



POLICY ROUNDTABLES

Minority Shareholdings

2008

Introduction

The OECD Competition Committee debated antitrust issues involved with minority shareholdings and interlocking directorates in February 2008. This document includes an executive summary and the documents from the meeting: an analytical note by Mr. Antonio Capobianco for the OECD, written submissions from Belgium, Brazil, Canada, the Czech Republic, the European Commission, Germany, Indonesia, Ireland, Israel, Italy, Japan, Korea, Lithuania, Mexico, the Netherlands, Norway, Romania, South Africa, Chinese Taipei, Turkey, the United Kingdom, the United States and BIAC as well as an aide-memoire of the discussion.

Overview

While there is no presumption of *per se* illegality of structural links between competitors, minority shareholdings and interlocking directorates can have negative effects on competition depending on the circumstances, either by reducing the individual incentives to compete or by facilitating collusion.

In OECD countries, merger review rules are most frequently used to examine the competitive effects of minority shareholdings. However, when the concept of "control" is used to assert jurisdiction on a transaction, there may be a risk of an enforcement gap with respect to minority shareholdings that do not affect control but may nevertheless have negative effects on competition. In these cases, competition law provisions concerning restrictive agreements and unilateral conduct have also been applied to review the competitive effects of minority shareholdings

The application of rules on restrictive agreements, however, is limited to cases where an "agreement" and anticompetitive effects can be established. Similarly, the application of the rules on unilateral conduct is limited by the need to show substantial market power and unlawful conduct.

Related Topics

- Managing Complex Mergers (2007)
- Mergers Remedies (2004)
- Price Transparency (2001)
- Competition Issues in Joint Ventures (2000)

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

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FOREWORD

This document comprises proceedings in the original languages of a Roundtable on Antitrust Issues involving Minority Shareholding and Interlocking Directorates held by the Competition Committee (Working Party No. 3 on Co-operation and Enforcement) in February 2008.

It is published under the responsibility of the Secretary General of the OECD to bring information on this topic to the attention of a wider audience.

This compilation is one of a series of publications entitled "Competition Policy Roundtables".

PRÉFACE

Ce document rassemble la documentation dans la langue d'origine dans laquelle elle a été soumise, relative à une table ronde sur les problèmes de droit de la concurrence concernant les participations minoritaires et le cumul des mandats d'administrateur qui s'est tenue en février 2008 dans le cadre du Comité de la concurrence (Groupe de Travail No. 3 sur la coopération et l'application de la loi).

Il est publié sous la responsabilité du Secrétaire général de l'OCDE, afin de porter à la connaissance d'un large public les éléments d'information qui ont été réunis à cette occasion.

Cette compilation fait partie de la série intitulée "Les tables rondes sur la politique de la concurrence".

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EXECUTIVE SUMMARY

By the Secretariat

Considering the discussion at the roundtable, the member country submissions, and the background paper, a number of key points emerge:

- (1) ***Minority shareholdings and interlocking directorates can have negative effects on competition, either by reducing the minority shareholder's incentives to compete (unilateral effects), or by facilitating collusion (coordinated effects). Regardless of the analytical framework and any characterization issues, the competition analysis should always focus on whether there is sufficient evidence in each specific case to support the conclusion that substantial anticompetitive effects are likely to result from minority shareholdings or interlocking directorates.***

A minority shareholding exists when a shareholder holds less than 50% of the voting rights or equity rights in a target firm. In some instances a minority shareholder can exercise a degree of control over the target, either solely or jointly with other shareholders. In other cases, minority shareholdings represent purely passive investments.

A minority shareholding can under some circumstances result in less output and higher prices. For example, if a firm owns equity in a competitor, the financial losses incurred by the competitor will affect the value of the firm's investment. In this scenario, the firm may have less incentive to compete against the company it has invested in. It may also have an incentive to unilaterally reduce output and raise prices, if it is in a position to recoup all or part of the lost sales through its financial participation in the target.

Structural links between competitors in the form of direct or reciprocal minority shareholdings may in certain circumstances facilitate express or tacit collusion; the minority shareholder is given access to information about the target, which facilitates collusion, or the monitoring of the target's adherence to the commonly agreed conduct. As with unilateral effects, minority ownerships might change the payoffs for the companies involved, or their respective incentives to deviate from a collusive agreement or to engage in a pricing war to punish deviations from a collusive agreement. Investments in competing companies may also signal to the rest of the market that there is an intention to compete less vigorously. This may induce the whole industry to reduce competition and favour a collusive equilibrium to the detriment of consumers.

In practice, anticompetitive unilateral or coordinated effects will depend on a number of factors which significantly influence the firms' incentives to compete and which require careful analysis. Such factors may be structural (*e.g.*, the degree of market concentration, entry conditions, the homogeneous or differentiated nature of the products concerned, the substitutability of the products concerned, their respective diversion ratios and the number of companies in the market which are linked to each other) or transaction specific (*e.g.*, the companies' respective costs and margins, their market shares, the size of the minority interest and the reciprocal nature of the structural links). Additional factors that should be taken into consideration include the availability of information about the target that can affect the acquiring firm's decisions; potentially conflicting incentives for management; the acquiring firm's ability to capture the

benefits associated with its minority stake; and the degree of control over the target's management decisions.

- (2) ***Merger review rules are most frequently used to examine the competitive effects of minority shareholdings. In merger regimes that use the concept of "control" to define a reviewable transaction, minority shareholdings can be reviewed only if they result in a change of control, which may create the risk of an enforcement gap with respect to minority shareholdings that do not affect control but may nevertheless have negative effects on competition. Other jurisdictions have a wider jurisdictional net and can review minority shareholdings under a "material influence" or similar standard, or can review all acquisitions of an interest in another company under their merger review regimes.***

Under the EC merger review regime and merger review regimes modelled after it, only transactions which lead to the acquisition of control, or to a qualitative change in the nature of control, are subject to review. In these regimes, a competition authority has jurisdiction to review the acquisition of a minority shareholding only if the shareholding allows for the exercise of control over the target, sometimes called an "active" minority shareholding. Both unilateral and coordinated effects of the acquisition of such active minority shareholdings can be examined. Conversely, if the minority shareholding does not result in changes in control over the target, a so-called "passive" minority shareholding, the merger review regime does not apply and the transaction escapes *ex ante* antitrust scrutiny. This has raised concerns of an enforcement gap in cases where anticompetitive minority shareholdings escape merger review, and rules on restrictive agreements and unilateral conduct rules can also not be effectively applied to prevent or remove anticompetitive effects.

In other jurisdictions merger review rules apply to a wide range of transactions, including those which do not confer control. For example, the United Kingdom's Office of Fair Trading has jurisdiction over transactions where one party acquires the ability to "materially influence" another party. "Material influence" is not equivalent to full control, so transactions falling short of the notion of control may nevertheless fall in the jurisdiction of the Office of Fair Trading.

Finally, the United States merger control system has a very extensive reach and can in principle cover all acquisitions of minority shareholdings. Because the jurisdiction over mergers is not premised on the concept of change in the control of a company, the agencies are able to focus more directly on the important substantive question of whether the acquisition might substantially lessen competition. This very broad jurisdictional reach is, however, mitigated by an exemption for certain acquisitions which are solely for investment purposes.

- (3) ***Competition law provisions concerning restrictive agreements and unilateral conduct have also been applied to review the competitive effects of minority shareholdings. The application of rules on restrictive agreements is not conditioned on a change in control, but at the same time their reach is limited because they apply only if an "agreement" and anticompetitive effects can be established. In a similar way, the application of the rules on unilateral conduct is limited by the need to show substantial market power and unlawful conduct.***

The application of competition rules on restrictive agreements to the acquisition of minority shareholdings does not depend on the acquisition of control or material influence over the target. Notwithstanding, antitrust provisions on restrictive agreements have not frequently been applied to minority shareholdings for a number of reasons, including: (1) the difficulty in establishing an anticompetitive agreement (for example, in stock market transactions the acquisition of the minority stake does not involve an agreement between the firms involved); and (2) the burden of

proof to show actual or highly likely anticompetitive effects. This may significantly limit the effectiveness of using provisions on restrictive agreements for enforcement actions against minority shareholdings.

With regard to unilateral conduct, it is generally said that dominant firms are less likely to invest in competitors. However, they may decide to invest in fringe competitors to discipline them and ensure that incentives to compete are reduced. Competition rules on unilateral conduct could be much better suited to pursue purely unilateral effects cases than the rules on restrictive agreements. But in practice the applicability of these provisions is limited, as they require the finding of market power or dominance and unlawful/abusive conduct.

- (4) ***In cases where minority shareholdings are found to have anticompetitive effects, competition authorities prefer to use structural remedies to eliminate competition concerns; generally these are remedies that seek to reduce or eliminate the interest or certain shareholder rights in the target so that the minority shareholder cannot control or influence the target. In some circumstances competition authorities have also accepted behavioural remedies, like firewalls, but these remedies are less attractive because of high monitoring costs and doubts concerning their effectiveness.***

In general, there are four categories of remedies that competition authorities have considered to eliminate concerns raised by minority shareholdings: (1) the divestiture of the acquired shares or part of the shares and the severance of the structural link between the competing firms; (2) the waiver of the rights linked to the minority shareholding, such as representation rights on the board, veto rights and information rights; (3) the creation of a so-called "firewall" between the firms in order to prevent the flow of sensitive information between them; and (4) the elimination of interlocking directorates, when the shareholder has the right to appoint board members of the target company and, as a result, one or more board members become members of the boards of both companies.

As a general matter, competition authorities prefer structural remedies to behavioural remedies. These include remedies aimed at preventing the acquirer of the minority shareholding from gaining control over the target or from acquiring a direct or indirect influence over the target's business conduct. Behavioural remedies generally are disfavoured because of concerns about their effectiveness in addressing structural problems and because of the often significant costs involved in monitoring behavioural remedies. The discussion suggested that behavioural remedies should be considered as standalone remedial measures only where an authority is satisfied that they will eliminate the anticompetitive effects, that there is no appropriate structural remedy, and that no or only minimal monitoring would be required.

- (5) ***The concept of "interlocking directorates" describes situations in which one or more persons have executive responsibilities in two or more companies which are competing with each other. Interlocking directorates can raise competition issues in particular because "shared" directors can become a conduit for information exchanges among competitors and facilitate coordination; they can also lead to foreclosure of rivals. Given the potential for concerns, some countries prohibit certain interlocking directorates in their competition laws.***

Interlocking directorates refer to situations in which one or more companies have one or more members of their respective boards in common. Vigorous competition on the market is premised on the assumption that companies take business decisions independently from each other. When interlocking directorates link together two or more competing firms, however, there may be questions as to the independence of board decisions and of the firms' competitive conduct. In

particular, the concerns are that interlocking directorates could lead to horizontal coordination of the business conduct of competing firms through the exchanges of information, parallel behaviour, or a number of other activities that might affect competition adversely to the detriment of consumers' welfare. Interlocking directorates can also be vertical. Vertical interlocks traditionally have been criticized on the ground that they can lead to preferential treatment and foreclose rivals, by facilitating reciprocal or exclusive dealing, tying arrangements, and vertical integration.

It is sometimes suggested that competition authorities should be comforted by fiduciary duties of independent directors to each of the firms on whose boards they are represented. But during the discussion, several competition authorities expressed doubt about the soundness of these arguments. The concern is that a director might have competing fiduciary duties and this may raise questions as to the independence of the directors and companies involved and their ability to compete in the market.

The majority of cases dealing with interlocking directorates are mergers in which the commonality of board members was considered to be a factor that could facilitate coordination between the firms. The preferred remedy is in most instances the elimination of the structural link and the end of the interlock, although in some cases competition authorities have accepted the creation of a firewall as a suitable remedy. Many countries have also enacted specific provisions in their antitrust laws prohibiting certain interlocking directorates.

RÉSUMÉ

du Secrétariat

Les débats de la table ronde, les contributions des pays membres, ainsi que la note de référence ont fait ressortir plusieurs points essentiels :

- (1) ***Les participations minoritaires et le cumul des mandats d'administrateur peuvent avoir des effets négatifs sur la concurrence, soit en incitant dans une moindre mesure les actionnaires minoritaires à faire concurrence aux entreprises cibles (effets unilatéraux), soit en facilitant la collusion (effets coordonnés). Indépendamment du cadre d'analyse et de toute question de typologie, l'analyse de la concurrence doit invariablement chercher à savoir s'il existe, dans chaque affaire, des preuves suffisantes permettant de conclure que des effets anticoncurrentiels notables risquent de découler des participations minoritaires ou du cumul des mandats d'administrateur.***

Il y a participation minoritaire lorsqu'un actionnaire détient moins de 50 % des droits de vote ou des droits sociaux d'une entreprise cible. Dans certains cas, un actionnaire minoritaire peut exercer un contrôle sur la cible, seul ou avec d'autres actionnaires. Dans d'autres cas, les participations minoritaires correspondent à des placements purement passifs.

Selon les circonstances, une prise de participation minoritaire peut entraîner une diminution de la production et une augmentation des prix. Si, par exemple, une entreprise détient une participation dans une entreprise concurrente, les pertes financières subies par cette dernière affecteront la valeur de la participation détenue. Dans ce scénario, l'entreprise peut être moins portée à concurrencer celle dans laquelle elle a investi. Elle peut aussi être incitée à réduire unilatéralement sa production et à relever ses prix lorsque sa participation financière dans la société cible lui permet de récupérer la totalité ou une partie des ventes perdues.

Dans certaines conditions, les liens structurels existant entre entreprises concurrentes sous forme de participations minoritaires directes ou réciproques peuvent faciliter la collusion expresse ou tacite ; l'actionnaire minoritaire a accès à des informations sur la société cible, ce qui facilite la collusion ou permet de vérifier si celle-ci adhère à la ligne d'action fixée de concert. Comme dans le cas des effets unilatéraux, les participations minoritaires peuvent modifier les résultats des entreprises concernées, ou leurs incitations respectives à ne pas se conformer à un accord de collusion ou à s'engager dans une guerre des prix pour sanctionner l'inobservation d'un tel accord. Les placements réalisés dans des entreprises concurrentes peuvent aussi indiquer au reste du marché une intention de se livrer à une concurrence moins énergique. Cela peut inciter tout un secteur à réduire la pression concurrentielle et à favoriser un équilibre de collusion au détriment des consommateurs.

Dans la pratique, les effets anticoncurrentiels unilatéraux ou coordonnés sont fonction de différents facteurs qui influent sensiblement sur les incitations des entreprises à se concurrencer et requièrent un examen attentif. Ces facteurs peuvent être structurels (comme le degré de concentration du marché, les conditions d'accès au marché, la nature homogène ou différenciée des produits concernés, la substituabilité de ces produits, leurs ratios de report respectifs et le nombre d'entreprises qui sont liées les unes aux autres sur le marché) ou spécifiques aux

opérations (par exemple, les coûts et marges respectifs des entreprises, leurs parts de marché, l'ampleur de la participation minoritaire et la nature réciproque des liens structurels). Les facteurs supplémentaires devant être pris en considération comprennent la disponibilité d'informations relatives à la société cible pouvant influencer sur les décisions de l'entreprise acquéreuse, les motivations potentiellement contradictoires des dirigeants, la capacité de l'entreprise acquéreuse de récupérer les bénéfices associés à sa participation minoritaire, ainsi que le contrôle exercé sur les décisions des dirigeants de l'entreprise cible.

- (2) *Pour analyser les effets des participations minoritaires sur la concurrence, on utilise le plus souvent les règles de contrôle des fusions. Dans les régimes applicables aux fusions qui définissent d'après la notion de « contrôle » les opérations pouvant être examinées, les participations minoritaires peuvent être examinées uniquement si elles entraînent une prise de contrôle, ce qui risque de créer un déficit d'application de la loi pour les participations minoritaires qui n'ont pas d'incidence sur le contrôle de l'entreprise, mais qui n'en sont pas moins susceptibles de nuire à la concurrence. Dans d'autres pays, les autorités de la concurrence ont des compétences plus étendues et elles peuvent contrôler les participations minoritaires selon le critère de « l'influence sensible » ou une norme analogue, ou examiner toutes les prises de participation conformément à leur régime de contrôle des fusions.*

Conformément au régime de contrôle des concentrations de la Commission européenne et aux régimes conçus sur ce modèle, seules les opérations qui conduisent à l'acquisition du contrôle ou à un changement qualitatif dans la nature du contrôle sont soumises à appréciation. Dans ces régimes, une autorité de la concurrence a compétence pour examiner une prise de participation minoritaire uniquement lorsque celle-ci permet d'exercer un contrôle sur la société cible ; dans ce cas, on parle parfois de participation minoritaire « active ». Les effets unilatéraux et coordonnés de ces prises de participation minoritaire active peuvent être analysés. Inversement, si la participation minoritaire n'implique pas de prise de contrôle de la société cible (participation minoritaire « passive »), le régime d'examen des fusions ne s'applique pas et l'opération échappe à l'appréciation préalable de l'autorité de concurrence. De ce fait, on craint qu'il y ait un déficit d'application de la loi dans les affaires où les prises de participation minoritaire anticoncurrentielles échappent au contrôle des fusions et que les règles sur les ententes restrictives et sur les comportements unilatéraux ne soient pas efficacement appliquées pour prévenir ou supprimer les effets anticoncurrentiels.

Dans d'autres pays, les règles de contrôle des fusions s'appliquent à un large éventail d'opérations, y compris celles qui ne confèrent pas à l'entreprise acquéreuse le contrôle de la société cible. Au Royaume-Uni, par exemple, l'OFT (Office of Fair Trading) a compétence sur les opérations dans le cadre desquelles une partie acquiert la capacité d'« exercer une influence sensible » sur une autre. Une « influence sensible » n'équivaut pas à un contrôle total, de sorte que les opérations qui ne sont pas assimilables à une prise de contrôle peuvent néanmoins relever de la compétence de l'OFT.

Enfin, le régime de contrôle des fusions en vigueur aux États-Unis a une très grande portée et il peut, en principe, s'appliquer à toutes les prises de participation minoritaire. La compétence en matière de fusions n'étant pas fondée sur la notion de prise de contrôle d'une société, les autorités peuvent se concentrer plus directement sur la question de fond qui consiste à savoir si la prise de participation risque de réduire sensiblement la concurrence. L'étendue considérable de ce domaine de compétence est atténuée, toutefois, par une exception applicable à certaines prises de participation uniquement réalisées à des fins de placement.

- (3) *Les effets des participations minoritaires sur la concurrence ont également été examinés au regard des dispositions du droit de la concurrence sur les ententes restrictives et sur les comportements unilatéraux. L'application des règles relatives aux ententes restrictives n'est pas conditionnée par une prise de contrôle, mais dans le même temps, leur portée est limitée, car elles s'appliquent uniquement lorsque l'existence d'une « entente » et d'effets anticoncurrentiels peut être démontrée. De même, l'application des règles sur les comportements unilatéraux est limitée par la nécessité de mettre en évidence un pouvoir de marché substantiel et un comportement illicite.*

L'application, aux prises de participation minoritaire, des règles de la concurrence sur les ententes restrictives ne dépend pas des notions de prise de contrôle et d'influence sensible sur l'entreprise cible. Quoiqu'il en soit, ces dispositions sur les ententes restrictives n'ont été que rarement appliquées aux participations minoritaires pour plusieurs raisons, et notamment : (1) la difficulté d'établir une entente anticoncurrentielle (dans les opérations boursières, par exemple, la prise d'une participation minoritaire n'implique pas nécessairement l'existence d'une entente entre les entreprises concernées) et (2) la charge de la preuve, qui impose de démontrer les effets anticoncurrentiels réels ou hautement probables. L'efficacité de l'utilisation des dispositions sur les ententes restrictives aux fins des mesures coercitives visant certaines participations minoritaires peut ainsi s'en trouver sensiblement limitée.

S'agissant des comportements unilatéraux, les sociétés en position dominante sont en général moins susceptibles d'investir dans des entreprises concurrentes. Toutefois, elles peuvent décider d'investir dans des entreprises concurrentes marginales car cela peut les discipliner et peut contribuer à réduire les incitations à concurrencer les autres sociétés. Dans les affaires portant sur des effets purement unilatéraux, les règles de la concurrence concernant les comportements unilatéraux pourraient être bien plus adaptées que les règles sur les ententes restrictives. Dans la pratique, toutefois, l'applicabilité de ces dispositions est limitée, car elles imposent d'établir un pouvoir de marché ou une position dominante et un comportement illicite ou abusif.

- (4) *Dans les affaires où les effets anticoncurrentiels de certaines prises de participation minoritaire ont été démontrés, les autorités de la concurrence préfèrent opter pour des mesures structurelles afin de régler tout problème de concurrence ; ces mesures correctrices cherchent généralement à réduire ou à supprimer la participation dans l'entreprise cible ou certains droits de l'actionnaire minoritaire, de sorte que celui-ci soit dans l'impossibilité d'exercer une influence sur la société cible ou de la contrôler. Dans certaines circonstances, les autorités de la concurrence ont également accepté des mesures comportementales, comme la création de murailles de Chine, mais ces mesures sont moins attrayantes en raison du coût des contrôles requis et des doutes pesant sur leur efficacité.*

En règle générale, quatre catégories de mesures correctrices ont été envisagées par les autorités de la concurrence pour remédier aux problèmes soulevés par les participations minoritaires : (1) la cession de la totalité ou d'une partie des actions acquises et la dissolution des liens structurels existant entre les entreprises concurrentes ; (2) la renonciation aux droits liés à la participation minoritaire, comme les droits de représentation au conseil d'administration, les droits de veto et les droits à l'information ; (3) la création d'une « muraille de Chine » entre les entreprises afin qu'elles ne puissent pas se communiquer des informations sensibles ; et (4) la suppression du cumul des mandats d'administrateur, lorsque l'actionnaire est habilité à désigner les membres du conseil d'administration de l'entreprise cible et que de ce fait, un ou plusieurs administrateurs siègent au conseil d'administration des deux entreprises.

Les autorités préfèrent globalement les mesures structurelles aux mesures comportementales. Ces mesures structurelles sont notamment destinées à empêcher l'acquéreur de prendre le contrôle de la société cible ou d'exercer une influence directe ou indirecte sur la conduite des affaires de celle-ci. D'ordinaire, les mesures comportementales n'ont guère les faveurs des autorités parce que leur capacité à régler les problèmes structurels est mise en doute et que les coûts inhérents au contrôle de ces mesures sont souvent élevés. Il ressort des débats que les mesures comportementales doivent être envisagées seules uniquement lorsqu'une autorité estime qu'elles permettront de remédier aux effets anticoncurrentiels, qu'il n'existe aucune mesure structurelle appropriée et qu'elles ne nécessiteront qu'un contrôle nul ou négligeable.

- (5) ***Le concept de « cumul des mandats d'administrateur » décrit des situations où une ou plusieurs personnes occupent des postes de direction dans deux ou plusieurs entreprises concurrentes. Le cumul des mandats d'administrateur peut poser des problèmes de concurrence, notamment parce que ces administrateurs « communs » peuvent servir de courroie de transmission pour des échanges de renseignements entre entreprises concurrentes et faciliter la coordination ; ils peuvent aussi entraîner l'élimination des concurrents. Compte tenu des problèmes pouvant en découler, certains pays proscrivent le cumul des mandats d'administrateur dans certains cas, en vertu de leur droit de la concurrence.***

Le cumul des mandats d'administrateur désigne les cas où une ou plusieurs entreprises ont en commun avec d'autres entreprises, dans leur conseil d'administration respectif, un ou plusieurs administrateurs. L'existence d'une vive concurrence sur le marché repose sur l'hypothèse selon laquelle les entreprises prennent des décisions commerciales indépendamment les unes des autres. Lorsque le cumul des mandats d'administrateur établit un lien entre deux ou plusieurs entreprises concurrentes, toutefois, cela peut susciter des questions quant à l'indépendance des décisions des administrateurs et du comportement de l'entreprise au regard de la concurrence. En particulier, on craint que le cumul des mandats d'administrateur ne conduise à une coordination horizontale des comportements commerciaux des entreprises concurrentes par le biais des échanges de renseignements, des comportements parallèles ou d'un certain nombre d'autres activités qui risquent d'entraîner des effets anticoncurrentiels, au détriment du bien-être des consommateurs. Le cumul de mandats peut aussi être vertical. Les interconnexions verticales font depuis longtemps l'objet de critiques au motif qu'elles peuvent conduire à un traitement préférentiel et à l'élimination des entreprises rivales, en facilitant les rapports de réciprocité ou d'exclusivité, les ventes liées et l'intégration verticale.

D'aucuns font valoir que les autorités de la concurrence devraient pouvoir se fier aux obligations de loyauté des administrateurs indépendants envers chacune des entreprises au sein desquelles ils exercent ces fonctions. Durant les discussions, toutefois, plusieurs autorités de la concurrence ont émis des doutes sur le bien-fondé de ces arguments. Le problème est qu'un administrateur peut être soumis à des obligations de loyauté antagoniques, ce qui peut soulever des questions quant à l'indépendance des administrateurs et des entreprises concernées, ainsi qu'à leur capacité à se faire concurrence sur le marché.

La majorité des problèmes liés au cumul de mandats d'administrateur se sont posés dans des affaires de contrôle des fusions, dans lesquelles la présence des mêmes administrateurs dans différents conseils d'administration a été considérée comme un facteur pouvant favoriser la coordination entre les entreprises en cause. La solution privilégiée la plupart du temps est l'élimination des liens structurels et du cumul de mandats d'administrateur, bien que dans certains cas, les autorités de concurrence aient jugé que l'élévation d'une muraille de Chine permettait de remédier à la situation. De nombreux pays ont également adopté, dans le cadre de

leur droit de la concurrence, des dispositions spécifiques interdisant certaines formes de cumul de mandats d'administrateur.

BACKGROUND NOTE

1. Introduction

Vigorous competition requires that firms take business decisions independently from each other. Structural links between competitors and interlocking directorates may jeopardize this essential requirement. In some OECD countries, minority shareholdings and interlocking directorates are common in certain sectors, such as banking and insurance, and antitrust authorities are giving this phenomenon increased attention. Ownership of a minority stake in a company might at first glance appear innocuous from a competition perspective. However, economic studies show that such links between competing companies can produce anti-competitive, unilateral and co-ordinated effects. While some of the concerns associated with structural links between competitors can be successfully addressed by laws and regulations governing mergers, others might require intervention under the competition rules on restrictive agreements between competitors and the competition rules on dominance.

Unilateral effects can arise if ownership of a minority stake in a competitor affects the incentives to compete vigorously. As a consequence of the structural and financial links, the companies' profit maximisation calculations will be affected and, as a result, they may be induced to compete less vigorously and to adopt behaviour more conducive to a joint maximization strategy. Structural links among competitors, particularly if reciprocal, can also facilitate coordination on the market. In particular, coordinated effects could be facilitated if the cross-ownership changes the information available to the companies involved and if it affects the parties' pricing incentives. Minority shareholdings and interlocking directorates can provide access to sensitive information on prices, costs, future strategies and other key competitive decisions that can assist competitors to reach explicit or implicit agreements and to monitor their adherence to such agreements.

This Note is primarily focused on the competition issues raised by equity investments in competing firms, as this is the area which raises the most interesting issues from a competition policy perspective and requires particular attention by competition authorities in their enforcement practices. The Note is structured as follows: Part II defines the notions of minority shareholdings and interlocking directorates; Part III reviews the basic economic principles underpinning the antitrust concerns raised by minority shareholdings; Part IV analyses how antitrust enforcers assess minority shareholdings and what legal instruments they have to prevent or to sanction their possible anti-competitive effects; Part V deals with the enforcement of competition laws against interlocking directorates; and finally, Part VI draws some conclusions from the economic theory and the current enforcement practices in the main OECD countries.

The main conclusions drawn by this Note are:

- Economic theory shows that the acquisition of a minority shareholding in a competing firm may lead to reduction of output and increase prices to the detriment of consumers' welfare.
- Acquisitions of a minority shareholding in a competing firm and interlocking directorates may also lead to co-ordinated effects in the market; minority shareholdings and interlocking directorates between competitors increase transparency and affect the firms' incentives to compete. The risk of co-ordinated effects is more likely if all firms in the market have invested in at least one competitor or if the equity investment is made by the industry maverick.

- These anti-competitive effects are likely to occur if the market is oligopolistic, with significant barriers to entry. If the structural links are reciprocal or involve many firms in the market, the magnitude of the anti-competitive effects increases.
- The acquisition of a competitor's debt can have similar anti-competitive effects as structural links among competitors.
- The risks of anti-competitive effects arise from both active minority interests and passive minority interests among competitors. Active minority shareholdings entitle the owner to exercise some form of control or influence over the target company. Passive minority shareholdings are mere financial investments in the activities of the target company and they only entitle the owner to a share in the profits or losses of the target.
- Some of the concerns associated with structural links between competitors can be successfully addressed by merger control provisions; others might require intervention under the competition rules on restrictive agreements between competitors and the competition rules on dominance.

2. Definitions and scope of the Background Note

2.1 *Minority shareholdings or partial ownership interests*

The terms “minority shareholding” or “partial ownership” refer to situations in which a shareholder holds less than 50% of the voting rights attached to the equity of another company (so-called target company). Generally speaking, under the corporate governance rules, this expression refers to the ownership of shares or securities in a company. It does not however indicate whether the owner of the minority stake is entitled to exercise control over the target company or otherwise influence its business conduct¹.

While holding a minority of the voting rights in a company does not generally entitle the owner to exercise control over the target, there are instances where a minority shareholder is in a position to exercise a degree of control over the target, either solely or jointly with other minority shareholders:

- A minority shareholding is sufficient to confer sole control if the minority shareholder has the right to determine the strategic commercial behaviour of the target company (such as the power to appoint more than half of the members of the relevant boards²), or is *de facto* highly likely to achieve a majority at the shareholders' meeting, e.g., if the remaining shares are widely dispersed among many investors.
- Where the company statutes require a supermajority for strategic commercial decisions, although the acquisition of a minority of the voting rights may not confer the power to determine strategic decisions, it may nevertheless be sufficient to confer the minority shareholder a blocking right and therefore negative control.
- When a minority shareholder cannot, individually, control the strategic business decisions of the target but can, on a legal or *de facto* basis, block other shareholders from doing so, then it enjoys

¹ On the distinction between ownership and control and the implication for competition, see O'Brien and Salop (2000) and Berle and Means (1932).

² This may be the case if the minority shareholder holds preferential shares to which special rights are attached enabling him to appoint more than half of the members of the supervisory board or the administrative board.

joint control on the target with these other shareholders. Joint control by a minority shareholder can arise mainly in two circumstances: (i) if the statutes of the jointly controlled company or the relevant agreements between two or more shareholders provide one or more minority shareholders with the ability to influence the commercial behaviour of the target company³; or (ii) even in the absence of specific rights, two or more minority shareholders may have joint control if, together, they hold a majority of voting rights and will act together in exercising those rights⁴.

