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THE CONCEPT OF A MERGER TRANSACTION

-- Note by the Secretariat --

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THE CONCEPT OF A MERGER TRANSACTION

Note by the Secretariat *

1. This paper examines how various jurisdictions define what transactions fall within the scope of their merger review laws (a "merger transaction")¹ and therefore can be subject to review. The determination that something is a merger transaction can mean different things in different merger review regimes, depending on whether notifications of merger transactions are mandatory or voluntary, and on whether - in merger review regimes with mandatory notification systems - jurisdiction to review and duty to notify are two separate concepts (so that certain reviewable merger transactions are not subject to mandatory notification and waiting periods) or are identical. But regardless of how a merger regime has organised the review process, common to all is the need to define in a first step which types of transaction they consider "suitable" for merger review.

2. A discussion of jurisdictional thresholds, including the definition of merger transaction, is a highly technical subject. But it is nevertheless important, as appropriate jurisdictional thresholds play a critical role in a well-functioning merger review regime that seeks to be effective, efficient, and transparent.² It is uncontroversial that a sound definition of a merger transaction should, in light of these goals, (i) target the "right" types of transactions, i.e., those that lead to structural, more durable changes in the market place and could ultimately jeopardise the policy goals of a competition law regime; (ii) avoid capturing too many transactions that typically pose no competition law risks or are more appropriately controlled by different instruments in a competition regime's tool box; and (iii) use as much as possible bright line tests based on objective, clear and transparent criteria to establish whether a transaction is subject to review.

3. But there are tensions between these goals, and there is no single solution for how to optimally balance them. This is so in particular because additional factors that are specific to each merger review regime will influence what the best solution might be, including notification thresholds, initial information requirements, speed of review, assumptions about the potential competitive harm of certain types of transactions, and the effectiveness of alternative enforcement instruments. It is therefore not surprising that, despite the development of internationally recognised best practices for the merger review process, different jurisdictions continue follow different approaches and that definitions of a merger transaction differ substantially. Changes to the definition of a "merger transaction," although they occur less frequently than changes to notification thresholds, are not uncommon, which underscores the importance, but also the complexity of the subject.

* This note was prepared for the Secretariat by Andreas Reindl (consultant to the OECD).

¹ This paper will use the term merger transaction as a neutral term to describe transactions that fall within the scope of the applicable merger review law, recognising that individual laws may use their own distinct terms, such as merger event, concentration, or merger.

² OECD, Recommendation on Merger Review, [C\(2005\)34](#), Article I(A)(1)(2); ICN, Recommended Practices for Merger Notification and Review Procedures, RP VI.A. Comment 1 ("Effectiveness, efficiency, transparency and predictability are fundamental attributes of a sound merger control regime"). On the topic of the definition of a merger transaction, *see also* ICN, Defining "Merger" Transactions for Purposes of Merger Review (2007).

4. All these differences and the trade-offs among the above principles matter little for transactions that lie at the core of merger review laws. For example, an outright acquisition of all shares of a previously independent target will invariably be considered a merger transaction. There would be not much difference if the acquiring firm obtains an 80% interest rather than 100% ownership of the target, or substantially all of the target's assets that are necessary to carry on the target's business. Merger review laws also would typically apply when two firms combine previously independent lines of business into a newly formed and jointly controlled entity that becomes a new market player.

5. But the more one moves from the core toward transactions at the "fringe," the more apparent the differences among various jurisdictions become. For example, when a firm acquires only a small interest in the target or more limited assets that in themselves do not represent a going business, or when two firms combine parts of their activities into some looser form of joint operation, different merger review regimes have made different policy decisions as to whether these transactions should represent a merger transaction.

6. This paper will discuss the concept of a merger transaction primarily by exploring how various merger review regimes apply the concept of a merger transaction to transactions on the "fringe" - where jurisdictions must make policy decisions about what types of transactions they want to control under their merger review systems - and how effectively they can target those transactions without compromising the efficiency and transparency goals of merger review. The discussion is organised around the main types of transactions that are typically relevant in merger review, share acquisitions, the acquisition of assets, and joint ventures. Each of these three areas raises a distinct set of questions. But it is common to all three areas that concerns about the ability to reach all or nearly all theoretically problematic types of transactions appear to have the greatest influence on the definition of a merger transaction. The idea that jurisdictional thresholds should use bright light tests and should be carefully targeted to avoid catching too many benign transactions appear to be less influential. Notification thresholds appear to be the more commonly used and more effective instrument to provide to greater objectivity and to better calibrate the reach of merger review laws.

1. Definition of a Merger Transaction – A Functional Approach

7. The definition of a merger transaction and notification thresholds are the two commonly used jurisdictional thresholds that determine whether any given transaction is subject to merger review and/or notification requirements. Notification thresholds, which most commonly refer to the size of the transaction or of the parties, seek to eliminate transactions that most likely have no material impact in a given jurisdiction.³ The definition of a merger transaction has a different function, as it seeks to identify transactions that are "suitable" for merger review. "Suitability" is related to the fact that merger review is a one-off review process to determine whether a more durable combination of previously independent assets likely will materially change incentives as to how to use the assets in the competitive process, which in turn could lead to results that conflict with the policy goals of a competition law regime. "Suitability" thus focuses on whether transactions lead to structural changes and whether there is a reasonable likelihood that they could interfere with competitive market outcomes. Less "suitable" for this type of review are in particular transactions that lead to minor structural changes that are highly unlikely to have anticompetitive

³ For a more detailed discussion of notification thresholds, including its function of ensuring a sufficient nexus, *see, e.g.*, ICN Recommended Practices, Recommendation II; ICN, Setting Notification Thresholds for Merger Review (2008) ("ICN Notification Threshold Report"). For an overview of the impact on national merger review regimes, *see, e.g.*, OECD, Report on Experiences of Member Countries under the 2005 OECD Recommendation on Merger Review (OECD Merger Recommendation Report) (forthcoming 2013); Maria Coppola & Cynthia Lagdameo, Taking Stock and Taking Root: A Closer Look at Implementation of the ICN Recommended Practices for Merger Notification & Review Procedures, in: The International Competition Network at Ten 297 (Paul Lugard ed. 2011).

effects and where the costs associated with review therefore would not be justified, and more transitory arrangements where the parties' future individual decisions that cannot be reasonably foreseen at the time of review may have a greater impact on competition.⁴

8. Jurisdictional threshold criteria must strike a balance between the desire to know of most transactions that may harm competition through more durable changes in the market place, and the need to keep the process manageable and the cost reasonable for all sides involved. Setting or adjusting jurisdictional thresholds could be envisaged as a process along some marginal cost/benefit curves. The reach of a merger review regime should be extended only to that point where the cost of reviewing additional transactions would exceed the benefits of prohibiting or remedying the additional (rare) transaction that would cause competitive harm. Conversely, the scope of merger review should be reduced so long as the cost savings (benefits) from reviewing fewer notified transactions exceed the additional cost to society that result from the consummation of an anticompetitive merger that slips through the net.⁵

9. Using an analogy to the principles that govern the development of norms for substantive competition law analysis, this trade-off could also be described by focusing on cost minimisation. Accordingly, the goal of jurisdictional thresholds should be to minimise the sum of costs resulting from type I errors (notified transactions that raise no competition problems), type II errors (problematic transactions that escape merger review) and compliance and enforcement efforts (that may increase when uncertain or subjective criteria are used).⁶

10. This calculation is of course not an exact science as good data on benefits or costs are not available. Plus, notification thresholds and the definition of a merger transaction will have interdependent effects: A jurisdiction may employ a very wide definition of a merger transaction but use high notification thresholds and therefore limit the number of affected transactions; high notification thresholds could also reduce compliance and enforcement costs as there may be a substantial number of transactions where the qualification as merger transaction is uncertain, but the parties are not affected as the transaction falls below notification thresholds. The cost/benefits analysis also will depend on additional factors, including on whether notification is obligatory,⁷ the initial information requirements, and the speed of review. Costs may also depend also on the effectiveness of alternative competition law tools to review potentially

⁴ Intra-group restructuring can also be excluded from merger review because it does not change incentives to use assets in the competitive process.

⁵ Discussed in more detail in ICN, Notification Threshold Report, *supra* note 3, at 4, with references to Konkursverket, Tröskelvärden för koncentrationsprövningar – Bättre omsättningsgränser för anmälan av företagskoncentrationer 31-33 (2006), available at http://www.kkv.se/upload/Filer/Trycksaker/Rapporter/rap_2006-3.pdf; English summary available at http://www.kkv.se/upload/Filer/ENG/Publications/rap_2006-3_summary.pdf For recent practical examples where a similar approach has been used, see OECD Merger Recommendation Report, *supra* note 3, at 11 (including examples of reforms in Brazil, Germany, and Italy).

⁶ ICN Notification Threshold Report, *supra* note 3, at 4.

⁷ In merger review regimes without mandatory notification requirements, the function of the definition of a merger transaction is essentially to limit the competition authority's discretion to select a transaction for review. In some jurisdictions that follow this approach, such as Australia or New Zealand, the definition of a merger transaction is so wide (in principle, capturing any acquisition of shares and assets) that it imposes no material limits on the competition authority's ability to reach any acquisition of shares or assets; more relevant limits exist, for example, in the UK merger regime. But this wide definition has little consequences for the regime's cost/benefit calculation because the vast majority of transactions that fall within the definition of a merger transaction will never be affected by merger review. In that sense, the definition of a merger transaction in regime without mandatory notification systems plays a slightly different role than in regimes where notification of a merger transaction is mandatory.

anticompetitive transactions that fall outside the definition of a merger transaction. If, for example, review of anticompetitive agreements is an effective way to address concerns that certain transactions may lead to more effective coordination between parties because they facilitate an exchange of information, the cost of a more limited definition of a merger transaction will be less and the case for expansion will be weaker.

