Non-controlling Minority Shareholdings in European Merger Control and under Article 101 TFEU

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Introduction (1)

An old issue in EU competition Law

- Before EC Merger Regulation

  ECJ. British American Tobacco (1987)

- Since EC Merger Regulation: *summa divisio*

- Minority shareholdings that constitute concentration because they confer control

- Minority shareholdings which do not confer control under art. 3 (2)

- Discussion on the merits of the solution in 2001, but no change in regulation 139/2004

Introduction (2)

An acute discussion before the Courts

The Saga *Aer Lingus/Ryanair Case (EU Side)*

- An attempt of creeping merger: Ryanair: 19,21 % to 25,17 %, bid launched in October 2006
- Commission, Prohibition decision. 27 June 2007
- GC, 6 July 2010. 2 decisions

- Ryanair's appeal rejected (T-342/07)
- Aer Lingus's appeal: request to initiate a procedure under art. 8 (4) and to adopt interim measures under art. 8 (5); dismissed (T-411/07)

Introduction (3)

An acute discussion before the Courts

The Saga ***Aer Lingus/Ryanair Case (British Side)***

- **OFT**: Oct. 2010: opening of an investigation
- **CAT**: Ryanair: OFT'investigation time-barred?

Judgment: July 2011; dismissed since the OFT cannot intervene before the GC judgments.

Sept. 2011; permission to appeal denied

- **Court of Appeal** (order): Nov. 2011; permission to appeal granted

Introduction (4)

The next step before the Commission

- Commissioner'speech, 10 March 2011: an issue to examine

- Commission services are currently assessing the issue

- Tender COMP/2011/016 (deadline, 15 Sept. 2011)

Study on the importance of minority shareholdings in the EU

- Tender COMP/2011/029 (deadline, 17 Nov. 2011)

Provision of data on the importance of minority shareholdings

Introduction (5)

An acute discussion among all stakeholders

- *Before the Aer Lingus Case: Competition Authorities*

OECD roundtable (2008), OFT (2010)

- *Since the Aer Lingus Case: broad litterature*

- *Concurrences*, n° 3-2011, Merger Control and minority shareholdings: Time for a change?
- *Concurrences,* n° 1-2012, Participations minoritaires et concentrations,
- *Competition Policy International*, January 2012, vol. 1

Introduction (6)
Presentation's outline

- The current situation

1. Is there a gap in EU competition law?
2. Is convergence needed in Europe?

- Possible ways forward

1. Minority shareholdings in general?
2. Minority shareholdings post prohibition?

I. The current situation

1. **The gap issue**?
2. **The divergence issue**?

1. The gap issue?

Preliminary data to keep in mind

- Various types of minority stakes: controlling, influential, silent

- Under EUMR, Commission

- Can examine acquisitions of minority shareholdings that confer single or joint control
- Has no jurisdiction to examine acquisitions of minority stakes which do not confer control

1.1. The economic approach

- **Evolution**:
- in the 80': no problem (Areeda & Turner)
- Now: a real concern for CA (OECD, 2008; OFT, 2010)

- **Two interrelated topics**: minority shareholdings strictly speaking, but also interlocking directorships

- **Why such a concern**? can affect the firms' decisions

2 distinct channels

- Shifting incentives
- Facilitating sharing of information

1.1.1.Risks in horizontal mergers

3 main risks

- **(Partial) unilateral effects**

- Reduction in the incentive to compete
- Change of incentives could lead to anticompetitive unilateral effects, when

- The relevant market is concentrated
- The parties involved are key players in the market
- The parties are close competitors
- The magnitude of passive investment is large enough

1.1.1. Risks in horizontal mergers (2)

- **Coordinated effects**
- Unilateral or bilateral communication of strategic information
- Improved communication could facilitate anticompetitive conduct and tacit collusion

- **Entry deterrent mechanism**

1.1.2. Risks in vertical mergers

- **Unilateral effects**

  Preferential treatment

  Facilitating reciprocal or exclusive dealing, tying arrangements

- **Deterrence mechanism**

  The French example of mass retail.

