

# Mind the gap: Prohibition on acquiring stakes falling short of control

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Companies may soon be prohibited from acquiring certain stakes falling short of control. Currently, the European Commission can only take existing structural links into account when analysing separate acquisitions of control, while the prohibitions on cartels and abuse of dominance do not suffice to catch the remaining anti-competitive structural links. [Extending the scope of the Merger Regulation](#) is meant to fix this enforcement gap. Once fixed, it would be wise to keep track of your firm's non-controlling minority stakes.

The European Commission launched a public consultation on 25 June 2013 for opinions on possible improvements to the EU's Merger Regulation ("EUMR"). One improvement relates to extending the scope of the EUMR to the acquisition of non-controlling minority shareholdings. According to the Commission, the acquisition of those shareholdings may in some cases have anti-competitive effects, particularly where they create structural links between competitors or in a vertical relationship.

Similar to Dutch merger control, the EUMR jurisdiction is currently based on the ability to exercise "control". As a result, minority acquisitions falling short of control do not trigger the merger notification requirement. Under the EUMR, the Commission can only scrutinise non-controlling minority shareholdings upon notification of a separate acquisition of control and when a pre-existing minority shareholding is part of the competitive picture. The Commission has a limited ability to assess potential anti-competitive effects of other minority shareholdings, as the TFEU's cartel prohibition and the prohibition on abuse of a dominant position do not cover all categories of structural links (see the [Commission's staff working paper](#)). The cartel prohibition only comes into play if the structural link qualifies as an agreement, which is sometimes hard to prove, particularly if the structural link is built up by the acquisition of a series of shares via the stock exchange. Additionally, the prohibition of abuse of dominance only covers a small number of cases, as it requires that the acquisition of the structural link by the already dominant company constitute abuse.

Looking to the decision-making practices of national competition authorities in several member states which have the power to review structural links (Germany, Austria and the UK) as well as the United States, Canada and Japan, the Commission suggests a number of options to solve this enforcement gap. The options range from extending the current system of ex ante merger control to the possible introduction of an ex post system that would provide the Commission with the discretionary power to select the structural links it intends to investigate (a selective system). The investigation would be conducted on the basis of either self-assessment or through a filing obligation for prima facie problematic structural links. Vice President Joaquín Almunia has

[expressed](#) a preference for the selective system to limit the regulatory burden for businesses as much as possible.

The public consultation closed on 12 September 2013. The Commission is currently studying the replies, and the sector is eagerly awaiting the results. It is quite likely that national competition authorities in other member states, including the ACM, will follow the Commission's proposal and introduce additional merger control rules as regards minority acquisitions. We will keep you posted!