COMPETITION POLICY INTERNATIONAL

CPI Antitrust Chronicle
January 2012 (1)

Minority Shareholdings and Interlocking Directorships: The European Union Approach

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I. INTRODUCTION

The debate about the antitrust treatment of minority shareholdings and interlocking directorships is certainly not new. The European Commission did, however, re-open the discussion earlier this century in its 2001 Green Paper, when considering the reform of the Merger Regulation that led to the adoption of the new European Merger Regulation ("EUMR").[2]

This debate has been reactivated recently following the *Ryanair* judgment of the General Court, which narrowed down the possibilities to apply the EUMR to the acquisition of non-controlling minority shareholdings.[3] In light of this judgment, the Vice-President of the European Commission (the "Commission") and Commissioner responsible for competition, Joaquín Almunia, announced, on March 10, 2011, that the Commission will consider again whether there is a gap in the assessment of minority shareholdings and "see whether it is significant enough for us to try and close this gap in EU merger control."[4]

This paper briefly summarizes the European Union's approach to minority shareholdings and interlocking directorships both from the merger control (EUMR) and antitrust perspectives (Articles 101 and 102 TFUE). In order to do so, the paper starts with a summary description of the main possible anticompetitive effects of minority shareholdings and interlocking directorships.

II. THE POSSIBLE EFFECTS ON COMPETITION OF MINORITY SHAREHOLDINGS

The approach to the acquisition of minority shareholdings and their possible effect on competition has changed substantially in the last thirty years. While in the 1980s Areeda & Turner considered that the acquisition of non-controlling shareholdings did not involve a

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[2] Council Regulation (EC) No 139/2004 of 20 January 2004 on the Control of Concentrations between Undertakings, O.J. L 24, 29.01.2004, p. 1-22.

[3] Case T-411/07, *Aer Lingus v. Commission*, July 6, 2010 [not yet reported].

[4] Press Release, *Joaquín Almunia Vice President of the European Commission responsible for Competition Policy EU merger control has come of age 'Merger Regulation in the EU after 20 years', co-presented by the IBA Antitrust Committee and the European Commission Brussels*, March 10, 2011, (*available at* http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/11/166&format=HTML&aged=0&language=EN&guiLanguage=en).

restriction of effective competition,[5] today, few competition economists and/or lawyers would be likely to make such a definitive statement.

As indicated by the OECD in its policy roundtable in 2008, antitrust enforcers should not underestimate the potential anticompetitive effects of minority shareholdings in competitors.[6] However, the likelihood and the magnitude of the potential unilateral or coordinated effects on the pricing decisions of the firms involved in this type of transactions heavily depend on a number of factors, such as: the degree of market concentration, entry conditions, the homogenous or differentiated nature of the products, diversion ratios, the type of firm owning the minority shareholding (a maverick or not), etc.[7]

Moreover, some authors have suggested that the analysis of the effects of minority shareholdings on competition should also take into account several important "real-world" factors[8]—namely, (i) information deficiencies, (ii) personal incentives of firm managers, and (iii) the difficulty in capturing any predicted gains—that can off-set and/or mitigate their possible harmful effects as they can have a significant countervailing effect on the incentives of the acquiring firm to reduce its competitive pressure as a consequence of the investment in the competing firm.[9]

A. Unilateral Effects

1. Minority Shareholdings

A partial acquisition can lessen competition by giving the acquiring firm the ability to influence the competitive conduct of the target firm. Such influence can be effected through the exercise of voting rights in the target firm or specific governance rights, such as the right to appoint members to the board of directors. Such influence can lessen competition because the

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[5] P. AREEDA & D. TURNER, ANTITRUST LAW, 1203d, at 322 "non-controlling acquisition has no intrinsic threat to competition at all."

[6] OECD Policy Roundtable concerning Minority shareholdings (2008) (Paper DAF/COMP(2008)30) (*available at* www.oecd.org/dataoecd/40/38/41774055.pdf), ("OECD Paper") D. O'Brien & S. Salop, *Competitive Effects on Partial Ownership: Financial Interest and Corporate Control,* 67 ANTITRUST J. 559-61467 (2000).