The fact that a minority shareholder can exercise some form of control or influence over the target company (so called *active minority shareholding*) is generally a sufficient factor to trigger the review of the acquisition of the minority shareholding under the relevant merger control rules. As it will be discussed later, this allows the competent antitrust agency (or agencies) to fully assess the impact of the acquisition of the minority shareholding on competition. The framework for the analysis of these transactions is well established and is premised on the assumption that, following the transaction, the firms linked by a common control structure will have an incentive to raise prices unless constrained by competition from other rivals.

However, not all minority shareholdings entitle the owner to exercise influence on the management of the target. In many cases, the rights attached to the shares do not entitle the owner to be represented in the board or to access sensitive information on the activities of the target. These types of situations, which are often referred to as *passive minority shareholdings* or *passive investments*, represent a mere financial investment in the activities of the target company⁵. In this case, the framework for analysis is less well established than that for the assessment of active minority shareholdings. In many jurisdictions, antitrust rules provide limited guidance as to how agencies or courts should review the risks for competition associated with the acquisition of a passive minority interest. In this context, the economic framework of analysis has greater importance.

Minority shareholdings, even between competing companies, are a widespread phenomenon in modern economies⁶. Firms invest in equity shares of other firms for a variety of reasons. In many

³ This is, for instance, the case if the minority shareholder is given veto rights over key matters, such as the appointment of management and the determination of the annual budget and business plan. Depending on the economic context, veto rights as to certain investment decisions or such matters as the choice of key technologies may also be sufficient to grant joint control. See, for example, the Consolidated Jurisdictional Notice of the European Commission, section 3.1.

⁴ This joint control may arise from a legally binding arrangement (e.g., a shareholder agreements or a pooling agreement or the creation of a holding company to which voting rights are transferred). In rare cases, a strong common and lasting interest between the minority shareholders indicating that they would *de facto* not act against each other in exercising their respective rights may create joint control. See, for example, the Consolidated Jurisdictional Notice of the European Commission, section 3.3.

⁵ In other words, passive minority shareholdings indicate the ownership of any security assets or claim for which the return is positively related to the issuing firm's profitability, e.g. bonds, leases, other financial instrument as well as common and preferred stock, which do not confer sole or joint control.

⁶ By way of example, Gilo (2000) refers to a number of passive investments in competitors, including Microsoft's share of non-voting stock in Apple, Northwest Airlines' investment in common stock of Continental Airlines, TCI's passive investment in Time Warner; and Gillette's acquisition of non-voting stock of Wilkinson Sword. See also examples mentioned in Ezrachi and Gilo (2006), footnote 2. Cross-shareholdings are a common phenomenon in many countries, particularly those that have a banking-oriented financial system, such as Germany (see Adams, 1999), Japan (see Berglöf and Perotti, 1994) and Italy (see Autorità Garante della Concorrenza e del Mercato, decision of 27 June 2007, opening a market investigation on Corporate Governance of Banks and Insurances). See also examples mentioned in Ezrachi and Gilo (2006), footnote 3.

instances, equity investments may generate potential efficiencies⁷, which justify the establishment of such structural links. For example, equity investments may be a means to diversify and spread costs and risks, to access new technologies or innovative managerial practices, to establish and strengthen business relationships, to ease the access to new markets, to fund and exploit joint activities (such as R&D), etc.⁸ However, when the investment links competing firms, the benefits of the partial integration must be balanced with possible restrictive effects on competition. As it will be discussed below, the establishment of structural links between competing firms might affect the firms' incentives to compete and ultimately reduce rivalry on the market to the detriment of consumers⁹.

Minority shareholdings may take many forms, some of which can be summarised in the three main structures illustrated by the diagrams below. If one considers two firms, Firm A and Firm B, it is possible to imagine three main structures. The first one in which only one firm has a direct minority interest in the other. The second one in which both firms hold direct minority stakes in each other; and, finally, the case in which the controlling shareholder of one firm (Firm A in the diagrams below) holds a minority stake in Firm B¹⁰. Other and more complex scenarios can obviously be envisaged¹¹.

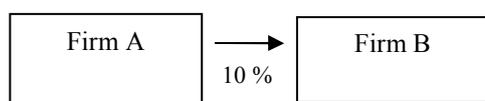
⁷ Ordinarily, efficiencies are linked to the acquisition of control. For this reason, the efficiencies generated by minority equity investments (particularly the passive investments) are not the same type of efficiencies generated by the acquisition of a controlling shareholding. In the latter case, the acquisition of control or influence over the target, allows the controlling shareholder (on its own or jointly with other shareholders) to run the two companies as one.

⁸ For a wider discussion on the possible efficiency gains from passive shareholding, see the Gilo (2000) at p. 42.

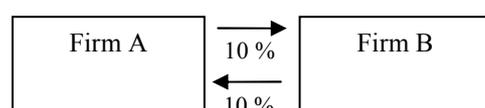
⁹ See *infra* Part III.

¹⁰ It is interesting to note at this stage that in Case 1 and in Case 2, the management's interest in the welfare of the company coincides with the interest of the shareholders. On the contrary, in Case 3, that may not be the case if the controlling shareholder does not own 100% of the share of the controlled entity. In this case, managers may not have an interest in raising Firm A prices and losing sales to the advantage of Firm B, just to please the controlling shareholder to the detriment of other minority shareholders of Firm A.

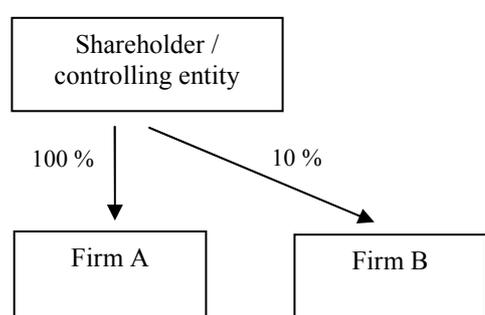
¹¹ See for example the discussion in Adams (1999) on the German experience with minority shareholdings, which refers to possible structures combining reciprocal shareholdings with indirect shareholdings, creating a sort of circular network between the companies involved.



Case 1 Direct, one-sided minority shareholding of Firm A in Firm B



Case 2 Direct, reciprocal minority shareholding of Firm A in Firm B and of Firm B in Firm A



Case 3 Indirect minority shareholding by the controlling entity of one firm in one of the firm's competitors

2.2 *Interlocking directorates*

Interlocking directorates refer to situations in which one or more companies have in common one or more members of their respective boards. A broader and more useful definition is the situation in which a member of the board of directors of a company, a top executive of that company (and particularly the Chief Executive Officer) or a close relative (e.g., wife or father) of a member of the board of directors or of a top executive of that company serves as a member of the board of directors of another corporation. This practice, although widespread¹² and lawful, raises questions about the quality and independence of board decisions.

Interlocking directorates can take various forms¹³. Depending on whether the interlock concerns companies which are direct competitors or companies which are in a buyer-seller relationship, the interlock can be *horizontal* or *vertical*. Interlocks can be *direct* if the person sits on the boards of vertically or horizontally related companies or *indirect* if the two companies are linked through different people who, however, (1) are related through a common source (such as employees of a bank), or (2) sit together on the

¹² In 2002, the American newspaper USA Today reported a study of The Corporate Library analysing the existing overlap between the major US corporations, based on public information on listed companies (see http://www.usatoday.com/money/companies/management/2002-11-24-interlock_x.htm). This analysis showed that there is a tight network linking the boards of the major US corporations. In particular, the study concluded that (i) out of the 15 largest companies in the United States, 11 of them have two board members that sit together on another company's board; (ii) four of those top-15 companies share at least two board members with another of the top-15 companies; (iii) one-fifth of the 1,000 largest companies in the United States share at least one board member with another of the top 1,000; and (iv) more than 1,000 board members sit on four boards or more; 235 board members sit on more than six boards.

¹³ See Areeda and Turner, paragraph 1300.

board of an unrelated company. Finally, the expression “*management interlock*” refers to situation in which the officer of one company sits on the board of a competing company¹⁴.

Such type of arrangements can make sense from a business and an economic perspective, particularly in industries where experienced and knowledgeable individuals are in short supply. However, interlocking directorates can raise antitrust concerns when companies that share a common member of their boards compete with each other in the marketplace. In particular, these arrangements might lead to exchanges of information, parallel behaviour, foreclosure of rivals, or a number of other activities that might affect competition adversely. In these situations, interlocking directorates have the potential to reduce or eliminate competition and to facilitate collusion.

3. The basic economics of minority shareholdings

Despite the many efficiency-enhancing effects of minority shareholdings, the results of the economic studies in this area should alert enforcement agencies that partial ownership arrangements between actual or potential competitors can lead to anti-competitive effects. Such effects can be unilateral, leading to a reduction of industry output even in the presence of relatively small ownership shares, or co-ordinated, as they can facilitate the reaching of collusive outcomes. From a policy perspective, antitrust agencies should be aware of these potential anti-competitive effects and review them in light of the enhanced efficiencies that may be generated by partial ownerships.

3.1 *Minority shareholdings and unilateral effects*

Economic theory concludes that in certain circumstances partial ownership arrangements can result in less output and higher prices than otherwise, because of the positive correlation they produce between the profits of the linked firms¹⁵. Linking the profits of competing firms is likely to reduce the firms’ incentives to compete and increases their incentives to adopt behaviour conducive to joint profit maximization. The intuition is simple: if a firm owns equity into a competitor and it compete fiercely against it, the financial losses incurred by the latter will affect the value of the investment owned by the investing firm. Therefore, the acquiring firm will have less incentive to compete against the company in which it has invested. On the contrary, the investing firm may even have an incentive to unilaterally reduce output and raise prices if it is in a position to recoup all or part of the losses in sales through its financial participation in the rival firm.

3.1.1 *Identifying the potential unilateral effects of minority shareholdings*

Reynolds and Snapp have analysed the unilateral effects of minority shareholdings in a “*modified Cournot model*” with high entry barriers and concluded that – even in the absence of collusion – the structural interdependence between firms might lead them to unilaterally reduce output and increase prices to the detriment of consumers’ welfare¹⁶. This structural effect is the consequence of the positive correlation among the profits of the firms linked by the partial ownership: in other words, through the acquisition of an equity interest in competitors, firms ‘internalise’ a competitive ‘externality’, namely the profits that firms generate for rivals as a result of unilateral output restrictions. The losses incurred can be partially recovered through a share in the equity (and therefore in the profit) of the participated firm. When firms are linked by minority shareholdings, aggressive competition can lower the value of the investor’s

¹⁴ In the case of management interlocks the person is not a director of both firms. However, the danger seems greater, because the usual officer is likely to be more intimately involved with the operating decisions of his company than the usual director. See Areeda and Turner, paragraph 1302e.

¹⁵ See Reynolds and Snapp (1986); O’Brien and Salop (2000); Gilo (2000); Dubrow (2000); O’Brien and Salop (2001); Merlone and Salleo (2003); Reitman (1994).

¹⁶ See Reynolds and Snapp (1986).

investment in equity shares. These links have an effect on the profit-maximisation decisions of the firms involved and induce them to compete less vigorously and to adopt behaviour more conducive to a joint maximization strategy.

The Reynolds and Snapp study is premised on a market in which identical firms produce homogeneous products at constant marginal costs¹⁷. It shows that in these circumstances the market output is a declining function of the extent to which firms are linked by partial equity interests. The higher the level of ownerships in competing firms, the higher the incentives of the firms to lower their output given the output of the other firms. The model and its conclusions are premised on one essential condition: the entry conditions in the market are difficult if not impossible. If entry would be easy, firms attracted by the higher industry profits would eliminate any likely rent and jeopardise any attempt to unilaterally raise prices.

The Reynolds and Snapp model also allows some quantitative assessment of the magnitude of the effects of minority shareholdings on output levels. Reynolds and Snapp conclude that the *“equilibrium market changes only modestly when few firms are linked and those links are small”*¹⁸. However, when the links include all the players in the market, the drop in output can be significant. According to Reynolds and Snapp, if in a market with five firms where each firm holds a 10% equity interest in each other, output would be 10% less than the level absent the links. In addition, if the structural links are reciprocal (see Case 2, illustrated in paragraph 0 above), the drop in market output would be double the original. Another factor that affects the level of output reductions is the level of the equity ownership. The higher the level of ownership, the higher the incentives of the firms to lower their output given the output of the other firms.

Reynolds and Snapp also note that this unilateral effect is not detectable by the traditional antitrust analysis based on structural indexes, such as concentration ratios. The traditional structural analysis does not adequately account for the effects of partial equity interests¹⁹. Let's imagine, for example, a market with 10 equal firms each with a market share of 10%. A simple CR4 concentration ratio of 40% would not necessarily alert agencies to the existence of a competition problem; however, if each firm would have a 10% share in each other, according to the Reynolds and Snapp model, this would be sufficient to achieve a monopoly level of output regardless of the non-alarming level of market concentration²⁰.

¹⁷ The authors acknowledge that the magnitude of changes for each firm could vary if the underlying cost and demand functions of the firms differ. If some firms have higher costs than others they may produce relatively smaller portions of the market output. Similarly, if products are differentiated, firms could hold different shares of the market.

¹⁸ See Reynolds and Snapp (1986), p. 146. The model shows an output decline of 0.1% if, in a market with ten equally-sized and unlinked firms, one firm acquires a 10% share in a competitor. The drop in output would double if there are only five firms in the market.

¹⁹ See Reynolds and Snapp (1986), p. 147.

²⁰ In particular, Reynolds and Snapp conclude that *“when ownership shares are at the maximum level which is feasible, given the number of firms in the market, the monopoly output level will result regardless of the number of firms”*.

Box 1. Unilateral effects - A numerical example

The unilateral effect of minority shareholdings on the acquiring firm's incentives to raise prices or lower output can be illustrated by a simple numerical example.

Suppose that Firm A sells 20 widgets to 20 customers at a unitary price of €10 and that Firm A makes a profit of €2 on each unit sold. At this price/output level, Firm A maximises its profits. If Firm A were to increase its price by 10% (i.e. to €11), this would lead to a likely loss of 8 customers, with a drop in total profits from €40 to €36 (i.e. 12 times €3). Firm A therefore would have no incentives to raise its prices unilaterally. In other words, absent structural links with competitors, Firm A would contemplate a unilateral price increase only if the expected gains from the price increase would more than compensate the loss of income due to the loss of sales to those customers who are discouraged by the price increase.

Let's suppose instead that Firm A owns a 25% passive investment in one of its competitors (Firm B), which also sells widgets at €10 per unit, with a profit per unit of €2. Firm B sells 10 widgets for a total profit of €20. As a consequence of the share in Firm B, Firm A is entitled now to 25% of Firm B's profits, supposing that Firm B's profits are accrued to the shareholders. In this new situation, absent a price increase, Firm A's profits would be €45 (i.e. €40 profits derived from sales to customers of Firm A, plus €5 which is 25% of Firm B's profits). However, should Firm A raise its price, its profit maximisation calculation would change²¹. Let's simulate various possible scenarios:

- Let's imagine that Firm A were to raise its price by 10% (to €11 for a profit of €3 per unit) and that this would cause Firm A to lose eight customers. If all the eight customers decide to purchase widgets from Firm B, Firm A's incentives to increase prices would not be affected as its profits would remain unchanged (i.e. €36 for sales to the 12 customer of Firm A, plus €9, i.e. 25% of €36 representing the new profits of Firm B), making a price increase not profitable for Firm A.
- If Firm A, however, were to raise its prices by 5% (to €10.5 for a profit of €2.5 per unit) it would likely lose four customers rather than eight. In this case, if all the four customers were to start purchasing from Firm B, Firm A's profits would rise to €47 (i.e. 16 times €2.5, plus 25% of 14 times €2). In this scenario, Firm A would find it profitable to unilaterally raise its prices. Firm A would find a 5% price increase profitable even if only one of the four lost customers would start purchasing from Firm B and the other three stopped purchasing or purchased from other suppliers.
- Finally, if Firm A were to raise its price only by 2.5% (to €10.25 for a profit of €2.25 per unit) it would expect to lose only two customers. Also in this case, Firm A would find it profitable to raise prices as it would increase its total profits to €46.5 (i.e. 18 times €2.25, plus 25% of 12 times €2). Firm A would still find it profitable to raise its price even if only one of the two lost customers start purchasing from Firm B.

The examples above illustrate how minority shareholdings, even of a totally passive nature, can modify the financial incentives of the acquiring firm (Firm A in the example) and induce it to unilaterally raise its prices. This is a likely outcome in markets with few firms and high barriers to entry, even if firms do not collude tacitly or expressly. However, as the examples show, the anti-competitive unilateral effects that might arise from passive investments in a competitor's stock are probabilistic in nature and may be difficult to prove if agencies do not have all the information required to simulate this analysis.

In practice the potential unilateral effects will depend on the combination of various factors such as the size of the minority interest, the market share of the 'target', the degree of substitutability between Firm

²¹ Similar effects on prices as those discussed here can also be expected in the case of indirect minority shareholdings (see Case 3 in paragraph 0 above), where Firm A has no direct participation in Firm B, but the controlling shareholder of firm A (Firm X) does.

A and Firm B's products, the diversion ratio between Firm A and Firm B (i.e. the amount of demand that would be captured by Firm B in the event of a price increase by Firm A), and the firm's respective variable costs which affect their particular margins²². Reynold and Snapp themselves have assumed that barriers to entry are high and that the structure of the market is oligopolistic. In a market which does not have these characteristics, the effect on individual incentives could be materially different. Similarly, Reynold and Snapp do not take into account the possibility that competing firms react strategically to Firm A's price increase. For instance; Firm C could lower its prices to attract the customers lost by Firm A to the detriment of Firm B. This again will jeopardise the success of a unilateral price increase.

3.1.2 Measuring unilateral effects of minority shareholdings

The fact that minority equity interests between competitors might have anti-competitive, unilateral effects, however, does not necessarily suggest that these effects will usually be present or substantive. Having identified what these effects could be, it becomes important to quantify the magnitude of these effects on competition. Areeda and Turner have shown scepticism about the possibility to quantify these effects: "*Unfortunately, there is no formula that can describe the likelihood of such effects for the generality of cases or even for the particular case.*"²³ This sceptical view, however, has been challenged in recent years by economists who have developed methodologies used traditionally to assess the impact of full mergers between competitors and adapted them to the specific analysis of partial ownership acquisitions.

In particular, two methodologies have been suggested. The first one, the Modified Herfindahl-Hirschman Index (MHHI), builds on the HHI concentration index widely used by antitrust enforcers for horizontal mergers. This methodology is based on a Cournot oligopoly model of quantity competition between firms producing homogeneous goods. The second one, the Price Pressure Index (PPI), expands on the use of diversion ratio methods and is premised on the Bertrand model of price competition between firms producing differentiated products.

The Modified Herfindahl-Hirschman Index (MHHI)

The MHHI methodology²⁴ builds on the HHI index, which is widely used by antitrust agencies to assess horizontal mergers²⁵. The HHI index is normally calculated by squaring the market shares of the market participants and summing the squared numbers. By comparing the results pre- and post-merger (the so-called "delta"), it is possible to measure the likely effect on the level of concentration in the market of a merger between competing firms. The Modified HHI index takes into account the fact that the firms have not entered into a full merger, as otherwise it would overstate the increase in concentration when the acquisition only involves a partial equity interest. In case of acquisition of a minority shareholding, the MHHI delta equals the financial interest share times the product of the two firms' market shares. This may be compared to a full merger where the MHHI delta would be twice the product of the firms' market

²² It is apparent that the magnitude of the effects on the incentives to raise prices or reduce output would be more significant if Firm B's margins would be larger relative to Firm A's costs.

²³ See Areeda and Turner (1980) ¶ 1203d, at 322.

²⁴ This methodology was first suggested by Bresnahan and Salop (1986) in the context of production joint ventures and further developed in O'Brien and Salop (2000) and O'Brien and Salop (2001).

²⁵ See, for example, the 1992 Guidelines of the US FTC and DOJ on Horizontal Mergers (available on both agencies' websites) and the European Commission Guidelines on the Assessment of Horizontal Mergers (in OJ C 31, 5.2.2004, p. 5-18).

shares.²⁶ Because the effects of minority shareholders depend on the distribution of control rights, for given ownership shares the index will differ depending on the specific pattern of control²⁷.

The analysis of the variation of the MHHI index pre- and post-transaction can offer some guidance as to whether a partial ownership acquisition may have an impact on the firm's incentives to compete, given a certain market structure and a certain corporate structure²⁸. However, this methodology is predictive in nature and cannot be relied upon to assert that a certain transaction will necessarily result in a significant lessening of competition²⁹. The same promoters of the MHHI index say that "[...] MHHI calculation, just like conventional HHI calculations, are very rough in that they assume a relevant market that entails no substitution to products outside the market, prohibitive entry barriers, no other competitive effects facts, and no efficiency benefits. However, the calculations can be useful as a first step, just as is the HHI in merger analysis."³⁰ Therefore, the MHHI index, just like the HHI index, can be no more than screening a device.

The Price Pressure Index (PPI)

If the acquisition of partial ownership involves firms manufacturing differentiated goods, a different methodology ought to be applied: the Price Pressure Index³¹. The PPI measures the direct incentive effects in response to a change in ownership structure and provides a more refined analysis based on the degree of closeness of the products of the firms involved³².

The PPI model is based on the differences in margins of the respective firms for their products and their diversion ratios, and predicts the price effect of the change in ownership structure. However, while the MHHI methodology is relatively easy to implement, as it is based on information which is normally easily available to antitrust enforcers (such as the parties' market shares and the percentage of the ownership acquired), the PPI methodology requires a more sophisticated set of information (such as the two firms' profit margins and the diversion ratios for differentiated products), some of which may not even be available. In addition, in contrast to the MHHI, which is a market-wide index, there are separate PPI indexes for each firm involved.

The analysis of the PPI methodology shows that the pressure to increase prices after the acquisition of partial ownership is a function of the margins of the two firms and of the amount of sales that would be lost by the firm holding the minority interest (Firm A) to the competitor in which it has invested (Firm B).

²⁶ See O'Brien and Salop (2001), p. 614. The numerical example given by the authors shows that the acquisition of a passive financial investment of 45% in a competitor, in the case where both the acquiring Firm A and the acquired Firm B have a 20% market shares, would yield a delta equal to 180 (45% x 20 x 20). If the two firms were to merge, the delta would be 800 (2 x 20 x 20).

²⁷ See O'Brien and Salop (2001), p. 614 who take into account six control scenarios: full merger, silent financial interest, total control, one-way control, coasian joint control, and proportional control. These scenarios derive from a previous study of Breshahan and Salop (1986) on production joint ventures.

²⁸ The European Commission has used the MHHI in Exxon/Mobil (see Case M.1383, point 256) and has referred to this methodology in the Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings, in [2004] OJ C/31, p. 5/18, footnote 25). In the US, the MHHI has not been used.

²⁹ See Dubrow (2001), p. 128 *et seq.*

³⁰ See O'Brien and Salop (2000), p. 596-597.

³¹ See O'Brien and Salop (2000) and O'Brien and Salop (2001).

³² See O'Brien and Salop (2000), p. 598.

Therefore, the larger the margin of Firm B relative to Firm A's marginal cost, the greater the profit that Firm A can recapture on the sales diverted to Firm B. Similarly, the greater the diversion ratio from Firm A to Firm B, the greater the profit that Firm A can recapture on the sales diverted to Firm B. Therefore, the greater Firm B's margins are and the larger the diversion ratio is from Firm A to Firm B, the more likely it is that Firm A will raise its prices post-transaction.

3.2 *Minority shareholdings and co-ordinated effects*

The theories discussed above, which predict potential unilateral effects from the acquisition of minority shareholdings, are based on the assumption that firms in the market set prices independently and do not tacitly or expressly collude or signal to the market their strategic decisions. A separate question is whether structural links between competitors in the form of direct or reciprocal minority shareholdings can also facilitate express or tacit collusion³³. The mere existence of links between competitors is not a sufficient condition to conclude that collusion is a likely outcome in the market. It is necessary to look closely at the function of these structural links in terms of the incentives and opportunities to collude that they provide to the firms involved and to the market.

Economic theory suggests that in order for the colluding parties to agree on a common strategy and to sustain it successfully over time, it is necessary that the following cumulative conditions are met³⁴:

- Market conditions must be sufficiently transparent to allow each cartel member to monitor if the other firms are adopting the common policy.
- The consequences of deviations or cheating from the common policy (i.e. punishment and retaliation) must be sufficiently severe and credible.
- The foreseeable reactions of both customers and current and future competitors must not be such as to undermine the common policy.

Various additional factors may facilitate the formation of a collusive outcome, i.e. the fulfilment of the cumulative conditions mentioned above, although not all of these additional factors must necessarily be present for collusion to be likely. These factors include the structure of the market and its level of concentration, the degree of transparency of market conditions, the difficulty of entry and exit, the strength of residual competition, buyer power, the stability of market conditions, the degree of symmetry among market participants and the ability of firms to interact repeatedly and on more than one market.

³³ See Reynolds and Snapp (1986); Gilo (2000); Gilo, Moshe, Spiegel (2005); Merlone and Salleo (2003); Merlone (2007). Similar conclusions apply if the firms affected by the structural links are not *actual* competitors by merely *potential* competitors. Ownership interest short of a complete merger can remove the entry threat of the potential competitor and allow firms in the market to charge cartel-like prices. See Reynolds and Snapp (1986).

³⁴ For further details regarding the theory on collusion, see Stigler (1964); Carlton and Perloff (1990); Scherer and Ross (1990); Philips (1995); Ivaldi, Jullien, Rey, Seabright and Tirole (2003); and the extensive literature cited in these texts.

While some authors have reached ambiguous results as to whether collusion can be facilitated by partial ownership investments in competing firms³⁵, the majority view is that structural links between firms in markets which are concentrated and prone to collusion (tacitly or explicitly) can be a collusion-enhancing factor. These authors argue that the acquisition of a minority shareholding can facilitate the establishment of a collusive equilibrium or its stability³⁶ in two ways: (i) it increases transparency and (ii) it negatively affects the firms' incentives to compete.

3.2.1 *Information exchanges and effects on transparency*

Minority shareholdings increase market transparency, as they provide to the owner an opportunity for a privileged view on the commercial activities of the target³⁷. A minority shareholder can access information on the target which can facilitate collusion or the monitoring of adherence of the target to the commonly agreed conduct. If the ownership investments are reciprocal and if they link all competitors in the market, the information exchange effect is clearly enhanced.

The degree of transparency which is offered by a structural link mainly depends on the rights associated with the ownership. If the minority stake is associated with a board representation or grants sufficient rights to appoint senior managers, the degree of transparency is higher. This would obviously allow competitors to be aware of the other company's pricing and commercial strategies and to obtain competitively sensitive information. This increased transparency is likely to facilitate coordination between the two firms.

But even in the situation of a totally passive investment, where the owner minority shareholder has no active participation in the management of the target whatsoever and no representation rights, transparency may still be increased. Even passive minority shareholders may have access to information that an independent competitor would not have, such as plans to expand, to merge with or to acquire other firms, plans to enter into major new investments; plans to expand production or to enter or expand into new markets³⁸.

3.2.2 *Effects on the firms' incentives to price competitively*

The simple fact that competing firms have common interests can have an impact on their respective incentives to compete aggressively against each other. As with unilateral effects, partial ownerships might

³⁵ See in particular Malueg (1992) who concluded that, for certain levels of passive investments, an increase in passive investment levels can make collusion more difficult and therefore it is theoretically pro-competitive. Malueg's conclusion is premised on the ambiguity which results from the fact that partial ownerships have two conflicting effects. On the one hand, in a Cournot model, partial ownerships allow firms to internalize part of the losses that they inflict on rivals when they deviate, therefore reducing the incentives to deviate. On the other, they soften competition following the break-down of the collusive scheme and hence strengthen the incentives for firms to deviate. The net effect depends on a number of factors and particularly on the level of the partial ownership interest.

³⁶ As Hovenkamp put it, "[u]nder the rules of competition, A would like nothing better than to force B out of the market through A's greater efficiency. As a result of partial acquisition [by A of B], however, A suddenly has a strong financial interest in B's welfare. The risk of tacit or express collusion may increase dramatically". See Hovenkamp (1994), p. 497.

³⁷ Such structural links may provide valuable insights into the activities of rival firms, which could be an important facilitating factor for collusion. See Martin (1995).

³⁸ In many countries, in order to protect the value of the equity investment, corporate laws grant special protection to minority shareholders, ensuring that non-controlling shareholders are not entirely excluded from the effective decision making process of the company.

change the payoffs of the firms involved and their respective incentives to deviate from a collusive agreement or to engage in a pricing war to punish deviations from a collusive agreement. In addition, investments in competing firms signals to the rest of the market the intention of the firms affected to start competing less vigorously. This may induce the whole industry to reduce the competitive pressure and favour a collusive equilibrium to the detriment of consumers. However, economics also suggests that structural links can have the opposite effect, i.e. they might reduce the likelihood of collusion³⁹. The net effect depends upon the demand and cost conditions of the firms as well as on the extent and nature of the minority stake.

In the following sections, we will discuss how direct and indirect equity investments can affect the incentives of the firms involved to engage in vigorous price competition and how firms could achieve the same collusion-enhancing effect without creating structural links but by acquiring a competitor's debt.

Direct equity investments

Reynolds and Snapp concluded that linking rivals with partial equity interests improves cartel performance as it strengthens the stability of the collusive arrangement and its long-term sustainability⁴⁰. In particular direct equity investments in competing firms:

- Reduce incentives of the target of a minority shareholding to cheat on the collusive equilibrium, as it would have to share part of the gains earned by free riding on the collusive arrangement with its competitor.
- Facilitate retaliation since it increases the ability of firms to detect cheating. The investor having a right to a share in the profit, it would be easily alerted to the fact that the target has engaged in a competitive strategy.
- Reduce the incentive of the investing firm in free riding on the collusive arrangement, because a price cut would reduce the target's profits and therefore de-value its own investment.
- Create incentives for the firm investing in equity to make additional investments at the margin that deter or retard entry by new companies which could then challenge the stability of the collusive and reduce the value of its initial equity investment.

This analysis on the collusion-facilitating effect of minority shareholdings is, however, based on the changes in the incentives of the firms linked by the minority stakes, but it does not however take into consideration the incentives of the other firms active on the market to price cut. Firms competing with the firms linked by the equity investment, even in concentrated industries, may still find it profitable to price cut, regardless of what the interlocked firms do. In this regard, scholars have looked at the policy question of whether it is necessary that all the industry is linked in order for collusion to be plausible. Some authors have indicated that minority shareholdings and the strategic reasons that a firm has to acquire their shareholdings must be distinguished from the problem of forming a coalition in terms of mutual cross-holdings and joint ventures where all sides share the benefit of reduced competition in a symmetric way⁴¹. While the acquisitions of minority interest that creates fairly symmetric cross-shareholdings between firms

³⁹ See discussion in footnote 35 above.

⁴⁰ See Reynolds and Snapp (1986), p. 149.

⁴¹ See Malueg (1992). Similarly, see Kwoka (1992) who also concluded that mutual cross-shareholdings are much more likely to be profitable for all participants for a broad range of market games.

may facilitate collusion, a simple shareholding in a rival firm may not, if it increases the asymmetry in the parties' respective financial interests.

