Minority shareholdings, interlocking directorships and the EC Competition Rules – Recent Commission practice

Enzo MOAVERO MILANESI, Directorate-General Competition, Director, and Alexander WINTERSTEIN, Directorate-General Competition, unit D-1

Minority shareholdings and interlocking directorships between competitors are, and have always been, a widespread practice in certain industries such as banking and insurance. Given that such links may influence the companies’ competitive behaviour and thus the market outcome, they are bound to attract the attention of competition authorities (1). Indeed, the Commission’s recent decisions in the Allianz/Dresdner (2) and Nordbanken/Postgirot (3) merger cases demonstrate the importance of this element in its analysis, and the US authorities appear to share the Commission’s concerns (4).

The main competition concerns

The concept of workable competition presupposes and requires economic operators to act independently from each other. Both minority shareholdings and interlocking directorships may jeopardise this essential requirement. In this respect, the main antitrust concerns can be grouped in the following three categories:

1. If X holds a significant share in competitor Y, their profit maximisation calculus may change as they take each other’s business interests into account. As a result, the economic incentives to compete are modified in that X and Y may compete less vigorously and adopt behaviour more conducive to joint profit maximisation (‘non-aggression understanding’). This effect will be even stronger in case of cross-shareholdings;

2. If X holds significant shares in both Y and competing Z, X will try to further his interests in both Y and Z, which is apt to lessen competition between the latter two;

3. Interlocking directorships may act as a conduit for anti-competitive transfer of price and strategic information.

Framework of analysis and possible remedies

The acquisition of a minority shareholding as such does not amount to a restriction of competition. However, the ECJ held, in its first and so far only judgement on this issue, that Article 81 applies to the acquisition of minority shareholdings in a competitor if it is apt to ‘serve as an instrument for influencing the commercial conduct of the companies in question so as to restrict or distort competition’ (5). The Court added that, in this respect, oligopolistic markets warrant particular antitrust scrutiny.

From this it follows that there is a ‘safe haven’ for minority shareholdings in competitive markets and without accompanying voting/representation rights, interlocking directorships, special rights (such as share options) or post-transaction cooperation arrangements. However, Article 81 (1)

(2) M.2431, Decision of 19 July 2001 (press release IP/01/1040)
(3) M.2567, Decision of 8 November 2001 (press release IP/01/1552)
(5) Joint Cases 142, 156/84, British American Tobacco Company Limited and R.J.Reynolds Industries Inc/Commission, ECR [1987] 4487 (hereinafter ‘Philip Morris’). The Court mentioned a number of scenarios in which the test would be satisfied, i.e., if the agreement either results in control or gives the acquirer the possibility to take effective control at a later stage, creates a structure likely to be used for commercial co-operation or necessarily leads the undertakings concerned to taking each others’ interest into account when making commercial decisions. In addition, the Court ruled that Article 82 can be infringed if the shareholder’s results in effective control of the other company or at least in some influence on its commercial policy’.

Number 1 — February 2002 15
may be applicable if and to the extent that the acquisition directly or indirectly influences the conduct of the undertakings concerned and thereby leads them to no longer act independently from each other.

The right and ability to exert influence will normally arise from company law or from contractual arrangements (1). However, even in the absence of such rights particular market conditions – in particular the degree of concentration and the existence of entry barriers – can be such as to lead to minority shareholdings (and even more cross-shareholdings) giving rise to the relevant degree of influence (2). Particularly in oligopolistic markets with high entry barriers such an operation may modify the economic incentives of the companies to compete or to deal with other companies (3). In such cases, therefore, the competition analysis should arguably not be limited to examining the ‘classic’ ways of exercising influence but should be extended to analysing the parties’ incentives to compete under the prevailing market conditions.

In the past, the Commission has addressed these competition concerns by imposing either structural remedies (i.e., divestiture of shareholdings and/or severance of interlocking directorships) or behavioural ones (e.g., setting-up of ‘Chinese walls’). The following section gives some examples.