[7] OECD Paper, *id.*

[8] J. Dubrow, *Challenging the economic incentives analysis of competitive effects in acquisitions of passive minority equity interests*, 69 ANTITRUST L.J. 113 (2001). For a response, *see* D. Salop S. & D. O'Brien, *Competitive Effects on Partial Ownership: Financial Interest and Corporate Control: Reply,* 69 ANTITRUST L.J. 611 (2001).

Incomplete information. In the real world, the information available to the executives of a firm is incomplete because they are unable to determine the market dynamics and the economic returns of an investment accurately *ex ante*, that is to say, there is an inherent risk in all transactions carried out in the open market.

Management's Incentives. Every managerial team tends to focus on increasing its profits and revenues, and secondarily on those of its corporate shareholders, since its credibility—and its compensation—generally do not depend on the performance of the group but on the performance of its own entity. Therefore, any acquiring company would be unwilling to implement this joint-profit strategy promptly since, despite the theoretical overall positive outcome, its particular business would suffer damages in the short term while it benefits a competitor.

Inability to Capture Benefits. The capacity of the acquiring firm to obtain profits through its minority shareholdings is also uncertain, since there is a substantial market risk that should be taken into account when considering stock investments in an open market environment.

[9] OECD Paper, *supra* note 6.

acquiring firm can use it to induce the target firm to compete less aggressively or to coordinate its conduct with that of the acquiring firm.[10]

Moreover, a minority shareholding can lessen competition by reducing the incentive of the acquiring firm to compete with the target. The acquisition of a minority position in a rival might significantly blunt the incentive of the acquiring firm to compete aggressively because it will share a proportion of the losses thereby inflicted on that rival. This reduction in the incentive of the acquiring firm to compete arises even if it cannot influence the conduct of the target firm. As compared with the unilateral competitive effects of a full merger, this effect is likely attenuated by the fact that the ownership is only partial.[11]

2. Interlocking Directorships

The behavior of directors holding interlocking directorships in competing firms may be affected by their multiple interests in different companies. For example, a director may have an incentive to reduce competitive pressure on the companies where he or she also holds a directorship.[12]

Vertical interlocks traditionally have also been criticized on the ground that they can lead to preferential treatment at the expense of other suppliers or customers by facilitating reciprocal or exclusive dealing, tying arrangements, and vertical integration.[13]

B. Coordinated Effects

1. Minority Shareholdings

Minority shareholdings may alter the incentives of a given set of companies to compete by either facilitating access to confidential information or by exchanging it. The competitive balance can be altered since the prevailing uncertainty about how competitors are likely to react is substituted by a situation of certainty which may allow competitors to plan their firm's strategy taking into account their rival's likely strategy.[14]

According to a recent report commissioned by the U.K.'s Office of Fair Trading ("OFT"), this type of concern should be less problematic in the case of publicly traded companies, given the existence of reporting obligations that significantly restrict the amount of non-public information and limit the value of any increased information flows.[15]

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[10] U.S. HORIZONTAL MERGER GUIDELINES, section 13 on partial acquisitions at 33 and 34. O'Brien & Salop, *supra* note 6.

[11] U.S. HORIZONTAL MERGER GUIDELINES section 13 on partial acquisitions at 34. O'Brien & Salop, *supra* note 6.

[12] The report commissioned by the Office of Fair Trading (OFT) from DotEcon., MINORITY INTERESTS IN COMPETITORS, (2010) (*available at* http://www.oft.gov.uk/shared_oft/economic_research/oft1218.pdf) ("OFT report"). OECD Paper, *supra* note 6, "If directors benefit from increased performance of some of the companies where they hold directorships without suffering from poorer performance of others, interlocking directorships may make it individually rational for directors to limit competition even if this is not in the interest of the respective shareholders."

[13] OECD paper, *supra* note 6 at 50. Areeda & Turner, *supra* note 5, ¶ 1303.

[14] OFT report (2010) *supra* note 12, 5.15 to 5.21.

[15] OFT report (2010) *supra* note 12, 5.21 and accompanying footnote 54. Although one might argue that there is still confidential information discussed at the board level that is not consequently disclosed.