11. Given the great variations in various cost/benefit factors, one cannot expect to identify the one “optimal” or “correct” definition of a merger transaction that would be applicable across jurisdictions. This is so because the definition of a merger transaction is only one in a number of criteria that determine the costs and benefits of any given solution. Nevertheless, the cost/benefit approach emphasises what goals should be taken into account when determining whether jurisdictional thresholds of a merger review regime function properly or should be revised; in particular it emphasises that the goal of an effective merger review regime should not be to chase after all sources of potential harm, but only after those where benefits of increased government activity likely exceed additional costs. It also highlights that decisions about extending the jurisdictional scope should not be based on an individual, highly publicised cases that lead to quick concerns about "enforcement gaps," but on a series of observations that provide a more reliable basis for assumptions of potential costs and benefits.⁸ And it highlights that an approach to merger definition that works in one jurisdiction does not necessarily work equally well elsewhere from a cost/benefit perspective.

12. This approach also explains how new learning and a better understanding of the substantive risks associated with certain types of transactions can lead to pressures to change the definition of a merger transaction. If a consensus develops that certain transactions may potentially cause greater harm than previously perceived, the expected costs of leaving those transactions outside merger review would increase. Questions will arise whether real or perceived "enforcement gaps" need to be narrowed by expanding the scope of merger review. This connection between substantive concerns and the possible jurisdictional response by the merger review regime was correctly emphasised in the background paper for the previous roundtable of Working Party No. 3 on minority shareholdings.⁹

2. Different Criteria Used in the Definition of a merger transaction

13. There are essentially two types of criteria that are used in different jurisdictions to define what constitutes a "merger transaction:" "objective," numerical criteria, and more "economic" criteria that seek to align the definition of a merger transaction more closely with the changes in the relationship between parties that could lead to competition concerns. Combinations of the two can be used. And there are some jurisdictions that use a wide definition of a merger transaction that catches in principle any acquisition of shares or assets and is not narrowed down by the use of additional objective or economic criteria.

14. Percentage thresholds for share acquisition are an example for an "objective" approach. Examples from various jurisdictions include the acquisition of a 5%, 10%, 20%, 25%, 35%, or 50%¹⁰ interest in a target firm. This list demonstrates that there is a wide range of thresholds that various merger review regimes consider relevant. But objective thresholds should not be picked arbitrarily, as they should serve as proxies for potential effects a given transactions might have on the relationship between the acquiror

⁸ Generally, it may be easier to reduce the scope of a merger transaction if it is possible to identify a certain class of transaction that almost invariably do not raise any competitive concerns and/or are simply not appropriately reviewed under a merger review system. Finding empirical support for a widening of the scope of a merger review regime may be more challenging.

⁹ OECD, *Antitrust Issues Involving Minority Shareholdings and Interlocking Directorates*, DAF/COMP(2008).

¹⁰ These examples are taken from the merger review regimes in Brazil, Canada, Germany, and Japan. All are discussed later in the text.

and the target. For example, acquiring a 50% interest means outright control over the target, an interest of 25% can suggest the existence of important, statutory minority shareholder rights that may confer influence over the target's commercial behaviour. Lower thresholds are typically linked to a minority stake in the target at which it is considered more likely that the holder may have other, sufficient means to influence the target's commercial behaviour.

15. In particular when percentage thresholds are established at the lower end of the scale, a combination with additional criteria that indicate a closer relationship between the two parties involved in the transaction might be preferable. The Japanese merger review regime illustrates this point well. In addition to a 50% interest threshold for share acquisitions it has two lower thresholds of a 10% or 20% interest in the target. But in each case a review will be triggered only if additional indicators suggest some influence over the target: in the case of a 20% interest, the holder must be the largest shareholder; in the case of a 10% interest, the holder must be among the three largest holders of voting rights and a number of other criteria must be taken into account that suggest some ability to influence the target.¹¹

16. "Economic" criteria used in the definition of a merger transaction are more directly aligned with the mechanism through which a transaction might harm competition, by focusing on whether a transaction will enable a firm to acquire the ability to exercise some form of control over a previously independent firm. Different legal systems define different levels of intensity of control, such as "decisive influence," "significant influence," "material influence," or "competitively significant influence," although it is less clear than from an economic perspective these differences are particularly meaningful. These definitions capture the reason for possible competitive concerns more directly than percentage thresholds. Perhaps they also reflect a concern that fixed percentage thresholds might invite parties to game the system. At the same time, though, they require more interpretation and guidance as to factors that will be taken into account and can therefore create uncertainty. Examples include the EU's merger review regime that uses an acquisition of "control/decisive influence" standard¹², which has also been adopted by many other merger review regimes in Europe and elsewhere, for example in China.¹³ Also included in this group are the merger review regimes in the United Kingdom,¹⁴ Germany,¹⁵ and Canada¹⁶ which use (in addition to other definitions of a merger transaction) less demanding "material influence," "competitively significant influence," or "significant influence" standards.

17. Guidelines issued in some jurisdictions that explain the concept of a merger transaction can help to make the applicable standard more predictable. But they can also illustrate the potential risks of the more open-ended "influence" standards. Both the Canadian and the UK Guidelines, for example, provide fairly long list of different relevant factors that might be relevant in the analysis of whether the requisite "influence" exist," emphasising that in the end the totality of circumstances will matter much more than the

¹¹ Japan Fair Trade Commission, Guidelines to the Application of the Antimonopoly Act Concerning Review of Business Combinations (revised version, 2010), Parts I(1)(A) and I(1)(B).

¹² Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, O.J. L 2004/1 (2004) (EUMR), Article 3 (1) and (2).

¹³ Anti-monopoly Law of the People's Republic of China, Article 203).

¹⁴ Enterprise Act 2002, Section 26(3). It should be noted that the Enterprise Act provides for three levels of control. In addition to "material influence," control can also exist as de jure control (controlling interest) or de facto control (ability to control). This paper will focus on the material influence standard which is the most relevant one for comparative purposes.

¹⁵ Gesetz gegen Wettbewerbsbeschränkungen (GWB).

¹⁶ Competition Act, Section 91.

presence or absence of a single factor.¹⁷ That is of course understandable from an enforcer's perspective, but the wide discretion of the competition authority to decide on a case-by-case basis whether it has (or wants) jurisdiction over a transaction may create some problems from the perspective of parties seeking greater clarity and predictability.

Using Guidelines to Make “Influence-” based Definitions of a merger transaction more Predictable - The Example of Canada

Factors used by the Canadian Competition Bureau to determine whether a particular minority shareholding, an interest in a combination, agreement or other relationship or interest confers material influence:¹⁸

- voting rights attached to the acquirer’s shareholdings or interest in a combination;
- the status of the acquirer of partnership interests (e.g., general or limited partner) and the nature of the rights and powers attached to the partnership interest;
- the holders and distribution of the remaining shares or interests (whether the target business is widely or closely held, and whether the acquirer will be the largest shareholder);
- board composition⁴ and board meeting quorum, attendance and historical voting patterns (whether the acquirer will be able to carry or block votes in a typical meeting);
- the existence of any special voting or veto rights attached to the acquirer’s shares or interests (e.g., the extent of shareholder approval rights for non-ordinary-course transactions);
- the terms of any shareholder or voting agreements;
- the dividend or profit share of the minority interest as compared to the acquirer’s equity ownership share;
- the extent, if any, of the acquirer’s influence over the selection of management or of members of key board committees;
- the status and expertise of the acquirer relative to that of other shareholders;
- the services (management, advisory or other) the acquirer is providing to the business, if any;
- the put, call or other liquidity rights, if any, that the acquirer has and may use to influence other shareholders or management;
- the access the acquirer has, if any, to confidential information about the business; and
- the practical extent to which the acquirer can otherwise impose pressure on the business’s decision-making processes.

It is generally the combination of factors – not the presence or absence of a single factor – that is determinative in the Bureau’s assessment of material influence.

¹⁷ Competition Bureau, Merger Enforcement Guidelines (2011), Section 1.6; Office of Fair Trading and Competition Commission, Merger Assessment Guidelines (2010), Section 3.2.8-3.2.12, and more detailed, OFT, Mergers, Jurisdictional and Procedural Guidance (2009), Section 3.15-3.28. Given that the UK has a merger review regime without mandatory notification, the risks for parties associated with the use of less well defined "influence" standards are considerably less than in a mandatory notification regime.

¹⁸ Competition Bureau, Guidelines, *supra* note 17, Section 1.6

18. Some jurisdictions use a series of different definitions to describe transactions that constitute merger transactions. A good example of such an approach is the German merger review law. According to Section 37 GWB, a merger transaction exists when a firm acquires a 25% interest or 50% interest in another firm; "control" over another firm; a significant competitive influence over another firm; or all or substantial parts of the assets of another firm. Each of these describes an alternative merger transaction scenario. This approach relies on two general concepts, "control" (which is identical to the EUMR's control/decisive influence concept) and "competitively significant influence" (which is less demanding), but adds some specific thresholds that should create greater clarity, in order to cover a broad range of various scenarios on how transactions may affect incentives to compete. As these are alternative definitions, a given transaction could be considered a merger transaction under two or more definitions. The qualification has no practical consequences because it does not affect the review process or substantive analysis of the transaction.