1.1.3. Conclusions

- Existence of **risks** of anticompetitive conducts

but

- Sometimes, **efficiencies** (OFT report)
- **Need to take into account « real-world factors »**

AS USUAL: NO GENERAL RULE

1.2. The legal approach

1.2.1. EU Merger rules (1)

Under EU merger rules, need to make a distinction between two different issues:

- Does the Commission have jurisdiction?
- Can the Commission intervene against a minority stake after a prohibition of an implemented concentration?

1.2.1. EU Merger rules (2)
1.2.1.1. Jurisdiction under EMR

- **Jurisdiction on the minority shareholding itself.**

Shall be qualified under art. 3. **BUT** easy may for the CA to adopt an extensive approach of the concept of control

- Commission. See the jurisdictional notice

- *Idem* in French law; see Merger Control Guidelines + one example, SNCF/Novatrans (arrêté, 28/1/2008; fines + divestiture)

1.2.1. EU Merger rules(3)

1.2.1.1. Jurisdiction under EMR

- **Jurisdiction** on a **minority shareholding ancillary** to a main transaction

Thorough analysis

Ex. Newcorp/Telepiu, 2003

Id. in F. Canal +/TPS (2006)

1.2.1. EU Merger rules(4)
1.2.1.1. Jurisdiction under EMR

- **Preexisting minority shareholdings**

Taken into account in the analysis of the effects on competition
2 issues

- Need to be informed: CO form. Section 4.2. or competitors'intervention. Lagardère/Sportfive (2007)
- Remedies: divestiture of minority stake as condition

Examples: Thyssen/Krupp (M.1080, 1998), Axa/GRE (M. 1453, 1999); Volvo/Renault (M.1980, 2000)Allianz Dresdner (M.2431, 2001); VEBA/VIAG (2000) ; IPIC/MAN Ferrostaal (2009)

1.2.1. EU Merger rules (5)
1.2.1.2 Intervention after a prohibition

- **Yes**: if part of the notified merger

  Schneider/Legrand, Tetra/Laval (more flexible position in Blokker/Toy R US)
- **No:** if minority stake acquired before a controlling bid was launched when the latter is prohibited (Aer Lingus/Ryanair, GC, 2010)

Issue of « creeping merger »

1.2. The legal approach
1.2.2. Antitrust Rules

- **Possible application of art. 101 TFEU**
- Philip Morris always applicable
- Thorough analysis, Enichem/ICI (Dec. 22, 1987, IV/31.846; BT/MCI (July 27, 1994, IV/34.857); Olivetti/Digital (Nov. 11, 1994, IV/34.510)
- 2 limits
- Requires a restrictive agreement (acquisition of shares into stock exchange?)
- Decisions following notifications **before** Reg. 1/2003

1.2. The legal approach

1.2.2. Antitrust Rules

- **Possible application of art. 102 TFEU**

- **Applicable**: Warner-Lambert/Gillette; Nov. 10, 1992, IV.33.340

- **But**: requires a preliminary dominant position

1.2.3. Intermediate conclusions on the gap

- Tools exist **BUT**

ex post control unrealistic

ex ante control do not cover all situations

- Evaluation

Globally positive by lawyers

More reluctance from economists

ABSENCE OF CONVERGENCE BETWEEN COMPETITION LAWS IS EASY TO EXPLAIN

2. Is convergence needed in Europe?

2.1. A quick overview of National Competition Laws (1)

- **2 Main groups**

- Either the EU model based upon the concept of control. The French law (see Mouy, *Concurrences*, 1-2012), Dutch Law (see. Kalbfleich in *Concurrences,* 3-2011)
- Or broader scope of control enabling the NCA to control more minority shareholdings, (G, Aus., UK)

2.1. A quick overview of National Competition Laws (2)

- **In the second group, various situations**

- Different tests:
- material influence (UK), significant influence (G);
- or/and thresholds, acquisition above 25 %

- Either within an *ex ante* compulsory control (G, Aus),
  or an optional control (UK)

2.2. What are the risks?

- **In the vertical relation?** EU/NL. **Weak?**
- Commission has jurisdiction on one merger.

  Norddeutsche Affinerie (NA)/Cumerio (M.4781,2008),

  + Minority shareholding A-TEC in NA: Bkmt; prohibition

- Commission cannot intervene.

  The Ryanair Case before the CAT and now the Court of Appeals

  Discussion on art. 4 TFEU, Masterfoods…

2.2. What are the risks?

- **In the horizontal relation?** if plurinotifications

- Discrepancies?