According to Gilo & Ezrachi, there may be a risk of coordinated effects even if a firm acquires a passive shareholding in a competitor, provided that the acquirer is the industry maverick.[16]

2. Interlocking Directorships

From a competition policy perspective, and because vigorous competition is premised on firms taking business decisions independently from each other, interlocking directorates may raise questions as to the companies' independence and their ability to perform competitively in the market. In some situations, interlocking directorates may indeed have the potential to reduce or eliminate competition and to facilitate collusion. In particular, from an antitrust perspective, these arrangements could lead to horizontal coordination of the business conduct of competing firms through the exchange of information.[17]

C. Preventing A Competitor From Acquiring The Target Company Or Deterring Entry To A Market

The acquisition of a minority shareholding in a competitor may also act as an entry deterrent mechanism.[18] The possibility that a minority shareholding may be used to block the acquisition of a target company by a competitor, or at least the likelihood of such a threat, was identified by the European Commission in 2008 within the framework of the OECD Roundtable on minority shareholdings. According to the Commission, competition concerns could arise when a firm holds a minority shareholding in a competitor if it: (i) significantly impedes third-party access to the equity of the target via acquisition, or (ii) it makes it less likely that the acquirer enters itself in the market where the target is active.[19]

D. Efficiencies

1. Minority Shareholdings

According to the OFT report, minority shareholdings merely create a financial interest in the performance of other firms in the market, without much scope for rationalization or avoiding cost duplication.[20]

The report does acknowledge, however, that minority shareholdings allow firms to diversify risks and thus reduce their costs (as firms face reduced uncertainty). Minority shareholdings might thus be both profitable and have the effect of sharpening competition to the benefit of consumers.[21]

2. Interlocking Directorships

According to the report commissioned by the OFT, interlocking directorships may be more likely than minority shareholdings to generate efficiencies. First, information sharing in an

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[16] A. Ezrachi & D. Gilo, *EC Competition Law and the Regulation of Passive Investments Among Competitors*, 26 (2) OXFORD J. LEG. STUDIES 327-349 (2006).

[17] OECD paper, *supra* note 6 at 50.

[18] F.E. González-Díaz, *Joint Ventures under EC Competition Law: The new boundaries,* MÉLANGES EN HOMMAGE À MICHAEL WAELBROECK (1999) 1019 - 1069

[19] A. Ezrachi, & D. Gilo, D. *supra* note 16, Contribution of the European Commission to the OECD policy report, OECD paper, *supra* note 6.

[20] OFT report (2010) *supra* note 12 at 5.23.

[21] OFT report (2010), *supra* note 12 at 5.24.

oligopoly market may reduce market uncertainty, which not only has an impact on the likelihood and effectiveness of collusion, but may also help to improve business decisions and so, in some circumstances, increase consumer and social welfare.[22]

These efficiencies are not restricted to vertically related firms. Interlocking directorships can also improve informational links with financial institutions (banking and insurance). Asymmetric information between customers and financial institutions may lead to severe inefficiencies and even market breakdown. In such markets information exchange may lead to welfare improvements since it may significantly reduce the problems of asymmetric information.[23]

III. MINORITY SHAREHOLDINGS AND INTERLOCKING DIRECTORHISP UNDER EUROPEAN LAW

Minority shareholdings and interlocking directorships can be assessed under three different legal provisions: the EUMR,[24] Article 101 TFEU, and Article 102 TFEU. The following section explores the Commission's jurisdiction over minority shareholdings and interlocking directorships under each of these provisions.

A. The Commission's Decisional Practice with Regard to Minority Shareholdings and Interlocking Directorships under the EUMR

Since its entry into force in 1990, the EUMR has allowed the Commission to review concentrations with a Community dimension.[25] According to the EUMR a concentration takes place when there is "change of control" on a "lasting basis."[26] Under the EUMR "control" refers to those rights, contracts, or any other means which, either separately or in combination—and having regard to the considerations of fact or law involved—confer the possibility of exercising "decisive influence" on an undertaking.[27]

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[22] OFT report (2010), *supra* note 12.

[23] OFT report (2010), *supra* note 12.