While the fact that not all firms in the market are linked to each other weakens, to a certain extent, the policy argument against minority shareholdings, scholars agree that strategic investments involving firms that are otherwise more likely to trigger a price cut may be sufficient to grant stability to a collusive equilibrium⁴². According to these scholars, to facilitate a collusive equilibrium it is not necessary for the whole industry to be linked by equity interests or that such links affect all the members of the cartel. It is usually sufficient to discipline the fringe and smaller competitors, which have the greatest interest to cheat and deviate from the collusive arrangement. Therefore, it is more likely to see ownership links between smaller competitors, or partial ownerships of larger firms by smaller competitors⁴³. This establishes a set of negative incentives for small firms to cheat because it will increase the effectiveness of retaliation as losses will be greater for smaller firms.

The strategic motivation for small, maverick firms to acquire minority interests in competitors is to commit themselves not to price cut⁴⁴. This signals to the other firms in the market the intention of the maverick firm not to compete fiercely. The effectiveness of such commitment is preserved if the maverick firm invests in only one rival; it does not need to invest in all its competitors. Such commitment is therefore sufficient to induce all firms in the market to collude tacitly. Without the maverick investing in a competitor, all firms would compete aggressively knowing that the maverick firm would adopt a competitively aggressive strategy anyway, making collusion in the market not sustainable. However, in order for the passive investment to serve as an effective commitment not to price cut, it is necessary that the transaction is visible⁴⁵ to the market and credible⁴⁶.

⁴² See Reynolds and Snapp (1986), p. 149. Gilo also arrives at a similar conclusion. He argues that in order to facilitate a collusive outcome, it is sufficient that passive investments are made by firms which are otherwise more inclined to trigger a price cut. A "trigger-happy" firm is for example the firm with the lowest marginal cost in the industry, who will generally be more willing to price cut than a firm with higher marginal costs. Similarly, firms with low market shares will be more willing to price cut than firms with larger shares of the market, since smaller firms have less to gain from collusion than larger firms. Likewise, firms whose business model is based on few, large-volume deals have a higher incentive to price cut since the scarcity of the deals makes detection of price cuts more difficult and retaliation less effective. In addition, for firms which only have few, large deals the gain from deviating at the right time may be large, certain and immediate, whereas the losses from being punished may be small and uncertain and only materialise after some time. However, Gilo also points out that in industries where all firms are equally inclined to price-cut, passive investments can facilitate collusion only if each firm in the industry passively invests in a competitor. See Gilo (2000), p. 15 *et seq.*

⁴³ See Reynolds and Snapp (1986), p. 149.

⁴⁴ In the context of all-pay auctions, Konrad (2005) has shown that passive shareholdings introduce asymmetric externalities and if the strongest firm (i.e., the firm with the highest valuation of winning the auction) owns a minority stake in the second strongest firm, this make the strongest firm abstain from bidding.

⁴⁵ This could be an issue if companies are closely held, while it should not pose any problem for companies whose shares are publicly traded. The latter type of companies is subject to disclosure requirements under national and international securities regulations. In the US, for example, under the SEC rules if the passive investment exceeds 5% of the outstanding stock, the investor must inform the market; similar disclosure requirements apply if the passive investment drops below 5%.

⁴⁶ For instance, if the acquisition of the passive investment is part of a multi-step transaction whereby it is already agreed that the acquired stake will be later transferred to a third party, the commitment not to price cut will not be credible. See Gilo (2000), p. 19.

Indirect equity investments by a controller entity

Another case which has been identified as potentially enhancing collusion is ownership investments made by the controlling shareholder of a firm in one of the competitors of the controlled firm⁴⁷. Also these indirect structural links therefore facilitate collusion and lead to higher prices in the market⁴⁸. In addition, once the controller has decided to invest in firms which compete with the company it controls, it will have a strong incentive to dilute its share in the controlled firm; the smaller this share is, the less aggressively the controlled firm will compete in the market. Therefore, this implies that even small shares in competing firms can substantially lessen competition if the controlling entity's stake in the firm it controls is diluted. For these reasons, indirect investments in competing companies can signify a stronger commitment not to price cut than direct investments in a competitor. This is because the lower the controller's stake in the firm it controls, the more weight it places on the minority stake in the rival firm.

Box 2. Co-ordinated effects and indirect equity investments - A numerical example

The effect discussed above can be illustrated with a simple example. Let's take the example of Firm A and Firm B used above in Box 1 and let's imagine that Firm A is the 100% controlled subsidiary of Firm X. Absent passive investments, if Firm X were to change firm A's pricing policy and lower prices by 5% to be a more aggressive market player, Firm A would gain seven customers to the expenses of Firm B and it would see its profits grow from €40 (i.e. a €2 profit for each of the 20 units sold) to €40.5 (i.e. a €1.5 profit for each of the 27 units sold). In this situation, Firm X has an incentive to ensure that Firm A competes aggressively.

Let's instead imagine that Firm X acquires a minority share of 25% in Firm B. In this situation the gain in profits from a 5% price cut of Firm A must be balanced with the loss of profits from Firm X's participation in Firm B. Before the price cut by Firm A, Firm X would have a profit of €45 (i.e. €40 for sales to Firm A's customers plus €5 from its 25% shareholding in Firm B.); after the price cut, Firm X's profit would drop to €42 (i.e. €40.5 profit from its controlling stake in Firm A, plus €1.5 which is 25% of the new profits from Firm B). In this situation, Firm X has no incentives to make Firm A compete aggressively, because Firm X would incur in a financial loss.

In addition, the lower Firm X's controlling share in Firm A, the higher the incentive of Firm X to reduce competition between Firm A and Firm B. For example, if Firm X controls only 75% of firm A, a drop in price by Firm A by 5% would reduce Firm X's profits from €35 to less than €32. This is because the lower Firm X's stake in Firm A is, the more weight Firm X will place on its minority stake in Firm B.

Questions, however, can be raised as to the actual incentives and ability of the management of Firm A in the example above to raise prices to divert customers from Firm A to a competing firm (Firm B in our example), in which the controlling shareholders (Firm X) has a stake, in order to maximise the stand-alone profits of that firm⁴⁹. It would not be in the interest of the managers of Firm A to lose sales and profits to the benefit of a competitor; they are most likely to make pricing decisions to maximise Firm A long-term competitive strength by gaining market shares and increasing the company's profits⁵⁰. In addition to a possible lack of management incentives to raise prices, one has to consider that management decisions may well be constrained by legal rules on corporate governance, which generally impose on the management a duty to serve the interest of the entire company, including the interests of the minority shareholders.

⁴⁷ This is the third structure of minority shareholdings described in paragraph 0 above, i.e. the minority shareholding in the competing firm is not held directly by the competitor but by its controlling shareholder (be it a parent company or an individual).

⁴⁸ See Gilo (2000) p. 22 *et seq.*; Ezrachi and Gilo (2006).

⁴⁹ See O'Brien and Salop (2000), p. 580; and Dubrow (2001), p. 133-134.

⁵⁰ See Dubrow (2001), p. 134.

Fiduciary duties may thus be extremely relevant as they may prevent executives from taking business decisions which are not in the interest of the minority shareholders.

On this specific issue, there are two points to make.

- First, the financial interests of the management can be artificially aligned with that of the controlling shareholder. This can be done by structuring executive compensation packages that positively link the remuneration of managers of Firm A, with the economic performance of Firm B. This would induce the management to make pricing decisions which would favour Firm B's economic success.
- Second, if the decision of Firm A to raise prices signals to the entire market an intention to compete less aggressively and that leads to the establishment of a tacitly collusive equilibrium in the market, this could lead to an increase in Firm A's profits as well as being advantageous to Firm A's minority shareholders. The success of this strategy would arguably ensure that management did not infringe its fiduciary duties towards minority shareholders, who would find such a strategy profitable, as would the rest of the market⁵¹.

Acquisition of a competitor's debt

In some circumstances, firms do not need to create structural links to facilitate collusion. Collusion-enhancing effects, very similar to those generated by a minority shareholding, can be obtained by acquiring a competitor's debt, as oppose to a competitor's equity.

The acquisition of a competitor's debt can induce the creditor to reduce its competitive pressure on the debtor if increased competition would increase the likelihood of the debtor's insolvency⁵². In other words, the creditor may refrain from adopting an aggressive commercial strategy if such strategy would jeopardise its chances of having the debt entirely repaid. In such circumstances, extending a loan to a competitor may act as a commitment against the market to adopt a less aggressive pricing policy, which may induce all market players to reduce overall rivalry in the market to the advantage of a collusive, non-competitive equilibrium.

The effect on the level of competition of the acquisition of a competitor's debt, however, is much more diluted than in the case of the acquisition of stock. While one can assume that the acquisition of shares always affects the financial interest of the acquirer and therefore its profit maximisation calculation, in the case of an acquisition of a competitor's debt, the effects on the creditor's incentives to compete depend on two main factors:

- Fierce competition must reasonably induce the insolvency of the debtor and,
- The debt must not be guaranteed by third parties.

Therefore, the acquisition of a competitor's debt can act as a facilitating factor for collusion only if competition jeopardises the ability of the creditor to have its credit repaid. Otherwise, the creditor will not be deterred from competing vigorously with the debtor.

⁵¹ See Gilo (2000) p. 24.

⁵² See Gilo (2000), p. 21. See also Kaiser (2004), p. 616 *et seq.* for a discussion of the enforcement of US antitrust rules against the acquisition of a competitor's debt.

3.3 *Conclusions on the likely anti-competitive effects of minority shareholdings*

From the overview of the economic literature on the effects on competition of the acquisition of minority shareholdings in competing firms, it is possible to draw a number of conclusions which should be taken into consideration when deciding on the enforcement policy of agencies and courts in this area of competition law.

3.3.1 *Unilateral effects*

- In oligopolistic markets with high barriers to entry, minority shareholdings between firms (even if only of a passive nature) might lead firms to unilaterally reduce output and increase prices to the detriment of consumers' welfare.
- The probability of unilateral price effects from minority shareholdings increases with the level of ownerships in competing firms; the higher the level of ownership, the higher the incentives of the firms to lower their output given the output of the other firms.
- The magnitude of the unilateral effect is larger the higher, the number of firms in the market which are tied-up. When the links include all the players in the market, the drop in output can be significant.
- The magnitude of the unilateral price effects is greater the larger the margins of the target firm and the higher the diversion ratio between the acquiring firm and the target.
- If the structural links are reciprocal, the expected unilateral effect would be double the original.

3.3.2 *Co-ordinated effects*

- The mere existence of links between competitors is not a sufficient condition to conclude that collusion is a likely outcome in the market. However, collusion can be facilitated by partial ownership investments in competing firms if markets are concentrated and there are high barriers to entry.
- The acquisition of a minority shareholding in a competitor can facilitate the establishment of a collusive equilibrium or its stability, because it increases transparency and negatively affects the firms' incentives to compete.
- Minority shareholdings by the firm which is more competitively aggressive on the market (i.e., a "maverick" firm) can be strategically used to facilitate collusion; in this respect, they raise more antitrust concerns than ownership investments by less competitive firms⁵³.

⁵³

Many jurisdictions believe that the acquisition of a maverick firm by a competitor can lead to collusion (for example, see European Commission, Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings, in [2004] OJ C/31, p. 5/18, paragraph 42; DoJ/FTC, 1992 Horizontal merger Guidelines, paragraph 2.12). The point here is that to facilitate collusion it may not be necessary to eliminate the maverick firm by way of an acquisition; it may be sufficient that the maverick firm commits to compete less aggressively via passive investment in competing firms.

- Ownership investments by less aggressive firms are less likely to facilitate collusion in the market, unless all firms in the market have invested in at least one competitor. They can nevertheless lead to unilateral price increases.
- In concentrated industries, equity investments by a controlling shareholder in firms competing with the controlled entity raise more serious concerns than direct investments between competing firms.
- In the case of equity investments by controlling shareholders, the smaller the controller's stake in the entity it controls, the higher the probable anti-competitive harm.
- In the case of equity investments by controlling shareholders, even small stakes in the firm's competitor can lead to a substantial lessening of competition.
- Under certain circumstances, the acquisition of a competitor's debt can have similar effects on competition as the acquisition of a competitor's equity.

The conclusions which can be drawn from economic theory indicate that antitrust enforcers should not underestimate the potential anti-competitive effects of minority equity investments among competitors. These conclusions, however, should not be viewed as supporting a *per se* negative approach to minority shareholdings, but should serve as a sign that such acquisitions should be carefully investigated. A lenient approach may not be justified from an enforcement policy perspective, as minority shareholdings have a clear potential for anti-competitive effects. However, the likelihood and the magnitude of the potential unilateral or co-ordinated effect on the pricing decisions of the firms involved depends on a number of factors, some of which can render the possibility of anti-competitive effects unlikely. The investigation of these factors can be complex.

3.3.3 *Countervailing factors*

In practice the potential unilateral or co-ordinated effects depend on structural factors such as the degree of market concentration, entry conditions, the homogeneous or differentiated nature of the products concerned, the substitutability of the products concerned, their respective diversion ratios and the number of firms in the market which are linked to each other. Other factors are transaction specific and relate to the firms involved in the transaction (such as the firms' respective costs and margins, and their market shares) and to the transaction itself (such as the size of the minority interest and the reciprocal nature of the structural links). Some of these factors are very familiar to the antitrust enforcers which already consider them carefully when assessing full mergers. However, while some of them are fairly straightforward, others require a significant amount of data, which may not always be available.

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, which could have significant countervailing effects on the incentives of the acquiring firm to reduce its competitive pressure as a consequence of the investment in the competing firm⁵⁴. These "real-world" factors are:

- *Incomplete information*: Business decisions are taken on the basis of the information available at a certain moment in time. The lack of data which allows to predict the movements of demand and the likely reactions of competitors following a price increase may affect firms' pricing decisions

⁵⁴ See in particular the discussion in Dubrow (2001) and the reply to Dubrow's criticisms in O'Brien and Salop (2001).

and could induce them to maintain a competitive strategy regardless of the acquisition of equity in a competitor⁵⁵.

- *Conflicting management incentives*: The assumption that the incentives of managers and the incentives of owners of the minority stakes coincide may not always be true. While this may be correct in the case of direct equity investments by a firm in one of its competitors, it may not be the case for indirect investments by a controlling shareholder. In this case, the management of the controlled firm may not be interested in reducing competition for the advantage of the competitor in which the controlling shareholder holds an equity stake. In this case, the interest of the management to increase the long-term profitability of the firm may not coincide with the interest of the controlling entity to maximise profits through the combined shareholdings in both firms. In addition, fiduciary duties towards minority shareholdings may prevent management from taking business decisions which do not serve the interest of all of the shareholders. The controlling shareholder may well carry the power of control, but management is subject to the duty not to injure minority shareholders.
- *Inability to capture the benefits*: The economic models, which analyse the incentives to compete of a firm acquiring a minority stake in a competitor, are premised on the assumption that the acquiring firm is in a position to capture the stream of profits associated with the minority stake⁵⁶. However, there may be instances where the expected benefit from the minority shareholding cannot be realised. Let's imagine, for example, that the target is a multi-product firm and that the overlap between the businesses of the acquiring firm and that of the target accounts for only a small fraction of the target firm's total profit. In this case, the opportunity for profits (or losses) on the investment is largely outside the product area in which the two firms compete and may be influenced only to a limited extent by the pricing decisions of the acquiring firm⁵⁷. In addition, some authors have also cautioned to the possibility that profits are not distributed to the shareholders by the target firm, eliminating the opportunity of an immediate sharing of profit. In this case, the acquiring firm would obtain a capital gain by the increased value of the target, which can only be realised in the future when the financial interest is liquidated. However, at that moment the capital gain may have disappeared for a variety of other shocks to the company or to the economy⁵⁸.
- *Lack of control over the target's management decisions*: A related "real-world" factor that could affect the incentives of the acquiring firm is that, in purely passive equity investments, the acquiring firm cannot control the decisions of the target's management as to how to use the extra profits generated by the actions of the acquiring firm⁵⁹. The risk is that the managers of the target firm may not direct these profits to the highest value uses and satisfy the acquiring firm's return on investment prospects, but rather dissipate them trying to meet a flawed investment or business

⁵⁵ See Dubrow (2001), p. 133 and the reply in O'Brien and Salop (2001), p. 616.

⁵⁶ Reynolds and Snapp say that their analysis: "[...] implicitly assumes that [...] profits are divided according to each partner's share of equity. [...] Joint ventures structured in a way that do not require a pro rata division of profits or output will not produce the economic effects discussed below." (Reynolds and Snapp, 1986, p. 143-144). Also the analysis of O'Brien and Salop's economic model assumes that "the acquiring firm is entitled to a share of the acquired firm's profits" (see O'Brien and Salop, 2000, p. 577) as is the MHHI methodology (see O'Brien and Salop, 2000, p. 595).

⁵⁷ See Dubrow (2001), p. 134 *et seq.* and the reply in O'Brien and Salop (2000), p. 620 *et seq.*

⁵⁸ See Dubrow (2001), p. 135 and the reply in O'Brien and Salop (2000), p. 621.

⁵⁹ See O'Brien and Salop (2001), p. 622.

plan. For example, rather than distributing the incremental profits to the shareholders in the form of dividends, they could use them to increase executive salaries⁶⁰.

4. The legal treatment of minority shareholdings

Having identified the potential for anti-competitive effects of both active and passive equity investments in competing firms, the following sections will briefly address the question of how antitrust agencies can address the concerns raised by minority shareholders under the traditional antitrust rules on mergers, horizontal agreements and dominance. The enforcement of antitrust rules, particularly when it comes to the review of ‘passive’ investments⁶¹ in competing firms, will also be discussed.

Unfortunately, this is an area of antitrust law enforcement where there is little guidance from the enforcement practice of antitrust agencies. There are relatively few cases where the acquisition of a minority shareholding has been challenged as anti-competitive. Most of the cases are merger control cases⁶², where the application of antitrust rules on horizontal agreements and on monopolisation / abuse of dominance is much more limited. Consistently with economic theory, there appears to be a general consensus amongst antitrust enforcers that the acquisition of a minority shareholding does not amount in itself to a restriction of competition and therefore should not be viewed as illegal⁶³. Agencies are nevertheless alerted to the fact that structural links between competing firms can under certain circumstances raise competition concerns and therefore deserve closer antitrust scrutiny.

4.1 *Applying merger control rules to minority shareholdings*

There is little doubt that a full merger between direct competitors should be reviewed by antitrust agencies to assess whether the transaction will lead to a substantial lessening of competition in the market. The agency’s review of full mergers focuses on the likely anti-competitive effects that the integration of the two firms may generate and balances them with likely efficiencies and synergies. In this sense, merger control rules allow a full review of both unilateral and coordinated effects arising from the transaction. But what about an acquisition of a minority equity share in a competitor? How do antitrust agencies treat cases of totally passive investments in a competing firm? How do they approach these situations, should they give rise to concerns that competition in the market is put at risk?

As discussed in the first section of this Note, the acquisition of a minority shareholding can confer to its owner rights that allow him to influence the target’s decision making process. These types of equity investments are called “active” minority shareholdings. However, equity ownerships can be totally “passive”, in the sense that they can only grant a share in the profits (or losses) of the target company. As opposed to active shareholdings, passive investments do not entitle the owner to control or influence the management of the target company. These are situations in which the investing firm does not seek to gain influence over the competitor’s activities or to access competitor’s sensitive information.

⁶⁰ In these circumstances, the acquiring firm would have an incentive to transform the passive investment into an active one to achieve better control over the management’s decision on profits and investments.

⁶¹ See definition of passive minority shareholdings in paragraph 0 above.

⁶² A large number of merger cases does not concern the direct acquisition of a minority shareholding in a competitor, but situations where a firm acquires another firm (possibly not even a competitor) which happens to hold a minority share in a third firm or in a JV which is competing with the acquiring firm.

⁶³ See, for example, the European Court of Justice in Joint Cases 142 and 156/84, *British American Tobacco and Reynolds v. Commission*, [1987] ECR 4487.

The distinction between active and passive shareholdings is extremely relevant under the merger control rules of many jurisdictions. The key difference is that shareholdings granting control are analogous to full mergers and therefore are subject to a full review of possible anti-competitive effects, while passive shareholdings may fall outside the scope of merger rules and consequently escape *ex-ante* review. From a legal and an economic perspective, passive equity investments are not full mergers. After the acquisition of a passive equity share, the acquiring firm and the target will continue to be managed separately. In these situations, the notion of ownership⁶⁴ and the notion of corporate control⁶⁵ do not coincide⁶⁶, as they do in full mergers. From a policy perspective, this is the main reason why many jurisdictions exclude the acquisition of a purely passive equity stake from the scope of their merger control provisions.

Therefore, the question is whether merger control regimes should be structured as to allow the antitrust enforcement agency (or agencies) to assert jurisdiction on all types of acquisitions of minority shareholdings, including those with a passive nature. From a policy perspective, the question is whether legal “control” of a corporation should necessarily be the threshold for considering partial acquisition under the merger rules. In the following sections we will discuss how a number of jurisdictions have addressed this issue.

4.1.1 *European Union: the framework for review of minority shareholdings under the EC Merger Regulation*

The jurisdiction of the European Commission under the EC Merger Regulation⁶⁷ is based on the notion of “concentration”. Only concentrations, which have a community dimension, are reportable to the European Commission. According to the EC Merger Regulation, a “concentration” arises when a change in control on a lasting basis results from (i) a merger between previously independent undertakings or parts of undertakings⁶⁸; (ii) an acquisition of control of the whole or parts of one or more undertakings whether by purchase of securities or assets, by contract or by any other means⁶⁹; and (iii) the creation of a full-function joint venture⁷⁰. The jurisdiction of the European Commission is therefore centred on the notion of “control”. Only transactions which lead to the acquisition of control (whether solely or jointly with others) or to a qualitative change in the nature of control are subject to review under the ECMR. “Control” can be constituted by rights, contracts or any other means which confer the possibility of exercising “decisive influence” on an undertaking⁷¹.

As discussed in paragraph 0 above, there are instances where a minority shareholder is in a position to exercise a degree of control over the target, either solely or jointly with other minority shareholders, despite the fact that it does not have the majority of the voting rights. We have defined these situations as “active” minority shareholdings. The European Commission has jurisdiction to review the likely unilateral

⁶⁴ Ownership of the financial interest entitles the owner to a share of the profits generated by the acquired company from its operations.

⁶⁵ Corporate control indicates the legal ability of the owner of the shares to influence the management of the acquired firm, including decisions affecting pricing, output and other key decisions of the company.

⁶⁶ On the distinction between financial interest and corporate control and its impact on the incentives of the acquiring firm and of the acquired firm, see discussion in O’Brien and Salop (2000), p. 569.

⁶⁷ See Council Regulation n. 139/2004, in OJ L/24 of 29 January 2004, pp. 1-22 (hereafter “ECMR”).

⁶⁸ See ECMR, Article 3(1)(a).

⁶⁹ See ECMR, Article 3(1)(b).

⁷⁰ See ECMR, Article 3(4).

⁷¹ See ECMR, Article 3(2).

and co-ordinated effects of the acquisition of an active minority shareholding, provided that it meets the definition of “concentration”. For purposes of establishing jurisdiction, if the transaction is a “concentration”, the level of ownership acquired is irrelevant. In this sense, also the acquisition of very small stakes can be subject to the jurisdiction of the European Commission under the ECMR. Conversely, if the minority shareholding is merely passive and it does not entitle its owner to have any decisive influence over the target, the ECMR does not apply⁷² and the transaction escapes *ex-ante* antitrust scrutiny.

The Commission has taken into consideration the possibility of revising the Merger Regulation to extend its jurisdiction to passive minority shareholdings. In the 2001 Green Paper on the review of the old EC Merger Regulation⁷³, the European Commission said that “*based on current experience, it appears that only a limited number of such transactions would be liable to raise competition concerns that could not be satisfactorily addressed under Articles 81 and 82 EC. Under this assumption it would appear disproportionate to subject all acquisitions of minority shareholdings to the ex ante control of the Merger Regulation. At the same time it appears doubtful whether an appropriate definition could be established capable of identifying those instances where minority shareholdings [...] would warrant such treatment.*”⁷⁴ The Commission invited interested parties to comment on the treatment of minority shareholdings under EC competition law based on their experience and to suggest what should be the most appropriate treatment of such arrangements.

The Commission, supported by the Member States⁷⁵, however, did not take the issue forward in the 2004 reform of the EC Merger Regulation. Two main justifications put forward for not expanding the Commission jurisdiction under the ECMR were: (i) Articles 81 and 82 of the EC Treaty provide adequate tools to deal with possible anti-competitive effects of passive shareholdings and (ii) abandoning the jurisdiction criterion based on the notion of control would significantly increase the number of merger notifications, unnecessarily burdening the European Commission’s services and the parties involved in these types of transactions, which in most cases are pro-competitive or competitively neutral.

Some commentators have criticised the decision of the European Commission not to extend the scope of the EC Merger Regulation to acquisitions of a passive equity interests in a competitor⁷⁶. These commentators were concerned that there may be instances where the antitrust rules on agreements between competitors (Article 81 EC) and on abuses of dominant position (Article 82 EC) cannot be applied to prevent or remove the anti-competitive effects which could potentially be triggered by a share transaction. While raising legitimate concerns, these proposals should take into account that an unconditional extension of the scope of the ECMR to acquisitions of minority shareholdings below the threshold of control bears risks of over-regulating these forms of investment, which in many cases are pro-competitive, and of excessively burdening the companies involved⁷⁷.

⁷² However, the acquisition of minority shares that do not fall under the merger control rules may still be caught by Article 81 EC (on agreements between competitors) and by Article 82 EC (on abuse of dominant position). See *infra*.

⁷³ COM(2001) 745/6 of 11 December 2001.

⁷⁴ See paragraph 109.

⁷⁵ See, for example, the responses to the consultation process of the United Kingdom, Department of Trade and Industry, (March 2002) and of German (December 2001) available on the website of the Directorate General for Competition of the European Commission.

⁷⁶ See in particular Russo (2006) and Caronna (2004). *Contra* see Reynolds and Anderson (2005).

⁷⁷ These legitimate concerns could be safeguarded by the introduction of criteria limiting the application of the ECMR only to those acquisitions of passive ownerships which are more likely to deserve close antitrust scrutiny. For example, “safe harbours” could limit jurisdiction on the basis of factors such as the market

4.1.2 United States: the framework for review of minority shareholdings under the merger rules

In the United States, the jurisdiction on mergers is not premised on the concept of change in the control of a company but extends to any acquisition of “*the whole or any part of the stock or other share capital*” of another firm and prohibits them where “*the effect of such acquisition may be substantially to lessen competition*”⁷⁸. This very broad jurisdictional criterion is mitigated by the third paragraph of Section 7 which holds that “[*t*]his section shall not apply to persons purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about the substantive lessening of competition”. In the United States therefore all acquisitions of equity shares in a company are subject to the jurisdiction of the antitrust agencies. It is irrelevant if the ownership in question grants control or any sort of influence over the target company and its business decision making process. Equally irrelevant is the size of the shareholding acquired⁷⁹.

The US merger control system therefore has a very extensive reach and there is little doubt that the acquisition of a minority shareholding, even if not conferring control, falls into the jurisdiction of the antitrust agencies⁸⁰. Not surprisingly, the debate is principally focussed on the scope of the “*solely for investment*” exemption in the third paragraph of Section 7. This exemption requires that the transaction must be “*solely for investment*” and that it must not be used to bring about, or attempt to bring about, the substantial lessening of competition. If the test is not satisfied, then the transaction has to be reviewed under the main effects clause in the Clayton Act. In determining whether an acquisition is used to bring about, or attempt to bring about, the substantial lessening of competition, courts have applied a more lenient approach than the main substantial lessening of competition test in the Clayton Act. According to the case law, in the context of the “*solely for investment*” exemption, the plaintiff must show actual

shares of the parties involved, the degree of concentration of the markets affected by the transaction, the delta in the HHI pre- and post-transaction, the existence of significant barriers to entry, the competitive ‘closeness’ of the products involved, the reciprocal nature of the equity ownership; and the involvement in the transaction of a maverick firm.

⁷⁸ See Section 7 of the Clayton Antitrust Act, 1914, 15 U.S.C. §§ 12-27 (hereafter “Section 7”). For a general commentary on the US treatment of partial ownership interests in merger cases see ABA (2006) at p. 368-369.

⁷⁹ For example, acquisitions of less than 25% of a company’s share have been found to infringe on Section 7 in a number of cases: *U.S. v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 592 (1957) (23% stock acquisition); *Denver & Rio Grande W. RR. Co v. U.S.*, 387 U.S. 485, 501 (1967) (20% stock acquisition); *American Crystal Sugar Co v. Cuban-American Sugar Co.*, 259 F.2d 524,526, 531 (2nd Cir. 1958) (23% stock acquisition). In more recent cases the two enforcement agencies have entered into consent orders limiting the partial ownership in cases involving partial stock acquisitions of less than 30%: see for example *U.S. v. Gillette Co.*, Proposed Final Judgement, Stipulation and Competitive Impact Statement, 55 Fed. Reg. 12,567, 12,569 (1991); *U.S. v. AT&T Corp.*, Proposed Final Judgement, Stipulation and Competitive Impact Statement, 64 Fed. Reg. 2506 (1999); *U.S. v. MCI Communications Corp.*, Proposed Final Judgement, Stipulation and Competitive Impact Statement, 59 Fed. Reg. 33,009 (1994); *Time Warner Inc.*, Proposed Consent Agreement with Analysis to Aid Public Comment, 62 Fed. Reg. 67,868, 67,871 (1996).

⁸⁰ See, for example, *Denver & Rio Grande W. RR. Co v. U.S.*, 387 U.S. 485, 501 (1967) (“*A company need not acquire control of another company in order to violate [§ 7]*”) and *U.S. v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 592 (1957) (“*Any acquisition of all or any part of the stock of another corporation, competitor or not, is within the reach of [§7] whenever the reasonable likelihood appears that the acquisition will result in a restraint of commerce or in the creation of a monopoly of any line of commerce.*”)

lessening of competition in contrast to the general clause in the Clayton Act which requires the plaintiff to show only likely effects on competition⁸¹.

In light of the statutes and their interpretation by courts, is it really possible to conclude that in the US merger control system the distinction between active and passive equity investment is irrelevant? The answer is probably negative. The main case-law supports the view that a transaction is “*solely for investment*” if the acquirer of the stock does not gain influence over the actions and business conduct of the target company⁸². On the contrary, if the acquirer obtains active control of the firm in which the investment is made, the acquisition will not be considered “*solely for investment*”⁸³. The “*solely for investment*” test will not be satisfied even if the acquirer does not acquire control but just the ability to influence the actions of the target firm, for example through representation rights allowing the acquirer to appoint a member of the target’s board⁸⁴. Similarly the “*solely for investment*” exemption is not granted if the acquirer can access sensitive information regarding the activities of the target company⁸⁵.