19. Canada could be considered another example of such an approach. It relies primarily on two statutory, general definitions of a "merger transaction," i.e., the acquisition of (de jure) control and of a "significant influence." But the Bureau also explains that it will presume that transactions that are notifiable according to Part IX of the Competition Act will also lead to the acquisition of a "significant interest" in a target: in the case of share acquisitions, the acquisition of a 20% (in a public corporation) or of a 35% interest (in a privately held corporation) will trigger a duty to notify (assuming the notification thresholds are met), and therefore would be presumed to lead to a significant influence.¹⁹

20. The U.S. merger review regime is an example of a jurisdiction that adopts yet another approach.²⁰ It relies on arguably one of the broadest definition of what constitutes a merger transaction. The language of Section 7 of the Clayton Act - "no person...shall acquire... the whole or any part of the stock or assets of another entity..." - can catch almost any acquisition of shares or assets,²¹ and is in principle limited only by a statutory exemption for certain share acquisitions for investment purposes.²² The above described cost/benefit calculation works here through other factors: The U.S. merger regime relies primarily on a set of "objective," numerical thresholds to significantly narrow down the group of merger transactions that are reportable, i.e., subject to mandatory notification requirements under the Hart Scott Rodino Act.²³ For the functioning of the merger review regime the HSR notification thresholds are of much greater significance, which explains why in descriptions of the U.S. merger review regime they typically receive much greater attention than the (wider) statutory definition of a merger transaction.

¹⁹ *Id.*, Section 1.7.

²⁰ Other jurisdictions follow a similar model with a very wide notion of share and asset acquisitions that fall within the definition of a merger transaction. Among them are Australia and New Zealand, two jurisdictions with a voluntary review system. As noted later, India follows a similar approach.

²¹ 15 U.S.C. §18.

²² Discussed (in conjunction with exemptions from notification requirements) *infra*, Section III.A.

²³ Hart Scott Rodino Antitrust Improvements Act (HSR Act), 15 USC § 18a. Very limited initial information requirements further limit the cost of the merger review regime, despite its basic wide definition of a merger transaction. The costs/benefit calculation is affected also by the fact that the agencies can review and challenge an anticompetitive transaction that falls under the definition of a merger transaction but outside the notification requirements, thus limiting the potential costs of type II errors that can result from high notification thresholds.

3. Merger Scenarios and Selected "Problem Areas"

3.1 *Share Acquisitions and Minority Shareholdings*

21. As noted earlier, outright acquisitions of a target in the form of share acquisitions raise very few questions with respect to jurisdictional thresholds. Whatever definition of a merger transaction jurisdictions use, all would consider the acquisition of all or a large percentage of shares a "merger transaction," either because it confers control over the target, because the acquired interest exceeds a numerical threshold, or share acquisitions in general are considered merger transactions.

22. The area that has lately received renewed attention is the application of merger review laws to acquisitions of minority interests that do not confer the same type of outright control over the target. Of course, many competition regimes around the world have recognised the potential competitive effects of minority shareholdings for quite some time and made such transactions subject to merger review. But the international competition world has seen a renewed interest in the topic, primarily concerning new insights into the substantive evaluation of potential competition law risks. The 2010 U.S. merger guideline include a new section on the evaluation of partial acquisitions.²⁴ In the same year, the OFT published a new report on minority shareholdings.²⁵ But there has also been renewed interest in the jurisdictional questions of merger review. Working Party No. 3 has discussed both aspects of this topic only a few years ago.²⁶

23. The European *Ryanair/Air Lingus* saga has generated much public discussion of the topic as well.

²⁴ U.S. Department of Justice and U.S. Federal Trade Commission, Horizontal Merger Guidelines (2010), Section 13.

²⁵ OFT, Minority Interests in Competitors, A Research Report prepared by DotEcon Ltd (2010).

²⁶ OECD, Antitrust Issues Involving Minority Shareholdings and Interlocking Directorates, [DAF/COMP\(2008\)30](#) (OECD, Minority Shareholdings).

Ryanair/Aer Lingus – Limited v. Extensive Jurisdiction to Review Minority Stakes in a Rival

Ryanair and Aer Lingus are two Irish airlines. Aer Lingus is the national flag carrier whose business fortunes have been waning although it remains a viable player in the airline market. Ryanair is Europe's largest low cost carrier, and has become one of Europe's largest airlines overall. They compete head-on on numerous routes.

In late 2006 Ryanair acquired a stake in Aer Lingus and mounted a public bid for the entire shareholding in Aer Lingus which was opposed by Aer Lingus. The European Commission prohibited the public bid in June 2007.²⁷ Aer Lingus sought a decision from the Commission ordering Ryanair to divest its minority shareholding. The Commission refused, reasoning that it did not have jurisdiction to do so: Ryanair had never implemented the acquisition of a "controlling" stake in Aer Lingus and therefore the Commission could not order it to divest all shares acquired as part of a consummated merger that was prohibited under the EUMR; the acquisition of a minority stake would have to be considered an independent transaction and as it did not confer "decisive influence" it did not fall under the EUMR jurisdiction.²⁸ Both parties appealed. In July 2010, the General Court upheld both aspects of the decision. It confirmed that the European Commission does not have the ability to examine or require divestment of the minority stake.²⁹

Ryanair's renewed (third) bid for the remaining shareholding in Aer Lingus was prohibited by the European Commission in February 2013. The Commission found that the merger would create substantial competitive problems on numerous routes where the two were the only or at least the closest competitors, and dismissed the proposed remedy as ineffective.³⁰ Ryanair has lodged an appeal with the General Court against this decision.

In the United Kingdom, the OFT commenced its own investigation into Ryanair's minority stake in Aer Lingus in October 2010. The UK authorities have jurisdiction to review Ryanair's acquisition of a minority interest in Aer Lingus under the "material influence" standard of the Enterprise Act 2002. Legal challenges by Ryanair against the OFT's jurisdiction were finally dismissed by the Court of Appeal in 2012 and in the same year the OFT referred the case to the Competition Commission for further investigation.³¹

On May 30, 2013 the Competition Commission provisionally decided that Ryanair's 29.8% stake could reduce competition on routes between Great Britain and the Republic of Ireland and that Ryanair may have to reduce its shareholding in Aer Lingus. Its provisional findings suggest that Ryanair's shareholding obstructs Aer Lingus's ability to merge or combine with another airline to build scale and achieve synergies to remain competitive, that Ryanair can hinder plans to issue shares and raise capital, and that it could prevent Aer Lingus from selling valuable slots at Heathrow.

Although there has not been an "enforcement gap" in this case, the question is whether there are more, similar transactions out there that create (fairly obvious) competition concerns but where the European Commission has no jurisdiction to intervene and where, perhaps, unlike in *Ryanair* no EU member state has an opportunity to intervene either.

²⁷ Case COMP/M.4439, *Ryanair/Aer Lingus*, Decision of June 27, 2006.

²⁸ Case COMP/M.4439, *Ryanair/Aer Lingus*, Note rejecting Aer Lingus' Request, October 11, 2007.

²⁹ Case T-342/07, *Ryanair v. Commission*, 2010 ECR II-3457.

³⁰ Case COMP/M.6663, *Ryanair/Aer Lingus*, Decision of February 27, 2013.

³¹ Office of Fair Trading, OFT refers Ryanair's minority stake in Aer Lingus to Competition Commission, Press Release, June 15, 2012.

3.1.1 *Competitive Concerns*

24. It is well understood today that under certain conditions minority shareholdings can have anticompetitive effects.³² Depending on the circumstances, they can lead to unilateral effects as minority shareholdings can increase incentives to reduce output/raise price. The holder of the minority interest may have the ability to influence the target to compete less aggressively. But even with a purely passive financial interest the holder may have a unilateral incentive to compete less aggressively as it benefits through its minority interest if the target faces less competition. In addition, in some cases there could be worries that the minority shareholding makes the target less attractive for alternative investors, thus substantially reducing the possibility that the target could become a more powerful competitor.³³ This would essentially also be a unilateral effects story. Minority shareholdings can lead to coordinated effects as they can facilitate coordination among competitors.³⁴ Harmful effects are more likely in the case of minority shareholdings involving competitors, but can in principle even occur where the minority interest is held in a vertically related firm.³⁵

25. Depending on the circumstances, minority shareholdings can establish different relationships between the two firms involved. From an economic perspective, a distinction can be made between "active" minority shareholdings that enable the shareholder to influence the target's decision making process and commercial conduct, and "passive" minority shareholdings where the shareholder has a purely financial interest in the target and no influence over the target firm's competitive conduct. In legal systems there can be even further differentiation between different degrees of active minority shareholdings, trying to distinguish those that lead to outright control similar to the majority ownership, and those that confer a lesser, but nevertheless competitively relevant, degree of influence.

3.1.2 *Jurisdictional Thresholds*

26. Given that minority shareholdings have the potential to harm competition, the important policy question for a merger review regime is whether it should have a wide enough definition of a merger transaction to reach minority shareholdings that confer less than outright control over the target firm, and whether they should reach even completely passive minority shareholdings. Generally speaking, situations where minority shareholdings confer influence over the target have been the main concern for merger review regimes; few merger regimes use definitions of a merger transaction that reach truly passive minority shareholdings.