[24] Council Regulation (EEC) No 4064/89 of 21 December 1989, on the control of concentrations between undertakings, replaced by Council Regulation (EC) No 139/2004 of January 2004 on the Control of Concentrations between Undertakings OJ [2004] L24/1

[25] According to Article 2 EUMR, a transaction has community dimension when:

(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5 000 million; and (b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State'. Besides, Article 3 EUMR states that 'a concentration that does not meet the thresholds laid down in paragraph 2 has a Community dimension where: (a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2 500 million; (b) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million; (c) in each of at least three Member States included for the purpose of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million; and (d) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.'

[26] Article 3(1) EUMR.

[27] Article 3(2) EUMR. The EUMR does not define the concept of decisive influence, but the Commission's decisional practice and its Consolidated Jurisdictional Notice ("Jurisdictional Notice") provide some clarification as to when a minority shareholding can grant decisive influence over a partially owned firm. Generally speaking the Commission considers that a given firm is in a position to exercise decisive influence when it has additional rights

Thus, a minority shareholding or an interlocking directorship will only fall under the EUMR's scope of review if they lead, either separately or jointly, to the acquisition of decisive influence over the target. On the contrary, in those cases where the minority shareholdings are either purely passive or grant some degree of influence to the acquiring firm but not control, the Commission will not be empowered to review the transaction under the EUMR.

In addition, and following the ruling of the General Court in *Ryanair,* the Commission would lack the power to order the divestment of those minority shareholdings acquired in the context of a planned creeping acquisition of control over the acquired firm where the acquisition of control is not ultimately implemented (i.e. whenever the acquiring firm does not ultimately obtain control over the target).

In its assessment of any given transaction the Commission does, however, take into account the presence of both minority shareholdings and interlocking directorships and their potential anticompetitive effects.

In *Thyssen/Krupp*,[28] the Commission noted that the merger between Thyssen (the market leader) and Krupp would create links between the former and Kone (the second largest competitor, in which Krupp held a minority shareholding of 10 percent). Krupp had the right to be represented on Kone's board of directors by appointing one member. The Commission feared that given the possibilities of Thysen/Krupp to influence Kone, the merged entity would: (i) subject Kone to the commercial strategy of the group, (ii) have incentives unilaterally to take Kone's commercial interest into account, and (iii) grant Thyssen access to sensitive information through Krupp's representative on the board of directors. The Commission allowed the retention of the minority interest subject to Krupp's waiver in relation to certain contractual rights and the right to appoint a board director of Kone.[29]

Similar concerns were expressed in *Allianz/Dresdner*.[30] In this case, both Allianz and Dresdner held a minority interest in Münchener Rück, one of their competitors. Similarly, Münchener Rück held a minority shareholding in both parties. The Commission observed that the combined Allianz/Dresdner would hold 30-35 percent of Münchener Rück's shares and this stake would have given them a majority vote in two out of three general meetings preceding the Commission's decision. The Commission noted that since the general tendency of the shareholders was not to attend the general meetings, and that 45 percent of Münchener Rück's shares were scattered over many small shareholders, Allianz was likely to have the majority vote at future general meetings as well. In addition, Münchener Rück's holding in Allianz/Dresdner accounted for one third of Müncheners Rück's market value, so the small shareholders would have the incentive to vote with Allianz/Dresdner. The merger was cleared after Allianz and Dresdner's commitment to reduce its shareholding in Münchener Rück to 20.5 percent.

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that allow it to veto decisions which are essential for the strategic commercial behavior of the target. Veto rights that confer control typically include decisions on issues such as the budget, the business plan, major investments, or the appointment of senior management.

[28] Case IV/M.1080, *Thyssen/Krupp*, Commission decision of June,2 1998 (1998 OJ C252/7).

[29] M. Reynolds & D. Anderson, D., *Acquisitions of Minority Interests in Competitors: The EU Perspective*, American Bar Association, Spring Meeting (2005).

[30] Case COMP/M.2431, *Allianz/Dresdner*, Commission decision of July 19, 2001 (2001 OJ C316/13).