Under the court’s approach to the “*solely for investment*” exemption, therefore, the acquisition of a merely passive equity stake seems equivalent to an investment, excluding these transactions from antitrust review under the main “significant lessening of competition” test in the Clayton Act and subjecting them to the more lenient test in the third paragraph of Section 7, whereby agencies have to show *actual* anti-competitive effects as opposed to only *likely* anti-competitive effects. It has been argued that the difficulties related to proving actual anti-competitive effects of passive shareholdings grants a *de facto* exemption to these types of acquisitions⁸⁶. Unilateral effects of passive shareholdings are indeed difficult to detect and to prove, since variations in price and output could be caused by a multitude of factors, including variation in costs or demand trends. Similarly, the collusion-enhancing effects of passive equity investments can be equally difficult to identify, particularly if the effect of the passive investment is to facilitate tacit collusion rather than explicit collusion.

⁸¹ See Gilo (2000), p. 29 *et seq.*

⁸² See, for example, *U.S. v. Tracinda Inv. Corp.*, 477 F.Supp. 1093, 1098 (C.D. Cal. 1979) (“*The ultimate definitive factor the courts have looked to [...] is whether the stock was purchased for the purpose of taking over the active management and control of the acquired company*”); *Anaconda Co. v. Crane Co.*, 411 F.Supp. 1210, 1219 (S.D.N.Y. 1975); *U.S. v. Gillette Co.*, 55 Fed. Reg. 28,312 (10 July 1990).

⁸³ The court's approach is reflected in the implementing regulations to the HSR Act, which has its own exemption from premerger notification and waiting requirements for “*acquisitions, solely for the purpose of investment, of voting securities*” resulting in holdings of 10% or less of outstanding voting securities (15 U.S.C. § 18a(c)(9)). Those regulations provide that an acquisition is “solely for investment” if the acquirer has no intention to participate in the formulation, determination, or direction of the basic business decisions of the issuer (16 C.F.R. § 801(1)(i)). The FTC’s related Statement of Basis and Purpose, 43 Fed. Reg. 33450, 33465 (July 31, 1978), identifies six types of conduct which could be considered evidence of an intent inconsistent with the “solely for investment” exemption: (1) nominating a candidate for the board of directors of the issuer; (2) proposing corporate action requiring shareholder approval; (3) soliciting proxies; (4) having a controlling shareholder, director, officer or employee simultaneously serving as an officer or director of the issuer; (5) being a competitor of the issuer; or (6) doing any of the foregoing with respect to any entity directly or indirectly controlling the issuer.

⁸⁴ See *U.S. v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 592 (1957).

⁸⁵ See *F. & M. Schaefer Corp. v. C. Schmidt & Sons, Inc.*, 597 F.2d 814, 818 (2d Cir. 1979).

⁸⁶ See Gilo (2000).

4.1.3 *The framework for review of minority shareholdings under other merger control systems*

At this stage, it is worthwhile mentioning that there are national merger control systems which are structured to include within their jurisdiction an acquisition of minority shareholdings falling short of the acquisition of legal or *de facto* control.

For example, the German and the Austrian merger rules apply to all acquisitions of control *and* to all acquisitions of at least 25% shareholding in a company, regardless of whether the acquisition of shares confers to the acquirer control or influence over the target. In these merger systems, therefore, the acquisition of a passive minority shareholding of 25% or more would have to be subject to review by the competent antitrust agency. However, a similar transaction of less than 25% of the share of the target company would not⁸⁷.

Similarly, the merger rules of the United Kingdom apply to a wide range of transactions, some of which do not need to confer control. In addition to acquisitions of control, the OFT has jurisdiction over transactions where one party acquires the ability to “*materially influence*” another party. The OFT has taken the view that “*material influence*” is not equivalent to full control, legal or *de facto*, so that there are transactions falling short of the notion of control which nevertheless fall in the jurisdiction of the OFT. In the Mergers - Substantive Assessment Guidance of May 2003⁸⁸, the OFT states that: “*A shareholding conferring on the holder 25% or more of the voting rights in a company generally enables the holder to block special resolutions; consequently, a 25% share of voting rights is likely to be seen as presumptively conferring the ability materially to influence policy – even when all the remaining shares are held by only one person. The OFT may examine any case where there is a shareholding of 15% or more in order to see whether the holder might be able materially to influence the company’s policy. Occasionally, a holding of less than 15% might attract scrutiny where other factors indicating the ability to exercise influence over policy are present*”.

Among the factors that the OFT takes into account when assessing if there is an acquisition of “*material influence*” are: (i) the distribution and holders of the remaining shares; (ii) patterns of attendance and voting at recent shareholders’ meetings; (iii) the existence of any special voting or veto rights attached to the shareholding under consideration; (iv) any other special provisions in the constitution of the company conferring an ability to materially influence policy; (iv) whether the acquiring entity has or will have board representation; and (v) whether there are any additional agreements with the company which would enable the holder to influence policy⁸⁹. Again, it is arguable whether a purely passive investment would be considered by the OFT to give its owner “*material influence*” over the target.

⁸⁷ As far as Germany is concerned, the acquisition of a “*competitively significant influence*” over another enterprise may constitute a reportable event even if the shareholding acquired is well below 25%. It is arguable whether a pure passive investment (i.e. with no voting rights, no board representation and no access to sensitive information) would easily meet this test.

⁸⁸ Available on the OFT web site.

⁸⁹ These might include the provision of consultancy services to the target or might, in certain circumstances, include agreements between firms that one will cease production and source all its requirements from the other. Financial arrangements may confer material influence where the conditions are such that one party becomes so dependent on the other that it gains material influence over the company’s commercial policy (for example, where a lender could threaten to withdraw loan facilities if a particular policy is not pursued, or where the loan conditions confer on the lender an ability to exercise rights over and above those necessary to protect its investment, say, by options to take control of the company or veto rights over certain strategic decisions). See the Mergers - Substantive Assessment Guidance of May 2003, at paragraph 2.10.

4.2 *Applying the rules on horizontal agreements to minority shareholdings*

It is generally acknowledged that there is no presumption of illegality for the acquisitions of minority stakes in competing firms. Courts and enforcement agencies, however, have recognised that there may be instances where the acquisition of a minority stake could be subject to review under the rules against horizontal conspiracies. In the United States, for example, the Supreme Court acknowledged that the acquisition of voting securities may be challenged under Section 1 of the Sherman Act, which prohibits contracts, combinations or conspiracies in restraint of trade⁹⁰. Similarly, the European Court of Justice (“ECJ”) in the *Philip Morris* case⁹¹ recognised that Article 81 (and Article 82) could apply to the acquisition of a minority shareholding. The ECJ held that the acquisition of a minority shareholding in a competitor can infringe Article 81 EC if it is an “*instrument for influencing the commercial conduct of companies or to distort competition*”⁹². Despite these statements, the application of the antitrust provisions on horizontal agreements to minority shareholdings is infrequent⁹³.

If one compares the application of merger control rules with the application of competition rules on horizontal agreements, the latter have the advantage of being totally unrelated to the acquisition of control or influence over the target company. However, the rules on horizontal agreements may pose their own problems:

- First, in many jurisdictions a general condition for the application of antitrust rules on horizontal anti-competitive conduct is that competing firms have entered into an anti-competitive agreement or contract, or have conspired to restrict competition. In many cases, such as in stock market transactions, the acquisition of the minority stake does not involve an agreement between “competing firms” but only an agreement between one company (the purchaser) and one or more shareholders of the target company, with the target company not being involved in the transaction⁹⁴. In these situations, the finding of an agreement between competing firms may not be clear-cut.

⁹⁰ See *U.S. v. First Nat'l Bank & Trust*, 376 U.S. 665, 671-72 (1964) (“Where [...] merging companies are major competitive factors in a relevant market, the elimination of significant competition between them, by merger or consolidation, itself constitute a violation of §1 of the Sherman Act”). This is reflected in Section 3.34 of the US Antitrust Guidelines for Collaboration Among Competitors (April 2000), in which the US antitrust agencies list the existence of minority shareholdings among the participants to a collaboration project as one of the factors which could affect the ability and the incentives of the firms to compete.

⁹¹ See Joint Cases 142 and 156/84, *British American Tobacco and Reynolds v. Commission*, [1987] ECR 4487. The *Philip Morris* case was decided at a time when the European Union did not have a merger control regime. Some of the ECJ’s statements must be read in light of this and are justified by the attempt to offer the European Commission a tool to assess (even if only *ex-post*) the potential anti-competitive effects of acquisitions of shares in a competitor leading to control over the target company and potentially to anti-competitive effects on the market.

⁹² See paragraph 37.

⁹³ In the US, see *Texas Gulf, Inc. v. Canada Dev. Corp.*, 366 F.Supp. 374, 406-07 &n. 49 (S.D. Tex 1973) rejecting the claim based on lack of actual anti-competitive effects in preliminary injunction. In the EU, after the *Phillip Morris* case cited above, there have been only three cases reviewing minority shareholdings under Article 81 EC: case IV/34.857, *BT/MCI*; case IV/34.410, *Olivetti/Digital* and case IV/35.617 *Phoenix/Global One*. In none of these cases did the European Commission find that the minority shareholding was an “*instrument for influencing the commercial conduct of companies or to distort competition*” and therefore concluded that Article 81 EC was not infringed.

⁹⁴ A different conclusion could be reached if the transaction is entered into by the two companies directly, with the involvement of their respective corporate bodies. See Caronna (2004).

- Second, even if an agreement between competitors could be established, antitrust rules on horizontal conspiracies tend to apply only to cases where clear co-ordinated effects can be established⁹⁵. This would be the case if the minority shareholding (either passive or active) led to coordination between the two firms (e.g. through an exchange of information) or to the acquisition of control or of influence over the business strategy of the target company (e.g. through side agreements between the two firms which could facilitate long-term collusion)⁹⁶. In this respect, pure unilateral effects (for instance from a totally passive equity investment) may fall outside the scope of application of these rules⁹⁷.
- Third, even in the realm of co-ordinated effects, there may be instances where the enforcement of antitrust rules on anti-competitive agreements against minority shareholdings may be complex. This is particularly the case of passive investments facilitating *tacit* collusion, as opposed to *explicit* collusion. Tacit collusion refers to situations in which firms align their business conduct and achieve supra-competitive profits without actually communicating with each other. The difficulty of enforcing the rules on horizontal conspiracies to tacit collusion in oligopolistic markets is a well-known policy problem⁹⁸.
- Finally, because rules on horizontal agreements entail an *ex-post* review of the anti-competitive effects of the agreement under examination, the enforcement agency (or the plaintiff) bears a high burden of proof and generally has to show *actual* anti-competitive effects. This may significantly limit the efficacy and promptness of enforcement actions in the area of minority shareholdings (particularly in the area of passive minority shareholdings), where the potential anti-competitive effects may indeed be difficult to detect and prove.

From the discussion above it appears that the difficulties in establishing the existence of an anticompetitive agreement between competing firms or in detecting and proving actual anticompetitive harm may end up limiting the efficacy of the enforcement of antitrust rules on horizontal anti-competitive conduct in this area.

4.3 Applying the rules on monopolisation / abuse of dominance to minority shareholdings

In general, dominant firms are less likely to invest in competitors, as they have less to gain. Supposedly, dominant firms are already charging monopoly prices, which leaves little room for further unilateral price increases. Moreover, since they have the most to gain from a collusive equilibrium,

⁹⁵ See Ezrachi and Gilo (2006), p. 338 *et seq.*

⁹⁶ For example, the ECJ in *Philip Morris* ([1987] ECR 4487) held that the acquisition of an equity interest in a competitor can be a restriction of competition if it was used to influence the commercial conduct of the companies involved. The Court added that this is the case when “*the investing company obtains legal or de facto control of the commercial conduct of the other or where the agreement provides for commercial cooperation between companies or created a structure likely to be used for such cooperation*” (see paragraph 38). Emphasis is therefore on (i) the acquisition of control and (ii) co-ordination of business conduct.

⁹⁷ The first part of this Note has discussed how passive minority shareholdings may have no (or weak) co-ordinated effects but significant unilateral effects. This is the case, for example, of passive equity investments by a firm which is not the maverick firm on the market. Other examples of weak co-ordinated effects and likely unilateral effects are discussed in Ezrachi and Gilo (2006).

⁹⁸ See, *inter alia*, Motta (2004) and Whish (2004). In this respect, it has been argued that the optimal policy option would be to extend the scope of application of merger control rules to acquisitions of passive minority stakes in competitors, since merger rules are better suited to review *ex-ante* the effects of these transactions on tacit collusion. See Ezrachi and Gilo (2006), p. 344 *et seq.*

dominant firms are also less likely to cheat and more likely to adhere to any collusive understanding⁹⁹. Furthermore, because dominant firms have an interest in reducing their exposure to antitrust review, they often strategically decide to limit acquisitions of equity ownerships in competitors, which would most certainly attract the interest of antitrust enforcers. For these reasons, acquisitions of minority stakes in fringe competitors by dominant firms are rare. On the other hand, it is more likely to see investments by fringe competitors in dominant firms, as this helps discipline fringe competitors and ensures that incentives to compete are reduced¹⁰⁰.

It is interesting to note that antitrust rules on monopolisation / abuse of dominance are much better suited to pursue purely unilateral effects, even those generated by merely passive minority shareholdings, than the rules on horizontal agreements. However, the enforcement of provisions such as Section 2 of the Sherman Act or Article 82 EC can in practice be quite limited. These provisions are premised on (i) the finding of market power or dominance and (ii) on the fact that the acquisition of the minority stake is abusive¹⁰¹.

4.4 Remedies to the antitrust concerns raised by minority shareholdings

Having identified what could be the potential anti-competitive effects of minority shareholdings among competing firms and having reviewed the legal tools that antitrust agencies have at their disposal to review *ex-ante* or *ex-post* anti-competitive effects, it remains to review what are the most effective remedies that antitrust enforcers can adopt to reduce or eliminate such anti-competitive effects.

In most decisions involving remedies for anti-competitive effects of minority shareholdings, remedies are aimed at preventing the acquirer of the minority stake from gaining control over the target or from acquiring a direct or indirect influence over the target's business conduct. Generally, the main concerns of antitrust enforcers are related to the risk of co-ordination between firms linked by shareholding and the effect that these structural links can have on the likelihood of collusion in the market. There is often less emphasis on the risks of unilateral effects, particularly if triggered by a merely passive minority shareholding.

Both structural remedies (such as divestitures) and behavioural remedies (such as confidentiality agreements and the so-called "Chinese Walls") have been accepted by antitrust agencies to remedy concerns raised by minority shareholdings. In general, there are four categories of remedies which have

⁹⁹ See Reynolds and Snapp (1986), p. 149.

¹⁰⁰ See discussion in paragraph 0 above.

¹⁰¹ Courts have recognised that the acquisition of a minority shareholding cannot be viewed as illegal or abusive as such. In the EU, the ECJ held that the acquisition by a dominant firm of a minority shareholding in a competitor can be abusive if the shareholding allows the dominant firm to influence the commercial policy of the target (see Joint Cases 142 and 156/84, *British American Tobacco and Reynolds v. Commission*, [1987] ECR 4487). The European Commission in *Warner-Lambert/Gillette* (case IV/33.440) and in *BIC/Gillette and Others* (case IV/33.486) applied Article 82 EC to the acquisition of a minority stake by Gillette, the dominant supplier for wet-shaving products in Europe, in Wilkinson Sword, its main competitor. The finding of an abuse was not predicated only on the acquisition of the shares but also on a number of other factors that would have allowed Gillette to exercise "*some influence*", as the ECJ put it in paragraph 65 of the judgement, over its competitor's commercial policy. These other factors were that Gillette was one of the major creditors of Wilkinson Sword, leaving the latter financially dependent on Gillette; and that Gillette had also acquired pre-emption and conversion rights in Wilkinson Sword. This could have allowed Gillette to acquire full control in the case that another firm tried to acquire Wilkinson Sword to improve its market performance to the detriment of Gillette's.

been considered by antitrust agencies when dealing with potential anti-competitive effects of minority shareholdings:

- Divestiture of the minority stake: The divestiture of the acquired shares and the severance of the structural link between the competing firms is the preferred solution by antitrust agencies to remedy antitrust concerns arising from minority shareholdings. However, in many instances, the acquirer of the minority stake is ordered to divest only a part of the stock that it has acquired (or planned to acquire), therefore allowing it to retain some shares in the target, provided that such remaining participation would not allow the acquirer to gain control or otherwise influence the business conduct of the target¹⁰².
- Dilution of an active shareholding into a passive shareholding: In some cases, agencies have allowed the acquirer of the minority stake to retain its shareholding in its entirety, provided that it waives the rights linked to minority stakes, such as representation rights on the board, veto rights and information rights¹⁰³. In these cases, the fact that the acquirer of the shares will not use them to influence the behaviour of the firm in which the investment was made (e.g. by electing a board member or by voting the shares or by obtaining sensitive information on the other company) is considered a sufficient remedy to prevent risks of co-ordination between the two firms.
- Creation of Chinese Walls: In other cases, antitrust agencies have required the elevation of a so-called Chinese Wall between the two firms in order to prevent the flow of sensitive information between the two companies. In practice, this entails the signature of confidentiality or non-disclosure agreements by those who are exposed to confidential information as a consequence of their role in the two firms. This remedy is clearly targeted to prevent that the exchange of confidential information may lead to an anti-competitive coordination of the business conduct of the two firms. This remedy has been used particularly in cases where board representation was associated with the minority stake¹⁰⁴, although it can also be applied to other instances, such as to common shareholders (with no common representation in the boards).
- Elimination of interlocking directorates: If the minority shareholding entitles the owner to appoint board members in the target company and that gives rise to situations where one or more board members sit on the boards of both companies, agencies have required that the interlocking directorate be ended¹⁰⁵. This is to prevent the common board members from having access to sensitive information of the two companies, which could facilitate parallel behaviours and collusion. This type of remedy is generally preferred to a Chinese Wall remedy, as it is structural in nature and better guarantees the separation between the parties' competitive conduct.

¹⁰² See, for example, the European Commission decisions in *Blokker/Toys 'R' Us* (case M.980), *Nordbanken/Postgirot* (case M.2567) and *Schneider Electric/Légrand* (case M. 2283).

¹⁰³ See, for example, the European Commission decision in *Thyssen/Krupp* (case M. 1080). In the United States, see *Medtronics Inc.*, 63 Fed. Reg. 53,919-20 (7 October 1998); *Time Warner Inc.*, 61 Fed. Reg. 50,301 (25 September 1996); *U.S. v. Gillette Co.*, 55 Fed. Reg. 28,312 (10 July 1990); *U.S. v. Tracinda Inc. Corp.*, 477 F.Supp. 1093, 1098 (C.D. Cal. 1979); *Anaconda Co. v. Crane Co.*, 411 F.Supp. 1210, 1219 (S.D.N.Y. 1975).

¹⁰⁴ See, for example, the European Commission decisions in *Blokker/Toys 'R' Us* (case M.980) and *Hoechst/Rhône Poulenc* (case M.1378).

¹⁰⁵ See, for example, the European Commission decisions in *Allianz/AGF* (case M.1082) and *Generali/INA* (case M.1712).

These types of remedies mostly deal with the concern that, following an equity investment, the firms involved may no longer act independently from each other but start co-ordinating their business strategies. Only the first type of remedy, i.e. the divestiture of the acquired stake, however, addresses effectively the risk of both unilateral and co-ordinated effects from active and passive minority shareholdings. In that sense, there is a strong policy argument that in cases where equity investments may substantially lessen competition, the only effective remedy is the divestiture of the acquired stock¹⁰⁶.

4.5 Conclusions on the legal treatment of minority shareholdings

The overview of the application of antitrust rules to minority shareholdings between competitors shows how merger control rules are the primary tool currently used by antitrust enforcers to ensure that these transactions do not raise anti-competitive effects. On the contrary, there are relatively few cases where acquisitions of a minority shareholding have been scrutinised under antitrust rules on horizontal agreements and on monopolisation / abuse of dominance.

In line with the economic theory, which predicts only *potential* anti-competitive effects, the acquisition of a minority shareholding is not viewed as a restriction of competition in itself. However, antitrust enforcers are increasingly concerned with the risks of unilateral and co-ordinated effects that structural links between competing firms can produce, particularly in oligopolistic markets with high barriers to entry. In some OECD countries, minority shareholdings are quite common in certain sectors, such as banking and insurance, and antitrust authorities are giving this phenomenon increased attention.

However, the analysis above also shows that the competition assessment of minority shareholdings may be complex and multi-faceted. Antitrust rules on mergers, horizontal agreements and dominance provide a solid legal basis to deal with the potential anti-competitive effects of many types of acquisitions of minority shareholdings but not with all of them.

5. The legal treatment of interlocking directorates

In the second part of this Note, we have defined “interlocking directorates” as those situations in which one or more person have executive responsibilities in two or more companies. An interlocking directorate may involve persons sitting on the boards of companies which are in a horizontal or vertical business relation. Corporate interlocks can be direct or indirect if companies are linked through different people. Interlocking directorates are a widespread phenomenon in many OECD countries and in many industry sectors. Such type of arrangements can make sense from a business and an economic perspective, particularly in industries where experienced and knowledgeable individuals are in short supply, but also raise concerns as they create conflict of interests which could lead to centralised control over the economy¹⁰⁷.

5.1 Identifying the potential concerns arising from interlocking directorates

Generally speaking, competition enforcement is neutral as to the composition of companies’ boards and in the large majority of cases arrangements on board composition are viewed as lawful. However, when interlocking directorates link together two or more competing companies, this practice could raise questions as to the quality and independence of board decisions.

¹⁰⁶ See Gilo (2000), p. 45-46.

¹⁰⁷ According to Louis Brandeis interlocking directorates violate the “*fundamental law that no man can serve two masters*” (see Brandeis, 1913, at 13).

- From a corporate governance perspective, one could question how a director can be loyal to the stockholders of competing companies without breaching his fiduciary duties; his fiduciary responsibility to one company might conflict with his fiduciary responsibility to the other.¹⁰⁸
- From an antitrust perspective, because vigorous competition on the market is premised on the assumption that firms take business decisions independently from each other, the fact that competing firms share the same board members may raise question as to the independence of the companies involved and their ability to perform competitively in the market. In these situations, interlocking directorates have the potential to reduce or eliminate competition and to facilitate collusion.

In particular, from an antitrust perspective, these arrangements could lead to horizontal co-ordination of the business conduct of competing firms, through the exchanges of information, parallel behaviour, foreclosure of rivals, or a number of other activities that might affect competition adversely to the detriment of consumers' welfare. Vertical interlocks traditionally have 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 integration¹⁰⁹.

5.2 *The antitrust enforcement practice against interlocking directorates*

The enforcement practise against anti-competitive interlocking directorates is relatively limited¹¹⁰. In the major OECD jurisdictions, there are no reported cases of application of horizontal rule on anti-competitive agreements or on unilateral conduct against interlocking directorates. While this does not imply that interlocking directorates are legally or *de facto* excluded from the application of antitrust rules, it indicates that these provisions may not always lend themselves to easily pursue these situations. In particular, it may not be easy to establish the presence of an agreement between competing firms or just a concerted practice or a conspiracy between the firms involved; in many cases, there are only separate arrangements between the director and the respective companies. Similarly, the firms involved may not be dominant or may not enjoy significant market power.

The majority of cases dealing with interlocking directorates are merger control cases, where the commonality of board members was considered to be a factor facilitating co-ordination between the interlocked firms. As seen above, most cases dealing with interlocking directorates relate to the direct or indirect acquisitions of minority shareholdings with board representation rights¹¹¹. We have also seen that the preferred remedy is in most instances the elimination of the structural link and the end of the interlock, although in some cases antitrust enforcers have accepted the creation of a Chinese Wall as a suitable

¹⁰⁸ See Areeda and Turner, paragraph 1300.

¹⁰⁹ See Areeda and Turner, paragraph 1303.

¹¹⁰ This Note does not take into account the possibility of enforcing national rules against unfair competition, such as Section 5 of the Federal Trade Commission Act, in the United States. The application of these statures to interlocking directorates is discussed in Areeda and Turner, paragraph 1301b.

¹¹¹ While interlocking directorates are typically merely features to a transaction otherwise qualifying as a "merger", it cannot be excluded that the interlocking directorate itself could be a reportable event under the merger control rules. This may well be the case if the interlocking directorate allows to acquire control or significant or material influence over a business.

remedy to illicit co-ordination. There is, however, a general scepticism on the efficacy of Chinese Walls as remedy to risks of co-ordination from interlocking directorates¹¹².

In order to address the concerns that may arise from interlocking directorates, some countries have enacted statutory provisions expressly prohibiting corporate interlocks. In the United States, for example, Section 8 of the Clayton Act is the principal statutory federal provision addressing interlocking directorates¹¹³. Section 8 deals with horizontal banking interlocks and corporate interlocks and states that “no person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than \$ 1,000,000 [...] if such corporations are or shall have been theretofore [...] competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws”. Other countries, such as Japan¹¹⁴, Indonesia¹¹⁵ and Korea¹¹⁶, have enacted similar statutory provisions prohibiting interlocking directorates if their effect is to restrict competition in the market.

¹¹² See for example for example, the decision of the European Commission in *Blokker/Toys ‘R’ Us* (case M.980), in which the European Commission accepted a Chinese Wall remedy, but only for a limited period of time. The European Commission argued that in the circumstances of the case “that the continued presence of Blokker in the form of a 20% minority shareholding in combination with the active presence of Blokker on the management board of Speelhoorn can, at least for a certain period of time, serve both to demonstrate the confidence of Blokker in the future viability of the company and to guarantee the development of the company into a viable business within this period” (paragraph 132). However, the Commission decided to limited the interlocking directorate to a specific time period and explained that “[a]lthough Blokker undertakes not to interfere with Speelhoorn’s freedom to determine independently its commercial policy, the presence of Blokker on the board will still give it access to information on the commercial decisions which it could use for its own competitive strategy and also in relation to the competitive strategy of the Toys ‘R’ Us business operated by Speelhoorn. This possibility is to be evaluated especially in the light of the fact that, for a certain period of time, Blokker will have been operating the Toys ‘R’ Us business on its own and that, even after the implementation of the divestiture as set out in the proposals, Blokker has a dominant position on the market. Therefore the Commission considers it necessary in order to ensure that effective competition is restored on the market, that Blokker’s active presence on the management board should be eliminated once the viability of the company is established”(paragraph 133). See also the decision of the European Commission in *Hoechst/Rhône Poulenc* (case M.1378).

¹¹³ The statute was enacted in 1914 after a number of anticompetitive practices had been uncovered by government investigations of corporate interlocks in key sectors of the American economy, such as the railroad, steel and banking industries. The fear of abuses arising from such a concentration of management power was the main reason that led Congress to enacted Section 8 to supplement and strengthen the antitrust provisions in the Sherman Act. See Areeda and Tuner, paragraph 1301c. For a general commentary on interlocking directorates in the US, see also ABA (2006) at p. 425-431.

¹¹⁴ Article 13(1) of the Japanese Antimonopoly Act stipulates that no officer or employee of a corporation can hold a position as an officer of another corporation where the effect of such an interlocking directorate is to substantially restrain competition. See the Japanese written submission to the Roundtable on “Antitrust Issues Involving Minority Shareholdings and Interlocking Directorates” (DAF/COMP/WP3/WD(2008)7).

¹¹⁵ Article 26 of the Indonesia Competition Law (Law No. 5/1999) states that, “A person concurrently holding a position as a member of the Board of Directors or as a Commissioner of a company, shall be prohibited from simultaneously holding a position as a member of the Board of Directors or a Commissioner in other companies, in the event that such companies: a) are in the same relevant market; or b) have a strong bond in the field and or type of business activities; or c) are jointly capable of controlling the market share of certain goods or services, which may result in monopolistic practices and or unfair business competition”. See the Indonesia written submission to the Roundtable on “Antitrust Issues Involving Minority Shareholdings and Interlocking Directorates” (DAF/COMP/WP3/WD(2008)25).

6. Conclusions

The overview of the economic theory indicates that in some instances the acquisition of a minority shareholding in a competing firm may reduce the firms' incentives to compete and increases incentives to adopt behaviour conducive to joint profit maximization. In the presence of these structural links, firms may be induced to unilaterally reduce output and increase prices to the detriment of consumers' welfare. Similarly, the acquisition of a minority shareholding in a competing firm may lead to co-ordinated effects, because it increases transparency and affects negatively the incentive to compete of all firms in the market. The risk of co-ordinated effects is more likely if all firms in the market have invested in at least one competitor or if the equity investment is made by the maverick firm. Interlocking directorates bears similar risks of co-ordination if the interlocked firms are directly competing in the marketplace.

These anti-competitive effects are particularly likely in oligopolistic markets with significant barriers to entry. If structural links are reciprocal or involve many firms in the market, the magnitude of the anti-competitive effects is increased. The risks of anti-competitive effects arise from both active minority interests and passive minority interests. Active minority shareholdings entitle the owner to exercise some form of control or influence over the target company. Passive minority shareholdings are mere financial investments in the activities of a target company and only entitle the owner to a share in the profits (or in the losses) of the target company. Similar anti-competitive effects can be achieved through the acquisition of a competitor's debt.

The overview of the legal treatment of minority shareholdings shows that antitrust enforcers are particularly vigilant of the possible anti-competitive effects of minority shareholdings when enforcing merger control rules. Conversely, there are relatively few cases applying antitrust rules on horizontal agreements and on monopolisation / abuse of dominance to minority shareholdings. This seems to be due to two main reasons. First, the large majority (although not all) of these types of transactions which potentially raise antitrust exposure are likely to be reviewed under the merger control rules. This moots the need for *ex-post* enforcement actions. Second, intrinsic limitations in the application of antitrust rules make the enforcement of rules on horizontal agreements and on dominance against minority shareholdings not always straightforward.

¹¹⁶ If an executive or an employee of a large company (i.e. a company which has more than two trillion Won's total asset or turnover) serves as director in another company, the arrangement is subject to a merger notification to the Korean Federal Trade Commission (see Article 12 (1)-3 of the Monopoly Regulation and Fair Trade Act). In addition, if a merger through interlocking directorate substantially restricts competition, the interlocking directorate is prohibited (see Article 7 (2)-2 of the Monopoly Regulation and Fair Trade Act). See the Korean written submission to the Roundtable on "Antitrust Issues Involving Minority Shareholdings and Interlocking Directorates" (DAF/COMP/WP3/WD(2008)8).

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NOTE DE RÉFÉRENCE

Par le Secrétariat

1. Introduction

L'exercice d'une concurrence vigoureuse exige que les entreprises prennent leurs décisions commerciales indépendamment les unes des autres. Cette condition essentielle risque de ne pas être satisfaite lorsqu'il y a des liens structurels entre des entreprises concurrentes et cumul de mandats d'administrateur. Dans certains pays de l'OCDE, les participations minoritaires et le cumul de mandats d'administrateur sont courants dans des secteurs comme la banque et l'assurance, et ces phénomènes retiennent de plus en plus l'attention des autorités de concurrence. À première vue, la détention d'une participation minoritaire dans une entreprise paraît anodine du point de vue de la concurrence. Les études économiques montrent cependant que l'existence de tels liens entre des entreprises concurrentes risque de créer des effets unilatéraux et coordonnés dommageables à la concurrence. Certains problèmes associés à l'existence de liens structurels entre des entreprises concurrentes peuvent être résolus efficacement en recourant à la législation et à la réglementation sur les concentrations, tandis que d'autres pourraient nécessiter une intervention en vertu des règles de concurrence concernant les ententes restrictives entre entreprises concurrentes et les positions dominantes.

