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A critical review of the European Commission's proposal to subject acquisitions of non-controlling minority stakes to EU merger control 97

This article provides a critical review of the European Commission's proposal to bring certain acquisitions of non-controlling minority shareholdings within the scope of EU merger control law. In particular, the authors express concerns about the criteria for determining which minority share acquisitions would have to be notified to the Commission, the informational requirements of such a notice, and the amount of time for the Commission to open an investigation.

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This article discusses the use of transitional safeguards to protect consumers while competition develops in newly liberalised markets. Using the UK water market as a case study, it argues that transitional safeguards reduce dependency on the market and perpetuate dependency on the regulator. This could delay the development of competition and the consumer benefits associated with it: use with caution.

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This article examines how the Australian Federal Court in November 2014 came to the diametrically opposite conclusion to the 2011 New Zealand decision by rejecting the claim that the supply of inbound air freight was a market in Australia. Perram J dismissed the experts' views which persuaded the New Zealand court that it was "in part" in New Zealand as mere theory and based on a "complete absence of any evidence". The Australian judge was right to reject the arguments put forward by the ACCC, and that analysis of the data shows that importers were unlikely to have influenced the market for air freight in Hong Kong, Singapore and Jakarta as claimed.

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Whilst competition authorities seem to have tolerated MFN clauses in the past, the most recent investigations of MFN clauses by competition authorities in several EU Member States show that this is about to change. Rightfully so. MFN clauses typically restrict competition within the meaning of art.101 TFEU and they are abusive when used by dominant companies.

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Certain price cartels are unusual in the sense that the cartel members' behaviour is in some way fostered or sponsored by the government. In these cases, there seems to be a confusion between a private anti-competitive conduct and the government's prerogative to intervene in prices. The question was analysed by the ECJ in the *Consortio Industrie Fiammiferi* case (2003), in which public participation in cartels was considered to be a mitigating circumstance that was to be taken into account in the calculation of the fine imposed on the cartel members. However, the more recent EGC judgment in the *Raw Tobacco* case (2010) departed from this previous ruling, and considered that the participation of a government body in a cartel exempted the other members, in this case tobacco producers, from the requirements of competition law. In Spain, the same issue arose again when the Spanish Competition Authority fined several grape producers in the Jerez area. The producers' associations had regularly met at the Ministry of Agriculture to fix prices for each annual harvest, before selling grapes or must to wine producers. These meetings were held publicly and transparently, and were reported in the *Official Gazette*. In spite of this, the producers were fined for engaging in anti-competitive conduct, and they protested vigorously on the grounds that they were entitled to expect the government to act within the law. The judicial review ruled that the fines were void, initially because they had not been properly calculated and then more recently (2013) considering that the conduct constituted a negotiation between labour representatives and distribution representatives, and was therefore exempt from competition scrutiny. There is a mismatch in the exercise of public prerogatives by government and competition authorities. The same government that creates a cartel then opens proceedings to impose fines on it. This contradiction shows that such cases should be considered as exempt from competition scrutiny, or conversely, that the government should also be fined, as a cartel member.

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Google might have triggered the EU Commission's antitrust action. But the next step will be EU laws. And those laws will hit other market players as well. In fact, Google triggered an EU regulation for the entire industry, affecting Facebook, Amazon, Apple, Yahoo, Uber, Dropbox and all the others.

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In 2014 the Australian Competition Policy Review Panel conducted the first comprehensive review of Australia's competition law for 20 years. The 2014 Review seeks to ensure that Australian competition policy maintains its international competitiveness and also anticipates developments in relation to Asia, Australia's increasingly ageing population and the impact of the Digital Revolution. In its Draft Report published in September 2014 the Review Panel made numerous recommendations, and a Final Report is due to be published in March 2015. This article critically analyses those recommendations which have significant daily application in practice and in Australian courts.

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This comment deals with the Italian Antitrust Authority's recently published Guidelines on calculating fines for serious breaches of national or EU competition law.

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