27. As minority shareholdings of any kind are not uncommon, the challenge is in particular whether clear enough lines can and should be drawn between those instances of minority shareholdings that more likely could lead to harmful effects, and those that most likely will not, and therefore should stay outside

³² There is also agreement that minority shareholdings tend to result in fewer efficiencies than full acquisitions, although there can be some, as well as some benign business rationales for acquiring non-controlling interest in a competitor.

³³ BSKyB v the Competition Commission et al, [2008] CAT 25, *conf'd*, BSKyB, [2010] EWCA Civ 2 (High Court); a similar rationale can be found in the Competition Commission's preliminary findings in *Ryanair*, Competition Commission, Ryanair may have to reduce its stake in Aer Lingus, Press Release, May 30, 2013.

³⁴ All this is well documented in OECD, *Minority Shareholdings*, *supra* note 26, 20-38, and in OFT, *Minority Interests in Competitors*, *supra* note 25.

³⁵ While there is less recent literature on this topic, vertical concerns related to (pre-existing) minority interests have featured in a number of decisions under the EUMR. *See, e.g.*, Case M.3653, Siemens/VA Tech July 13, 2005); Case M.5406, IPIC/Man Ferrostaal (March 13, 2009).

the notion of a merger transaction. Different jurisdictions have approached this challenge in very different ways.

Regimes Using Fixed Percentage Thresholds

28. Certain jurisdictions use fixed thresholds to define at what levels the acquisition of a minority stake constitutes a merger transaction. Already earlier mentioned examples include Germany which has a 25% threshold, and Japan, which has thresholds of 20% and 10%, although each will be triggered only if additional, case specific factors are present that indicate the possibility that the minority interest will also confer the ability to influence the target's conduct.³⁶ These percentage thresholds have obvious benefits as they rely on objective and predictable jurisdictional criteria. The example of Germany also illustrates the risks of fixed thresholds, as there had reportedly been the perception that parties structured their transactions "around" the 25% threshold to escape review, which led to the introduction of the "competitively significant influence" standard as an additional definition of a merger transaction.

29. A far more extensive reach of a merger review law toward minority shareholdings exists in Brazil following the 2012 competition law reforms.³⁷ According to Article 90 of the new competition law, minority interests of at least 5% constitute a merger transaction when the shareholder and the target are in a horizontal or vertical relationship. In the absence of a horizontal or vertical relationship between the parties, the relevant threshold increases to 20%. No further requirements appear to exist to determine whether the minority interest leads some level of influence, comparable to those that exist, for example, in Japan. Thus, Brazil appears to be one of the few jurisdictions where purely passive interests over a very low de-minimis threshold are covered by the definition of a merger transaction.

30. There is not yet much experience with the application of the new law, and it is thus too early to evaluate the new provisions. They have the advantage of using clear thresholds (leaving aside that there may be disputes about whether parties are in a vertical or horizontal relationship) and making circumvention almost impossible, but they cast their net very wide. Experience in light of notified mergers will show whether there are sufficiently many transactions where such low interest acquisitions lead to material competition concerns that justify the - potentially costly - wide definition of a merger transaction.

Minority Shareholdings in Regimes with "Control/Decisive Influence" Standards

31. Minority shareholdings generate the most questions in merger review regimes that rely exclusively on the "acquisition of control" concept to define a merger transaction in the sense of acquiring a decisive influence over the target. Not surprisingly, therefore, the topic has attracted a great deal of attention in Europe, where EU competition law and many EU member states follow this approach. Acquisitions of minority interests can of course meet the "decisive influence" threshold, depending in particular on additional rights and shareholder contracts that accompany the minority shareholding, and the dispersion of other shareholdings, but many times they will not.

32. In the course of the last revision of the then ECMR, the European Commission had already considered whether the notion of a merger transaction should be changed in order to capture a wider range of minority shareholdings,³⁸ but ultimately dismissed the need for reform. It reasoned that alternative enforcement mechanisms provided sufficiently effective tools to adequately cover the "gap," and an

³⁶ See *supra*, Section II.

³⁷ Competition Act of 2011 (effective May 29, 2012).

³⁸ European Commission, Green Paper on the Review of Council Regulation 4064/89, COMP(2001)745 (December 11, 2001).

expansion of the scope of merger review would be too costly. But the debate has returned and the Commission is currently actively considering whether there is a need to adjust its merger review system, how large the perceived or real "enforcement gap" actually is, and how cost effective reforms could be implemented. At least from the publicly available information it remains a little unclear whether, apart from *Ryanair*,³⁹ there are so many cases pointing to a significant enough enforcement gap to justify reform, considering also that expanding the EUMR's jurisdictional scope would not be costless.⁴⁰

Reaching Minority Shareholdings through "Material/Significant Influence" Standards

33. Other jurisdictions, including some European jurisdictions, cast their nets wider and include at least certain minority shareholdings that confer a lesser degree of control on the shareholder. Germany is a jurisdiction where minority shareholdings can fall under the definition of a merger transaction in a variety of circumstances. Even if a minority shareholding does not confer EUMR-type "control" over the target (Section 37(1)(3) GWB and falls below the 25% threshold in Section 37(1)(2) GWB), there would be a merger transaction if it confers on the holder a "competitively significant influence." (Section 37(1)(4) GWB)

34. The provision in Section 37(1)(4) GWB was introduced 1989 in reaction to the perception that some parties gamed the system by structuring potentially harmful transactions so as to remove them from the reach of German merger control, in particular by acquiring rights below the 25% level and avoiding the acquisition of formal control rights equivalent to those that a 25% interest would confer.⁴¹

35. The statute provides no specific details on when a transaction results in a competitively significant influence, and its precise contours are not easily understood. The literature has observed that the relevance of the provision when introduced the first time was inversely related to the difficult interpretive questions it raised.⁴² Since then, however, the provision has played a much more important role in particular in the media and energy sectors. And decision making practice has developed a number of relevant elements, including, for example, appointment of senior management, information and control rights, shareholder agreements, and the economic relationship between the parties. In the end, the inquiry is focused on whether the target's decisions concerning competitively relevant actions are no longer adopted independently but can be influenced as a result of the minority shareholdings. Pure long-term contractual relationships that create some sort of economic dependence without any additional rights, however, do not appear to fall under the definition of a merger transaction.⁴³

36. The lower bound of the relevant minority interest appears to be as low as 10%, although at least in one decision the Federal Cartel Office considered the acquisition of a 9% interest a relevant merger transaction. The decision was reversed on appeal, although the court did not in principle rule out that a 9%

³⁹ And even in *Ryanair* one could argue that there was no enforcement gap because a member state was able to review the transaction. More generally, the more minority shareholding cases that escape from the EUMR can be dealt with in certain member states, the smaller the "enforcement gap."

⁴⁰ It appears that much of the evidence consists of reviewed mergers where a pre-existing minority interest in a third party was held by one of the parties to the merger and the (reviewed) merger created a competitive relationship between the third party and the other merger party that ultimately led to concerns. To the extent the pre-existing minority shareholdings in these cases were competitively benign, a wider jurisdiction to review such transaction would not have had any benefits.

⁴¹ Veelken, in Immenga/Mestmäcker, Wettbewerbsrecht: GWB, ¶86 (4th ed. 2007).

⁴² Richter, in Wiedemann, Handbuch des Kartellrechts ¶116 (2nd ed. 2008).

⁴³ BGH, KVR16/99, Judgment of November 21, 2000, WuW/E DE-R 607, 612, Minderheitsbeteiligung im Zeitschriftenhandel; Richter in Wiedemann, *supra* note 42, ¶121.

interest, if accompanied by sufficient "ancillary" measures, could confer the requisite level of "influence."⁴⁴ The provision applies also to vertical relationships. In fact, it has played a particularly prominent role in the energy sectors where the Cartel Office relied on the provision to prevent the major players in the German energy market from acquiring minority interests in municipality owned energy firms.

37. UK merger control law is significantly different from German merger control as it is based on a voluntary notification system, but it is similar in its ability to reach acquisitions of minority interests that confer influence below the level of outright control. According to Section 26 of the Enterprise Act 2002, a "merger situation" exists where two enterprises cease to be distinct, which occurs when they are brought under common ownership or control. The notion of control includes situations where the shareholder acquires a "material influence" over the target.⁴⁵

38. The Act does not specify under what circumstances material influence can be found. In practice, a broad range of factors are considered, including the size of shareholdings and dispersion of other shareholdings, the shareholder's identity, special voting rights, board representations, and voting rights restrictions. Ultimately, the competition authority will seek to determine whether the shareholder can materially influence the policy of the target in the market place.⁴⁶

BSkyB/ITV – Reaching Minority Shareholdings Under the "Material Influence" Standard

In 2006, BSkyB, the leading UK pay-TV provider, acquired an ~ 18% interest in ITV, the UK's biggest commercial (over the air) broadcaster. There was some suspicion that the transaction was motivated by a desire to thwart third parties from taking over ITV. The Government intervened, and the OFT initiated an investigation. It found that the transaction was a merger transaction and raised competitive concerns. The case was referred to the Competition Commission in 2007 for further review.

The Competition Commission found that the minority stake conferred "material influence" on BSkyB, as it would de facto be able to block special resolutions of ITV and could therefore limit ITV's strategic options such as its ability to raise funds. BSkyB's status of a major industry player would give it additional influence.

