership: Financial interest and corporate control. *Antitrust Law Journal,* 67(3), 559-614.
18 Reynolds, R. J., and Snapp, B. R. (1986). The competitive effects of partial equity interests and joint ventures. *International Journal of Industrial Organization*, 4(2), 141-153. DOI: 10.1016/0167-7187(86)90027-5.
19 Bresnahan, T. F., and Salop, S. C. (1986). Quantifying the competitive effects of production joint ventures. *International Journal of Industrial Organization*, 4(2), 155-175. DOI: 10.1016/0167-7187(86)90028-7.
20 Dubrow, J. B. (2001). Challenging the economic incentives analysis of competitive effects in acquisitions of passive minority equity interests. *Antitrust Law Journal*, 69(1), 113-145.
21 O'Brien and Salop subsequently addressed reviews: O'Brien, D. P., and Salop, S. C. (2001). The competitive effects of passive minority equity interests: reply. *Antitrust Law Journal*, 69(2), 611-625.
22 Nain, a., and Wang, Y. (2016). The product market impact of minority stake acquisitions. *Management Science*. DOI: 10.1287/mnsc.2016.2575.
23 Trivieri, f. (2007). Does cross-ownership affect competition? Evidence from the Italian banking industry. *Journal of International Financial Markets, Institutions and Money*, 17(1), 79-101. DOI: 10.1016/j.intfin.2005.09.001.
24 As mentioned above, there may be cases where a minority stake gives the acquiring company controlling influence over the other company's operations. For example in the form of rights to veto strategic decisions or limited attendance by other shareholders at general meetings of the other company. This may, subject to a specific assessment, afford the minority shareholder control of the other company, including e.g. negative sole or joint control. It is beyond the scope of this article to go into detail on the issue of minority shareholdings and control, but the interested reader can find further information i.a. in pages 16-21 of the European Commission's Consolidated Jurisdictional Notice of 16 April 2008 under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01).
25 In its White Paper on merger control, the EU Commission has described a specific example of the ability to influence strategic decisions through a non-controlling minority stake. See EU Commission (2014). *Towards more effective EU merger control*. COM (2014) 449 final, para 34. For the assessment of a notifiable merger where an existing minority stake had significance. It was considered that the ability to influence the strategic decisions did not involve control as rights "*correspond to veto rights normally accorded to minority shareholders in order to protect their financial interests as investors in the joint venture*"(See EU Commission Decision of 19 September 2006 in Case M.4153, *Toshiba/Westinghouse*, para 76-80).
26 See above: O'Brien and Salop (2000).
27 Li, S., Ma, H., and Zeng, C. (2015). Passive cross holding as a strategic entry deterrence. *Economics Letters*, 134, 37-40. DOI: 10.1016/j.econlet.2015.06.006.
28 Gilo, D., Moshe, Y., and Spiegel, Y. (2006). Partial cross ownership and tacit collusion. *The RAND Journal of Economics*, 37 (1), 81-99.
29 Malueg, D. A. (1992). Collusive behaviour and partial ownership of rivals. *International Journal of Industrial Organization*,10(1), 27-34. DOI: 10.1016/0167-7187(92)90045-Z.
30 Alley, W. a. (1997). Partial ownership arrangements and collusion in the automobile industry. *The Journal of Industrial Economics*, 45(2), 191-205.
31 In another study of telephone companies in the US, Parker and Röller found that two competing companies seem to increasingly coordinate in one market if they are partners in another market: Parker, PM, and Röller, l. H. (1997). Collusive conduct in duopolies: multimarket contact and cross-ownership in the mobile telephone industry. *The RAND Journal of Economics*, 28 (2), 304-322.
32 Competition Council's decision of 14 May 2008, *Lemvigh-Müller's takeover of Brdr. A & O Johansen*. See e.g. a detailed assessment of the minority stake in the decision's section 7.2.
33 See e.g. the decision's para. 1408: "*Sanistål will be interested in as high a return as possible on its investment and hence as high a profit as possible in the merged entity. An increase in prices as a result of coordinated effects will thus give Sanistål double profit: Firstly, increased earnings from its own business and, secondly, increased returns from the increased earnings of the merged entity. Sanistål's stake thus exacerbates the competitive issues already identified, as the stake reduces Sanistål's incentive to compete against the merged entity in the plumbing market and in the electricity market where Sanistål is currently a minor wholesaler.*""
34 Motta, M. (2004). *Competition Policy – Theory and Practice*, Cambridge University Press, p. 307-313.
35 Competition Council's decision of 23 February 2011, *Danish agro a.m.b.a's acquisition of Nordjysk Andels Grovvareforening a.m.b.a., and the acquisition of sole control over a number of vertically related companies*. See e.g. section 4.2.3.
36 The Competition Council's decision of 24 June 2015, *Danish Agro a.m.b.a.'s*

acquisition of sole control over Dan Agro Holding A/S. See e.g. section 5.5 and 5.2.4.

