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**ANTITRUST ISSUES INVOLVING MINORITY SHAREHOLDING AND INTERLOCKING
DIRECTORATES**

-- European Commission --

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MINORITY SHAREHOLDINGS AND INTERLOCKING DIRECTORATES

I. Introduction

1. Minority shareholdings and interlocking directorates¹ may play a role in the application of EC competition law, both in the field of merger control and in the context of the antitrust rules. The acquisition of minority shareholdings may only be assessed directly under the merger control rules (the EC Merger Regulation or ECMR²) to the extent that the holding confers effective control of the target business on the acquirer. Minority shareholdings may also be relevant for the calculation of the turnover of the firms involved in a merger transaction for the purposes of determining EC merger control jurisdiction over that operation. The impact of minority shareholdings and interlocking directorates may furthermore be looked in the substantive competition assessment of a merger case, including the assessment of possible remedial measures to allay concerns that have been identified. The European Commission (hereafter the Commission) and the European Court of Justice (ECJ) have likewise recognised that the acquisition or existence of minority shareholdings may in some cases be of importance in determining whether the EC's antitrust rules, Articles 81 (on restrictive agreements and concerted practices) and Article 82 (on abuse of dominance) of the EC Treaty, have been infringed.

1.1 Theories of harm

2. EC competition law recognises that minority shareholdings and interlocking directorates may, in some circumstances, produce adverse effects on competition.

3. A number of possible anti-competitive scenarios can be envisaged, which are set out in a general manner below. *First*, in some instances, structural links of this kind (minority shareholdings and interlocking directorates) may facilitate collusion or the unilateral exercise of market power by serving as a means by which market-sensitive information can be passed between competing enterprises. *Second*, the incentives of competing firms to compete vigorously – incentives which are generally assumed to be driven by the motive of profit maximisation – may be altered if one holds a significant stake in the other. If company A holds a significant share in its rival B it may have an incentive to replace unrestrained competition by collusion or at least “peaceful” coexistence, in order to maximise profits. If B also holds shares in A (so-called “cross-shareholdings”) this effect may be further strengthened. Likewise, if company A holds shares in both competitors B and C, it may have an incentive to lessen competition between the latter two firms. It is in general likely that these kinds of effects will be more pronounced in markets which are highly concentrated, or entry to which is particularly difficult. In these scenarios, the adverse impact on the level of competition may be even greater if there are interlocking directorships which provide competitors with an opportunity to access strategic commercial information concerning each other's business strategies, which can facilitate collusive behaviour or the unilateral exploitation of market power.

¹ The OECD request for contributions refers to both minority shares and interlocking directorships. This note focuses on the former, given that there is more experience in this area. However, the note mentions some cases where interlocking directorships gave rise to concerns in combination with minority shareholdings.

² Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings; Official Journal L 24, 29.01.2004, p. 1-22

Thirdly, the acquisition of a minority stake may be regarded as anti-competitive if it seems likely to have been made in pursuit of a strategy to deter entry to a market, or to have that effect. This may be the case, for example, if the acquiring firm's stake in a competitor makes it significantly more difficult for a third firm to enter the market via acquisition, or if it makes it less likely that the investing firm will itself enter the market where the target firm is operating.

2. Minority shareholdings in ec merger control

2.1 Acquisitions of minority stakes constituting a "concentration" under the ECMR

4. Under the ECMR, only those mergers and acquisitions ("concentrations") of a Community dimension (fulfilling certain turnover thresholds) are covered which result in lasting changes in the control of the target business. Consequently, the acquisition of a non-controlling minority shareholding does *not* constitute a concentration within the meaning of the ECMR. The change in control – usually via acquisition of a majority stake by one company in another - may take the form of *sole or joint control*. In both cases, control is defined as the possibility of exercising decisive influence over the target business in question. Sole control can be exercised by a minority shareholder on a *de jure* basis if specific rights are attached to the minority shareholding, or on a *de facto* basis (e.g. if the acquisition of the stake would enable the acquiring firm to form a majority at the shareholders' meeting, given that the remaining shares are widely dispersed).³ In the case of joint control, one or more of the jointly controlling parties may be a minority shareholder/s who must, however, reach agreement on major decisions concerning the jointly-controlled undertaking.⁴

2.2 The role of minority stakes in establishing merger control jurisdiction (turnover thresholds)

5. In addition to the requirement of a lasting change of control, the turnover achieved by the parties to the concentration is decisive in establishing whether the transaction falls under Community jurisdiction.