La détention d'une participation minoritaire dans une entreprise concurrente, en affectant les incitations des entreprises à se faire concurrence vigoureusement, peut donner lieu à des effets unilatéraux. L'existence de liens structurels et financiers affecte les calculs d'optimisation des bénéfices des entreprises et les incite à se faire concurrence moins vigoureusement et à adopter un comportement plus propice à une stratégie d'optimisation commune. Les liens structurels entre entreprises concurrentes, surtout s'ils sont réciproques, peuvent également faciliter la coordination sur le marché. Des effets coordonnés peuvent notamment se manifester lorsque les participations croisées modifient les informations mises à la disposition des entreprises concernées et influencent leurs motivations en matière de fixation des prix. Les participations minoritaires et le cumul de mandats d'administrateur peuvent donner accès à des informations sensibles sur les prix, les coûts, les stratégies futures et d'autres décisions importantes pour la compétitivité et permettre à des entreprises concurrentes de conclure des ententes expresses ou tacites et de surveiller l'adhésion à ces ententes.

La présente note s'attache principalement aux problèmes de concurrence soulevés par les prises de participations dans des entreprises concurrentes parce que ce phénomène soulève les questions les plus intéressantes du point de vue de la politique de la concurrence et nécessite l'attention particulière des autorités de concurrence dans le cadre de leurs pratiques d'application. Cette note est structurée comme suit : la Partie II définit les notions de participation minoritaire et de cumul de mandats d'administrateur ; la Partie III expose les principes économiques fondamentaux qui sous-tendent les problèmes de concurrence associés aux participations minoritaires ; la Partie IV examine la manière dont les autorités de concurrence apprécient les participations minoritaires ainsi que les moyens juridiques dont elles disposent pour empêcher ou sanctionner leurs éventuels effets anticoncurrentiels ; la Partie V traite de l'application du droit de la concurrence au cumul de mandats d'administrateur ; enfin, la Partie VI dégage des conclusions à partir de la théorie économique et des pratiques d'application courantes dans les principaux pays de l'OCDE.

Les principales conclusions dégagées ici sont les suivantes :

- La théorie économique montre que l'acquisition de participations minoritaires dans une entreprise concurrente peut donner lieu à une réduction de la production et à une augmentation des prix, au détriment du bien-être des consommateurs.
- L'acquisition de participations minoritaires dans une entreprise concurrente et le cumul de mandats d'administrateur peuvent également entraîner des effets coordonnés sur le marché ; l'une et l'autre augmentent la transparence et affectent les incitations des entreprises à se faire concurrence. Le risque d'effets coordonnés est plus élevé si toutes les entreprises présentes sur le marché ont investi dans au moins une entreprise concurrente ou si la prise de participation est le fait de l'entreprise franc-tireur d'un secteur.
- Ces effets anticoncurrentiels risquent de se produire sur un marché oligopolistique présentant de fortes barrières à l'entrée. Ils sont plus importants lorsque les liens structurels sont réciproques ou concernent un grand nombre d'entreprises présentes sur le marché.
- L'acquisition des créances d'une entreprise concurrente peut avoir des effets anticoncurrentiels comparables à ceux qu'entraîne l'existence de liens structurels entre des entreprises concurrentes.
- Les risques d'effets anticoncurrentiels découlent aussi bien des prises de participations minoritaires actives que des prises de participations minoritaires passives réalisées par des entreprises concurrentes. Une participation minoritaire active permet d'exercer une certaine forme de contrôle ou d'influence sur l'entreprise cible. Une participation minoritaire passive est un placement purement financier dans les activités de l'entreprise cible et est seulement assortie d'une participation aux bénéfices ou aux pertes de cette entreprise.
- Certains problèmes soulevés par l'existence de liens structurels entre des entreprises concurrentes peuvent être résolus efficacement par le biais des dispositions relatives au contrôle des concentrations ; d'autres nécessitent une intervention en vertu des règles de concurrence concernant les ententes restrictives entre entreprises concurrentes et les positions dominantes.

2. Définitions et champ couvert par la note de référence

2.1 *Participations minoritaires ou partielles*

Les termes « participation minoritaire » ou « partielle » désignent la détention, par un actionnaire, de moins de la moitié des droits de vote attachés à la participation au capital d'une autre entreprise (appelée entreprise cible). De manière générale, en vertu des règles de gouvernement d'entreprise, ils correspondent à la détention d'actions ou de titres d'une entreprise. Ils n'indiquent toutefois pas si le détenteur est habilité à exercer un contrôle sur la société cible ou à influencer d'une autre manière sa manière de conduire les affaires¹.

Bien que la détention de droits de vote attachés à une participation minoritaire dans une entreprise n'autorise habituellement pas l'exercice d'un contrôle sur cette entreprise, il arrive qu'un actionnaire minoritaire puisse exercer un certain degré de contrôle sur ladite entreprise, que ce soit seul ou conjointement avec d'autres actionnaires minoritaires :

¹ Au sujet de la distinction qu'il convient de faire entre participation et contrôle et sur l'incidence de l'une et l'autre sur la concurrence, voir O'Brien et Salop (2000) et Berle et Means (1932).

- Une participation minoritaire suffit pour assurer le contrôle exclusif lorsque l'actionnaire minoritaire est habilité à décider la stratégie commerciale de l'entreprise cible (par exemple lorsqu'il a le pouvoir de désigner plus de la moitié des membres des conseils compétents à cet égard²), ou est de fait largement en mesure d'obtenir la majorité à l'assemblée des actionnaires, par exemple lorsque les autres actions sont très dispersées entre de nombreux investisseurs.
- Lorsque les statuts de la société exigent la supermajorité pour la prise de décisions commerciales stratégiques, l'acquisition d'une minorité des droits de vote, même si elle ne confère pas nécessairement le pouvoir de prendre des décisions stratégiques, peut néanmoins être suffisante pour donner à l'actionnaire minoritaire un droit de blocage et, partant, un contrôle par la négative.
- Lorsqu'un actionnaire minoritaire ne peut exercer seul un contrôle sur les décisions commerciales stratégiques de l'entreprise cible mais peut, de droit ou de fait, empêcher les autres actionnaires d'exercer leur contrôle sur ces décisions, il détient un contrôle conjoint sur cette entreprise cible, de concert avec les autres actionnaires. La détention d'un contrôle conjoint par un actionnaire minoritaire peut découler principalement de deux situations : (i) les statuts de l'entreprise faisant l'objet d'un contrôle conjoint ou les accords à cet égard entre deux ou plusieurs actionnaires prévoient qu'un ou plusieurs actionnaires minoritaires peuvent influencer le comportement commercial de la société cible³ ; ou (ii) même sans détenir de droits spécifiques, deux ou plusieurs actionnaires minoritaires peuvent disposer d'un contrôle conjoint s'ils détiennent ensemble une majorité de droits de votes qu'ils exercent conjointement⁴.

Le fait qu'un actionnaire minoritaire puisse exercer une certaine forme de contrôle ou d'influence sur l'entreprise cible (c'est-à-dire qu'il bénéficie d'une *participation minoritaire active*) est généralement suffisant pour déclencher l'examen de l'acquisition au regard des règles sur le contrôle des concentrations. Comme on le verra plus loin, la ou les autorités de concurrence compétentes pourront ainsi apprécier l'impact global de la prise de participation minoritaire sur la concurrence. Le cadre d'analyse de ces opérations est bien établi et repose sur l'hypothèse selon laquelle après les avoir effectuées, les entreprises liées par une structure de contrôle commune auront une incitation à augmenter les prix sauf si elles en sont dissuadées par la concurrence d'autres entreprises.

Cependant, les participations minoritaires n'habilitent pas toujours leur détenteur à exercer une influence sur la gestion de l'entreprise cible. Dans de nombreux cas, les droits attachés aux actions n'autorisent pas le détenteur à être représenté au conseil d'administration ou à avoir accès à des informations sensibles sur les activités de l'entreprise cible. On parle alors de *participations minoritaires*

² Tel peut être le cas si l'actionnaire minoritaire détient des actions privilégiées auxquelles sont attachés des droits spéciaux lui permettant de désigner plus de la moitié des membres du conseil de surveillance ou du conseil d'administration.

³ Tel est par exemple le cas lorsque des droits de veto sont consentis à l'actionnaire minoritaire sur des questions fondamentales comme la désignation des dirigeants et la détermination du budget annuel et du plan d'entreprise. Selon le contexte économique, les droits de veto sur certaines décisions d'investissement ou sur certaines questions comme le choix de technologies fondamentales peuvent également suffire pour conférer un contrôle conjoint. Voir, par exemple, la Communication juridictionnelle consolidée de la Commission européenne, section 3.1.

⁴ Ce contrôle conjoint peut découler d'un accord juridiquement contraignant (par exemple d'un pacte d'actionnaires, d'un accord de mise en commun ou de la création d'une société holding à laquelle sont transférés les droits de vote). Dans de rares cas, les intérêts communs, durables et forts qui unissent les actionnaires minoritaires indiquent de fait qu'ils ne s'opposeraient pas les uns aux autres dans l'exercice de leurs droits de vote respectifs, et peuvent engendrer un contrôle conjoint. Voir, par exemple, la Communication juridictionnelle consolidée de la Commission européenne, section 3.3.

passives ou *placements passifs*, qui représentent un placement purement financier dans les activités de l'entreprise cible⁵. Leur cadre d'analyse est moins bien établi que celui des participations minoritaires actives. Dans de nombreux pays, les règles de concurrence fournissent peu d'orientations sur la manière dont les autorités ou les tribunaux doivent apprécier les risques anticoncurrentiels associés à l'acquisition d'une participation minoritaire passive. De ce point de vue, le cadre économique d'analyse revêt une plus grande importance.

Les participations minoritaires, même entre des entreprises concurrentes, sont un phénomène répandu dans les économies modernes⁶. Les entreprises acquièrent des actions de leurs concurrentes pour une foule de raisons. Dans de nombreux cas, les prises de participation peuvent générer des gains d'efficacité⁷ qui justifient l'établissement de tels liens structurels. Par exemple, les prises de participation peuvent être un moyen de diversifier et de répartir les coûts et les risques ; d'avoir accès à de nouvelles technologies ou à des pratiques de gestion innovantes ; de nouer et de renforcer des relations commerciales ; de faciliter l'accès à de nouveaux marchés ; enfin, de financer et d'exploiter des activités communes (par exemple, dans le domaine de la recherche et du développement)⁸. Cependant, lorsque la prise de participation crée des liens entre des entreprises concurrentes, il convient de faire la part des avantages de l'intégration partielle et de ses possibles effets restrictifs de concurrence. Comme on le verra ci-dessous, la création de liens structurels entre des entreprises concurrentes peut modifier les incitations des entreprises à se faire concurrence et, au bout du compte, affaiblir la concurrence sur le marché au détriment des consommateurs⁹.

Les participations minoritaires peuvent prendre des formes diverses, dont certaines peuvent être synthétisées dans les trois principales structures illustrées dans les graphiques ci-dessous. Pour deux entreprises A et B, on peut imaginer trois grandes structures. Dans la première structure, une entreprise détient une participation minoritaire directe dans l'autre. Dans la deuxième, chaque entreprise détient une participation minoritaire directe dans l'autre ; dans la troisième, l'actionnaire de contrôle d'une entreprise

⁵ En d'autres termes, la participation minoritaire passive correspond à la détention de titres ou de créances dont le rendement est directement lié à la rentabilité de l'entreprise émettrice -- obligations, baux, autres instruments financiers ou actions ordinaires et privilégiées -- qui ne confèrent pas un contrôle exclusif ou conjoint.

⁶ Par exemple, Gilo (2000) mentionne un certain nombre de placements passifs effectués dans des entreprises concurrentes. Ainsi, la société Microsoft détient des actions sans droit de vote dans la société Apple ; la société Northwest Airlines a acquis des actions ordinaires dans la société Continental Airlines ; la société TCI a réalisé un investissement passif dans la société Time Warner ; enfin, la société Gillette détient des actions sans droit de vote dans la société Wilkinson Sword. Voir également les exemples mentionnés dans Ezrachi et Gilo (2006), note de bas de page 2. Les participations croisées sont courantes dans de nombreux pays, en particulier ceux dont le système financier est fondé sur la banque, comme l'Allemagne (voir Adams, 1999) ; le Japon (voir Berglöf et Perotti, 1994) ; et l'Italie (voir la décision de l'autorité de concurrence du 27 juin 2007 relative à l'ouverture d'une enquête sur le gouvernement des entreprises de banque et d'assurance.) Voir enfin les exemples cités dans Ezrachi et Gilo (2006), note de bas de page 3.

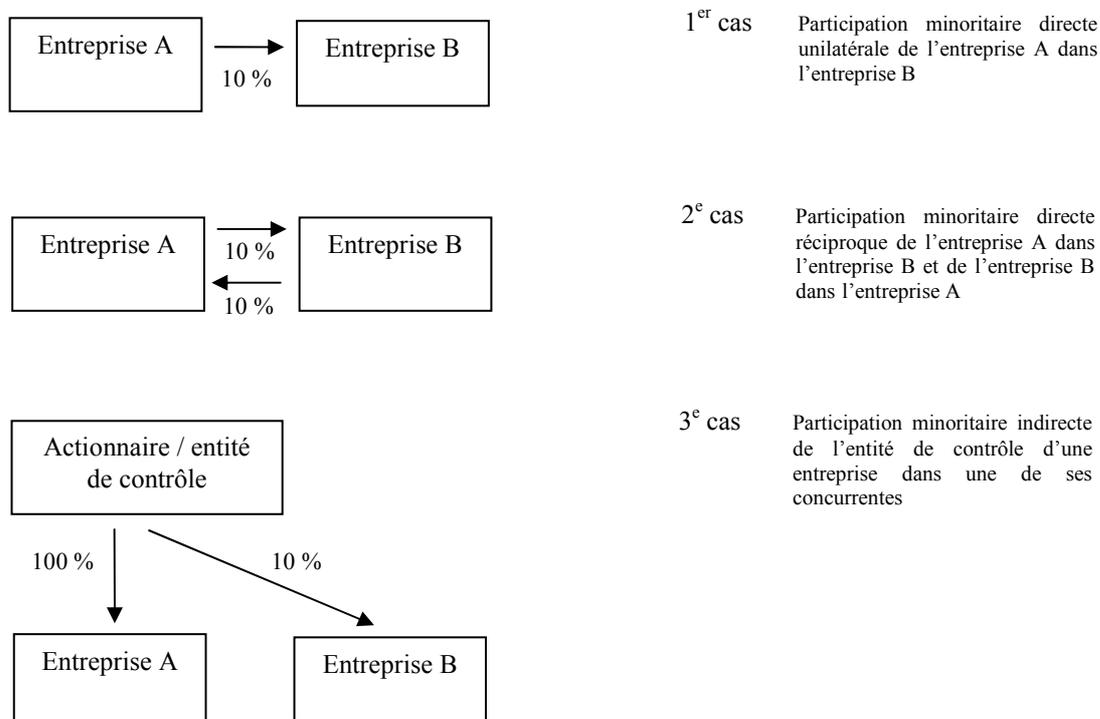
⁷ Habituellement, les gains d'efficacité sont liés à l'acquisition du contrôle. C'est pourquoi il convient de faire la distinction entre les gains d'efficacité générés par les participations minoritaires (en particulier les participations passives) et ceux qui découlent de l'acquisition d'une participation de contrôle. Dans ce dernier cas, l'acquisition du contrôle ou d'influence sur l'entreprise cible permet à l'actionnaire de contrôle (seul ou conjointement avec d'autres actionnaires) d'exploiter les deux entreprises comme si elles n'en formaient qu'une.

⁸ On trouvera un examen approfondi des gains d'efficacité qui peuvent résulter des participations passives dans Gilo (2000) p. 42.

⁹ Voir *infra* Partie III.

(l'entreprise A dans le graphique) détient une participation minoritaire dans l'entreprise B¹⁰. Il peut bien entendu se présenter d'autres situations plus complexes¹¹.

Graphique 1.



2.2 Cumul de mandats d'administrateur

Le cumul de mandats d'administrateur désigne les cas où une ou plusieurs entreprises ont en commun avec d'autres entreprises, dans leurs conseils d'administration respectifs, un ou plusieurs administrateurs. Au sens plus large et plus commodément, le cumul de mandats d'administrateur peut renvoyer à la situation dans laquelle un membre du conseil d'administration d'une entreprise, un de ses dirigeants (et en particulier le directeur général) ou un de ses proches (par exemple, son épouse ou son père) siège au

¹⁰ Fait intéressant, dans les cas 1 et 2, les dirigeants et les actionnaires portent un intérêt identique au bien-être de la société. Au contraire, il n'en irait pas de même dans le cas 3 si l'actionnaire de contrôle ne détenait pas la totalité des actions de l'entité qu'il contrôle. Dans ce cas, les dirigeants n'ont peut-être pas intérêt à augmenter les prix de l'entreprise A et à perdre des ventes au profit de l'entreprise B, dans le seul but de satisfaire l'actionnaire de contrôle, au détriment des autres actionnaires minoritaires de l'entreprise A.

¹¹ Voir par exemple Adams (1999). Dans un examen de l'expérience de l'Allemagne en matière de participations minoritaires, cet auteur mentionne que certaines structures peuvent combiner prises de participation réciproques et participations indirectes, créant ainsi un réseau que l'on pourrait qualifier de circulaire entre les entreprises.

conseil d'administration d'une autre entreprise. Bien qu'elle soit répandue¹² et licite, cette pratique soulève des interrogations sur la qualité et l'indépendance des décisions prises par le conseil d'administration.

Le cumul de mandats d'administrateur prend des formes diverses¹³. Il est *horizontal* ou *vertical* selon qu'il concerne des entreprises en concurrence directe ou des entreprises ayant une relation acheteur-vendeur. Il est *direct* si la personne siège aux conseils d'administration de sociétés liées verticalement ou horizontalement, ou *indirect* si les deux entreprises sont liées par le biais de différentes personnes qui, cependant, (1) sont liées par une origine commune (salariés d'une banque), ou (2) siègent simultanément au conseil d'administration d'une entreprise non affiliée. Enfin, on parle d'« *imbrication de directions* » lorsque qu'un dirigeant d'entreprise siège au conseil d'administration d'une entreprise concurrente¹⁴.

Ces accords peuvent se justifier d'un point de vue commercial et économique, en particulier dans les secteurs qui connaissent une pénurie de personnes expérimentées et renseignées. Cependant, le cumul de mandats d'administrateur peut soulever des problèmes de concurrence lorsque les entreprises qui ont en commun un même administrateur se font concurrence. Ils peuvent notamment donner lieu à des échanges d'informations, au parallélisme des comportements, à l'éviction des sociétés rivales ou à un certain nombre d'activités pouvant se révéler nuisibles à la concurrence. Dans ces cas, le cumul de mandats d'administrateurs peut réduire ou éliminer la concurrence et faciliter la collusion.

3. Les principaux aspects économiques des participations minoritaires

Bien que les participations minoritaires permettent de nombreux gains d'efficacité, les résultats des études économiques menées dans ce domaine doivent attirer l'attention des autorités d'application sur le fait que les prises de participations partielles réalisées par des concurrents avérés ou potentiels risquent d'entraîner des effets anticoncurrentiels. Ces effets peuvent être unilatéraux, et conduire à une réduction de la production industrielle, même si les participations sont relativement réduites, ou coordonnés, étant donné qu'elles peuvent faciliter la collusion. Du point de vue de l'action publique, les autorités de concurrence doivent être au courant de ces effets anticoncurrentiels possibles et les examiner à la lumière des gains d'efficacité que peuvent générer les participations partielles.

3.1 Les effets unilatéraux des participations minoritaires

Selon la théorie économique, les prises de participations partielles peuvent dans certains cas entraîner une diminution de la production et une augmentation des prix en raison de la corrélation positive qu'elles

¹² En 2002, le journal américain USA Today a fait état d'une étude sur le recoupement entre grandes entreprises américaines réalisée par la Corporate Library d'après des informations publiées sur des sociétés inscrites en bourse (voir http://www.usatoday.com/money/companies/management/2002-11-24-interlock_x.htm). Cette étude montre qu'un réseau étroit lie les conseils d'administration des grandes entreprises américaines. Elle constate en particulier que (i) sur les 15 plus grandes entreprises implantées aux États-Unis, 11 comptent deux administrateurs siégeant simultanément au conseil d'administration d'une autre entreprise ; (ii) sur les 15 plus grandes entreprises, quatre ont en commun au moins deux administrateurs avec l'une des dites entreprises ; (iii) le cinquième des 1 000 plus grandes entreprises implantées aux États-Unis compte au moins un administrateur siégeant au conseil d'administration d'une des dites entreprises ; et (iv) plus de 1 000 administrateurs siègent au conseil d'administration de quatre sociétés ou plus ; enfin, 235 administrateurs sont membres de plus de six conseils d'administration.

¹³ Voir Areeda et Turner, paragraphe 1300.

¹⁴ Lorsqu'il y a imbrication de directions, le dirigeant concerné n'est pas membre du conseil d'administration des deux entreprises. Cependant, le risque paraît alors plus grand, étant donné qu'en général, un dirigeant participe davantage aux décisions concernant la marche des affaires de son entreprise qu'un administrateur. Voir Areeda et Turner, paragraphe 1302e.

instaurent entre les bénéfiques des entreprises liées¹⁵. La création d'un lien entre les bénéfiques d'entreprises concurrentes risque de diminuer les incitations de ces entreprises à se faire concurrence et accroît leurs incitations à adopter un comportement propice à l'optimisation commune des bénéfiques. Assez simplement, on peut prédire que si une entreprise détient une participation dans une entreprise concurrente et lui livre une concurrence féroce, les pertes financières subies par cette dernière affecteront la valeur de la participation détenue. En conséquence, l'entreprise acquéreuse est moins portée à concurrencer l'entreprise dans laquelle elle a investi. Au contraire, elle pourrait même être incitée à réduire unilatéralement sa production et à augmenter ses prix si, grâce à sa participation financière dans l'entreprise concurrente, elle est en mesure de récupérer la totalité ou une partie des ventes perdues.

3.1.1 *Identification des effets unilatéraux possibles des participations minoritaires*

Reynolds et Snapp, dans leur analyse des effets unilatéraux des participations minoritaires à l'aide d'un « modèle de concurrence à la Cournot modifié » présentant de fortes barrières à l'entrée, constatent que – même en l'absence de collusion – l'interdépendance structurelle entre les entreprises peut conduire celles-ci à réduire unilatéralement la production et à augmenter les prix au détriment du bien-être des consommateurs¹⁶. Cet effet structurel est la conséquence de la corrélation positive des bénéfiques des entreprises liées par la participation partielle : en d'autres termes, par l'acquisition d'une participation dans des entreprises concurrentes, les entreprises « internalisent » une « externalité » concurrentielle, en l'occurrence les bénéfiques qu'elles génèrent pour leurs concurrentes par des restrictions de production unilatérales. Les pertes subies peuvent être partiellement compensées par une participation détenue dans le capital (et de ce fait dans les bénéfiques) d'une autre entreprise. Lorsque des entreprises sont liées par des participations minoritaires, l'exercice d'une concurrence agressive peut réduire la valeur de ces participations. Ces liens ont des incidences sur les décisions d'optimisation des bénéfiques prises par les entreprises concernées et les incitent à se faire concurrence moins vigoureusement et à adopter un comportement davantage orienté vers une stratégie commune d'optimisation.

L'étude de Reynolds et Snapp est fondée sur l'hypothèse d'un marché sur lequel des entreprises identiques produisent des produits homogènes à coûts marginaux constants¹⁷. Elle montre que sur un tel marché, la production marchande décline en fonction de l'étendue du lien créé par la détention de participations partielles. Plus leur niveau de participation dans des entreprises concurrentes est élevé, plus les entreprises ont d'incitations à diminuer leur production compte tenu de la production des autres entreprises. Le modèle et les conclusions dégagées reposent sur une condition essentielle : l'entrée sur le marché est difficile, sinon impossible. Si l'entrée était facile, des entreprises attirées par les bénéfiques plus élevés réalisés dans le secteur élimineraient toute rente éventuelle et contrediraient toute tentative de relèvement unilatéral des prix.

Le modèle de Reynolds et Snapp permet également d'effectuer une évaluation qualitative de l'ampleur des effets des participations minoritaires sur les niveaux de production. Selon les auteurs, « *le marché d'équilibre est très peu modifié lorsque le nombre d'entreprises liées est faible et que leurs liens le*

¹⁵ Voir Reynolds et Snapp (1986) ; O'Brien et Salop (2000) ; Gilo (2000) ; Dubrow (2000) ; O'Brien et Salop (2001) ; Merlone et Salleo (2003) ; et Reitman (1994).

¹⁶ Voir Reynolds et Snapp (1986).

¹⁷ Les auteurs admettent que l'ampleur des modifications pour chaque entreprise peut varier si les coûts sous-jacents et les fonctions de demande de chaque entreprise diffèrent. Si certaines entreprises assument des coûts plus élevés que d'autres, elles peuvent produire des portions relativement plus faibles de la production sur le marché. De même, si les produits sont différenciés, les entreprises peuvent détenir des parts de marché différentes.

sont également »¹⁸. Cependant, lorsque tous les acteurs présents sur le marché sont liés, la chute de production peut être significative. Reynolds et Snapp estiment que si, sur un marché comptant cinq entreprises, chaque entreprise détient une participation de 10 % dans le capital des autres entreprises, la production serait de 10 % inférieure à ce qu'elle serait en l'absence de liens. En outre, si les liens structurels sont réciproques (voir le cas n° 2, illustré au paragraphe 10 ci-dessus), la chute de production correspondrait au double du pourcentage initial. Le niveau de participation dans le capital a également des incidences sur les réductions de production. Plus le niveau de participation est élevé, plus les entreprises ont d'incitations à réduire leur production compte tenu de la production des autres entreprises.

Reynolds et Snapp remarquent également que cet effet unilatéral ne peut pas être décelé par une analyse de concurrence classique fondée sur des indices structurels comme les ratios de concentration. L'analyse structurelle classique ne prend pas adéquatement en compte les effets des participations partielles dans le capital d'autres entreprises¹⁹. Prenons par exemple le cas d'un marché comptant 10 entreprises de taille identique détenant chacune une part de marché de 10 %. Un indice de concentration des quatre premières entreprises de 40 % ne suffirait peut-être pas à attirer l'attention des autorités sur l'existence d'un problème de concurrence ; le modèle de Reynolds et Snapp montre en revanche que si chaque entreprise détenait une participation de 10 % dans chacune des autres entreprises, cela suffirait pour que la production atteigne un niveau monopolistique, et cela en dépit du fait que l'indice de concentration sur le marché n'est pas préoccupant²⁰.

¹⁸ Voir Reynolds et Snapp (1986), p. 146. Selon le modèle, si, sur un marché comptant dix entreprises de taille identique sans lien les unes avec les autres, une entreprise acquiert une participation de 10 % dans une entreprise concurrente, on observe une diminution de production de 0.1 %. Ce pourcentage doublerait s'il n'y avait que cinq entreprises sur le marché.

¹⁹ Voir Reynolds et Snapp (1986), p. 147.

²⁰ Reynolds et Snapp constatent notamment que « *lorsque les prises de participation correspondent au niveau maximal possible compte tenu du nombre d'entreprises présentes sur le marché, le niveau de production monopolistique sera atteint quelque soit le nombre d'entreprises.* »

Encadré 1. Effets unilatéraux : un exemple numérique

Un simple exemple numérique illustre les effets unilatéraux des participations minoritaires sur les incitations des entreprises qui les acquièrent à relever les prix ou à réduire la production.

Supposons que l'entreprise A vend 20 petites pièces à 20 clients au prix unitaire de 10 EUR et réalise un bénéfice de 2 EUR l'unité. À ces niveaux de prix et de production, l'entreprise A optimise ses bénéfices. Si cette entreprise augmente son prix de 10 % (en le portant à 11 EUR), elle perdra vraisemblablement huit clients et son bénéfice total diminuera, passant de 40 à 36 EUR (12 x 3 EUR). Elle n'a donc aucune raison d'augmenter unilatéralement son prix. Autrement dit, en l'absence de liens structurels avec des entreprises concurrentes, l'entreprise A n'envisagerait la possibilité d'augmenter unilatéralement son prix que si les gains escomptés de cette augmentation dépassaient la perte de revenu occasionnée par son effet dissuasif sur les clients.

Supposons maintenant que l'entreprise A détient une participation passive de 25 % dans une entreprise concurrente (l'entreprise B), qui vend également des petites pièces 10 EUR et réalise ce faisant un bénéfice de 2 EUR l'unité. L'entreprise B vend 10 petites pièces et obtient un bénéfice total de 20 EUR. Du fait de sa participation dans l'entreprise B, l'entreprise A a droit à 25 % des bénéfices de l'entreprise B, en supposant que les bénéfices de l'entreprise B soient versés aux actionnaires. Dans ce cas, sans augmentation du prix, les bénéfices de l'entreprise A seraient de 45 EUR (c'est-à-dire 40 EUR provenant des ventes aux clients de l'entreprise A, auxquels s'ajouteraient les 5 euros représentant 25 % des bénéfices de l'entreprise B.) Toutefois, si l'entreprise A relève son prix, son calcul d'optimisation des bénéfices sera modifié²¹. Examinons quelques scénarios possibles :

- Supposons que l'entreprise A relève son prix de 10 % (elle le porte à 11 EUR et réalise ainsi un bénéfice de 3 EUR l'unité) et que cela lui fasse perdre huit clients. Si ces huit clients décident d'acheter des petites pièces auprès de l'entreprise B, les incitations qu'aurait l'entreprise A à augmenter son prix ne seraient pas modifiées puisque que ses bénéfices demeureraient inchangés (ils s'élèveraient à 36 EUR au titre des ventes réalisées auprès des 12 clients de l'entreprise A, auxquels s'ajouteraient 9 EUR représentant 25 % des nouveaux bénéfices de l'entreprise B, soit 36 EUR.) Une augmentation de prix ne serait pas rentable pour l'entreprise A.
- Si l'entreprise A décide toutefois de relever son prix de 5 % (c'est-à-dire de le porter à 10.5 EUR, réalisant ainsi un bénéfice de 2.5 EUR par petite pièce), elle perdrait vraisemblablement quatre clients plutôt que huit. Si ces quatre clients décidaient d'acheter des petites pièces auprès de l'entreprise B, les bénéfices de l'entreprise A s'élèveraient à 47 EUR (c'est-à-dire 16 x 2.5 EUR, plus 14 x 2 EUR). Dans ce scénario, l'entreprise A trouverait rentable d'augmenter unilatéralement son prix. Elle estimerait rentable une augmentation de 5 % même si un seul de ses quatre clients perdus se tournait vers l'entreprise B et que les trois autres cessaient d'acheter ou optaient pour d'autres fournisseurs.
- Enfin, si l'entreprise A décidait d'augmenter son prix de 2.5 % seulement (en le portant à 10.25 EUR, pour un bénéfice de 2.5 EUR l'unité), elle pourrait s'attendre à perdre seulement deux clients. Elle estimerait rentable dans ce cas aussi de relever son prix étant donné que cela porterait ses bénéfices, au total, à 46.5 EUR (c'est-à-dire 18 x 2.25 EUR, plus 25 % du produit obtenu en multipliant 12 par 2 EUR). L'entreprise A jugerait également rentable de relever son prix même si un seul des deux clients perdus se tournait vers l'entreprise B.