37 See press release of the Competition and Consumer Authority: https://www.kfst.dk/pressemeddelelser/kfst/2017/20170124-jp-politiken-traekker-fusion-med-boersen-tilbage/

38 See press release issued by JP/Politikens Hus A/S: http://www.jppol.dk/media/63944/pressemeddelelse_24012017.pdf

39 As mentioned, the exchange of competitively sensitive information between competitors – including those where partial ownership exists between them – may contravene section 6 of the Danish Competition Act. In other cases, it may be more unclear whether a minority stake is contrary to section 6.

40 See e.g. the court's judgment (Sixth chamber) of 17 November 1987 in Joined Cases 142 and 156/84 and the European Commission's decision of 10 November 1992 (93/252/EEC – concerning cases IV/33.440 Warner-Lambert/Gillette and Others and IV/33.486 BIC/Gillette and Others). In the latter, the Commission found both abuse of dominant position and infringement of the prohibition on anti-competitive agreements.

41 In Norway, the option to take action against minority shareholdings is based on section 16a and section 18 of the Norwegian Competition Act. There is no compulsory notification of the acquisition of minority shareholdings, but the competition authority may require the minority shareholder to notify the acquisition within a period of three months, and the company may opt to notify voluntarily: https://lovdata.no/lov/2004-03-05-12

42 EU Commission (2014). *Towards more effective EU merger control*. COM(2014) 449 final. Including annexes (see, e.g. in particular *Commission staff working document – Impact assessment*, SWD(2014) 217 final). The White Paper and its recommendations in relation to minority shareholdings is described further at the end of this article.

43 The cases have been described in the European Commission White Paper. Information on the cases may, however, also be found with the UK competition authorities via the following link. BSkyB/ITV: https://www.gov.uk/cma-cases/british-sky-broadcasting-group-plc-itv-plc-merger-inquiry-cc
Ryanair/Aer Lingus: https://www.gov.uk/cma-cases/ryanair-aer-lingus-merger-inquiry.

44 See the blog entry which refers to examples of specific cases: https://www.ftc.gov/news-events/blogs/competition-matters/2016/05/whats-interest-partial-interests

45 EU Commission (2014). *Towards more effective EU merger control*. COM(2014)
449 final. Including annexes.

46 See consultation material and published responses: http://ec.europa.eu/competition/consultations/2014_merger_control/index_en.html

47 47 See consultation material: http://ec.europa.eu/competition/consultations/2016_merger_control/index_en.html

48 See i.e. Margrethe Vestager's speech to Studienvereinigung Kartellrecht on March 2015, 2015: *"any system for the control of minority shareholdings at the EU level would need to be carefully designed. Otherwise we risk adding too much red-tape that would not be justified by the number of cases that we could take on. To design such a system takes time and we need to discuss the modalities of any such system again internally, with Member States, and other stakeholders. There is no need to rush. What counts is that the new rules – when they are introduced – work well and are proportionate to the problem."* (https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/thoughts-merger-reform-and-market-definition_en). See also Margrethe Vestager's speech at the same venue on 10 March 2016: "*(...) But shareholdings change hands all the time, and only a tiny handful of those deals are likely to raise issues. (…) when we met last year, I said we needed to think more deeply about how it could work. Since then, we've been looking at the issue very carefully. And we've asked a team of experts to study how the system works in the countries that have it. It's still too early to say where our reflections will lead us. But we'd need to see compelling evidence that the system could work at European level – without creating a lot of complexity – before we took any more steps in this direction. And what I've seen so far hasn't convinced me that this is a change we absolutely have to make to our system."* (https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/refining-eu-merger-control-system_en).

The DCCA, independent competition authority

As an independent competition authority, DCCA (the Competition and Consumer Authority) is responsible for enforcing the Danish Competition Act and conducting analyses resulting from it. The Competition Council is part of DCCA and holds overall responsibility for DCCA's administration of the Danish Competition Act and regulations issued pursuant thereto.