6. Minority shareholdings are normally not taken into account for the purpose of calculating the turnover of the undertakings concerned, unless the undertaking concerned directly or indirectly owns more than half of another undertaking's assets, has the power to exercise more than half of its voting rights, has the power to appoint more than half of its members of the relevant boards or has the right to manage the undertakings' affairs (Article 5(4) of the ECMR).

7. If the European Commission will take into account the turnover of the joint ventures held by one of the merging parties together with a third party in establishing the existence of Community jurisdiction (the existence of a merger with a "Community dimension, as set out in Article 1 of the ECMR). The attribution of turnover to the jointly controlling parent companies is normally made per capita. For example, in a joint venture with three controlling parent companies, one third of the joint venture's merchant sales are attributed to each parent company irrespective of their actual shareholdings.⁵

³ See Case COMP/M.4336 MAN/Scania of 20 December 2007; Case IV/M.754 Anglo American/Lonrho of 23 April 1997. Case COMP/M.2574; Pirelli/Edizione/Olivetti/Telecom Italia of 20 September 2001.

⁴ See Case COMP/M.3097 Maersk Data/Eurogate IT Global Transport Solutions JV of 12 March 2003.

⁵ One example for this is the case *Ameritech / Tele Danmark* where the EC stated: "Since Ameritech has joint control over Belgacom together with Tele Danmark, Singapore Telecom and the Belgian State, 25% of Belgacom's turnover is attributable to each parent."

2.3 *Minority shareholdings in the competitive assessment*

8. Minority shareholdings between competitors were considered in the competitive assessment of a number of merger cases assessed under the ECMR. It should be mentioned however, that in most if not all cases minority shareholdings were not considered in an isolated manner but as one of several relevant factors in the competition analysis. In connection with other factors, minority holdings between competitors may lead to competition concerns and warrant remedial action. Some examples are explained in more detail below.

9. In mergers involving an acquisition of sole control, the Commission attributes the market shares of a subsidiary to the merging party. In cases involving joint ventures between a merging party and a third party, the shares of the joint venture may likewise be taken into account in calculating the market shares. Market shares of joint ventures were attributed to the merging parties, for example, in the *General Electric / Honeywell*⁶ case. In *Vodafone / Mannesmann*⁷, both merging parties had separate joint ventures with third parties. The Commission argued that the merged group would be able to fully eliminate competition between these joint ventures and therefore attributed all joint venture sales to the merging parties. A similar argumentation was applied in *Veba / Viag*,⁸ where the Commission attributed BEWAG's and VEAG's sales entirely to the market shares of the merging parties, since none of these joint ventures with third parties would enter into competition with the controlling companies.

10. Several mergers raised competition concerns because the parties would have retained structural links and sometimes also personal links to a key competitor. This would have led to a serious reduction in competition and the incentives of rivals to compete. This was the case in *Thyssen/Krupp*⁹ because Krupp held a 10% stake in its competitor Kone, together with a number of contractual rights and interlocking directorships. In view of the oligopolistic nature of the market the Commission raised concerns that post-merger competition could be reduced. A similar situation arose when global insurance company *Generali*, proposed to acquire *INA*¹⁰, one of the largest Italian insurers. Generali held large stakes in its direct competitors as well as interlocking directorships. Minority shareholdings and interlocking directorships were also considered in the Commission's analysis of the *Allianz/Dresdner*¹¹ and *Nordbanken/Postgirot*¹² cases. In *Allianz/Dresdner* there were significant cross-shareholdings between the merged entity and its most important competitor in Germany, Munich Re. In *Nordbanken/Postgirot* the target company operated one of two giro payment systems in Sweden, while holding a significant share the second giro system operator, Bankgirot. In all these cases the Commission feared that the structural and/or personal links between competitors would seriously reduce competition after the merger.