Commission practice in antitrust cases…

In Enichem/ICI (4) – the first relevant decision after Philip Morris – the Commission exempted a production JV between Enichem and ICI only on condition that neither the parents nor the JV should hold any participation in competitors which could be used to influence the economic behaviour of such companies. In the same vein, there should be no interlocking directorships (5). Similarly, the Commission cleared the acquisition by BT of 20% in MCI, including interlocking directorships, because BT undertook not to attempt to influence MCI’s business conduct and not to acquire more than 20% within ten years following the transaction (6). In Olivetti/Digital (7), the Commission approved the acquisition by Digital of 8% in Olivetti, again including interlocking directorships, due to the fact that Olivetti’s board – where Digital was represented – had delegated all executive powers to its chairman. Consequently, neither co-ordination of business behaviour nor anti-competitive information flows were considered likely.

…and in merger proceedings

In Volvo/Renault, the Commission cleared the merger inter alia after Volvo undertook to sell its minority stake in Scania (8). The same approach was followed in AXA/GRE (9) where the Commission took issue with GRE’s minority shareholding in, and interlocking directorships with, its competitor Le Foyer. GRE undertook to sell its participation in Le Foyer, whereupon the Commission cleared the merger.

In the same vein, the Commission initially objected to the proposed merger between Thyssen and Krupp because Krupp held a 10% stake in its competitor Kone. Connected to this minority shareholding was a number of particular contractual rights granted to Krupp, including an inter-

---

1. Such arrangements include rights relating to voting, to representation, to acquisition of additional stock, to the establishment of interlocking directorships or to post-transaction co-operation. Whether such rights lead to an appreciable restriction of competition will depend – like in any other case – on an analysis of the legal and economic context.
2. In this context, it should be noted that under Article 82, minority shareholdings and/or interlocking directorships may be a factor leading to a situation of joint dominance. Moreover, in cases where undertakings already are in a dominant position (either individually or jointly), the acquisition of minority shareholdings and/or the establishment of interlocking directorships by such undertaking(s) may itself infringe Article 82. This may be because of the operation’s detrimental effect on market structure, of the erection of an additional entry barrier or – in a vertical context – of the foreclosure of competitors on an up/downstream market; see Commission Decision of 10 November 1992, Warner-Lambert/Gillette, BIC/Gillette, OJ [1993] No L 116/21.
3. Indeed, the Court in Philip Morris assessed whether – in view of the oligopolistic structure of the cigarettes market – the participation of Morris in its competitor Rothmans would lead to a linking of profits, giving those two companies an incentive to compete less vigorously. The Court concluded that Morris’s own commercial interests would outweigh its interest to protect its investment in its competitor Rothmans. In this context, note that it is generally under oligopolistic market conditions that an exchange of competitive information will become problematic: see, e.g., Case C-7/95 P, John Deere Limited/Commission, ECR [1998] L 311, at paragraph 67
5. Given that ICI did indeed hold a minority shareholding in a competitor at the time of notification, the Commission in fact imposed a structural remedy.
8. IV/M.1980, Decision of 1 September 2000
9. IV/M.1453, Decision of 8 April 1999
locking directorship. In view, *inter alia*, of the oligopolistic structure of the product market concerned, the Commission feared that such horizontal links could dampen the post-merger competition between the competitors Thyssen and Kone and cleared the operation only after Krupp undertook irrevocably to waive the exercise of its rights as well as to sever the interlocking directorship with Kone (\(^1\)).

Likewise, in *Allianz/AGF* (\(^2\)) the Commission did not accept the parties’ initial argument that Coface, at the time being AGF’s delcredere insurance subsidiary in France, would turn into an independent competitor to AGF after AGF would have reduced its shareholding in Coface to 24.9%. In reaching this conclusion, the Commission highlighted both business links and interlocking directorships between the two companies. It was only after AGF undertook to sever those interlocks (and to sell its stake in Coface) that the Commission cleared the transaction – without prejudice, naturally, to the possible application of Article 81 to the co-operation between AGF and Coface.