Les exemples qui précèdent montrent comment les participations minoritaires, même lorsqu'elles sont de caractère purement passif, peuvent modifier les incitations financières de l'entreprise acquéreuse (l'entreprise A dans l'exemple) et la conduire à augmenter unilatéralement ses prix. Cet effet est susceptible de se manifester sur des marchés comprenant peu d'entreprises et présentant de fortes barrières à l'entrée. Cependant, comme l'illustrent les exemples ci-dessus, les effets unilatéraux anticoncurrentiels des placements passifs dans les actions d'une entreprise concurrente ont un caractère probabiliste et il

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Des effets sur les prix comparables à ceux qui sont évoqués ici se produisent sans doute également dans le cas des participations minoritaires indirectes (voir le cas n° 3 exposé au paragraphe 10 ci-dessus) lorsque l'entreprise A ne détient pas de participation directe dans l'entreprise B mais que l'actionnaire qui contrôle l'entreprise A (entreprise X) en a une.

serait difficile d'en établir la preuve si les autorités ne disposent pas de toutes les informations requises pour simuler cette analyse.

En pratique, les effets unilatéraux possibles des participations minoritaires sont fonction de la combinaison de divers facteurs tels que l'importance de la prise de participation ; la part de marché de l'entreprise « cible » ; le degré de substituabilité des produits de l'entreprise A et de l'entreprise B ; le ratio de report entre l'entreprise A et l'entreprise B (c'est-à-dire la part de la demande qui se reporterait sur l'entreprise B si l'entreprise A augmentait son prix) ; et les coûts variables respectifs des entreprises et qui affectent leur marge²². Reynold et Snapp ont pour leur part fondé leur analyse sur un marché oligopolistique présentant de fortes barrières à l'entrée. Sur un autre type de marché, l'effet sur les incitations des différentes entreprises pourrait être sensiblement différent. De même, Reynold et Snapp ne prennent pas en compte la possibilité que des entreprises concurrentes aient recours à une stratégie pour réagir à l'augmentation de prix décidée par l'entreprise A. Par exemple, l'entreprise C pourrait diminuer son prix pour attirer les clients perdus par l'entreprise A, au détriment de l'entreprise B. Cela compromettrait également le succès d'une augmentation unilatérale du prix.

3.1.2 *Mesure des effets unilatéraux des participations minoritaires*

Le fait que les participations minoritaires dans le capital d'entreprises concurrentes puissent avoir des effets unilatéraux anticoncurrentiels ne signifie toutefois pas nécessairement que ces effets se produiront dans tous les cas ou qu'ils seront importants. Une fois que ces effets probables ont été identifiés, il importe d'en évaluer les incidences sur la concurrence. Areeda et Turner se montrent sceptiques quant à la possibilité de quantifier ces effets : « *Malheureusement, il n'existe pas de formule qui permette d'indiquer, en général ou même dans des cas particuliers, si ces effets risquent de se produire* »²³. Ce scepticisme a toutefois été remis en cause au cours des dernières années par des économistes qui ont étoffé des méthodes servant habituellement à évaluer l'impact des fusions complètes d'entreprises concurrentes et les ont adaptées à l'analyse précise des acquisitions de participations partielles.

En l'occurrence, deux méthodes ont été proposées. La première consiste à calculer l'indice de Herfindahl-Hirschman modifié, lequel est inspiré de l'indice de concentration de Herfindahl-Hirschman largement utilisé par les autorités d'application du droit de la concurrence dans le cadre des concentrations horizontales. Cette méthode repose sur un modèle d'oligopole à la Cournot dans lequel des entreprises qui produisent des biens homogènes se font concurrence par la quantité. La deuxième définit l'indice de pression sur les prix en élargissant les méthodes de calcul de l'indice de report de la demande sur une entreprise concurrente, et est fondée sur le modèle de Bertrand de concurrence par les prix entre des entreprises produisant des produits différenciés.

L'indice de Herfindahl-Hirschman modifié

L'indice de Herfindahl-Hirschman modifié²⁴ est dérivé de l'indice de Herfindahl-Hirschman généralement utilisé par les autorités de concurrence pour apprécier les concentrations horizontales²⁵.

²² Il est évident que l'ampleur des effets des participations minoritaires sur les incitations des entreprises à relever leur prix ou à réduire la production serait plus grande si les marges de l'entreprise B étaient plus importantes comparativement aux coûts de l'entreprise A.

²³ Voir Areeda et Turner (1980) ¶ 1203d, at 322.

²⁴ Cette méthode a initialement été proposée par Bresnahan et Salop (1986) dans le cadre des coentreprises de production et a été par la suite développée par O'Brien et Salop (2000) et O'Brien et Salop (2001).

L'indice de Herfindahl-Hirschman classique correspond à la somme des carrés des parts de marché des participants sur le marché. En comparant la situation avant et après la concentration (ce qui permet d'obtenir le « delta ») il est possible de mesurer l'effet probable, sur le niveau de concentration du marché, d'une fusion entre des entreprises concurrentes. L'indice de Herfindahl-Hirschman modifié prend en compte le fait que les entreprises n'ont pas procédé à une fusion complète. En effet, l'augmentation de la concentration imputable à une simple prise de participation partielle serait surévaluée. En cas d'acquisition de participation minoritaire, le delta de l'indice de Herfindahl-Hirschman modifié est obtenu en multipliant le pourcentage de la participation financière par le produit des parts de marché des deux entreprises. À titre comparatif, le delta de l'indice de Herfindahl-Hirschman modifié correspond, en cas de fusion complète, au double du produit des parts de marché des entreprises concernées²⁶. Étant donné que les incidences des participations minoritaires sont fonction de la répartition des droits de contrôle, pour des participations données l'indice varie en fonction de la configuration particulière du contrôle exercé²⁷.

L'analyse de la variation de l'indice de Herfindahl-Hirschman modifié, avant et après une opération, peut offrir des pistes pour déterminer si une acquisition partielle risque d'avoir un impact sur les incitations d'une entreprise à concurrencer ses rivales, compte tenu de la structure du marché et de celle de l'entreprise²⁸. Cependant, cette méthode est par nature conjecturale et ne peut être réputée fiable pour évaluer si une opération donnée entraînera nécessairement une diminution significative de la concurrence²⁹. Les tenants de l'indice de Herfindahl-Hirschman modifié remarquent : « [...] le calcul de l'indice de Herfindahl-Hirschman modifié, comme celui de l'indice de Herfindahl-Hirschman classique, est très approximatif étant donné qu'il suppose un marché de référence sur lequel n'intervient aucune substitution au moyen de produits provenant d'un autre marché, où il y a de fortes barrières à l'entrée, et où ne se manifestent pas d'autres effets concurrentiels, ni de gains d'efficacité. Cependant, comme l'indice classique, cet indice peut se révéler utile dans un premier temps »³⁰. En conséquence, l'indice de Herfindahl-Hirschman modifié est tout au plus un dispositif de filtrage, comme l'indice de Herfindahl-Hirschman classique.

²⁵ Voir, par exemple, les principes directeurs relatifs aux concentrations horizontales publiés en 1992 par la FTC et le DOJ des États-Unis (qui peuvent être consultés sur le site web de ces deux organismes) et les Lignes directrices sur l'appréciation des concentrations horizontales au regard du règlement du Conseil relatif au contrôle des concentrations entre entreprises publiées par la Commission européenne (JO C 31, 5.2.2004, p. 5-18).

²⁶ Voir O'Brien et Salop (2001), p. 614. L'exemple numérique fourni par les auteurs montre que l'acquisition d'un placement financier passif de 45 % dans une entreprise concurrente, lorsque l'entreprise acquéreuse A et l'entreprise cible B disposent chacune d'une part de marché de 20 %, donnerait un delta de 180 (45 % x 20 x 20). Si les deux entreprises devaient fusionner, le delta serait de 800 (2 x 20 x 20).

²⁷ Voir O'Brien et Salop (2001), p. 614. Six scénarios de contrôle sont décrits : fusion complète, participation financière passive, contrôle total, contrôle unidirectionnel, contrôle conjoint selon Coase et contrôle proportionnel. Ces scénarios sont inspirés d'une étude antérieure de Breshahan et Salop (1986) sur les coentreprises de production.

²⁸ La Commission européenne a utilisé l'indice de Herfindahl-Hirschman modifié dans l'affaire Exxon-Mobil (voir affaire M.1383, considérant 256) et mentionne cette méthode dans les Lignes directrices sur l'appréciation des concentrations horizontales au regard du règlement du Conseil relatif au contrôle des concentrations entre entreprises, [2004] JO C/31, note 25. L'indice de Herfindahl-Hirschman modifié n'a pas été utilisé aux États-Unis.

²⁹ Voir Dubrow (2001), p. 128 *et seq.*

³⁰ Voir O'Brien et Salop (2000), p. 596-597.

L'indice de pression sur les prix

Lorsque l'acquisition d'une participation partielle concerne des entreprises qui fabriquent des produits différenciés, il convient d'utiliser une autre méthode : l'indice de pression sur les prix³¹. Cet indice mesure les effets directs, en termes d'incitations, d'une modification de la structure de la participation et fournit une analyse plus fine fondée sur le degré de proximité des produits des entreprises concernées³².

Le modèle de l'indice de pression sur les prix est fondé sur les différences entre les marges des différentes entreprises pour leurs produits et leurs ratios de report, et prédit les effets de la modification de la structure de participation sur les prix. Cependant, bien que le calcul de de l'indice de Herfindahl-Hirschman modifié soit relativement facile à mettre en oeuvre, étant donné qu'il est réalisé d'après des informations que les autorités d'application peuvent en général se procurer facilement (ces informations portent sur les parts de marché des différentes parties et le pourcentage de participation acquise), celui de l'indice de pression sur les prix nécessite des informations plus poussées (par exemple sur les marges bénéficiaires des deux entreprises et les ratios de report pour des produits différenciés), dont certaines ne sont parfois même pas accessibles. En outre, contrairement à l'indice de Herfindahl-Hirschman modifié, qui est applicable à l'ensemble du marché, l'indice de pression sur les prix diffère d'une entreprise à l'autre.

L'indice de pression sur les prix montre que la pression en faveur d'une augmentation des prix à la suite de l'acquisition d'une participation partielle est fonction des marges des deux entreprises et du montant des ventes perdues par l'entreprise qui détient une participation minoritaire (entreprise A) au profit de l'entreprise concurrente dans laquelle elle a investi (entreprise B). En conséquence, plus la marge de l'entreprise B par rapport au coût marginal de l'entreprise A est importante, plus le bénéfice que l'entreprise A peut récupérer à même les ventes reportées sur l'entreprise B est élevé. De même, plus le ratio de report entre l'entreprise A et l'entreprise B est important, plus le bénéfice que l'entreprise A peut récupérer au titre des ventes qu'elle a perdues au profit de l'entreprise B est élevé. En d'autres termes, plus les marges de l'entreprise B sont importantes, plus il est vraisemblable que l'entreprise A relèvera ses prix une fois l'opération réalisée.

3.2 Participations minoritaires et effets coordonnés

Les théories examinées ci-dessus, qui prédisent les effets unilatéraux possibles de la prise de participations minoritaires, sont fondées sur l'hypothèse selon laquelle les entreprises sur le marché fixent les prix indépendamment et ne se livrent pas tacitement ou expressément à la collusion ou ne communiquent pas leurs décisions stratégiques au marché. Se pose par ailleurs la question de savoir si les liens structurels entre entreprises concurrentes sous forme de participations minoritaires directes ou réciproques peuvent également faciliter la collusion expresse ou tacite³³. La simple existence de liens entre des entreprises concurrentes n'est pas une condition suffisante pour conclure qu'elle aura pour effet de faciliter la collusion sur le marché. Il est nécessaire d'examiner attentivement si ces liens structurels représentent, pour les entreprises et le marché, une incitation à la collusion ou une possibilité d'y recourir.

³¹ Voir O'Brien et Salop (2000) et O'Brien et Salop (2001).

³² Voir O'Brien et Salop (2000), p. 598.

³³ Voir Reynolds et Snapp (1986) ; Gilo (2000) ; Gilo, Moshe, Spiegel (2005) ; Merlone et Salleo (2003) ; Merlone (2007). Il se dégage des conclusions similaires lorsque les entreprises ayant des liens structurels ne sont pas des concurrentes *véritables*, mais *potentielles*. Les participations dans le capital pratiquement assimilables à une fusion complète peuvent faire disparaître la menace d'entrée de la concurrente potentielle et permettre aux entreprises présentes sur le marché de pratiquer des prix caractéristiques d'entente. Voir Reynolds et Snapp (1986).

Selon la théorie économique, pour que des parties pratiquant la collusion arrêtent une stratégie commune et l'appliquent efficacement au fil du temps, les conditions cumulatives suivantes doivent être réunies³⁴ :

- Les conditions du marché doivent être suffisamment transparentes pour permettre à chaque membre du cartel de vérifier si les autres entreprises adoptent la ligne d'action commune.
- Les conséquences des déviations ou de la tricherie par rapport à la ligne d'action commune (par exemple, les sanctions ou les représailles) doivent être suffisamment sévères et crédibles.
- Les réactions prévisibles des clients et des concurrents courants et futurs ne doivent pas contrecarrer l'action commune.

Différents autres facteurs peuvent conduire à un résultat caractéristique de la collusion, c'est-à-dire à la réunion des conditions cumulatives mentionnées ci-dessus, bien qu'il ne soit pas nécessaire qu'ils soient tous présents pour qu'il y ait collusion vraisemblable. Ces facteurs comprennent la structure et le niveau de concentration du marché ; le degré de transparence des conditions du marché ; les difficultés d'entrée et de sortie ; la force de la concurrence résiduelle ; le pouvoir d'achat ; la stabilité des conditions du marché ; le degré de symétrie entre les participants sur le marché ; et la capacité des entreprises à agir les unes sur les autres de façon répétée et sur plus d'un marché.

Bien que certains auteurs aient obtenu des résultats incertains quant à savoir si la collusion peut être facilitée par des prises de participations partielles dans des entreprises concurrentes³⁵, la plupart d'entre eux estiment que les liens structurels entre entreprises sur des marchés concentrés et propices à la collusion (tacite ou expresse) peuvent contribuer à augmenter la collusion. Selon eux, la prise d'une participation minoritaire peut favoriser la création d'un équilibre caractérisé par la collusion ou la stabilité d'un tel équilibre³⁶, et ce, de deux manières : (i) elle accroît la transparence et (ii) elle a un effet négatif sur les incitations des entreprises à se faire concurrence.

³⁴ Pour de plus amples détails sur la théorie de la collusion, voir Stigler (1964) ; Carlton et Perloff (1990) ; Scherer et Ross (1990) ; Philips (1995) ; Ivaldi, Jullien, Rey, Seabright et Tirole (2003) ; voir également les nombreux ouvrages cités dans ces textes.

³⁵ Voir notamment Malueg (1992). Cet auteur démontre que l'augmentation de certains niveaux de placements passifs peut rendre la collusion plus difficile à réaliser et, en théorie, favoriser la concurrence. La conclusion de Malueg est fondée sur l'incertitude tenant au fait que les participations partielles ont deux effets contradictoires. D'une part, dans un modèle de concurrence à la Cournot, les participations partielles permettent aux entreprises d'internaliser une partie des pertes qu'elles infligent à leurs rivales lorsqu'elles dévient de la ligne d'action fixée, et réduisent par conséquent les incitations à dévier de cette ligne d'action. D'autre part, elles affaiblissent la concurrence après le démantèlement du dispositif de collusion et font donc en sorte que les entreprises sont davantage incitées à dévier de la ligne d'action fixée. L'effet net est fonction d'un certain nombre de facteurs, et en particulier du degré de participation partielle.

³⁶ Hovenkamp remarque : « selon les règles de la concurrence, l'entreprise A n'a d'autre souhait que d'évincer l'entreprise B en améliorant son efficacité. À la suite de l'acquisition partielle [par l'entreprise A de l'entreprise B], toutefois, l'entreprise A a soudainement tout intérêt à ce que la situation financière de l'entreprise B soit bonne. Cela peut faire augmenter considérablement le risque de collusion tacite ou expresse ». Voir Hovenkamp (1994), p. 497.

3.2.1 *Échanges d'informations et effets sur la transparence*

Les participations minoritaires accroissent la transparence du marché étant donné qu'elles procurent à leur détenteur un point de vue privilégié sur les activités commerciales de l'entreprise cible³⁷. Un actionnaire minoritaire peut avoir accès à des informations concernant l'entreprise cible qui peuvent faciliter la collusion ou permettre de vérifier si l'entreprise cible adhère à la ligne d'action fixée de concert. La réciprocité des participations et le fait qu'elles lient tous les concurrents présents sur le marché augmentent nettement l'effet des échanges d'informations.

Le degré de transparence qui va de pair avec un lien structurel est principalement fonction des droits associés à la prise de participation. Le degré de transparence est plus élevé si la participation minoritaire s'accompagne d'une représentation au conseil d'administration ou accorde suffisamment de droits pour désigner les dirigeants. L'entreprise concurrente serait alors manifestement en mesure de connaître les stratégies tarifaires et commerciales de l'autre entreprise et d'obtenir des informations sensibles du point de vue de la concurrence. Cette transparence accrue est susceptible de favoriser la coordination entre les deux entreprises.

Cependant, même en présence d'un placement purement passif, c'est-à-dire lorsque le détenteur d'une participation minoritaire n'exerce aucune participation active dans la gestion de l'entreprise cible et n'a pas de droits de représentation, la transparence peut être accrue. Même les actionnaires minoritaires passifs peuvent avoir accès à des informations qu'un concurrent indépendant n'aurait pas concernant différents projets d'expansion, de fusion ou d'acquisition d'autres entreprises ; la mise en oeuvre de nouveaux placements considérables ; l'augmentation de la production ; ou l'entrée ou l'expansion sur de nouveaux marchés³⁸.

3.2.2 *Effets sur les incitations des entreprises à adopter des prix compétitifs*

Le seul fait que des entreprises concurrentes aient des intérêts communs peut avoir un impact sur leurs incitations respectives à se faire concurrence vigoureusement. Comme dans le cas des effets unilatéraux, les participations partielles peuvent modifier les résultats des entreprises concernées et leurs incitations respectives à ne pas se conformer à un accord de collusion ou à mettre en oeuvre une guerre des prix pour réprimer le non-respect d'un accord de collusion. En outre, les placements réalisés dans des entreprises concurrentes indiquent au reste du marché que les entreprises ainsi liées ont l'intention de se faire concurrence moins énergiquement. Cela peut inciter tout un secteur à réduire la pression concurrentielle et favoriser un équilibre de collusion au détriment des consommateurs. Cependant, les économistes avancent également que les liens structurels peuvent parfois entraîner l'effet contraire, c'est-à-dire qu'ils pourraient réduire le risque de collusion³⁹. L'effet net est fonction de la demande et des coûts des entreprises ainsi que de la portée et de la nature de la participation minoritaire.

Dans les sections qui suivent, nous examinons comment les prises de participations directes et indirectes peuvent avoir des incidences sur la volonté des entreprises concernées de mettre en oeuvre une concurrence par les prix vigoureuse et comment les entreprises peuvent produire un effet similaire de collusion sans nouer de liens structurels, mais en acquérant les créances d'entreprises concurrentes.

³⁷ Ces liens structurels peuvent apporter des informations précieuses sur les activités des entreprises rivales, ce qui pourrait fortement faciliter la collusion. Voir Martin (1995).

³⁸ Dans de nombreux pays, afin de protéger la valeur de participations, le droit des sociétés accorde une protection spéciale aux actionnaires minoritaires et veille à ce que les actionnaires qui n'exercent pas de contrôle sur une entreprise ne soient pas complètement exclus du processus effectif de prise de décision.

³⁹ Voir à ce sujet la note de bas de page 35 ci-dessus.

Prises de participations directes

Reynolds et Snapp constatent que la création de liens entre entreprises concurrentes au moyen de prises de participations partielles améliore les résultats des cartels en renforçant la stabilité des accords de collusion et leur durabilité à long terme⁴⁰. En particulier, les prises de participations directes dans des entreprises concurrentes :

- Réduisent les incitations de l'entreprise cible à ne pas respecter l'équilibre de collusion étant donné qu'elle serait alors obligée de partager avec sa concurrente une partie des gains retirés en ne se conformant pas à cet accord.
- Facilitent les représailles étant donné qu'elles permettent aux entreprises de mieux détecter la tricherie. L'entreprise acquéreuse a droit à une part des bénéfices et saurait rapidement que l'entreprise cible a mis en oeuvre une stratégie concurrentielle.
- Diminuent les incitations qu'a l'entreprise acquéreuse à ne pas se conformer à l'accord de collusion étant donné qu'une diminution du prix entraînerait une réduction des bénéfices de l'entreprise cible et, partant, une dépréciation de la participation de l'entreprise acquéreuse.
- Créent, pour l'entreprise acquéreuse, des incitations à prendre des participations additionnelles à la marge qui dissuadent ou diffèrent l'entrée de nouvelles entreprises susceptibles de menacer la stabilité de l'accord de collusion et de réduire la valeur de la prise de participation initiale.

Cette analyse de l'effet favorable à la collusion des participations minoritaires est toutefois fondée sur la modification des incitations des entreprises liées par des participations minoritaires, et ne prend pas en compte les facteurs susceptibles d'inciter d'autres entreprises présentes sur le marché à réduire les prix. Les entreprises en concurrence avec des entreprises liées par une prise de participation, même dans des secteurs concentrés, peuvent malgré tout trouver rentable de réduire les prix indépendamment du comportement des entreprises liées. À cet égard, les analystes ont examiné la question de savoir s'il est nécessaire que l'ensemble des entreprises d'un secteur soient liées pour que la collusion soit plausible. Selon certains auteurs, il faut établir une distinction entre d'une part les participations minoritaires et les raisons stratégiques qui portent une entreprise à acquérir ce type de participations, et d'autre part le problème de la formation d'une coalition en termes de participations croisées et de coentreprises lorsque toutes les parties en présence partagent symétriquement les avantages de la réduction de concurrence⁴¹. Bien que les prises de participations minoritaires qui créent des participations croisées assez symétriques entre des entreprises puissent faciliter la collusion, il n'en va pas nécessairement de même de la simple détention d'une participation dans le capital d'une entreprise rivale si elle accroît l'asymétrie des participations financières respectives des parties.

Même si le fait que toutes les entreprises présentes sur le marché ne sont pas liées les unes aux autres ôte de leur poids aux arguments des détracteurs des participations minoritaires, les chercheurs s'accordent à penser que la prise de participations stratégiques par des entreprises qui autrement seraient davantage susceptibles de déclencher une baisse des prix pourrait suffire à assurer la stabilité d'un équilibre de

⁴⁰ Voir Reynolds et Snapp (1986), p. 149.

⁴¹ Voir Malueg (1992). Voir également Kwoka (1992), selon lequel les participations croisées sont plus susceptibles d'être rentables pour l'ensemble des participants dans une gamme étendue de jeux de marché.

collusion⁴². De leur point de vue, il n'est pas nécessaire, pour favoriser un équilibre de collusion, que toutes les entreprises d'un secteur soient liées par des participations dans le capital les unes des autres ou que les liens créés par ces participations affectent tous les membres du cartel. Il suffit habituellement de discipliner les petits concurrents marginaux qui ont le plus intérêt à tricher et à dévier de l'accord collusif. En conséquence, on peut davantage s'attendre à voir des petites entreprises concurrentes acquérir des participations les unes dans les autres ou encore des petites entreprises acquérir des participations partielles dans des grandes entreprises qu'elles concurrencent⁴³. Les petites entreprises ont ainsi un certain nombre de raisons de ne pas tricher. En effet, les repréailles à leur endroit sont plus efficaces parce qu'elles risquent de leur occasionner des pertes plus importantes.

La stratégie des petites entreprises francs-tireurs qui acquièrent des participations minoritaires dans des entreprises concurrentes consiste à s'engager à ne pas réduire les prix⁴⁴. Ce faisant, elles indiquent aux autres entreprises présentes sur le marché leur intention de ne pas les concurrencer vigoureusement. L'efficacité de cet engagement est assurée si l'entreprise franc-tireur acquiert une participation dans une seule entreprise concurrente ; en effet, il n'est pas nécessaire qu'elle investisse dans le capital de toutes ses rivales. Cet engagement suffit en conséquence pour inciter toutes les entreprises présentes sur le marché à recourir à la collusion tacite. Si l'entreprise franc-tireur n'investissait pas dans le capital d'une entreprise concurrente, toutes les entreprises exerceraient une forte concurrence, sachant que l'entreprise franc-tireur adopterait de toute façon une stratégie concurrentielle agressive, et que la collusion serait alors non tenable sur le marché. Cependant, pour que la participation passive constitue un engagement réel à ne pas réduire les prix, il est nécessaire que l'opération soit visible⁴⁵ sur le marché, et crédible⁴⁶.

⁴² Voir Reynolds et Snapp (1986), p. 149. Gilo fait à peu près la même constatation. Il estime que pour induire une situation de collusion, il suffit que des participations passives soient prises par des entreprises qui seraient autrement plus enclines à déclencher une baisse des prix. Dans un secteur donné, l'entreprise prompte à déclencher une réduction des prix serait par exemple celle qui a le coût marginal le plus bas, et est donc plus disposée à réduire les prix qu'une entreprise ayant des coûts marginaux plus élevés. De même, les entreprises qui détiennent de faibles parts de marché seront plus portées à réduire les prix que celles qui détiennent d'importantes parts de marché, étant donné que les petites entreprises retireraient moins d'avantages de la collusion que les grandes. En outre, les entreprises dont le modèle commercial repose sur des transactions peu nombreuses et un volume élevé sont plus disposées à réduire les prix étant donné que la rareté des transactions rend la détection des réductions de prix plus difficile et les repréailles moins efficaces. Enfin, pour ces entreprises, le bénéfice retiré d'une déviation au moment opportun peut être important, assuré et immédiat tandis que les pertes résultant d'une sanction peuvent être faibles, incertaines et longues à se manifester. Gilo souligne toutefois que dans les secteurs où toutes les entreprises sont également enclines à réduire les prix, des participations passives peuvent faciliter la collusion seulement si chaque entreprise d'un secteur donné acquiert une participation passive dans le capital d'une entreprise concurrente. Voir Gilo (2000), p. 15 *et seq.*

⁴³ Voir Reynolds et Snapp (1986), p. 149.

⁴⁴ Konrad (2005) a montré que dans le cadre d'enchères où tous les concurrents paient une inscription, les participations passives introduisent des externalités asymétriques et que si l'entreprise la plus solide (c'est-à-dire l'entreprise la plus susceptible de remporter les enchères) détient une participation passive dans le capital de la deuxième entreprise, elle s'abstient de soumissionner.

⁴⁵ Cela pourrait poser problème dans le cas de sociétés fermées, mais vraisemblablement pas dans celui de sociétés faisant appel à l'épargne publique. Ces dernières sont soumises à des obligations de divulgation en vertu de la réglementation nationale et internationale sur les valeurs mobilières. Aux États-Unis, par exemple, la SEC exige que l'acquéreur d'une prise de participation passive représentant plus de 5 % des actions en circulation en informe le marché ; des obligations de divulgation du même ordre s'appliquent lorsque les participations passives passent sous la barre des 5 %.

Prises de participations indirectes effectuées par une entité de contrôle

Un autre cas est réputé pouvoir favoriser la collusion : c'est celui où l'actionnaire de contrôle d'une entreprise prend des participations dans le capital d'une entreprise concurrente de l'entreprise sur laquelle il exerce son contrôle⁴⁷. En plus de favoriser la collusion, ces liens structurels indirects entraînent une augmentation des prix pratiqués sur le marché⁴⁸. En outre, une fois que l'actionnaire de contrôle a décidé de prendre des participations dans des entreprises qui concurrencent la société sur laquelle il exerce son contrôle, il est fortement incité à diluer sa participation dans cette dernière ; plus sa participation est faible, moins l'entreprise qu'il contrôle sera une concurrente dynamique sur le marché. En conséquence, cela implique que le simple fait qu'un actionnaire de contrôle détienne de faibles participations dans des entreprises concurrentes peut réduire substantiellement la concurrence lorsque la participation détenue par cet actionnaire dans l'entreprise qu'il contrôle est diluée. C'est pourquoi les participations indirectes, plus que les participations directes, dans des sociétés concurrentes, peuvent traduire une volonté plus forte de ne pas réduire les prix. En effet, plus la participation de l'actionnaire de contrôle dans l'entreprise qu'il contrôle est faible, plus sa participation minoritaire dans l'entreprise concurrente a du poids.

Box 3. Encadré 2. Effet coordonnés et prises de participations indirectes - Un exemple numérique

L'effet examiné ci-dessus peut être illustré à l'aide d'un exemple simple. Prenons l'entreprise A et l'entreprise B mentionnées dans l'encadré 1 et supposons que l'entreprise A est une filiale à 100 % de l'entreprise X. En l'absence de prises de participations passives, si l'entreprise X décide de modifier la politique tarifaire de l'entreprise A et de réduire son prix de 5 % afin de devenir un acteur plus agressif sur le marché, l'entreprise A gagnerait sept clients au détriment de l'entreprise B et verrait ses bénéfices passer de 40 EUR (c'est-à-dire un bénéfice de 2 EUR pour chacune des 20 unités vendues) à 40.5 EUR (c'est-à-dire un bénéfice de 1.5 EUR pour chacune des 27 unités vendues). Dans ce cas, l'entreprise X est incitée à veiller à ce que l'entreprise A exerce une concurrence agressive. Supposons maintenant que l'entreprise X acquiert une participation minoritaire de 25 % dans l'entreprise B. Dans ce cas, l'augmentation des bénéfices imputable à une réduction de 5 % du prix de l'entreprise A doit être mise en équilibre avec la perte de bénéfices au titre de la participation de l'entreprise X dans l'entreprise B. Avant la réduction de prix pratiquée par l'entreprise A, l'entreprise X réaliserait un bénéfice de 45 EUR (c'est-à-dire 40 EUR provenant des ventes aux clients de l'entreprise A, auxquels s'ajouteraient 5 EUR au titre de sa participation à hauteur de 25 % dans l'entreprise B) ; après la réduction, les bénéfices de l'entreprise X chuteraient à 42 EUR (c'est-à-dire un bénéfice de 40.5 EUR au titre de sa participation en tant qu'actionnaire de contrôle dans l'entreprise A, auxquels s'ajouteraient 1.5 EUR représentant les nouveaux bénéfices de l'entreprise B). Dans ce cas, l'entreprise X n'a aucune incitation à faire en sorte que l'entreprise A exerce une concurrence agressive parce qu'elle subirait alors une perte financière.