In its substantive analysis, the Competition Commission identified a different set of concerns, including that BSkyB could influence ITV's content production strategy and investment in HDTV technology. It concluded that there was likely to be a substantial lessening of competition as a result of a loss of rivalry between ITV and BSkyB in the all-TV market. It concluded that divestiture to below 7.5% would be an effective remedy.⁴⁷

The Competition Appeal Tribunal upheld in 2008 the Competition Commission's findings both with respect to jurisdiction and with respect to the substantive analysis, including a suitable remedy (which had also been accepted by the Secretary of State). The CAT found on the question of BSkyB's ability to block special resolutions including those to raise funding the jurisdictional test and the competition assessment overlapped. It was relevant for a finding of BSkyB's material influence and for the conclusion that it could impair ITV's competitive position.⁴⁸

In 2010, the High Court dismissed BSkyB's appeal from the CAT's decision, upholding all previous decisions concerning jurisdiction and substantive competition law evaluation.⁴⁹

⁴⁴ Cartel Office, B6-27/04, Bonner Zeitungsdruckerei (September 8, 2004), WuW/E DEV 968, *rev'd*, OLG Düsseldorf (Ct. Appeals), VI-Kart 26/04 (V) (July 7 2005), WuW DE-R 1581.

⁴⁵ *See also supra*, note 14.

⁴⁶ OFT, Jurisdictional and Procedural Guidance, *supra* note 17, ¶ 3.15.

⁴⁷ Competition Commission, Acquisition by British Sky Broadcasting Group plc of 17.9 per cent of the shares in ITV plc (2008) (a formal decision in this case was taken by the Secretary of State).

⁴⁸ British Sky Broadcasting Group Plc v. The Competition Commission, [2008] CAT 25.

⁴⁹ British Sky Broadcasting Group Plc v. The Competition Commission, [2010] EWCA Civ 2.

39. In practice, a shareholding of 25% is considered to confer material influence in light of rights conferred on minority shareholders in the relevant company law. A 15% interest appears to be a relevant lower bound, although it is not excluded that material influence can be found with a lesser interest.⁵⁰

40. Thus, both European jurisdictions discussed here have fairly extensive abilities to reach minority shareholdings, although in order to accomplish this they had to rely on statutory language that does not provide clearly defined boundaries as to what transactions fall under merger review, and on decision making practice that has in each jurisdiction developed a catalogue of criteria which can be applied with some degree of flexibility in each case. Neither jurisdiction is able to intervene against passive minority shareholdings that confer only a purely financial interest in the target.

Casting an Even Wider Net with Certain Exemptions

41. The treatment of passive minority shareholdings for purposes of defining a merger transaction follows a different approach in U.S. merger review law, and it would appear that a broader range of minority shareholdings can be reached as merger transactions than, for example, in the United Kingdom and Germany. According to Section 7 of the Clayton Act, a merger transaction is any acquisition of “*the whole or any part of the stock or other share capital*” of another firm; such a transaction can be prohibited where “*the effect of such acquisition may be substantially to lessen competition.*”⁵¹ Therefore, all acquisitions of equity shares in a target company could be considered merger transactions.⁵² This very broad definition is mitigated by Section 7(3) which provides that which holds that “[*t*]his section shall not apply to persons purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about the substantive lessening of competition.”

42. The “investment exemption” in Section 7(3), which has no cap on the percentage of stock that can be owned “passively,” can eliminate certain types of minority shareholdings from the scope of U.S. merger review law. But the exemption has a very limited scope in practice, which is shaped largely by the same exemption in HSR filing rules.⁵³ A transaction will be considered “solely for investment” only if the acquirer does not gain influence over the actions and business conduct of the target and does not use some mechanism to bring about a substantial lessening of competition. Excluded from Section 7(3) are situations where the shareholder gains active control over the target, the ability to influence the actions of the target by means other than control, or gains access to commercially sensitive information. These

⁵⁰ OFT, Jurisdictional and Procedural Guidance, *supra* note 17, ¶ 3.20.

⁵¹ Throughout this paper it is important to keep in mind the difference between transactions that are considered merger transactions under Section 7 Clayton Act and those that are reportable under the HSR Act and implementing rules, 16 CFR §§801-803.

⁵² U.S. v. E.I. duPont de Nemours & Co., 353 U.S. 586 (1957).

⁵³ The HSR Act provides for cap, as it exempts share acquisitions for investment purposes up to 10%, HSR Act, Section (a)(C)(9). The most prominent violator of HSR reporting requirements in connection with the “investment exemption” is probably Bill Gates, who agreed to pay a US \$800,000 civil penalty for failure to report the acquisition of a small stake in another corporation; he could not benefit from the investment exemption because he also was a member of the board of directors of the same corporation. U.S. Department of Justice, Bill Gates to Pay \$ 800,000 Civil Penalty for Violating Antitrust Premerger Notification Requirements, Press Release, May 3, 2004. This and more recent enforcement actions suggest that the agencies are monitoring closely that the exemption cannot be abused by persons acquiring more than a strictly passive minority stake.

criteria suggest that the jurisdictional test of whether a transaction is a merger transaction is not materially different than the substantive analysis of possible anticompetitive effects.⁵⁴

43. Whether the "solely for investment" exemption can ever benefit acquisitions of minority rights in a direct competitor is a little unclear,⁵⁵ although the agencies have sometimes, as part of remedial intervention, accepted purely passive investments in a competitor that remained well below 10%.⁵⁶ As the remedies were designed to ensure that the transactions no longer had the likely effect of substantially lessening competition, passive investments under similar circumstances and in a similar range might in principle benefit from the exemption in Section 7(3) Clayton Act.

44. A similar approach to minority shareholdings can be seen in India where the recently introduced merger review regime appears to largely follow the U.S. model with respect to the definition of a merger transaction. It has of course done so without the benefit of many years of decision making practice which has resulted in considerable uncertainty and concerns about unreasonably wide and unclear jurisdictional thresholds.⁵⁷ The Competition Act defines a merger as an acquisition of control, shares, voting, rights, *or* assets of another enterprise,⁵⁸ suggesting that any acquisition of a small interest in another firm can, in principle, be considered a merger transaction. This wide concept of a merger transaction is narrowed down by exemptions that exclude certain minority shareholdings from the definition of a merger transaction. Under a Regulation issued by the Indian Competition Commission, share acquisitions of up to 25% are exempted if they are solely for investment purposes and do confer on the purchaser control over the target.⁵⁹ Not covered by this exemption are minority share acquisitions in a competitor.⁶⁰

3.1.3 Conclusions

45. Share acquisitions, and in particular share acquisitions below a de jure control level are a good illustration of the desire of many merger review regimes to reach a wide range of transactions that confer on the purchaser the ability to influence conduct of the target. But almost no merger review regime appear

⁵⁴ See, e.g., *U.S. v. Tracinda Inv. Corp.*, 477 F.Supp. 1039 (C.D. Cal. 1979) (test for "solely for investment" exemption inherently no different than the analysis proscribed by Section 7 itself).

⁵⁵ Areeda & Hovenkamp, *Antitrust Law*, ¶ 1204(b) (investment exception should benefit only investors, in particular institutional investors); Paul C. Cuomo et al, *Partial Acquisitions: Recent MOFCOM Action Suggests Possible Divergence with U.S. Standards*, *CPI Antitrust Chronicle*, January 2012, at 3, footnote 5 (partial stock acquisition in competitors cannot benefit from Section 7(3) Clayton Act).

⁵⁶ See, e.g., U.S. Federal Trade Commission, *FTC Requires Restructuring Of Time Warner/Turner Deal: Settlement Resolves Charges That Deal Would Reduce Cable Industry Competition*, Press Release, September 12, 1996 (9.2% non-voting interest permitted); U.S. Department of Justice, *American Airlines Cleared to Acquire Stock in Argentine Airline*, Press Release, July 8, 1998 (8.5% interest permitted); U.S. Department of Justice, *Department Announces Tentative Settlement in the Northwest-Continental Lawsuit*, Press Release, November 6, 2000 (7% interest permitted).

⁵⁷ For a summary of the developments and concerns, see, e.g., Tony Reeves & Dan Anderson, *India's New Merger Control Regime: When Do You Need to File*, 26 *Antitrust* 94 (2011).

⁵⁸ The Competition Act 2002, No. 12 of 2003, as amended by the Competition (Amendment) Act 2007, Section 5.

⁵⁹ The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 as amended up to 4th April, 2013, Schedule I. A second exemption, added in 2013, covers share acquisitions of up to 5% in the target, where the purchaser already holds a 25% or greater interest in the target, but only up to a 50% interest and only if the incremental share acquisitions do not confer on the purchaser control over the target.

⁶⁰ Reeves & Anderson, *India's New Merger Control Regime*, *supra* note 57, at 97.

to be satisfied with simple and objective percentage of interest thresholds, perhaps because they could be too easily circumvented or because they would have to be chosen so low that the competition authority would be confronted with too many unnecessary cases. As a result, the more extensive reach of merger review laws frequently comes at the cost of open-ended definitions and a set of potentially relevant variables that need to be applied on a case by case basis.

46. The focus on an ability to influence the target's commercial conduct also means that passive shareholdings (purely financial interests) rarely covered by definitions of a "merger transaction," despite the fact that they could have harmful effects. One exception to this general approach appears to be Brazil where every share acquisition above a 5% threshold is covered unless the parties are totally unrelated. Only experience will show whether this approach was overly cautious or will be beneficial overall.