In *AXA/GRE*,[31] the Commission stated that the 34.8 percent stake of GRE in Le Foyer (a leading insurance company in Luxembourg) would give AXA—also active in the insurance market—strong incentives not to challenge Le Foyers's market position and thus raised concerns about competition in the highly concentrated market for non-life insurance. In order to remedy the competition concerns, AXA undertook either: (i) to sell an undisclosed percentage of GRE'S stake in Le Foyer to buyers independent of AXA and to sever "all personal links" between GRE and Le Foyer or (ii) to divest certain undisclosed insurance portfolios to one or more competitors who would be credible challengers of the two leading players.[32]

In *Nordbanken/Postgirot* [33]the Commission assessed the acquisition by Nordbanken, a large Swedish bank, of Postgirot, one of Sweden's only two companies offering giro payment systems. Nordbanken held a significant shareholding in Bankgirot, Postgirot's only competitor, and was represented in Bankgirot's board of directors. According to the Commission, following its acquisition of Postgirot, Nordbanken could 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 cleared the transaction once Nordbanken undertook to reduce its shareholding in Bankgirot to no more than 10 percent 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 ensure a firewall so no commercial information available to the Board, the working groups, or other bodies would be made available to Nordbanken.[34]

In *Ryanair/ Aerlingus*,[35] the Commission prohibited Ryanair's acquisition of Aer Lingus. Ryanair had made a conditional offer on Aer Lingus. This offer lapsed following the opening of the second phase investigation. In the meantime, however, Ryanair had acquired a shareholding of close to 30 percent in Aer Lingus. Following the prohibition decision, Aer Lingus requested the Commission to order the divestment of Ryanair's minority shareholdings in Aer Lingus. The Commission took the view that, since there had been no concentration as Ryanair had not acquired control over Aer Lingus as a result of the prohibition decision, it could not order the divestment of a minority shareholding that did not grant Ryanair decisive influence over Aer Lingus.

Aer Lingus appealed the decision before the General Court, which dismissed all of Aer Lingus's arguments. The Court concluded that the Commission was right in holding that a concentration can only be deemed to have been "implemented" under Article 8(4) EUMR if the acquiring party had acquired control, either *de facto* or *de jure*, over the target. The Court analyzed whether Ryanair's shareholding granted it control, i.e. decisive influence, over Aer Lingus. In this regard, the Court highlighted that the law of the European Union had made an express choice to review, under the EUMR, only those minority shareholdings which granted decisive influence, as opposed to other jurisdictions, such as Germany or the United Kingdom, "in which the national authorities are authorized under provisions of national law on the control of concentrations to

[31] Case No. IV/M. 1453, *AXA/GRE*, Commission decision of April 8, 1999 (2000 OJ C30/6).

[32] *Id*. at 36.

[33] Case COMP/M.2567, Nordbanken/Postgirot, Commission decision of November 8, 2001.

[34] E. Moavero Milanesi & A. Winsterstein, *Minority shareholdings, interlocking directorships and the EC Competition Rules—Recent Commission practice*, COMPETITION POL'Y NEWSLETTER (2002).

[35] Case COMP/M.4439 – *Ryanair/Aer Lingus*, Commission decision of June 27, 2007 (2008 OJ C47/9).

take action in connection with minority shareholdings in the broader sense."[36] The Court concluded that, although Ryanair held some rights as a result of its shareholding, it was undisputed that such rights did not grant Ryanair the right to control Aer Lingus.

The Court did not, however, ignore entirely the anticompetitive concerns raised by Aer Lingus and undertook a brief but thorough analysis of the potential anticompetitive effects of Ryanair's minority stake in Aer Lingus. However it ultimately reached the conclusion that all the theories of harm suggested by Aer Lingus were unfounded.[37]

B. The Commission's Powers to Review Minority Shareholdings Under Articles 101 TFEU and 102 TFEU

1. Philip Morris

In *Philip Morris*,[38] the European Court of Justice acknowledged that although the acquisition by one company of an equity interest in a competitor does not, by 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 or distort competition in the market in which they carry on business.[39] According to the Court, this would specifically be the case where: (i) the acquisition of a shareholding provides legal or *de facto* control of the commercial conduct of the other company, (ii) the agreement provides for commercial cooperation between the companies, or (iii) it creates a structure likely to be used for such cooperation.[40]

The Court concluded that the transaction did not fall under any of these categories and indicated, in addition, that the Commission's decision fell within its margin of discretion, absent any manifest errors of appreciation.[41] Nonetheless, the Court considered whether, in the circumstances of this case, Philip Morris's shareholding in Rothmans International compelled the companies to take into consideration each other's interest.