- But not new. Already exist for a lot of reasons

2.3. Intermediate conclusions

- **No need to change** because of discrepancies

- **Change is needed** only if the control is necessary from an economic point of view

- But do not forget the main difference between the economic analysis and the lawyer's position

+ an economist always requires a case by case approach: no general rule

+ the lawyer always works on the basis of general rules and has to make a choice

II. Possible ways forward

1. **Control of minority shareholdings and creeping mergers**
2. **Intervention post prohibition**

1. Control of minority shareholdings

- **What are the objectives?**

To catch all situations at risk including « creeping mergers » (increase in the level of control or acquiring control by stages)

- **Two main issues**

- What type of control? *Ex ante, ex post* or mixed?
- What scope for the control?

1.1. What type of control(1)

- **A pure *ex ante* control**

Pros (Legal certainty) and cons (Heaviness of a formal control; limited means of the CA; additional charge for firms; if extension of the EMR, stand still provision)

It works: The German and Austrian examples

The US example

- **A voluntary notification system with possible *ex post* interventions**

The British Example with improvement to deal with the issue of time limits

1.1. What type of control (2)
Link with other provisions

- In EU, not only competition rules, but also company law

- Need to set a link. Two set of rules

- Information requirements: Directive 2004/109/EC on the harmonisation of transparency requirements (…), new proposal in October 2011; need of a cooperation between the Agencies?
- Prohibition: comp. section 8 Clayton Act on interlocking directorates

1.2. What jurisdictional test?

- The German Approach?

§ 37 (3): acquisition of 25%

+ « catch all clause »

§ 37 (4): competitively significant influence

- The British Approach?

A general test: « the ability to exercise material influence »

(Jurisdictional and Procedural, Guidance, 2009, § 3.19 and..)

- Through shareholdings (presumptions:25%;15%+other relevant factors)
- Through board presence

2. Intervention post prohibition
The Ryanair/Aer Lingus scenario

- Techical amendment of article 8 (4) and 8 (5) EMR to give jurisdiction to the Commission to restore the situation prevailing prior to the implementation of the concentration.

In favor,

- would prevent the need for a NCA to review such shareholding
- would remove discrimination with the treatment of shareholdings following an incompatibility decision in situaions where the implementation of the transaction is merely due to national rules on takeover bids.

To conclude

- **Some improvements are certainly useful**
- Better information of the CA (Improvements of the notification form; Coordination with the financial regulators)
- Confirmation of powers: remedies and article 8 (4) and 8 (5)

- **Whether the German solution shall be adopted is another question**

Grey areas will always exist….

THANK YOU

Selective bibliography (1)

- OECD: Competition Committee, "Antitrust Issues Involving Minority Shareholding and Interlocking Directorates", 15 Feb. 2008, DAF/COMP/WP3/WD(2008)
- Office of Fair Trading, "Minority interests in competitors A research report prepared by DotEcon Ltd", 2010

- *Competition Policy International*, January 2012 (1), special file, with P. Lugard, S. R. Miller, M.E. Raven & D. Went, E. Gonzales Diaz, C. Riis-Masden, S. Stephanou & K. Kehoe
- "Merger control and minority shareholdings: Time for a change? " *Concurrences,* n° 3-2011, n° 37934, pp. 14-41 (D. Spector, J-Ph. Gunther, D. Bosco, P. Kalbfleisch, B. van de Walle de Ghelcke, P. Freeman, A. Bardong)

Selective bibliography (2)

- « Participations minoritaires et concentrations », *Concurrences*, n° 1-2012, n° 41504, www.concurrences.com, (N. Mouy, L. Flochel, E. Morgan de Rivery, E. Barbier de la Serre)
- T. Staahl Gabrielsen, E Hjelmeng, L. Sorgard, "Rethinking Minority Share Ownership and Interlocking Directorship: The Scope for Competition Law Intervention", (2011) E.L.Rev. , Dec., p. 837.
- M. Reynolds & D. G. Anderson, "Acquisitions of minority interests in competitors. The EU perspective", ABA, 31st March 2005
- C. Esteva Mosso, "Minority shareholdings - A gap in EU competition law?", IBA, 2011