3.2 *Asset Acquisitions, in Particular the Acquisitions of Limited Assets*

47. In virtually all mainstream merger review regimes an acquisition of a target company in the form of an asset acquisition falls within the definition of a merger transaction. These transactions use a more "direct" way than share acquisitions to bring about durable, structural changes in the market place that may affect how assets can be used in the competitive process, and therefore should be treated like share acquisitions. The same applies where the acquired assets form the whole of a distinct line of business of the seller, and/or when the acquisition does not involve the outright transfer of full ownership rights but are some similar contractual arrangement that vests long term, and perhaps irrevocable rights to manage assets in the purchaser, such as lease agreements that transfer control over assets, managerial rights, and business risks.

48. Like in the case of share acquisitions, however, more difficult questions can arise when things change from the outright acquisition of ownership rights in the entire assets of a firm or a business. There can be questions, in particular, concerning the size/value/significance that the assets must have to be so competitively significant that the transaction merits merger review. Essentially all jurisdictions extend the reach of their merger review laws beyond the acquisition of the totality of a business' assets, but there are differences as to what level of "granularity" various merger review laws reach. Some require that the acquired assets form enough of a unity that a particular business activity can be transferred and continued by the purchaser or that the assets represent a distinct source of revenue. Other jurisdictions consider essentially every asset transfer that is significant enough to be capable of changing the competitive position of the purchaser a merger transaction.

3.2.1 *Requiring the Acquisition of More Substantial Assets*

49. Compared with some other major jurisdictions, EU competition law applies a more restrictive concept as to when asset acquisitions can be considered a merger transaction. According to the EUMR provisions addressing asset acquisitions,⁶¹ there will be the requisite change in control over an "undertaking" if the purchaser acquires the possibility of exercising decisive influence by way of ownership of, or the right to use, all or part of the assets of another undertaking.⁶² Although the "...right to use...part of the assets of another undertaking..." language could be interpreted very broadly, in practice the acquired assets must represent at least "part of an undertaking," which means that there must be a transfer in control over a business with a market presence which generates clearly attributable revenues.⁶³

⁶¹ European Commission, Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, O.J. C /1 (2008) (CJN).

⁶² EUMR, Article 3(2)(a).

⁶³ CJN, *supra* note 61, at ¶24.

50. The revenue attribution requirement will lead to borderline cases that will require a case-specific analysis of broader circumstances. For example, the transfer of individual assets like power plants has been found to meet this requirement. But in other circumstances the simple transfer of assets might be insufficient for a "merger transaction," and there may be a need to transfer know how and marketing facilities in addition to assets to enable the purchaser to engage in revenue generating activities vis-à-vis third parties. Similarly, an agreement to transfer all existing customer relationships, even if only for a certain group of customers, has been found to constitute a merger transaction." But the "revenue attribution" requirement makes it less likely that transfers of only customer lists or of an individual IPR fall under the definition of a merger transaction.⁶⁴

51. The United Kingdom uses a different statutory concept, but its position vis-à-vis asset acquisitions appears to be not so different from that developed under the EUMR. According to the Enterprise Act 2002, all acquisitions of the activities or part of the activities of a business can in principle be considered merger transactions. Whether transferred assets are substantial enough requires a case-by-case assessment that, according to the UK merger guidelines, takes into account the totality of all relevant circumstances.⁶⁵ The transferred assets must enable a business activity to be continued and revenues directly related to the transferred assets must be identifiable. A purchase price that includes payment for the transfer of goodwill would be a strong indication that a business enterprise has been transferred, as it would suggest that the purchaser acquires not only "naked" assets, but the ability to use the assets in a business activity.⁶⁶ On the other hand, transfers of individual rights like IPRs would not in themselves regarded as merger transaction. And although the transfer of customer lists can be an important factor in determining whether a business has been transferred, but it appears that the transfer of a customer list in itself would not be considered a merger transaction.

52. Japan appears to have a slightly more restrictive scope when it comes to asset acquisitions. The Merger Guidelines to Application of the Antimonopoly Act Concerning Review of Business Corporations suggests that asset acquisitions must concern a "substantial part" of a business, which elsewhere is described as a portion of a business that must function as a single business unit that must have a distinct value to the selling business. In addition, the Guidelines use numerical thresholds to define "substantiality," referring to the revenues generated by the sold assets relative to the total revenues of the seller and to absolute revenues attributable to the sold assets, to identify a merger transaction.⁶⁷

3.2.2 *Casting a Wider Net to Reach More Limited Asset Acquisitions*

53. Other jurisdictions apply their merger review laws to a broader range of asset acquisitions. A case in point is U.S. merger review law. According to Section 7 Clayton Act, "...no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation..."⁶⁸ Courts have confirmed that this is a wide definition of a merger transaction as the

⁶⁴ But it is in principle not excluded that the necessary criteria for an "asset" can be met. CJN, *supra* note 61, at ¶24.

⁶⁵ OFT, Jurisdictional and Procedural Guidance, *supra* note 17, Section. 3.12.

⁶⁶ *Id.*, Section 3.10.

⁶⁷ JFTC, Guidelines Concerning Review of Business Combinations, *supra* note 11, Section 4(3).

⁶⁸ The language covering asset acquisitions was introduced in Section 7 by the 1950 Celler-Kefauver Act, when it was recognised that a prohibition against anticompetitive share acquisitions could easily be circumvented through an all asset deal. The reference to corporations subject to the jurisdiction of the Federal Trade Commission appears to restrict the jurisdictional scope compared to share acquisitions, but case law has virtually eliminated this limitation.

statute uses "generic, imprecise terms encompassing a broad spectrum of transactions," and that "[a]s used in this statute, and depending upon the factual context, "assets" may mean anything of value."

54. The statutory language has been found to be sufficiently broad to include property or property rights, real or personal, tangible or intangible, which are subject to transfer and which have been used by the seller and could be used by the buyer competitively. Customer lists, sales routes and sales volumes, exclusive licenses, a franchise, and trademarks and patents have been found to be assets within the purview of section 7. The only limiting – and not very demanding – requirement to distinguish asset acquisitions that are merger transactions from those that are not is that the transferred asset is capable of having some competitive use after it came under control by the purchaser.⁶⁹

55. Along the same lines, a relatively broad range of asset acquisitions would be considered a merger transaction under Section 37 of the German GWB. The relevant provision refers broadly to ownership or user rights in all or parts of the assets of a firm. Enforcement practice has focused on whether the assets covered by a transaction (i) have been material for the position of the seller (determined by a flexible combination of qualitative and quantitative criteria); and (ii) are capable of impacting the purchaser's position on the market.⁷⁰ Thus, in applying this jurisdictional test, some assessment of the circumstances in which an asset transfer occurs appears to be required.

56. Under this interpretation, the transfer of a single store (out of several hundred stores that belonged to a larger chain), customer lists, or of a trademark used in business have been found to fall under the definition of a merger transaction.⁷¹

3.2.3 *What Transactions are Asset "Acquisitions?"*

57. A flexible approach in jurisdictional requirements can also be observed with respect to the form in which the acquiror gains control over assets. A narrow interpretation of the term "acquisition" might suggest that only formal transfers of ownership should be included, but virtually all mainstream jurisdictions have consistently used a wider interpretation to ensure that their jurisdictional thresholds reflect competitive realities. Therefore, a wide range of other forms in which the acquiror gains the right to control how the other party's assets are used will be considered "acquisitions."⁷²

⁶⁹ The breadth of the statutory concept of a merger transaction is mitigated by broad exceptions from the obligation to notify a merger transaction that exclude, for example, certain real estate transactions and assets acquisitions in the ordinary course of a business, unless they represent "all or substantially all of the assets of an operating unit." See 16 CFR §802.

⁷⁰ BGH, KVR 14/91, Judgment of July 7, 1992, Warenzeichenerwerb; BGH, KVR32/05, Judgment of October 10, 2006, National Geographic I; Richter in Wiedemann, *supra* note 42, Para. 81.

⁷¹ *United States v. Columbia Pictures Corp.*, 189 F.Supp. 153 (SDNY 1960). Along the same lines, Canadian merger review law appears to reach any acquisition of an "essential" asset as a "merger transaction," which may include distribution facilities, a retail outlet, a brand name or intellectual property rights. Competition Bureau, Guidelines, *supra* note 17, Section 1.13.

⁷² In *United States v. Columbia Pictures Corp.*, 189 F.Supp. 153, 182, the court supported its wide interpretation of the term "acquisition" in the following terms: "The statute imposes no specific method of acquisition. It is primarily concerned with the end result of a transfer of a sufficient part of the bundle of legal rights and privileges from the transferring person to the acquiring person to give the transfer economic significance and the proscribed adverse 'effect.'"

58. For example, it has already been mentioned that the acquisition of intellectual property rights can constitute a relevant asset acquisition.⁷³ This does not only apply to full transfer of ownerships, but also to a transfer by long-term, preferably irrevocable, exclusive license that brings about a durable change in the market.⁷⁴ On the other hand, non-exclusive licenses of IPRs would generally not be considered "acquisitions."⁷⁵ That simple distinction can break down quickly and a more detailed evaluation of case-specific circumstances may be required, as license arrangements are flexible instruments that allow an allocation of rights according to the parties' business needs. For example, licensor may grant an exclusive license but nevertheless retain certain limited exploitation rights with respect to the licensed IPR. At least in the U.S. merger review regime, this does not appear to affect the characterisation of the transaction as a "merger transaction,"⁷⁶ but in these types of situations different outcomes in different merger review regimes appear more likely.