11. In order to address these competition concerns the undertakings concerned offered remedies which mostly consisted in the divestiture or (gradual) reduction of the minority shareholding. These commitments served to remove structural links which could have led to the coordination of the commercial behaviour of the merging company and its rivals. In some cases structural remedies were accompanied by behavioural commitments, e.g. the notifying parties committed to sever interlocking directorships and other personal links by refraining from appointing to the Board of Directors and Executive Committee of

⁶ Case M. 2220 GE/Honeywell; Decision of 8 May 2001.

⁷ Case M. 1795 Vodafone/Mannesmann; Decision of 12 April 2000

⁸ Case M. 1673 Veba/Viag; Decision of 13 June 2000

⁹ Case M. 1080 Thyssen/Krupp; Decision of 2 June 1998

¹⁰ Case M. 1712 Generali/INA; Decision of 12 January 2000

¹¹ Case M. 2431 Allianz/Dresdner; Decision of 19 July 2001

¹² Case M. 2567 Nordbanken/Postgirot; Decision of 8 November 2001

the new entity persons holding operating and corporate functions in other competing companies. In other cases companies committed to reducing their mutual holdings and joint shareholdings in a competitor to a certain threshold as part of the planned merger. In some of these cases the parties also agreed not to exercise their voting rights attached to their shares pending the reduction/removal of the shareholding.

12. Minority shareholdings were also identified as a problem in two more recent merger investigations, one relating to the energy sector in the case *E.ON / MOL*¹³, the other one relating to the acquisition of *VA Tech* by *Siemens*¹⁴, concerning the building of metal plants. In the case *E.ON/MOL* the competition issues were related to market foreclosure created through vertical integration and a minority shareholding in an input supplier. In the latter, the Commission feared that a large minority stake of the merged entity in a rival would seriously weaken competition and create a dominant position. In both cases the competition concerns could be removed by divestiture commitments. These concentrations were subjected to an in-depth inquiry ("second phase") and are explained in more detail below.

13. The *E.ON/MOL* case relates to the acquisition by E.ON, a large energy operator active in the gas and electricity sectors, of the gas wholesale, trading (MOL WMT) and storage (MOL Storage) subsidiaries of MOL, the incumbent oil and gas operator in Hungary. The transaction would create a vertically integrated entity along the gas and electricity supply chains in Hungary. The Commission identified a risk of foreclosure of competitors on the downstream gas and electricity markets as the new entity would have both the ability and the incentive to discriminate against its competitors in these downstream markets. These concerns were reinforced by a 25%+1 minority shareholding that MOL would retain in MOL WMT. This minority stake would give MOL Transmission an incentive to reinforce the gas input foreclosure strategy to the detriment of E.ON's competitors downstream through discriminatory behaviour in granting access to the transmission network. In order to remove the various competition concerns identified during the procedure, E.ON submitted a package of commitments which the Commission accepted. One of the elements of the package, the divestiture of MOL's 25% shareholdings in MOL Storage and MOL WMT, was aimed at removing the concerns about reinforcement of incentives of the foreclosure strategy stemming from the structural links between MOL and E.ON.