In particular, the Court concluded that although Philip Morris had sufficient votes to block certain special resolutions that possibility was too hypothetical to amount to a real threat.[42]

With regard to the unilateral effects arising out of the possible modification of the parties' incentives to compete, the Court indicated that there were no grounds for the conclusion that the acquisition of a shareholding might have resulted in a market-sharing agreement. Although Philip Morris had an interest in the success of Rothmans International, its first interest remained in increasing its own market share and turnover.[43]

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[36] Case T-411/07, *Aer Lingus v. Commission*, July 6, 2010 [not yet reported] at 64.

[37] For a more detail analysis, F. E. González-Díaz, *Minority shareholdings and creeping acquisitions*, FORDHAM COMPETITION LAW INSTITUTE 2011, Chapter 17.

[38] Cases 142/85 and 156/84, *British American Tobacco Company Limited and R. J. Reynolds Industries Inc. v European Commission* ("Philip Morris") 1987 ECR 4487.

[39] Philip Morris, *supra* note 38 at 37.

[40] Philip Morris, *supra* note 38 at 38.

[41] For a more detailed discussion of this judgment *see*, K. Banks, *Mergers and Partial Mergers under EEC Law*, 11 FORDHAM INT'L L.J. 255 (1987), at 307 (focusing on the fact that the companies had remained independent), B. Hawk & H. Huser (1993) *supra.* at 299 (focusing on the concept of control) and R. Struijlaart at 189 (focusing on the margin of discretion).

[42] Philip Morris, *supra* note 38 at 49.

[43] Philip Morris, *supra* note 38 at 50 and 51.

With regard to Article 102 TFEU, the Court indicated that, in order for the acquisition of a minority ownership to constitute an abuse of a dominant position, it is necessary that "the shareholding in question results in effective control of the other company or at least in some influence on its commercial policy."[44]

Philip Morris thus provides the legal basis for the Commission's possible application of Articles 101 TFEU and 102 TFEU to the acquisition of minority shareholdings in competing undertakings. Indeed, based on this ruling, the European Commission could, under the right circumstances, conclude that the acquisition of a minority stake in a competitor infringes Articles 101 TFEU and 102 TFEU either in situations where the acquisition in question serves as an instrument for influencing the commercial conduct of the companies in question, or where it modifies the unilateral incentives of the firms to compete.

The Commission has made it clear that it considers that the reasoning applied by the ECJ in *Philip Morris* to be still applicable despite the entry into force of the EUMR.[45]

2. BT/MCI[46]

In July 1994, the Commission had the opportunity to review the applicability of Article 101 TFEU to a non-controlling minority interest. In this case the Commission assessed whether BT's acquisition of a 20 percent stake in MCI, which would make it the largest single shareholder in MCI with proportionate board representation and investor protection, infringed Article 101 TFEU.

The Commission explained that:

> as a general rule, both the Commission and the Court of Justice have taken the view in the past that Article 85 (1) does not apply to agreements for the sale or purchase of shares as such. However, it might do so, given the specific contractual and market contexts of each case, if the competitive behavior of the parties is to be coordinated or influenced.

The Commission thus assessed whether the presence of BT's nominees on the board of MCI could give rise to coordination of the competitive behavior of the two companies, in particular given the access that BT would have to MCI's confidential information. The Commission concluded that the investment agreement had been drafted in such a way that BT did not have the possibility to seek "to control or influence" the company.[47]

In addition, the Commission pointed out that both American corporate and antitrust laws would impede any misuse of (or even access to) any piece of confidential information of MCI by BT. For these reasons, the Commission concluded that the investment by BT in MCI did not fall within the scope of Article 101 TFEU.