59. Similar issues can of course come up with respect to other property rights. Again, formal transfer of ownership would not be required and transactions with substantially similar effects will also be considered "acquisitions." What is important is the relatively durable right to use certain assets.⁷⁷ This can be accomplished, for example, through a lease agreement that gives the lessee the control over the target's management and resources. Much of this is well presented in the European Commission's CJN,⁷⁸ but appears to apply along the same lines across jurisdictions.

60. The "fringe" that raises the most difficult questions appears to exist in situation where the creation of a purely economic relationship provides one side means to influence the business decisions of the other side, in the absence of structural links or contracts that confer rights to control/influence management decisions. The question here is whether, and under what circumstances, the creation of such an economic dependence situation could be considered an "acquisition." A wide interpretation of the concept "acquisition" that might be able to reach in principle purely contractual relationships can be found, for example, in the European Commission's discussion of various means to acquire control over another business. According to the Commission, a situation of economic dependence might lead to the requisite level of control where long term contracts or credits confer decisive influence, provided they are coupled with structural links.⁷⁹ The Commission's discussion as well as the case law cited in support of its views, suggest that some structural links, like a shareholding, right to appoint management, or at least an option that can be converted into ownership rights, will typically be required and will be considered in combination with the "other," economic links in order to establish "control/decisive influence." This may suggest that in practice purely economic relationships that are so "intense" that they confer on one side the

⁷³ See *supra*, Sections III.B.1 and III.B.2. As discussed above, there may be differences among jurisdictions as to the circumstances in which the transfer of an IPR might be considered an "acquisition."

⁷⁴ In *United States v. Columbia Pictures Corp.*, 189 F.Supp. 153, for example, a 14-year exclusive license agreement that gave the licensee the right to exploit a large library of movies through television broadcast was considered an "acquisition."

⁷⁵ European Commission, Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, O.J. C 95/1 (2008) (CJN), ¶24.

⁷⁶ Interesting in this context is a proposed amendment to the HSR premerger notification rules which seeks to clarify that a transfer of exclusive patent rights in the pharmaceutical industry result in a potentially reportable asset acquisition under the HSR Act. See U.S. Federal Trade Commission, FTC Seeks Public Comments on Proposed Amendments to the Premerger Notification Rules Related to the Transfer of Exclusive Patent Rights in the Pharmaceutical Industry (August 13, 2012).

⁷⁷ See, e.g., EUMR, Article 3(2)(a).

⁷⁸ CJN, *supra* note 75, ¶18.

⁷⁹ CJN, *supra* note 75, ¶20.

ability to substantially influence the other do not often occur without some additional, "legal" (structural or contractual) means to strengthen the influence. Alternatively, such purely contractual relationships creating economic dependence may exist, but bringing them under the scope of merger control laws may be inappropriate, given the difficulty to create clear and predictable boundaries.

61. Instructive is in this respect also the discussion concerning the reach of Article 37(1)(4) GWB, already discussed above, and its "competitively significant influence" standard in the definition of a merger transaction. In principle, the language of the provision would appear wide enough to capture transactions where purely economic ties result in such a degree of economic dependence that the requisite level of influence over another firm or group of assets is met. But commentary on the provision points out that such a wide interpretation would raise concerns about legal certainty especially in a merger review regime with mandatory notification and sanctions for failure to notify and obtain approval for reportable transactions; accordingly, the creation of a "competitively significant influence" might require that the transaction involves some more permanent "legal" means (which can of course be complemented by an analysis of arrangements that create economic influence) to establish influence such as the acquisition of an interest in the target.⁸⁰

3.2.4 *Conclusions*

62. Perhaps even more consistently than in the case of share acquisitions, there appears to be a great willingness in many jurisdictions to engage in a broader examination of all relevant circumstances to determine whether an acquisition of assets is a merger transaction. The notion of acquisition is interpreted with some flexibility. And especially the need to inquire into effects of the asset transfer on the purchaser's competitive position might bring this jurisdictional question relatively close to a substantive assessment of competitive effects, although it will always remain much less detailed. Many times, of course, notification requirements will mitigate the effects of such a broad definition of a merger transaction. But the impression remains that competition authorities enjoy a fair amount of discretion in deciding when an asset acquisition falls under merger review.

3.3 *Joint Ventures*

63. The "core/fringe" explanation for parallels and differences among major merger review regimes applies also to the area of joint ventures. When two or more parties form and control a joint venture that involves a genuine integration of assets with a certain permanence and ends competition among the parents in the field of the joint venture, almost invariably the creation of the joint venture will be considered a merger transaction.⁸¹ But given the flexible notion of what constitutes a joint venture, there are many different types of cooperation that come under this label. And the more the joint venture emphasises collaboration and de-emphasises asset integration, the less clear its "independent" role in the market is, the greater the differences among jurisdictions become.⁸²

⁸⁰ Veelken, in Immenga/Mestmäcker, *supra* note 41, ¶¶ 93-94.

⁸¹ Provided, as discussed below, that at least one of the parents has decisive influence over the joint venture's activities, which in many European merger review regimes is an additional important element.

⁸² Differences in the qualification of a joint venture can substantially affect the parties: if the joint venture is a "merger transaction," there may be notification requirements and waiting periods, but a final decision on the lawfulness of the venture and therefore legal certainty can typically be obtained much faster than if the joint venture is reviewed as a restrictive agreement. Different standards of review would apply as well, although there appears to be agreement among most mainstream jurisdictions that certain collaborative aspects of a joint venture (or the entire joint venture if it cannot be properly characterised as a merger in substance) would be subject to review under restrictive agreement standards, even if the joint venture

64. Very generally speaking, there are two approaches to the question of how the definition of a merger transaction applies to joint ventures. Many merger review regimes do not see a need to separately address joint venture formation; the formation of joint ventures that have some integration of assets will typically include the acquisitions of shares or assets, or some assets that were previously independently owned will be used to form a new "enterprise" controlled by the parents, which would be sufficient to bring the transaction under the generally applicable definition of a merger transaction. Other jurisdictions have joint venture-specific provisions in their definitions of a merger transaction. In particular jurisdictions following the EUMR's "control/significant influence" model may find a greater need to specifically consider how joint ventures fit into the merger transaction definition; and they tend to include a narrower range of joint ventures under their definition of a merger transaction. These differences lead to the well-known phenomenon that an international joint venture may be considered a merger transaction with notification obligations in some jurisdictions, whereas it may be considered a non-notifiable restrictive agreement in others.⁸³

65. In U.S. merger review law, for example, the acquisition of assets or voting securities in the context of the formation of a joint venture would be considered a merger transaction according to the generally applicable rules in Section 7 Clayton Act, although a reporting obligation would again depend on HSR rules. An acquisition of assets may exist when the joint venture parents have enough rights to acquire "control" over assets contributed to the joint venture.⁸⁴ As before, these rules cast a wide net over the type of joint ventures that would be considered a merger transaction. The qualification as a merger transaction under this wide definition and possible HSR reporting requirements do not necessarily determine the standards for the substantive assessment. In certain cases a reportable joint venture may be evaluated as collaboration among competitors rather than under the horizontal merger guidelines.⁸⁵

66. The general definition of a merger transaction would also apply in the United Kingdom. The formation of a joint venture would lead to a merger transaction where two or more enterprises cease to be distinct and the requisite degree of control over the enterprise by at least two parents exists. Different parents could have different degrees of "control," for example if one holds a controlling interest but the other one has "material influence." A similar approach to joint ventures exists in Germany. A merger transaction would be found if as a result of the formation of a joint venture, two or more parents hold an interest in the joint venture of at least 25%, or have a competitively significant influence over the joint venture's activities.

formation is considered a merger transaction. And, ultimately, one would expect that similar analytical questions about the competitive effects of a joint venture will be asked, regardless of the characterisation and the applicable procedural framework. Different remedies may apply as well, although, again, the practical differences might not be substantial.

⁸³ An example of such a joint venture is the formation of Covisint, an online supply platform created by the three major Detroit-based car manufacturers GM, Ford, and (then independent) Chrysler. The formation of Covisint was reviewed as a merger transaction, among others, in the United States and in Germany, but not under ECMR (because no parent had "decisive influence" over the joint venture); the European Commission reviewed the joint venture as a restrictive agreement under Article 101. *See* U.S. Federal Trade Commission, FTC Terminates HSR Waiting Period for Covisint B2B Venture, Press Release, September 11, 2000; Federal Cartel Office, Decision B 5 - 34100 - U 40/00, Covisint (September 25, 2000); European Commission, Commission clears the creation of the Covisint Automotive Internet Marketplace, Press Release IP/01/1155 (July 31, 2001). The decision was reviewed as a merger also in Brazil, although the clearance decision was issued after such a long review process that the parents had already sold their joint venture.

⁸⁴ *See, e.g., Addamax Corp. v. Open Software Foundation, Inc.*, 888 F.Supp. 274 (D. Mass. 1995).

⁸⁵ Depending on the degree of integration, the effects on competition among the parents, and the duration of their collaboration, certain joint ventures could be analysed.