En outre, plus la participation de contrôle de l'entreprise X dans l'entreprise A est faible, plus l'entreprise X est incitée à affaiblir la concurrence entre l'entreprise A et l'entreprise B. Par exemple, si l'entreprise X ne contrôle que 75 % de l'entreprise A, une réduction de 5 % du prix de l'entreprise A entraînerait une diminution des bénéfices de l'entreprise X, qui passeraient de 35 à moins de 32 EUR. En effet, plus la participation de l'entreprise X dans l'entreprise A est faible, plus grand sera le poids attribué par l'entreprise X à sa participation minoritaire dans l'entreprise B.

⁴⁶ Par exemple, si l'acquisition de la participation passive s'inscrit dans une opération en plusieurs étapes dans le cadre de laquelle il est déjà convenu que la participation acquise sera ultérieurement transférée à un tiers, l'engagement de ne pas réduire les prix n'est pas crédible. Voir Gilo (2000), p. 19.

⁴⁷ Il s'agit de la troisième structure de participation minoritaire décrite au paragraphe 10 ci-dessus, dans le cadre de laquelle la participation minoritaire dans le capital de l'entreprise concurrente n'est pas détenue directement par sa concurrente mais par son actionnaire de contrôle (qui peut être une société-mère ou une personne physique.)

⁴⁸ Voir Gilo (2000) p. 22 *et seq.* ; Ezrachi et Gilo (2006).

On peut toutefois s'interroger sur les véritables motivations et sur la capacité des dirigeants de l'entreprise A mentionnée dans l'exemple ci-dessus à relever les prix dans le but de détourner les clients de l'entreprise A vers une entreprise concurrente (l'entreprise B dans notre exemple), dans laquelle l'actionnaire de contrôle (l'entreprise X) détient une participation, dans le but d'optimiser les seuls bénéfices de cette entreprise⁴⁹. L'entreprise A n'aurait pas intérêt à perdre des ventes et des bénéfices au profit d'une entreprise concurrente ; ses dirigeants prendront plus vraisemblablement des décisions tarifaires visant à optimiser sa vigueur concurrentielle à long terme en gagnant des parts de marché et en augmentant les bénéfices⁵⁰. Outre une absence possible de volonté des dirigeants d'augmenter les prix, il faut prendre en compte que les décisions des dirigeants peuvent très bien être commandées par les règles juridiques du gouvernement d'entreprise, qui imposent en général aux dirigeants de servir les intérêts globaux de la société, actionnaires minoritaires compris. Les devoirs de loyauté peuvent en conséquence se révéler d'une très grande utilité étant donné qu'ils peuvent empêcher les dirigeants de prendre des décisions commerciales contraires aux intérêts des actionnaires minoritaires.

Ce point précis appelle deux remarques.

- Premièrement, les intérêts financiers des dirigeants peuvent être alignés artificiellement sur ceux de l'actionnaire de contrôle. Pour ce faire, il est possible de structurer des dispositifs de rémunération des dirigeants qui établissent un lien positif entre la rémunération des dirigeants de l'entreprise A et les résultats économiques de l'entreprise B. De la sorte, la direction serait amenée à prendre des décisions tarifaires propices à la réussite économique de l'entreprise B.
- Deuxièmement, si la décision de l'entreprise A de relever les prix transmet à l'ensemble du marché des indications quant à son intention d'exercer une concurrence moins agressive et que cela conduit à l'instauration d'un équilibre de collusion tacite sur le marché, les bénéfices de l'entreprise A pourraient s'en trouver augmentés et les actionnaires minoritaires de cette entreprise se verraient donc avantagés. Il n'est pas interdit de penser que la réussite de cette stratégie signifierait que la direction n'a pas manqué à ses devoirs de loyauté à l'égard des actionnaires minoritaires. Ces derniers, comme les autres acteurs du marché, jugeraient cette stratégie rentable⁵¹.

Acquisition des créances d'une entreprise concurrente

Dans certains cas, il n'est pas nécessaire que les entreprises nouent des liens structurels pour favoriser la collusion. Des effets de collusion très comparables à ceux que créent les participations minoritaires peuvent être obtenus en acquérant les créances d'une entreprise concurrente plutôt que des participations dans son capital.

L'acquisition des créances d'une entreprise concurrente peut inciter le créancier à réduire sa pression concurrentielle sur le débiteur lorsqu'une concurrence accrue est susceptible d'accroître le risque d'insolvabilité de ce dernier⁵². Autrement dit, le créancier peut s'abstenir d'adopter une stratégie commerciale agressive si cela risque de compromettre ses chances d'être remboursé intégralement. En pareil cas, le fait d'accorder un prêt à une entreprise concurrente peut équivaloir à s'engager à adopter une politique tarifaire moins agressive, ce qui est contraire aux intérêts du marché. Ce comportement risque de

⁴⁹ Voir O'Brien et Salop (2000), p. 580 ; et Dubrow (2001), p. 133-134.

⁵⁰ Voir Dubrow (2001), p. 134.

⁵¹ Voir Gilo (2000) p. 24.

⁵² Voir Gilo (2000), p. 21. Voir également l'examen, par Kaiser (2004), p. 616 *et seq.*, de l'application, aux États-Unis, des règles de concurrence à l'égard de l'acquisition des créances d'une entreprise concurrente.

conduire tous les acteurs du marché à se faire concurrence moins âprement, au profit d'un équilibre de collusion exempt de concurrence.

L'acquisition des créances d'une entreprise concurrente a toutefois sur le niveau de concurrence un effet beaucoup plus dilué que l'acquisition d'actions. On peut supposer qu'elle a toujours des incidences sur les intérêts financiers de l'acquéreur et, partant, sur ses calculs d'optimisation des bénéfices. Les effets de l'acquisition des créances d'une entreprise concurrente sur les incitations d'un créancier en matière de concurrence sont pour leur part fonction de deux facteurs principaux :

- Une concurrence acharnée doit logiquement entraîner l'insolvabilité du débiteur ; et,
- La créance ne doit pas être garantie par des tiers.

En conséquence, l'acquisition des créances d'une entreprise concurrente peut favoriser la collusion seulement si l'exercice de la concurrence empêche le créancier d'obtenir remboursement. Si tel n'est pas le cas, le créancier ne sera pas dissuadé de concurrencer vigoureusement le débiteur.

3.3 Conclusions relatives aux effets anticoncurrentiels des participations minoritaires

Les études économiques sur les effets anticoncurrentiels des prises de participations minoritaires dans des entreprises concurrentes permettent de dégager un certain nombre de faits qu'autorités de concurrence et tribunaux devraient prendre en compte dans leurs décisions d'application concernant ce volet du droit de la concurrence.

3.3.1 Effets unilatéraux

- Sur des marchés oligopolistiques présentant de fortes barrières à l'entrée, les participations minoritaires (même passives) des entreprises les unes dans les autres peuvent inciter celles-ci à réduire unilatéralement leur production et à relever les prix, au détriment du bien-être des consommateurs.
- La probabilité que les participations minoritaires entraînent des effets unilatéraux sur les prix augmente avec le degré de participation dans des entreprises concurrentes ; plus leur degré de participation est élevé, plus les entreprises sont incitées à réduire leur production en fonction de celle des autres entreprises.
- L'effet unilatéral est d'autant plus important que le nombre d'entreprises liées sur le marché est élevé. L'existence de liens entre toutes les entreprises présentes sur le marché peut entraîner une chute considérable de la production.
- L'effet unilatéral sur les prix est d'autant plus important que les marges de l'entreprise cible sont élevées et que le ratio de report de la demande entre l'entreprise acquéreuse et l'entreprise cible est élevé.
- Lorsque les liens structurels sont réciproques, l'effet unilatéral attendu correspond au double de la situation initiale.

3.3.2 Effets coordonnés

- L'existence de liens entre des entreprises concurrentes n'est pas suffisante pour donner lieu à des pratiques de collusion. Sur des marchés concentrés présentant de fortes barrières à l'entrée, la

collusion peut toutefois être facilitée par des prises de participations partielles dans des entreprises concurrentes.

- L'acquisition d'une participation minoritaire dans une entreprise concurrente peut favoriser la création d'un équilibre de collusion ou la stabilité de ce type d'équilibre parce qu'elle accroît la transparence et incite les entreprises à s'abstenir de se faire concurrence.
- Les participations minoritaires détenues par l'entreprise la plus agressive (c'est-à-dire une entreprise « franc-tireur ») peuvent constituer un outil stratégique pour favoriser la collusion ; elles soulèvent en conséquence plus de problèmes de concurrence que les prises de participations réalisées par des entreprises moins compétitives⁵³.
- Les prises de participations réalisées par des entreprises moins compétitives risquent moins de favoriser la collusion, sauf dans les cas où toutes les entreprises présentes sur le marché ont acquis des participations dans au moins une entreprise concurrente. Ces prises de participations peuvent néanmoins donner lieu à des augmentations de prix unilatérales.
- Dans les secteurs concentrés, les prises de participations d'un actionnaire de contrôle dans des entreprises concurrentes de celle sur laquelle il exerce un contrôle soulèvent plus de problèmes épineux que les participations directes d'entreprises concurrentes les unes dans les autres.
- Les prises de participations d'un actionnaire de contrôle posent un risque d'autant plus élevé d'entrave à la concurrence que la part détenue par cet actionnaire dans l'entité dont il détient le contrôle est faible.
- Les prises de participations d'un actionnaire de contrôle peuvent, si faibles soient-elles, donner lieu à une diminution sensible de la concurrence.
- Dans certains cas, l'acquisition des créances d'une entreprise concurrente peut avoir, du point de vue de la concurrence, des effets similaires à l'acquisition de participations dans le capital d'une entreprise concurrente.

Les conclusions qui se dégagent de la théorie économique indiquent que les autorités de concurrence ne doivent pas sous-estimer les effets anticoncurrentiels possibles des prises de participations minoritaires effectuées par des entreprises concurrentes les unes dans les autres. Cela ne signifie pas que les participations minoritaires doivent être perçues négativement mais plutôt qu'elles doivent faire l'objet d'un examen attentif. Du point de vue de l'application, l'indulgence ne se justifie sans doute pas, en raison des effets anticoncurrentiels possibles évidents des participations minoritaires. Cependant, l'éventualité et l'ampleur de leurs effets unilatéraux ou coordonnés sur les décisions tarifaires des entreprises concernées sont fonction de différents facteurs, dont certains peuvent conduire à penser que des effets anticoncurrentiels sont peu probables. L'examen de ces facteurs peut se révéler complexe .

⁵³

De nombreux pays estiment que l'acquisition d'une entreprise franc-tireur par une entreprise concurrente peut conduire à la collusion (voir par exemple les Lignes directrices sur l'appréciation des concentrations horizontales au regard du règlement du Conseil relatif au contrôle des concentrations entre entreprises publiées par la Commission européenne (JO 2004/C 31, paragraphe 42 ; DoJ/FTC, 1992, *Horizontal merger Guidelines*, paragraphe 2.12). De fait, pour favoriser la collusion, il n'est sans doute pas nécessaire d'éliminer l'entreprise franc-tireur par le biais d'une acquisition ; il peut être suffisant que cette dernière s'engage à exercer une concurrence moins agressive en acquérant des participations passives dans des entreprises concurrentes.

3.3.3 Facteurs compensatoires

En pratique, les effets unilatéraux ou coordonnés potentiels des prises de participations minoritaires sont fonction de facteurs structurels comme le degré de concentration du marché ; les conditions d'entrée ; la nature homogène ou différenciée des produits concernés ; la substituabilité de ces produits ; leurs ratios de report respectifs ; et, enfin, le nombre d'entreprises qui sont liées les unes aux autres sur le marché. D'autres facteurs sont spécifiques aux opérations et concernent les entreprises qui y participent (par exemple, les coûts et marges respectifs des entreprises ainsi que leurs parts de marché) et l'opération elle-même (par exemple, la taille de la participation minoritaire et la nature réciproque des liens structurels). Certains de ces facteurs sont très connus des autorités de concurrence, qui les examinent déjà attentivement lorsqu'elles évaluent les fusions complètes. Cependant, bien que certains facteurs soient assez simples à analyser, d'autres exigent une quantité significative de données qui ne sont pas toujours disponibles.

Certains auteurs ont suggéré que l'analyse des effets des participations minoritaires sur la concurrence prenne également en compte plusieurs facteurs concrets importants qui pourraient avoir des effets compensatoires sensibles sur les motivations de l'entreprise acquéreuse à réduire sa pression concurrentielle après avoir investi dans une entreprise concurrente⁵⁴. Ces facteurs concrets sont :

- *Le caractère fragmentaire des informations* : Les décisions commerciales sont prises en fonction des informations dont disposent les entreprises à un certain moment. L'absence de données qui permettent de prédire les fluctuations de la demande et les réactions probables des concurrents à la suite d'une augmentation des prix peut avoir des incidences sur les décisions tarifaires des entreprises et les inciter à maintenir une stratégie axée sur la concurrence, indépendamment du fait qu'elles ont acquis une participation dans une entreprise concurrente⁵⁵.
- *Les motivations contradictoires des dirigeants* : L'hypothèse selon laquelle les dirigeants et les détenteurs de participations minoritaires sont animés par des motivations identiques ne tient pas toujours. Bien qu'elle puisse être vraie dans le cas des prises de participations directes d'une entreprise dans une entreprise concurrente, elle ne l'est pas nécessairement dans celui des participations indirectes détenues par un actionnaire de contrôle. En effet, les dirigeants de l'entreprise dont cet actionnaire détient le contrôle ne sont pas nécessairement disposés à réduire leur compétitivité au profit de l'entreprise concurrente dans laquelle l'actionnaire de contrôle a investi. De leur point de vue, l'accroissement de la rentabilité à long terme de l'entreprise concurrente ne revêt pas nécessairement la même importance que ne le fait, pour l'entité de contrôle, l'optimisation des bénéfices rendue possible par sa participation simultanée dans les deux entreprises. En outre, les devoirs de loyauté à l'égard des participations minoritaires peuvent empêcher la direction de prendre des décisions commerciales qui vont à l'encontre de l'intérêt de l'ensemble des actionnaires. L'actionnaire de contrôle détient certes le pouvoir de contrôle mais les dirigeants sont tenus de ne pas nuire aux actionnaires minoritaires.
- *Incapacité à récupérer les bénéfices* : Les modèles économiques utilisés pour analyser les facteurs qui incitent une entreprise qui acquiert une participation minoritaire dans une entreprise concurrente à concurrencer cette dernière reposent sur l'hypothèse selon laquelle l'entreprise

⁵⁴ Voir en particulier l'examen de Dubrow (2001) et la réponse aux critiques de ce dernier formulée par O'Brien et Salop (2001).

⁵⁵ Voir Dubrow (2001), p. 133 et la réponse de O'Brien et Salop (2001), p. 616.

acquéreuse peut récupérer les bénéfices associés à la participation minoritaire⁵⁶. Il arrive toutefois que les avantages attendus de la participation minoritaire ne puissent être concrétisés. Supposons, par exemple, que l'entreprise cible propose de nombreux produits et que ses activités communes avec l'entreprise acquéreuse ne représentent qu'une portion infime de ses bénéfices totaux. Dans ce cas, les perspectives de bénéfices (ou de pertes) au titre de la prise de participation dépassent largement le domaine des produits dans lequel les deux entreprises se font concurrence et les décisions tarifaires de l'entreprise acquéreuse n'exercent sur ces perspectives qu'une influence limitée⁵⁷. Certains auteurs ont également évoqué l'éventualité de la non-distribution des bénéfices aux actionnaires par l'entreprise cible, qui élimine la perspective d'un partage immédiat des bénéfices. L'entreprise acquéreuse obtiendrait alors un gain de capital du fait de la valeur accrue de l'entreprise cible mais ne pourrait le réaliser que plus tard, une fois la participation financière liquidée. Entretemps, le gain en capital risque en revanche de s'être volatilisé par suite des différents chocs subis par l'entreprise ou l'économie⁵⁸.

- *Impossibilité d'exercer un contrôle sur les décisions des dirigeants de l'entreprise cible* : Un facteur concret qui pourrait avoir des incidences sur les incitations de l'entreprise acquéreuse est que dans le cas des participations purement passives, l'entreprise acquéreuse n'exerce pas de contrôle sur les décisions des dirigeants de l'entreprise cible concernant l'utilisation des bénéfices supplémentaires générés par les initiatives de l'entreprise acquéreuse⁵⁹. Les dirigeants de l'entreprise cible peuvent très bien décider de ne pas affecter ces bénéfices aux usages représentant la valeur la plus élevée, ce qui comblerait les attentes de l'entreprise acquéreuse en matière de rendement des investissements, mais, au contraire, les dilapider dans des investissements ou des plans d'action risqués. Par exemple, au lieu de distribuer les bénéfices additionnels aux actionnaires sous forme de dividende, il pourraient les affecter à une augmentation de leur rémunération⁶⁰.

4. Le traitement juridique des participations minoritaires

Dans les sections précédentes, nous avons identifié les effets anticoncurrentiels potentiels des prises de participations actives et passives dans des entreprises concurrentes. Dans les sections qui suivent, nous examinerons brièvement la manière dont les autorités de concurrence peuvent traiter les problèmes soulevés par les participations minoritaires au regard des règles de concurrence classiques sur les concentrations, les accords horizontaux et les positions dominantes. L'application des règles de

⁵⁶ Reynolds et Snapp indiquent que leur analyse « [...] suppose implicitement que [...] les bénéfices sont répartis en fonction de la part de capital détenue par chaque associé. [...] Les coentreprises structurées de telle sorte qu'il n'y a pas lieu de procéder à une répartition au prorata des bénéfices ou de la production ne donnent pas lieu aux effets économiques examinés plus loin. » (Reynolds et Snapp, 1986, p. 143-144). En outre, l'analyse du modèle économique de O'Brien et Salop part du principe selon lequel « l'entreprise acquéreuse est habilitée à recevoir une part des bénéfices de l'entreprise dans laquelle a acquis des participations » (voir O'Brien et Salop, 2000, p. 577.) C'est également le cas de la méthode fondée sur l'indice de Herfindahl-Hirschman modifié (voir O'Brien et Salop, 2000, p. 595).

⁵⁷ Voir Dubrow (2001), p. 134 et seq. Voir également la réponse de O'Brien et Salop (2000), p. 620 et seq.

⁵⁸ Voir Dubrow (2001), p. 135 et la réponse de O'Brien et Salop (2000), p. 621.

⁵⁹ Voir O'Brien et Salop (2001), p. 622.

⁶⁰ L'entreprise acquéreuse serait dans ce cas incitée à transformer la participation passive en participation active afin de mieux pouvoir contrôler les décisions des dirigeants concernant les bénéfices et les investissements.

concurrence, en particulier dans le cadre de l'appréciation des participations « passives »⁶¹ dans des entreprises concurrentes, sera également abordée.

Malheureusement, il s'agit d'un domaine de l'application du droit de la concurrence dans lequel les activités des autorités de concurrence ne fournissent guère d'orientations. Les acquisitions de participations minoritaires ont rarement été remises en cause pour leur caractère anticoncurrentiel. La plupart des affaires examinées portent sur le contrôle des concentrations⁶², dans le cadre duquel l'application des règles de concurrence sur les accords horizontaux, les monopoles et les abus de position dominante est beaucoup plus limitée. Conformément à la théorie économique, il semble y avoir, parmi les autorités de concurrence, un consensus général selon lequel les acquisitions de participations minoritaires ne sont pas assimilables à une pratique restrictive de concurrence et ne doivent donc pas être considérées comme illicites⁶³. Les autorités de concurrence sont néanmoins sensibilisées au fait que les liens structurels entre des entreprises concurrentes peuvent dans certains cas soulever des problèmes de concurrence et méritent pour cette raison un examen plus attentif de leur part.

4.1 Application des règles sur le contrôle des concentrations aux participations minoritaires

Il est à peu près certain qu'une fusion complète entre des entreprises qui se font directement concurrence doit faire l'objet d'un examen par les autorités de concurrence afin de déterminer si l'opération entraînera une diminution sensible de la concurrence sur le marché. Cet examen portera sur les effets anticoncurrentiels possibles de l'intégration des deux entreprises et les mettra en équilibre avec les gains d'efficacité et de synergie probables. À cet égard, les règles sur le contrôle des concentrations permettent un examen approfondi des effets unilatéraux et coordonnés de l'opération. Mais qu'en est-il de l'acquisition d'une participation minoritaire dans une entreprise concurrente ? Quel traitement les autorités de concurrence réservent-elles aux prises de participations purement passives dans une entreprise concurrente ? Sous quel angle examinent-elles ces affaires et devraient-elles les considérer comme présentant un risque d'effet anticoncurrentiel sur le marché ?

Comme on l'a vu dans la première section, l'acquisition d'une participation minoritaire peut conférer à l'acquéreur des droits qui l'autorisent à influencer le processus de prise de décision de l'entreprise cible. On parle alors de participation minoritaire « active ». Toutefois, la participation peut être purement « passive », au sens où elle est simplement assortie d'une participation aux bénéfices (ou aux pertes) de la société cible. Contrairement à la participation active, la participation passive n'habilite pas son détenteur à contrôler ou à influencer les dirigeants de la société cible. L'entreprise acquéreuse ne cherche pas à avoir de l'influence sur les activités de l'entreprise concurrente ou à obtenir des informations sensibles sur son compte.

Dans de nombreux pays, la distinction entre participation active et participation passive est très utile dans le cadre des règles sur le contrôle des concentrations. L'essentiel de cette distinction tient au fait que les participations qui confèrent un droit de contrôle sont assimilables à des fusions complètes et sont en conséquence soumises à une appréciation exhaustive destinée à juger de leurs effets anticoncurrentiels possibles, tandis que les participations passives peuvent se situer en dehors du champ d'application des règles concernant les concentrations et, de ce fait, échapper à l'examen préalable. Du double point de vue

⁶¹ Voir la définition des participations minoritaires passives au paragraphe 8 ci-dessus.

⁶² Un grand nombre d'affaires de concentrations porte non pas sur l'acquisition directe d'une participation minoritaire dans une entreprise concurrente mais plutôt sur l'acquisition d'une entreprise (qui n'est pas nécessairement une entreprise concurrente) qui détient une participation minoritaire dans une troisième entreprise ou dans une coentreprise concurrente de l'entreprise acquéreuse.

⁶³ Voir, par exemple, la Cour de justice des Communautés européennes, affaires jointes 142 et 156/84, *British American Tobacco and Reynolds v. Commission*, [1987] Recueil de la jurisprudence 4487.

juridique et économique, les participations passives ne sont pas des fusions complètes. Après l'acquisition d'une participation passive, l'entreprise acquéreuse et l'entreprise cible continuent d'être administrées séparément. Dans ce cas, la notion de participation⁶⁴ et celle de contrôle de l'entreprise⁶⁵ ne se recoupent pas⁶⁶, comme lors d'une fusion complète. Du point de vue de l'action des pouvoirs publics, c'est la principale raison pour laquelle de nombreux pays excluent l'acquisition d'une participation purement passive du champ d'application de leurs dispositions sur le contrôle des concentrations.

En conséquence, il convient de se demander si les régimes de contrôle des concentrations devraient être structurés de manière à permettre aux autorités d'application du droit de la concurrence d'étendre leur compétence à tous les types d'acquisitions de participations minoritaires, y compris à celles qui ont un caractère passif. Du point de vue de l'action des pouvoirs publics, la question porte sur le fait de savoir si le « contrôle » légitime d'une société doit nécessairement constituer le seuil à partir duquel une acquisition partielle doit être appréciée au regard des règles sur les concentrations. Dans les sections qui suivent, nous examinons comment un certain nombre de pays ont traité cette question.

4.1.1 *Union européenne : le cadre de l'examen des participations minoritaires aux termes du règlement CE sur les concentrations*

La compétence de la Commission européenne aux termes du règlement CE sur les concentrations⁶⁷ repose sur la notion de « concentration ». Seules les concentrations de dimension communautaire peuvent être soumises à l'appréciation de la Commission européenne. Selon le Règlement sur les concentrations, une « concentration est réputée réalisée lorsqu'un changement durable du contrôle résulte (i) de la fusion d'entreprises ou parties d'entreprises antérieurement indépendantes⁶⁸; (ii) de l'acquisition du contrôle direct ou indirect de l'ensemble ou de parties d'une ou de plusieurs autres entreprises, que ce soit par prise de participations au capital ou achat d'éléments d'actifs, contrat ou tout autre moyen⁶⁹; et (iii) de la création d'une entreprise commune accomplissant toutes les fonctions d'une entité économique autonome⁷⁰. La compétence de la Commission européenne est donc centrée sur la notion de « contrôle ». Seules les transactions qui conduisent à l'acquisition du contrôle (exercé seul ou conjointement) ou à un changement qualitatif dans la nature du contrôle sont soumises à l'appréciation au terme du règlement CE sur les concentrations. Le « contrôle » découle des droits, contrats ou autres moyens qui confèrent la possibilité d'exercer une « influence déterminante » sur l'activité d'une entreprise⁷¹.

Comme on l'a vu au paragraphe 6 ci-dessus, il arrive qu'un actionnaire minoritaire soit en mesure d'exercer un certain degré de contrôle sur l'entreprise cible, que ce soit seul ou conjointement avec

⁶⁴ La prise de participation habilite le détenteur à recueillir une part des bénéfices retirés des activités de la société cible.

⁶⁵ L'exercice d'un contrôle renvoie à la capacité légitime du détenteur des actions à influencer les dirigeants de l'entreprise cible, et notamment dans les décisions concernant la tarification, la production et d'autres aspects essentiels des activités de l'entreprise.

⁶⁶ Sur la distinction qu'il convient de faire entre la participation et le contrôle et leurs incidences sur les incitations de l'entreprise acquéreuse et celles de l'entreprise cible, voir l'étude réalisée par O'Brien et Salop (2000), p. 569.

⁶⁷ Voir le règlement du Conseil n. 139/2004, in JO L/24, 29 janvier 2004, p. 1-22 (ci-après le règlement CE sur les concentrations).

⁶⁸ Voir le règlement CE sur les concentrations, article 3(1)(a).

⁶⁹ Voir le règlement CE sur les concentrations, article 3(1)(b).

⁷⁰ Voir le règlement CE sur les concentrations, article 3(4).

⁷¹ Voir le règlement CE sur les concentrations, article 3(2).

d'autres actionnaires minoritaires, et ce même s'il ne détient pas la majorité des droits de vote. Nous avons défini cette situation comme relevant d'une participation minoritaire « active ». La Commission européenne a compétence pour évaluer les effets unilatéraux et coordonnés probables de l'acquisition d'une participation minoritaire active, pour autant que celle-ci corresponde à la définition de « concentration ». Pour les besoins de l'établissement de la compétence, si l'opération est une « concentration », le niveau de participation acquis n'est pas pris en compte. En ce sens, l'acquisition de très petites participations peut également relever de la compétence de la Commission européenne aux termes du règlement CE sur les concentrations. Inversement, si la participation minoritaire est purement passive et qu'elle n'habilite pas le détenteur à exercer une influence déterminante sur l'entreprise cible, le règlement CE sur les concentrations ne s'applique pas⁷² et l'opération échappe à l'appréciation préalable de l'autorité de concurrence.

La Commission a pris en compte la possibilité de revoir le Règlement sur les concentrations afin d'étendre son champ d'application aux participations minoritaires passives. En 2001, dans le Livre vert concernant la révision du Règlement sur les concentrations⁷³, la Commission européenne indiquait : « *L'expérience actuelle révèle toutefois qu'un petit nombre seulement de ces opérations poseraient des problèmes de concurrence qui ne pourraient être résolus d'une manière satisfaisante par le recours aux articles 81 et 82 CE. Dans cette hypothèse, il serait disproportionné de soumettre toutes les acquisitions de participations minoritaires au contrôle ex ante du Règlement. En même temps, on voit mal comment on pourrait trouver une définition appropriée capable d'appréhender les cas où les participations minoritaires et l'interpénétration des entreprises au niveau des conseils d'administration justifieraient cette procédure* »⁷⁴. La Commission invitait néanmoins les parties intéressées à décrire leur expérience du traitement des participations minoritaires au regard des règles de concurrence communautaires, et à donner leur avis sur le régime qu'il conviendrait d'appliquer à ces opérations.

La Commission, appuyée par les États membres⁷⁵, n'a toutefois pas abordé cette question dans la réforme du règlement CE sur les concentrations de 2004. Les deux principales raisons invoquées pour ne pas étendre la compétence de la Commission aux termes du règlement CE sur les concentrations sont les suivantes : (i) les articles 81 et 82 du Traité CE fournissent des outils appropriés pour traiter les effets anticoncurrentiels possibles des participations passives ; et (ii) l'abandon du critère de la compétence fondée sur la notion de contrôle accroîtrait considérablement le nombre de notifications de concentrations, ce qui alourdirait inutilement le travail des services de la Commission européenne et des parties concernées par ces types d'opérations, qui sont dans la plupart des cas propices à la concurrence ou neutres du point de vue de la concurrence.

Certains commentateurs ont critiqué la décision de la Commission européenne de ne pas étendre le champ d'application du règlement CE sur les concentrations aux acquisitions de participations passives dans une entreprise concurrente⁷⁶. Ces commentateurs craignaient que dans certains cas les règles de concurrence concernant les accords entre entreprises concurrentes (article 81 du Traité CE) et les abus de

⁷² Toutefois, l'acquisition d'actions minoritaires qui n'est pas couverte par les règles concernant le contrôle des concentrations peut l'être par l'article 81 CE (relatif aux accords conclus entre entreprises concurrentes) et par l'article 82 CE (relatif à l'abus de position dominante). Voir *infra*.

⁷³ COM(2001) 745/6 du 11 décembre 2001.

⁷⁴ Voir paragraphe 109.

⁷⁵ Voir, par exemple, les réponses formulées dans le cadre du processus de consultation mené par le ministère du Commerce et de l'Industrie (DTI) du Royaume-Uni (mars 2002) et par l'Allemagne (décembre 2001) et consultables sur le site web de la Direction générale de la concurrence de la Commission européenne.

⁷⁶ Voir en particulier Russo (2006) et Caronna (2004). Pour une opinion contraire, voir Reynolds et Anderson (2005).

position dominante (article 82 du Traité CE) ne puissent s'appliquer pour empêcher ou éliminer les effets anticoncurrentiels susceptibles d'être déclenchés par une opération portant sur l'acquisition d'une participation. Bien qu'elles soulèvent des préoccupations légitimes, ces propositions devraient prendre en compte le fait qu'une extension inconditionnelle du champ d'application du règlement CE sur les concentrations aux acquisitions de participations minoritaires en-deça du seuil de contrôle comporte le risque de surréglementer ces formes de participation, qui dans certains cas sont favorables à la concurrence, et, d'imposer des contraintes exagérées aux entreprises concernées⁷⁷.