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[44] Philip Morris, *supra* note 38 at 65. The European Court of Justice later confirmed the application of article 102 to the acquisition of minority shareholdings in *Gillette,* Case IV.33.440 -*Warner-Lambert/Gillette,* Commission decision of November 10, 1992 (1193 OJ L 116/21).

[45] Case No. IV/34.857 BT/MCI, Commission decision of July 27, 1994 (1994 OJ L223/36) and Case No. IV/34.410 *Olivetti/Digital*, Commission decision of November 11, 1994 (1994 OJ L309/24)

[46] Case No. IV/34.857 BT/MCI, Commission decision of July 27, 1994 (1994 OJ L223/36) ("BT/MCI").

[47] "The IA has been drafted in such a way that BT does not have the possibility to seek to control or influence the company. This is particularly so in the case of the obligations found in Articles 7 (1) (not to increase shareholding for 10 years) and 7 (3) (not to seek to control or influence the company)." *See* BT/MCI, *supra* note 46 at 44.

The *BT/MCI* decision proves very insightful since the Commission: (i) clarified that as a general rule it would not apply Article 101 TFEU to the purchases of shares, (ii) indicated that it would require at least some degree of influence or coordination to find an Article 101 TFEU infringement,[48] (iii) emphasized that its main concern was the potential for unlawful exchanges of information, and (iv) acknowledged the importance of competition and corporate law as a constraint on the anticompetitive effects arising out of minority shareholdings in a competitor.[49]

The Commission's emphasis on the need for some influence and/or coordination to exist should be stressed, since, in line with the *Philip Morris* judgment, it indicated that the Commission was willing to challenge under Article 101 TFEU those minority shareholdings that can lead to some degree of coordination.[50]

3. *Olivetti/Digital*[51]

Shortly thereafter, in November 1994, the Commission approved a cooperation agreement in the field of computer systems between the two companies, which was accompanied by the acquisition by Digital of approximately 8 percent of Olivetti's share capital. The Commission concluded that the agreements would not lead to a change in the control of Olivetti or to a coordination of the parties' business behavior.

The analysis in *Olivetti* focused on evidence about influence. According to the Commission, since: (i) Digital's minority share acquisition of Olivetti did not lead to a change in the control of Olivetti,[52] and (ii) it was unlikely that Digital's representation on Olivetti's board of directors would have led to a coordination of competitive behavior or to an exchange of competitive information (the board of directors of Olivetti had delegated all of its operative functions to Olivetti's Chairman and General Manager), there was no infringement of Article 101 TFEU.

IV. CONCLUSIONS

The acquisition of minority shareholdings and/or interlocking directorships leading to the possibility to exercise "decisive influence" are, in principle, covered by the EUMR. The indirect

[48] BT/MCI, *supra* note 46 at 44 "As a general rule, both the Commission and the Court of Justice have taken the view in the past that Article 85 (1) does not apply to agreements for the sale or purchase of shares as such. However, it might do so, given the specific contractual and market contexts of each case, **if the competitive behaviour of the parties is to be coordinated or influenced**." (emphasis added).

[49] BT/MCI, *supra* note 46 at 44 "The Commission consequently assessed whether the presence of BT's nominees to the board of MCI could give rise to coordination of the competitive behaviour of the two companies, in particular given the access that BT will have to MCI's confidential information. In this respect, the IA has been drafted in such a way that BT does not have the possibility to seek to control or influence the company. This is particularly so in the case of the obligations found in Articles 7 (1) (not to increase shareholding for 10 years) and 7 (3) (not to seek to control or influence the company). In addition both **American corporate and antitrust laws would impede any misuse of (or even the access to) any piece of confidential information of MCI by BT**." (emphasis added). Note that these arguments are in line with Dubrow's criticisms of O'Brien and Salop theories

[50] Ezrachi & Gilo, *supra* note 16 at 340.

[51] Case No. IV/34.410 *Olivetti/Digital*, Commission decision of November 11, 1994 (1994 OJ L309/24)

[52] Digital was not allowed to purchase any interest in Olivetti that would have resulted in a holding of more than 10 percent. Digital was prohibited from entering into voting arrangements with third parties in respect of its Olivetti shares. There were no veto rights that could have given Digital, immediately or at a later stage, a controlling power over Olivetti.

acquisition of a minority shareholding which does not lead to the acquisition of control can nevertheless be assessed in the context of the review of the main transaction. As to the acquisition of minority stakes in the context of creeping acquisitions of control, two scenarios can be distinguished: (i) those where the actual purchase that granted control has been implemented, and (ii) those where the purchase that would have granted control has not been implemented.