67. Because these jurisdictions apply the same jurisdictional test to all transactions, there is also no difference between the qualification of joint venture formation and the acquisition of a minority interest as merger transactions. Certain instances of minority shareholdings will require a different substantive analysis than joint ventures, but that does not affect the assessment of whether they are merger transactions.

68. The jurisdictional reach under the EUMR is more limited in joint venture situations. This is so because a merger transaction will be found to exist only if at least two parents acquire "decisive influence" over the joint venture, and because the joint venture must be "full function," i.e., is must be acting on the market as an autonomous economic entity. Thus, a joint venture may lead to a structural, durable change in the market, but in the absence of "decisive influence" by the joint venture parents, or in the absence of an autonomous entity that acts on the market place, there would be no merger transaction.

69. Both requirements may lead to questions concerning jurisdictional thresholds in joint venture situations that other merger review regimes might be able to avoid. A brief discussion of various joint venture scenarios illustrates this point: If a single purchaser acquires control over assets that represent an undertaking,⁸⁶ the transaction would represent a "merger transaction," regardless of whether the acquired undertaking is considered "full function" or not.⁸⁷ But when more than one party is involved, things can get a little unclear. It appears that if two parties form a joint venture by jointly acquiring an undertaking from a third party, there is no need to assess "full functionality;" the acquisition that leads to a joint venture would always be considered a merger transaction. But if the two parties form a new venture by contributing their own assets (which could include assets representing an "undertaking"), a merger transaction will be found only if the resulting joint venture is "full function."⁸⁸ Things seem to be a little unclear when a purchaser becomes a joint venture partner with respect to an undertaking that was previously owned individually by the other joint venture partner; "full functionality" of the jointly owned business may be required, but an argument to the contrary appears plausible as well.⁸⁹

70. Thus, transactions that appear to result in very similar structural changes in the market place might be subject to different jurisdictional rules. The concept of a merger transaction may have a slightly narrower scope when at least two parties form a joint venture by contributing a business than when a single purchaser acquires a business.⁹⁰ It may well be that in practice these difficult questions do not create material problems for parties, for example because parties in this type of transactions will have an incentive to have their joint venture vetted under merger review laws and the competition authority normally will be reluctant to refuse their request. Nevertheless, it shows that inserting the need to apply the "full function" requirement into the determination of a jurisdictional threshold can raise difficult questions that can be avoided in other merger review regimes. One jurisdiction that has decided to avoid these challenges is China, where after some consideration the decision was ultimately made to eliminate the full function requirement from jurisdictional rules governing joint ventures.⁹¹

⁸⁶ See *supra*, Section II.

⁸⁷ CJN, *supra* note 75, ¶24.

⁸⁸ CJN, *supra* note 75, ¶92.

⁸⁹ CJN, *supra* note 75, ¶86.

⁹⁰ Much of the preceding discussion follows Lars-Peter Rudolf & Bettina Leupold, Joint Ventures – The Relevance of the Full Functionality Criterion under the EU Merger Regulation, 3 J. Europ. Comp. L. & Practice 439 (2012).

⁹¹ As discussed above, China largely followed the model of the EUMR when designing its merger regime. The AML does not specify when joint ventures are considered "merger transactions," and it was left to MOFCOM, the competition authority in charge of merger review, to publish implementing rules to clarify

71. The “control/decisive influence” element may also lead to interesting questions, for example if the European Union were to consider extending the notion of a merger transaction to catch at least certain types of minority shareholdings that currently fall outside merger review.⁹² In the current situation, the acquisition of minority interests in the joint venture context fall under the definition of a merger transaction only if the "decisive influence" requirement is met. The creation of a joint venture with three parents with equal shares and no particular control rights or instruments would currently not be considered a merger transaction. All three parents would be considered minority shareholders without "control/decisive influence."⁹³ If the jurisdictional scope of the EUMR were to be extended to reach minority shareholdings that do not confer "control/decisive influence," this could have repercussions on the jurisdictions over "non-controlled" joint ventures. A broader jurisdictional scope that would reach non-controlling minority shareholdings would capture joint ventures where the parents hold non-controlling interests as well, potentially increasing the scope of merger review under the EUMR substantially. This may in turn require the use of minority interest-specific jurisdictional rules try to distinguish between "normal minority interests" and "joint venture minority interests."

4. Conclusions

72. Despite the substantial differences in the ways various merger review regimes define a "merger transaction," the brief comparative discussion of some of the more challenging areas shows some common themes. Most importantly, many jurisdictions have an extensive reach of the merger review laws that covers transactions far beyond the "core" transactions such as acquisition of a de jure control over the target or asset acquisitions with a similar scope.⁹⁴

open questions, including jurisdictional questions. Draft Provisional Rules included a full function requirement for joint ventures, thus excluding from the scope of a merger transactions non-full function joint ventures. But MOFCOM’s final Rules on the Notification of Concentration between Undertakings, published in 2009, does not include a full function requirement, thus subjecting a wider range of joint ventures to merger review.

⁹² See *supra*, Section III.A.2.

⁹³ See the example *supra*, note 83.

⁹⁴ Another area demonstrating the need to expand the jurisdictional scope of merger review regimes through sometimes more flexible rules that depend on individual circumstances are "creeping" acquisitions and interrelated transactions; in each case, each individual transaction in a series of transactions would not meet jurisdictional thresholds, but jurisdiction over all would exist if all transactions were considered as one. The concern here is that a narrow, transaction-by-transaction application of jurisdictional thresholds would allow parties to engage in transaction engineering in order to avoid merger review of what is in commercial reality a single transaction (with potentially anticompetitive effects).

A number of jurisdictions have developed aggregation rules so that their jurisdictional thresholds correspond to competitive realities. Under the notification rules of the HSR Act, for example, all separate acquisitions of shares, assets, and non-corporate interests during a six month period are aggregated to determine whether notification thresholds are met. 16 CFR §801.13. The EUMR has a two year aggregation rule for transactions between the same parties. EUMR, Article 5(2)(2). In addition, closely related transactions can under certain circumstances be treated as one. EUMR, recital 20 This can mean, for example, that all step-by-step share purchases in a target are treated as one single reviewable transaction once the last, decisive transaction has occurred, not only the last transaction that confers the requisite "control" on the target; of course, if the last, control-conferring transaction is not implemented, all previous transactions remain outside the EUMR's jurisdiction. This aggregation rule is also extended to a series of distinct, but economically related transactions where neither transaction would be carried out without the other. Especially in the latter case, the jurisdictional rule becomes dependent on a case-by-case assessment of all circumstances to assess the economic aim pursued by the parties, but this may be a necessary step to ensure the effectiveness of the system.

73. For one, this may suggest that there is not a great deal of confidence that alternative enforcement instruments can effectively reach transactions that are somewhere at the "fringe" of merger review and regularly intervene against those that may have anticompetitive effects. There may be detection issues as well as questions whether enforcement standards and evidentiary requirements under provisions prohibiting anticompetitive agreements and anticompetitive unilateral conduct make an ex-post control of such transactions ineffective. Certainly, the application of merger review to transactions on the "fringe" has benefits for competition authorities as parties must bring their deals to the competition authority's attention and the ex-ante review mechanism strengthens the hand of the reviewing authority. And, of course, there may be transactions where alternative enforcement instruments simply do not help, like non-consensual acquisitions of minority interests.

74. As noted at the beginning of the paper, there has been a strong push in the international debate on merger review procedures toward "objectivising" jurisdictional thresholds. Between the two key components of jurisdictional thresholds, this debate has focused on notification thresholds much more than on the definition of a merger transaction. In the context of notification thresholds, using market shares as notification thresholds is in principle not unreasonable if the goal is to filter out transaction that are unlikely to cause harm, but their use has nevertheless been discouraged because they are not objective and insert uncertainty and the need to evaluate case specific circumstances into the determination of jurisdiction.⁹⁵

75. In the context of the definition of a "merger transaction," the same type of case specific evaluation of a wide set of criteria, which confers some degree of discretion on a competition authority, appears to be much less objectionable. The tension between using objective and transparent criteria and targeting potentially harmful transactions through more open-ended standards is not infrequently resolved in favor of using more flexible standards and fact specific inquiries. In fact, it appears that more flexible "material/significant" influence standards, or inquiries into whether an acquired asset is capable of affecting the purchaser's competitive position, might enable a competition authority to use some very preliminary assessment of likely competitive effects of a transaction to determine whether in its view the transaction qualifies (or should qualify) as a merger transaction. A certain discretion to make judgment calls is perhaps a necessary mechanism to make a merger review regime effective and reasonably targeted at potentially problematic transactions.

76. There has certainly not been an organised "outcry" that this approach does not work, even though there are some costs in terms of legal certainty and predictability. This suggests that jurisdictions have been successful in mitigating concerns about unnecessary costs that result from broad or unclear definitions of a merger transaction by using higher notification thresholds and/or less costly review procedures as effective tools to eliminate review for a large number of obviously unproblematic transactions, thus limiting the number of "fringe" cases where less than bright line definitions really matter. In addition, many competition authorities appear to have managed to use guidelines, informal guidance, and consistent decision making practice to make the process reasonably predictable. But where such "cost containment" mechanisms do not exist, there may be more legitimate concerns that expanding the reach of a merger review regime to cover more "fringe" transactions might result in too much uncertainty and costs that exceed any benefits that such a move might have.

⁹⁵ ICN Notification Threshold Report, *supra* note 3, at 4.

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