14. In *Siemens/VA Tech* the Commission analysed *inter alia* the metal plant building market(s) in which the main competitors would be the acquired VA Tech (which is active in this field via its subsidiary VAI) and the undertaking SMS Demag in which Siemens held a 28% shareholding. The Commission's market investigation showed that competition between VA Tech and SMS Demag would be weakened owing to Siemens's minority stake in the latter. More particularly, the merger would create a significant impediment to effective competition through non-coordinated behaviour and possibly also by creating a dominant position for the merged entity because of VA Tech's market strength in this already concentrated market. A commitment to divest the stake in question removed these concerns, together with a commitment Siemens gave to replace Siemens' representatives on SMS Demag's shareholder bodies by trustees, thus ensuring the company's independence from Siemens until the final sale of the minority shareholding.

15. Finally, the Commission has sometimes required companies to dispose of (almost) all of their minority shareholdings in the wake of prohibition decisions, at least to the extent that the prohibited operation had already been fully implemented¹⁵. By contrast, in case *Ryanair/Aer Lingus*¹⁶ the Commission prohibited the concentration without requiring Ryanair to divest its minority stake of 25% in Aer Lingus.¹⁷

¹³ Case M. 3696 *E.ON/MOL*; Decision of 21 December 2005

¹⁴ Case M. 3653 *Siemens/VA Tech*; Decision of 13 July 2005

¹⁵ For example in cases *Tetra Laval/Sidel and Schneider/Legrand* the acquiring party was only allowed to keep a 5% stake

3. Minority shareholdings under articles 81 and 82 ec treaty

16. Both the European Court of Justice (ECJ) and the Commission have recognised that acquisitions of minority shareholdings may – in some circumstances – fall foul of the prohibitions contained in Articles 81 and 82 of the EC Treaty, i.e. the prohibitions of anti-competitive agreements and unilateral abuse of dominance respectively.

17. In the landmark *Philip Morris*¹⁸ ruling, the ECJ made a number of general statements concerning the applicability of Articles 81 and 82 to the acquisition of an equity stake by a firm in one of its competitors, although neither the Commission nor the Court considered that infringements had taken place in that particular case. The case concerned the acquisition by Philip Morris of a minority holding in one of its competitors, Rothmans, and the court judgement upheld the Commission's finding that the stake contravened neither Articles 81 nor 82.

18. With regard to Article 81, the court stated that: "Although the acquisition by one company of an equity interest in a competitor does not *in itself* constitute conduct restricting competition, such an acquisition may nevertheless serve as an instrument for influencing the commercial conduct of the companies in question so as to restrict competition on the market on which they carry on business. That will be true in particular where, by the acquisition of a shareholding or through subsidiary clauses in the agreement, the investing company obtains legal or *de facto* control of the commercial conduct of the other company or where the agreement provides for commercial cooperation between the companies or creates a structure likely to be used for such cooperation. That may also be the case where the agreement gives the investing company the possibility of reinforcing its position at a later stage and taking effective control of the other company. Account must be taken not only of the immediate effects of the agreement but also of its potential effects and of the possibility that the agreement may be part of a long-term plan." The court went on to state that an abuse of a dominant position contrary to Article 82 "can only arise where the shareholding in question results in effective control of the other company or at least in some influence on its commercial policy".

19. The extent to which it may be concluded that the minority stake is capable of having an anti-competitive impact will depend on the facts in the specific case. The possibility for the stake to enable influence to be exercised may depend, for example, on the extent and importance of the voting rights associated with the holding, on the degree of dispersion of the remaining shares among the other shareholders and on those other holders' voting rights, on the voting patterns of shareholders, on the content of applicable national or Community rules, on the content of the company's own internal statutes, and on any agreements between shareholders concerning the exercise of voting rights or on the commercial operation of the company more generally. The possibility of the investing company to be represented in the decision-making organs of the target company may also provide the former with access to commercially sensitive information, thereby perhaps facilitating coordination of the competitive behaviour of those companies or perhaps enabling the investing firm to more effectively exploit any market power it may possess. The acquisition of special rights by the investing company, such as a "right of first refusal" over future disposals of shares by other shareholders, may in some circumstances increase the likelihood of anti-competitive effects.