In the first scenario, the Commission might compel the acquiring firm to divest all the shareholdings actually purchased, regardless of the different stages at which they were acquired. In the second scenario, the Commission will not be able to compel the acquiring firm to divest its minority shareholdings.

Minority shareholdings and/or interlocking directorships that do not grant the acquiring party control over the competitor fall outside the scope of application of the EUMR. However, the entry into force of the EUMR does not prevent the possibility to apply Articles 101 or 102 TFEU to the acquisition of minority shareholdings and/or interlocking directorships.[53]

The question, however, arises whether the Commission would be able to review the legality of minority shareholdings and/or interlocking directorships that might affect competition as a result of unilateral or even coordinated effects under Article 101 TFEU. As noted above, *Philip Morris* does not completely close the door to such an analysis and, in fact, the evolution of the Court's case law thereafter seems increasingly open to an effects-based interpretation of Article 101.[54] As to Article 102 TFEU, the Commission's ability to intervene would be subject to similar caveats in addition to being limited to cases involving a dominant firm or group of dominant firms.[55] It thus remains uncertain whether the purely structural unilateral and/or coordinate effects of passive minority shareholdings can or will be reviewed under these provisions.

This state of affairs was acknowledged by the Commission in its 2001 Green Paper on the Review of Council Regulation (EEC) No 4064/89 ("Green Paper"). However, following the consultation process, the Commission chose not to propose to bring the acquisition of minority shareholdings within the scope of the EUMR. There are two broad categories of arguments against the institution of a system of mandatory *ex ante* control of acquisition of minority shareholdings. This first includes those of a regulatory nature, i.e. how to define the category of notifiable minority shareholdings so as to provide all the benefits deriving from legal certainty without unduly burdening firms with additional filing requirements. The second includes

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[53] M. Reynolds & D. Anderson, *Acquisitions of Minority Interests in Competitors: The EU Perspective*, American Bar Association, Spring Meeting (2005).

[54] Case C-8/05 P, *New Holland Ford Ltd v Commission,* ECR I-3175 at 90:

> According to the settled case-law of the Court, in order to determine whether an agreement is to be considered to be prohibited by reason of the distortion of competition which is its effect, the competition in question should be assessed within the actual context in which it would occur in the absence of the agreement in dispute (see, in particular, Case 56/65 Société Technique Minière [1966] ECR 337 and Case 31/80 L'Oréal v De Nieuwe AMCK [1980] ECR 3775, paragraph 19). 91 Article 85(1) does not restrict such an assessment to actual effects alone; it must also take account of the agreement's potential effects on competition within the common market (see, to this effect, Case 31/85 ETA v DK Investment [1985] ECR 3933, paragraph 12, and Joined Cases 142/84 and 156/84 BAT and Reynolds v Commission [1987] ECR 4487, paragraph 54). As the Court of First Instance correctly reiterated, an agreement will, however, fall outside the prohibition in Article 85 if it has only an insignificant effect on the market (Case 5/69 Völk v Vervaecke, cited above, paragraph 7).

[55] Ezrachi & Gilo, *supra* note 16.

arguments of a policy nature, i.e., whether, and to what extent, there is a sufficient body of theoretical and empirical evidence about the anticompetitive effects of minority shareholdings and their magnitude to justify the institution of a mandatory system of *ex ante* control given the possibilities open to the Commission under the EUMR and Articles 101 and 102 TFEU.

In this regard, it is worth emphasizing that the limited frequency and the potentially limited impact of the possible anticompetitive effects of these transactions in the real world warrants a cautious approach if further regulation, if any, were to be adopted in this field.[56]

[56] For an overview of the reasons why further regulation might not be the adequate response, see F. E. González-Díaz, *Minority shareholdings and creeping acquisitions*, Fordham Competition Law Institute 2011, Chapter 17.