In *Generali/INA* (\(^3\)), the Commission was initially concerned, *inter alia*, about the fact that Generali held large stakes in its direct competitors and that interlocking directorships could, at least potentially, allow it to exert significant influence. To ease those concerns, the parties undertook, *inter alia*, not to establish interlocking directorships with competitors in Italy. The Commission considered that this commitment was likely to remove the risk of anti-competitive information flows. In addition, certain existing interlocks were severed, or announced to be severed, prior to clearance by the Commission. (\(^4\))

Finally, minority shareholdings and interlocking directorships played an important part in the Commission’s analysis of two recent merger operations. In *Allianz/Dresdner*, the Commission noted the existence of significant cross-shareholdings between the merged entity and its most important competitor in Germany, Munich Re/Ergo group. In particular, Allianz’ and Dresdner’s combined post-merger shareholding in Munich Re of 30-35% would, in view of the latter’s dispersed shareholder structure, in all likelihood have afforded the merged entity with a majority in Munich Re’s general shareholders’ meetings. Moreover, the Commission found that the market value of Munich Re’s shareholding in Allianz equalled more than one third of Munich Re’s own total market value. Consequently, any change in the market value of competing Allianz would have an immediate impact on Munich Re’s own economic situation.

In view of those circumstances, the Commission was initially concerned that, as a consequence of the transaction as notified, competition between the two groups would be significantly reduced. In order to remove the Commission’s concerns, Allianz and Dresdner undertook to reduce to 20.5% their joint holdings in Munich Re until the end of 2003, and to refrain from exercising their voting rights in excess of 20.5% already as of the date of the Commission’s decision.

Finally, in *Nordbanken/Postgirot* the Commission had to assess the proposed acquisition by Nordbanken, a large Swedish bank, of Postgirot, a Swedish company which owns and operates one of Sweden’s two giro payment systems – the second system being Bankgirot, an entity owned by a number of Swedish banks. Nordbanken held a significant shareholding in Bankgirot and was represented in the Bankgirot’s Board of Directors. Thus, following its acquisition of Postgirot, Nordbanken would have had access to confidential business information of the only competing giro system and could have exerted significant influence on strategic decisions by both systems. The Commission took the initial view that such a scenario could seriously reduce competition between the only two providers of giro payment services in Sweden.

In order to remove the Commission’s concerns, Nordbanken undertook to reduce its shareholding in Bankgirot to no more than 10% and to refrain from exercising any shareholder rights going beyond minority protection rights safeguarding the financial value of its participation. In addition, Nordbanken would withdraw all its representatives in Bankgirot’s Board of Directors, working groups or other bodies, and no commercial information available to the Board, the working groups and other bodies would be made available to Nordbanken (\(^5\)). In view of those commitments, the Commission cleared the transaction.

**Outlook**

This article has identified potential competition problems where there are shareholdings falling

---

(\(^1\)) IV/M.1080, Decision of 2 June 1998
(\(^2\)) IV/M.1082, Decision of 8 May 1998
(\(^3\)) COMP/M.1712, Decision of 12 January 2000
(\(^4\)) See press release IP/00/29
short of sole or joint control. The question is whether shareholdings, where they confer sufficient influence, alter the behavior of the companies concerned in a way that restricts competition under Article 81(1).

As this is a question of economic appraisal, there are no automatic thresholds above which concerns can always be triggered or below which concerns can always be excluded. It will be necessary to analyse each transaction in its specific legal and economic context. Similarly, whether the appropriate remedy is structural or behavioral will also vary depending on this context and the severity of the competition concern.

(5) For other examples of similar arrangements required by the Commission see its decision in AT&T/BT (JV.15) of 30 March 1999 and its comfort letter plus press release concerning Volbroker.com (IP/00/896). In both cases, the parties offered commitments with a view to avoid the exchange of sensitive business information.