¹⁶ Case M.4439 Ryanair / Aer Lingus; Decision of 10 November 2007

¹⁷ However, this decision is at present under appeal with the European Court of First Instance, Case T411/07 Aer Lingus Group Plc. vs. Commission of the European Communities

¹⁸ Case 142 and 156/84 *British-American Tobacco Company Ltd and R. J. Reynolds Industries Inc. v EC of the European Communities*, [1986] ECR 1899.

20. It is also conceivable that Articles 81 and 82 could be applied to passive investments between competitors involving little or no influence by the acquiring firm over the commercial operations of the target enterprise, or even little or no access to commercially sensitive information. In those circumstances, it would however need to be demonstrated that the stake was capable of altering the incentives of the investing and/or target firm to such an extent as to have an appreciable adverse impact on competition. This might be the case, for example, if the market characteristics were such as to make it likely that the stake would render it more profitable for the two firms and/or their competitors to compete less vigorously than in the absence of the stake. Another conceivable anti-competitive scenario is that the stake was acquired with a view to making market entry more difficult, by diminishing the possibilities for potential entrants to enter the market via acquisition of existing operators.

21. The Commission has, for example, found Article 82 applicable to the acquisition by a dominant firm of minority shareholdings which do not confer decisive control over the company in which the stake was acquired. In *Warner-Lambert/Gillette*¹⁹, the Commission held that the acquisition by Gillette, which was dominant in the wet-shaving market in Europe, of a minority shareholding in its principal competitor, was contrary to Article 82. The Commission reached this conclusion notwithstanding the fact that the 22% stake in question conferred on Gillette very few formal powers; it obtained no voting rights or board representation. The Commission pointed out that "the structure of the wet-shaving market in the Community has been changed by the creation of a link between Gillette and its leading competitor" and that the change would have an adverse effect on competition. Referring to *BAT and Reynolds*, the Commission concluded that the management of Gillette's competitor would be "obliged to take into account" the position of Gillette, and that the minority stake would thereby influence its commercial conduct.

22. In terms of remedying the harm to competition brought about by the acquisition or possession of a minority stake, the rules on the implementation of Articles 81 and 82 (Article 7 of Regulation 1/2003) enable the Commission to "impose any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end. Structural remedies can only be imposed either where there is no equally effective behavioural remedy or where an equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy". Structural remedies would normally be appropriate in cases where anti-competitive conduct produces a change in the market structure, which is by definition the case for the acquisition or possession of a minority stake. In *Gillette*²⁰, for example, the Commission considered that the acquisition of a 22% share of the company that had acquired Wilkinson Sword, a competitor, constituted an abuse of a dominant position and expressly imposed an obligation on Gillette to dispose of that equity stake. Behavioural undertakings, such as the creation of "Chinese walls", would generally be regarded as sub-optimal at addressing structural competition concerns of this kind, both in terms of their effectiveness and in terms of the difficulties associated with monitoring their implementation.

4. Conclusion

23. The effect of minority shareholdings, cross-shareholdings and interlocking directorships have been assessed under the ECMR but also under the EC antitrust rules. Acquisitions of minority shareholdings which confer effective control – whether *de jure* or *de facto* – of the target business by the acquiring firm fall within the scope of the ECMR if they fulfil the required turnover thresholds and have to be notified to the Commission. In addition, there are merger investigations where existing minority shares held by the merged entity in a main competitor, or interlocking directorships, have given rise to

¹⁹ Case 93/252 *Warner-Lambert/Gillette* L116, 12.5.1993, p. 21

²⁰ EC Decision in *Warner-Lambert/Gillette and BIC/Gillette*, OJ 1993 L 116, page 21.

competition concerns. The European Court of Justice has furthermore confirmed that acquisitions of minority shareholdings not conferring effective control may be analysed under Articles 81 and 82. In most if not all cases the competition problems created by minority shareholdings or interlocking directorships could be resolved by structural, sometimes in combination with behavioural, remedies.