4.1.2 États-Unis : le cadre d'examen des participations minoritaires au regard des règles sur les concentrations

Aux États-Unis, la compétence en matière de concentrations n'est pas fondée sur la notion de modification apportée au contrôle d'une société mais s'étend à l'acquisition de « *tout ou partie des actions ou du capital-actions* » d'une autre entreprise, qu'elle interdit lorsque « *l'effet de cette acquisition serait de réduire sensiblement la concurrence* »⁷⁸. Ce critère très vaste en matière de champ d'application est atténué par le troisième paragraphe, article 7 de la loi Clayton : « *le présent article ne s'applique pas aux personnes qui acquièrent ces actions uniquement à titre de placement et qui ne les utilisent pas pour voter ou pour réduire ou tenter de réduire sensiblement la concurrence* ». Aux États-Unis, en conséquence, les acquisitions de participations dans une entreprise relèvent toutes de la compétence des autorités de concurrence. N'entre pas en compte le fait de savoir si la participation en cause accorde un contrôle ou quelque influence sur l'entreprise cible et sur le processus de prise de décision relatif à ses activités. N'entre pas non plus en compte la taille de la participation acquise⁷⁹.

Le régime de contrôle des concentrations en vigueur aux États-Unis a par conséquent une très grande portée et il est quasiment certain que l'acquisition d'une participation minoritaire, même si elle ne confère

⁷⁷ Ces préoccupations légitimes pourraient être prises en compte par l'introduction de critères limitant l'application du Règlement sur les concentrations aux seules acquisitions de participations passives les plus susceptibles de justifier un examen au titre du droit de la concurrence. Par exemple, une marge de tolérance pourrait limiter la compétence sur la base de facteurs comme les parts de marché des parties concernées ; le degré de concentration des marchés affectés par l'opération ; le delta de l'indice de Herfindahl-Hirschman calculé avant et après l'opération ; l'existence de fortes barrières à l'entrée ; la proximité des produits concernés du point de vue de la concurrence ; la réciprocité de la participation ; et la participation d'une entreprise franc-tireur à l'opération.

⁷⁸ Voir l'article 7 de la loi Clayton, 1914, 15 U.S.C. §§ 12-27 (ci-après « l'article 7 »). Pour une remarque générale sur le traitement réservé aux États-Unis aux participations partielles dans les affaires de concentrations, voir ABA (2006) at p. 368-369.

⁷⁹ Par exemple, dans de nombreuses affaires, l'acquisition de moins de 25 % du capital d'une société a été considérée comme violant l'article 7 : *U.S. v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 592 (1957) (acquisition de 23 % des actions) ; *Denver & Rio Grande W. RR. Co v. U.S.*, 387 U.S. 485, 501 (1967) (acquisition de 20 % des actions) ; *American Crystal Sugar Co v. Cuban-American Sugar Co.*, 259 F.2d 524,526, 531 (2nd Cir. 1958) acquisition de 23 % des actions). Plus récemment, dans des affaires concernant des acquisitions de participations partielles de moins de 30 %, les deux organismes d'application du droit de la concurrence ont limité la participation partielle par le biais de transactions judiciaires : voir par exemple les affaires *U.S. v. Gillette Co.*, Proposed Final Judgement, Stipulation and Competitive Impact Statement, 55 Fed. Reg. 12,567, 12,569 (1991) ; *U.S. v. AT&T Corp.*, Proposed Final Judgement, Stipulation and Competitive Impact Statement, 64 Fed. Reg. 2506 (1999) ; *U.S. v. MCI Communications Corp.*, Proposed Final Judgement, Stipulation and Competitive Impact Statement, 59 Fed. Reg. 33,009 (1994) ; *Time Warner Inc.*, Proposed Consent Agreement with Analysis to Aid Public Comment, 62 Fed. Reg. 67,868, 67,871 (1996).

pas le contrôle, relève de la compétence des autorités de concurrence⁸⁰. Comme on pouvait s'y attendre, le débat porte surtout sur l'étendue de l'exemption applicable aux acquisitions effectuées «*uniquement à titre de placement*» énoncée au troisième paragraphe de l'article 7. L'exemption s'applique si l'opération est effectuée «*uniquement à titre de placement*» et ne sert pas à réduire ou tenter de réduire sensiblement la concurrence. Si ce critère n'est pas rempli, l'opération doit être examinée au regard de l'article de la loi Clayton applicable aux principaux effets. Lorsqu'ils ont eu à déterminer si une acquisition était utilisée pour induire ou tenter d'induire une diminution sensible de la concurrence, les tribunaux ont fait preuve d'une indulgence plus grande que ne l'exigerait le critère principal de la loi Clayton relatif à la diminution sensible de la concurrence. Selon la jurisprudence, s'agissant de l'exemption applicable aux acquisitions réalisées «*uniquement à titre de placement*», le demandeur doit démontrer qu'il y a une diminution véritable de la concurrence, alors que selon l'article à portée générale de la loi Clayton, le demandeur doit démontrer seulement les effets probables sur la concurrence⁸¹.

Peut-on vraiment déduire des textes de loi et de leur interprétation par les tribunaux que le régime de contrôle des concentrations en vigueur aux États-Unis ne prend pas en compte la distinction entre participation active et participation passive ? Probablement pas. Les principaux éléments de jurisprudence soutiennent l'idée selon laquelle une opération est réalisée «*uniquement à titre de placement*» lorsque l'acquéreur n'a pas la possibilité d'exercer une influence sur les actions et la manière de conduire les affaires de l'entreprise cible⁸². Au contraire, si l'acquéreur obtient le contrôle actif de l'entreprise dans laquelle il prend une participation, l'acquisition ne sera pas considérée comme étant réalisée «*uniquement à titre de placement*»⁸³. Le critère n'est pas rempli même lorsque l'acquéreur n'obtient pas le contrôle, mais seulement la capacité d'influencer les actions de l'entreprise cible, par exemple par le biais de droits de représentation lui permettant de désigner un membre du conseil d'administration de l'entreprise cible⁸⁴.

⁸⁰ Voir, par exemple, *Denver & Rio Grande W. RR. Co v. U.S.*, 387 U.S. 485, 501 (1967) («*Il n'est pas nécessaire qu'une société acquière le contrôle d'une autre société pour qu'il y ait infraction à l'article 7.*») et *U.S. v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 592 (1957) («*L'acquisition de la totalité ou d'une partie des actions d'une autre entreprise, concurrente ou non, tombe dans le champ d'application de l'article 7, pour autant que l'acquisition entraînera vraisemblablement une restriction du commerce ou la création d'un monopole dans un secteur d'activité commerciale, quel qu'il soit.*»).

⁸¹ Voir Gilo (2000), p. 29 et seq..

⁸² Voir, par exemple, *U.S. v. Tracinda Inv. Corp.*, 477 F.Supp. 1093, 1098 (C.D. Cal. 1979) («*Le facteur déterminant que les tribunaux ont pris en compte [...] a été de savoir si les actions avaient été achetées dans le but de prendre activement la direction et le contrôle de la société acquise*»); *Anaconda Co. v. Crane Co.*, 411 F.Supp. 1210, 1219 (S.D.N.Y. 1975); *U.S. v. Gillette Co.*, 55 Fed. Reg. 28,312 (10 juillet 1990).

⁸³ L'approche du tribunal est traduite dans les règles d'application de la loi HSR qui exempte de la notification et des obligations d'attente préalables à une opération de concentration «*les acquisitions, effectuées uniquement à titre de placement, de titres assortis de droits de vote*» qui entraînent une participation de 10 % ou moins dans les titres en circulation assortis de droits de vote (15 U.S.C. § 18a(c)(9)). Ces règles prévoient que l'acquisition est effectuée «*uniquement à titre de placement*» si l'acquéreur n'a pas l'intention de participer à la mise au point, à la détermination ou à l'orientation des décisions commerciales courantes de l'émetteur (16 C.F.R. § 801(1)(i)). L'énoncé des principes et de l'objet de la FTC (43 Fed. Reg. 33450, 33465 (31 juillet 1978)) identifie six types de comportements qui peuvent être considérés comme preuve d'une intention contraire à l'exemption applicable aux acquisitions réalisées uniquement à titre de placement : (1) désignation d'un candidat au conseil d'administration de l'émetteur ; (2) proposition que l'entreprise prenne une mesure nécessitant l'approbation des actionnaires ; (3) sollicitation de mandats ; (4) un actionnaire de contrôle, un administrateur, un dirigeant ou un salarié agit simultanément en tant qu'administrateur ou dirigeant de l'émetteur ; (5) l'acquéreur est un concurrent de l'émetteur ; ou (6) adoption d'un des comportements précités par toute entité exerçant un contrôle direct ou indirect sur l'émetteur.

⁸⁴ Voir *U.S. v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 592 (1957).

De même, l'exemption au titre du critère selon lequel l'acquisition est effectuée « *uniquement à titre de placement* » n'est pas accordée si l'acquéreur peut avoir accès à des informations sensibles concernant les activités de l'entreprise cible⁸⁵.

En conséquence, si l'on se fie au traitement réservé par les tribunaux à l'exemption concernant les prises de participations effectuées « *uniquement à titre de placement* », l'acquisition d'une participation purement passive paraît équivaloir à un placement, ce qui exclut ces transactions des examens des autorités de concurrence au regard du critère principal de la « diminution sensible de la concurrence » énoncé dans la loi Clayton et les soumet au critère plus souple énoncé au troisième paragraphe de l'article 7 de cette loi, en vertu duquel les autorités doivent démontrer les effets anticoncurrentiels *véritables* et non seulement les effets anticoncurrentiels *probables* de l'opération. D'aucuns ont avancé que les difficultés liées à la démonstration des effets anticoncurrentiels véritables des participations passives constituent une exemption de fait pour ces types d'acquisitions⁸⁶. Les effets unilatéraux des participations passives sont de fait difficiles à détecter et à démontrer étant donné que les variations de prix et de production peuvent être causées par une foule de facteurs, et notamment les fluctuations des coûts ou de la demande. De même, il peut également se révéler difficile d'identifier l'influence des participations passives sur l'augmentation de la collusion, en particulier si la prise de participation passive favorise la collusion tacite plutôt que la collusion expresse.

4.1.3 *Le cadre d'examen des participations minoritaires en vertu d'autres régimes de contrôle des concentrations*

Il convient ici de mentionner que certains régimes nationaux de contrôle des concentrations sont structurés de manière à inclure dans leur champ de compétence l'acquisition de participations minoritaires pratiquement assimilables à l'acquisition d'un contrôle de droit ou de fait.

Par exemple, en Allemagne et en Autriche, les règles sur les concentrations s'appliquent à l'ensemble des acquisitions de contrôle *et* à toutes les acquisitions d'au moins 25 % des actions d'une entreprise, indépendamment du fait que l'acquisition des actions confère à l'acquéreur le contrôle ou une influence sur la société cible. En conséquence, dans ces régimes, l'acquisition d'une participation minoritaire passive de 25 % ou plus devrait faire l'objet d'une appréciation de l'autorité de concurrence compétente. Ce ne serait en revanche pas le cas d'une opération du même type portant sur moins de 25 % des actions d'une société cible⁸⁷.

De même, au Royaume-Uni, les règles relatives aux concentrations s'appliquent à un vaste éventail d'opérations dont certaines ne doivent pas nécessairement conférer le contrôle. En plus d'avoir compétence sur les acquisitions de contrôle, l'OFT a compétence sur les opérations dans le cadre desquelles une partie acquiert la capacité d'« *exercer une influence sensible* » sur une autre. L'OFT a estimé qu'une « *influence sensible* » n'équivaut pas à un contrôle total, de droit ou de fait, de sorte que certaines opérations qui ne sont pas assimilables à une prise de contrôle relèvent néanmoins de la compétence de l'OFT. Dans le document d'orientation sur l'évaluation de fond des concentrations publié en mai 2003 (*Mergers - Substantive Assessment Guidance*)⁸⁸, l'OFT déclare : « *Une participation conférant à son détenteur 25 %*

⁸⁵ Voir *F. & M. Schaefer Corp. v. C. Schmidt & Sons, Inc.*, 597 F.2d 814, 818 (2d Cir. 1979).

⁸⁶ Voir Gilo (2000).

⁸⁷ En ce qui concerne l'Allemagne, l'acquisition d'une « *influence significative du point de vue de la concurrence* » auprès d'une autre entreprise peut constituer un fait notifiable même si la participation acquise se situe bien en deçà de 25 %. On peut se demander si une prise de participation purement passive (c'est-à-dire non assortie de droits de vote, sans représentation au conseil d'administration ni accès à des informations sensibles) satisferait facilement ce critère.

⁸⁸ Ce document peut être consulté sur le site web de l'OFT.

ou plus des droits de vote d'une entreprise habilite généralement le détenteur à bloquer des décisions spéciales ; en conséquence, la détention de 25 % des droits de vote est susceptible d'être considérée comme pouvant conférer la capacité d'exercer une influence sensible sur la ligne d'action de l'entreprise – même dans les cas où la totalité des participations restantes sont détenues par une seule personne. L'OFT peut examiner toute affaire concernant la détention d'une participation de 15 % ou plus afin de déterminer si le détenteur pourrait avoir la capacité d'exercer une influence sensible sur la ligne d'action de l'entreprise. Il peut arriver qu'une participation de moins de 15 % suscite une évaluation en présence d'autres facteurs traduisant la capacité d'exercer une influence sur la ligne d'action de l'entreprise ».

Parmi les facteurs pris en compte par l'OFT dans le cadre de l'évaluation menée pour déterminer s'il y a acquisition d'une « *influence sensible* », mentionnons : (i) la composition et l'identité des détenteurs des actions restantes ; (ii) la répartition des présences et des votes lors des assemblées récentes d'actionnaires ; (iii) l'existence de droits de vote ou de droits de veto spéciaux attachés à la participation considérée ; (iv) d'autres dispositions spéciales de la constitution de l'entreprise conférant une capacité à influencer sa ligne d'action ; (iv) le fait que l'entité acquéreuse dispose ou disposera d'une représentation au conseil d'administration ; et (v) le fait que d'autres accords conclus avec l'entreprise cible habiliteraient le détenteur à influencer la ligne d'action de l'entreprise⁸⁹. La question se pose également de savoir si une participation purement passive serait considérée par l'OFT comme conférant à son détenteur une « *influence sensible* » sur l'entreprise cible.

4.2 Application des règles sur les accords horizontaux aux participations minoritaires

Il est généralement admis qu'il n'existe pas de présomption d'illicéité à l'égard des acquisitions de participations minoritaires dans des entreprises concurrentes. Les tribunaux et les autorités d'application ont reconnu qu'il peut y avoir des cas où l'acquisition d'une participation minoritaire peut être soumise à un examen en vertu des règles prohibant les accords horizontaux. Aux États-Unis, par exemple, la Cour suprême a reconnu que l'acquisition de titres assortis de droits de vote peut être contestée en vertu de l'article premier de la loi Sherman, qui interdit les contrats, associations ou complots restrictifs de concurrence⁹⁰. De même, la Cour de justice des Communautés européennes (CJCE) a reconnu, dans l'affaire *Philip Morris*⁹¹, que les articles 81 et 82 pouvaient s'appliquer aux cas d'acquisition d'une

⁸⁹ Ces facteurs peuvent comprendre la prestation de services de conseil à l'entreprise cible ou, dans certains cas, les accords en vertu desquels l'une des deux entreprises cessera la production et s'approvisionnera exclusivement auprès de l'autre. Les accords financiers peuvent conférer une influence déterminante lorsqu'ils prévoient qu'une partie devient dépendante de l'autre au point que cette dernière acquiert une influence sensible sur sa politique commerciale (par exemple, lorsqu'un prêteur peut menacer de retirer ses prêts si une politique particulière n'est pas menée, ou lorsque les conditions de prêt confèrent au prêteur la capacité d'exercer des droits qui vont bien au-delà de ce qui est nécessaire pour protéger son investissement, comme des options permettant une prise de contrôle ou des droits de veto sur certaines décisions stratégiques.) Voir le document intitulé *Mergers - Substantive Assessment Guidance*, mai 2003, paragraphe 2.10.

⁹⁰ Voir *U.S. v. First Nat'l Bank & Trust*, 376 U.S. 665, 671-72 (1964) (« Lorsque [...] les entreprises qui fusionnent sont des facteurs significatifs de concurrence sur un marché pertinent, l'élimination d'une part significative de la concurrence entre ces deux entreprises par fusion ou consolidation constitue en soi une violation de l'article premier de la loi Sherman. ») Ce critère est énoncé à la section 3.34 des principes directeurs applicables à la coopération entre concurrents (*Antitrust Guidelines for Collaboration Among Competitors*) publiés en avril 2000, dans laquelle les autorités de concurrence américaines rangent l'existence de participations minoritaires entre les participants à un projet de collaboration parmi les facteurs qui pourraient affecter la capacité et les motivations des entreprises à se faire concurrence.

⁹¹ Voir les affaires jointes 142 et 156/84, *British American Tobacco et Reynolds v. Commission*, [1987] Recueil de la jurisprudence 4487. La décision concernant l'affaire *Philip Morris* a été rendue à une époque où l'Union européenne n'était pas dotée d'un régime de contrôle des concentrations. Certaines décisions de

participation minoritaire. La Cour de justice des Communautés européennes a jugé que l'acquisition d'une participation minoritaire dans une entreprise concurrente peut violer l'article 81 du Traité CE s'il s'agit d'un « *moyen apte à influencer sur le comportement commercial des entreprises en cause, de manière à fausser le jeu de la concurrence* »⁹². Malgré ces déclarations, les dispositions du droit de la concurrence concernant les ententes horizontales ne sont guère appliquées à l'égard des participations minoritaires⁹³.

Si l'on compare l'application des règles sur le contrôle des concentrations et celle des règles concernant les ententes horizontales, ces dernières ont l'avantage d'être entièrement distinctes de l'acquisition de contrôle ou d'influence sur l'entreprise cible. Les règles concernant les ententes horizontales posent cependant des problèmes particuliers :

- Premièrement, dans de nombreux pays, une condition générale de l'application des règles de concurrence concernant les pratiques horizontales anticoncurrentielles est que les entreprises concurrentes doivent avoir conclu un accord ou un contrat anticoncurrentiel ou avoir comploté pour restreindre la concurrence. Dans de nombreux cas, comme dans celui des opérations boursières, l'acquisition d'une participation minoritaire ne sous-tend pas un accord entre des « entreprises concurrentes » mais seulement un accord entre une entreprise (l'acquéreuse) et un ou plusieurs actionnaires de l'entreprise cible, laquelle n'est pas engagée dans l'opération⁹⁴. Dans de tels cas, la conclusion d'un accord entre des entreprises concurrentes n'apparaît pas toujours de façon nette.
- Deuxièmement, même si une entente entre des entreprises concurrentes a pu être établie, il semble que les règles de concurrence concernant les ententes horizontales s'appliquent seulement lorsqu'il est possible de démontrer l'existence d'effets coordonnés⁹⁵. Ainsi, il y aurait effets coordonnés si la participation minoritaire (passive ou active) avait débouché sur une coordination entre les deux entreprises (par exemple par le biais d'un partage d'informations) ou sur l'acquisition de contrôle ou d'influence sur la stratégie commerciale de l'entreprise cible (par exemple par le biais d'ententes parallèles susceptibles de faciliter la collusion à long terme)⁹⁶. À

la Cour de justice des Communautés européennes doivent être abordées en tenant compte de ce fait. Elles sont justifiées par la tentative d'offrir à la Commission européenne un outil pour évaluer (même *a posteriori*) les effets anticoncurrentiels possibles des acquisitions d'actions d'une entreprise concurrente qui mènent au contrôle de l'entreprise cible et risquent d'entraîner des effets anticoncurrentiels.

⁹² Voir paragraphe 37.

⁹³ Dans le cas des États-Unis, voir l'affaire *Texas Gulf, Inc. v. Canada Dev. Corp.*, 366 F.Supp. 374, 406-07 &n. 49 (S.D. Tex 1973) dans le cadre de laquelle la plainte a été rejetée au motif que l'injonction préliminaire ne mentionnait pas d'effets anticoncurrentiels véritables. Dans l'Union européenne, on n'a recensé, après l'affaire *Phillip Morris* déjà mentionnée, que trois affaires d'examen de participations minoritaires aux termes de l'article 81 du Traité CE : l'affaire IV/34.857, *BT/MCI* ; l'affaire IV/34.410, *Olivetti/Digital* ; et l'affaire IV/35.617 *Phoenix/Global One*. La Commission européenne n'a jugé dans aucune de ces affaires que les participations minoritaires constituaient un « *moyen apte à influencer sur le comportement commercial des entreprises en cause, de manière à fausser le jeu de la concurrence sur le marché* » et a donc conclu à l'absence de violation de l'article 81 du traité CE.

⁹⁴ Une décision différente pourrait être rendue si l'opération était réalisée directement par les deux entreprises, avec l'intervention des personnes morales respectives. Voir Caronna (2004).

⁹⁵ Voir Ezrachi et Gilo (2006), p. 338 *et seq.*.

⁹⁶ Par exemple, dans l'affaire *Philip Morris* ([1987] Recueil de la jurisprudence 4487), la Cour de justice des Communautés européenne a estimé que l'acquisition d'une participation dans une entreprise concurrente peut constituer une pratique restrictive de concurrence si elle est utilisée pour influencer le comportement commercial des entreprises en cause. La Cour a ajouté que tel est le cas lorsque « *l'entreprise qui investit obtient un contrôle de droit ou de fait sur le comportement commercial de l'autre entreprise ou si l'accord*

cet égard, les effets essentiellement unilatéraux (par exemple ceux qu'entraîne une participation purement passive) ne relèvent pas du champ d'application de ces règles⁹⁷.

- Troisièmement, même en matière d'effets coordonnés, l'application des règles de concurrence concernant les ententes anticoncurrentielles à l'encontre des participations minoritaires se révèle parfois complexe. Tel est en particulier le cas des participations passives favorisant la collusion *tacite*, par comparaison avec la collusion *expresse*. Il y a collusion tacite lorsque les entreprises alignent leur comportement commercial et réalisent des bénéfices supraconcurrentiels sans véritablement communiquer l'une avec l'autre. La difficulté que présente l'application des règles concernant les ententes horizontales aux affaires de collusion tacite sur les marchés oligopolistiques est bien connue⁹⁸.
- Enfin, du fait que les règles concernant les ententes horizontales prévoient un examen *a posteriori* des effets anticoncurrentiels de l'entente considérée, c'est à l'autorité d'application (ou au demandeur) qu'incombe la lourde charge de la preuve et de la démonstration, en général, de l'existence d'effets anticoncurrentiels véritables. Cela peut restreindre considérablement l'efficacité et la rapidité des mesures d'application en matière de participations minoritaires (en particulier de participations minoritaires passives), dont les effets anticoncurrentiels possibles se révèlent parfois difficiles à détecter et à démontrer.

À partir de l'examen qui précède, il semble que les difficultés associées à l'établissement de l'existence d'une entente anticoncurrentielle entre des entreprises concurrentes ou à la détection et à la démonstration de l'existence d'effets anticoncurrentiels véritables risquent, au bout du compte, de limiter l'efficacité de l'application des règles de concurrence concernant les pratiques horizontales anticoncurrentielles aux participations minoritaires.

4.3 Application des règles sur la monopolisation / l'abus de position dominante aux participations minoritaires

En général, les entreprises dominantes sont moins susceptibles d'investir dans des entreprises concurrentes car elles ont moins à y gagner. Selon toute vraisemblance, les entreprises dominantes pratiquent déjà des prix de monopole, ce qui leur laisse peu de latitude pour procéder à des augmentations de prix unilatérales additionnelles. En outre, étant donné qu'elles ont davantage à gagner d'un équilibre de collusion, on peut supposer qu'elles sont moins portées à tricher et plus disposées à adhérer à un accord de collusion⁹⁹. En outre, parce qu'elles ont intérêt à limiter les risques d'examen des autorités de concurrence, les entreprises dominantes adoptent souvent une stratégie consistant à limiter leurs acquisitions de

prévoit une coopération commerciale entre les entreprises ou crée des structures aptes à promouvoir une telle coopération » (voir paragraphe 38). L'accent est donc mis sur (i) l'acquisition du contrôle et (ii) la coordination du comportement commercial.

⁹⁷ La première partie de la présente note montre que dans certains cas, les participations minoritaires n'ont pas (ou peu) d'effets coordonnés mais qu'elles entraînent des effets unilatéraux significatifs. Tel est le cas, par exemple, des participations passives acquises par une entreprise autre que l'entreprise franc-tireur. D'autres exemples d'effets coordonnés faibles et d'effets unilatéraux probables sont abordés dans les travaux de Ezrachi et Gilo (2006).

⁹⁸ Voir, entre autres, Motta (2004) et Whish (2004). Sur ce point, il a été avancé que la meilleure solution consisterait à étendre le champ d'application des règles sur le contrôle des concentrations aux acquisitions de participations minoritaires passives dans des entreprises concurrentes, étant donné que les règles sur les concentrations se prêtent davantage à l'appréciation préalable des effets de ces opérations sur la collusion tacite. Voir Ezrachi et Gilo (2006), p. 344 *et seq.*

⁹⁹ Voir Reynolds et Snapp (1986), p. 149.

participations dans des entreprises concurrentes, qui ne manqueraient pas d'attirer l'attention des autorités d'application. C'est pourquoi il est rare que des entreprises dominantes procèdent à des acquisitions de participations minoritaires dans des entreprises concurrentes marginales. Il est par ailleurs plus fréquent de voir des entreprises concurrentes marginales effectuer des investissements dans des entreprises dominantes étant donné que cela les aide à se discipliner et contribue réduire les incitations à concurrence¹⁰⁰.

Fait intéressant, les règles de concurrence sur la monopolisation / l'abus de position dominante sont beaucoup mieux adaptées que les règles sur les ententes horizontales à la poursuite des effets essentiellement unilatéraux, même ceux qui sont générés par les participations minoritaires purement passives. Cependant, l'application de dispositions telles que celles qui sont énoncées à l'article 2 de la loi Sherman ou à l'article 82 du Traité CE peut en pratique être très limitée. Ces dispositions sont fondées sur (i) la constatation de l'existence d'un pouvoir de marché ou d'une position dominante et (ii) le caractère abusif de l'acquisition de la participation minoritaire¹⁰¹.

4.4 Correctifs visant à contrer les effets anticoncurrentiels appréhendés des participations minoritaires

Après avoir recensé les effets anticoncurrentiels possibles des participations minoritaires détenues par des entreprises concurrentes et examiné les outils juridiques dont disposent les autorités de concurrence pour procéder à leur examen *a priori* et *a posteriori*, il convient de s'intéresser aux solutions les plus efficaces qui s'offrent aux autorités d'application du droit de la concurrence pour les réduire ou les éliminer.

Dans la plupart des décisions comportant l'apport de correctifs destinés à contrer les effets anticoncurrentiels des participations minoritaires, les correctifs visent à empêcher l'acquéreur de la participation minoritaire de prendre le contrôle de l'entreprise cible ou d'acquérir une influence directe ou indirecte sur la conduite des affaires de l'entreprise cible. Les autorités d'application du droit de la concurrence s'intéressent surtout au risque de coordination entre les entreprises liées par des participations et sur l'effet que ces liens structurels risquent d'avoir sur la collusion probable sur le marché. Les risques d'effets unilatéraux, en particulier s'ils sont déclenchés par une participation minoritaire purement passive, ne retiennent pas autant l'attention.

¹⁰⁰ Voir à ce sujet le paragraphe 40 ci-dessus.

¹⁰¹ Les tribunaux ont reconnu que l'acquisition d'une participation minoritaire ne peut être considérée comme illicite ou abusive en soi. Dans l'Union européenne, la Cour de justice des Communautés européennes a jugé que l'acquisition par une entreprise dominante d'une participation minoritaire dans une entreprise concurrente peut être abusive si la participation permet à l'entreprise dominante d'influer sur la politique commerciale de l'entreprise cible (voir les affaires jointes 142 et 156/84, *British American Tobacco et Reynolds v. la Commission*, [1987] Recueil de la jurisprudence 4487). La Commission européenne, dans l'affaire *Warner-Lambert/Gillette* (affaire IV/33.440) et l'affaire *BIC/Gillette et autres* (affaire IV/33.486) a appliqué l'article 82 du Traité CE à l'acquisition d'une participation minoritaire par Gillette, le fournisseur de produits de rasage mécanique occupant une position dominante en Europe, dans Wilkinson Sword, sa principale concurrente. Le verdict d'abus de position dominante n'est pas fondé seulement sur l'acquisition des actions mais aussi sur un certain nombre d'autres facteurs qui auraient permis à Gillette d'exercer une « influence » sur la politique commerciale de sa concurrente, comme l'indique la CJCE au paragraphe 65 de la décision. Les facteurs pris en compte sont notamment que Gillette était l'un des principaux créanciers de Wilkinson Sword, qui était en conséquence sous sa dépendance financière ; que Gillette avait également acquis des droits de préemption et de conversion dans Wilkinson Sword. Gillette aurait donc été en mesure de prendre le contrôle intégral de Wilkinson Sword advenant le cas où une autre entreprise aurait tenté d'acquérir cette dernière pour améliorer ses résultats, au détriment de Gillette.

Les autorités de concurrence ont admis le recours aux correctifs structurels (comme le désinvestissement) et comportementaux (comme les accords de confidentialité et les « murailles de Chine ») pour remédier aux problèmes soulevés par les participations minoritaires. En général, quatre catégories de correctifs sont examinées par les autorités de concurrence lorsqu'elles traitent les effets anticoncurrentiels probables des participations minoritaires :

- *Cession de la participation minoritaire* : La cession des actions acquises et la dissolution du lien structurel entre les entreprises concurrentes sont la solution privilégiée par les autorités de concurrence pour dissiper les préoccupations concernant les effets anticoncurrentiels des participations minoritaires. Cependant, dans de nombreux cas, l'entreprise qui détient une participation minoritaire doit céder seulement une partie des actions qu'elle a acquises (ou prévu d'acquérir), et peut par conséquent conserver un certain nombre d'actions dans l'entreprise cible, à la condition que cette participation résiduelle ne lui permette pas d'acquérir le contrôle de l'entreprise cible ou d'exercer une influence sur la conduite de ses affaires¹⁰².
- *Dilution – transformation d'une participation active en participation passive* : Dans d'autres cas, les autorités ont autorisé l'entreprise détenant une participation minoritaire à conserver la totalité de sa participation à la condition de renoncer aux droits associés aux actions minoritaires, par exemple les droits de représentation au conseil d'administration, les droits de veto et les droits à l'information¹⁰³. Dans ces cas, le fait que l'entreprise acquéreuse n'utilise pas ses actions pour influencer le comportement de l'entreprise cible (par exemple en élisant un membre du conseil d'administration ou en obtenant des informations sensibles sur son compte) est considéré comme un correctif suffisant pour contrer les risques de coordination entre les deux entreprises.
- *Création de murailles de Chine* : Dans d'autres cas, les autorités de concurrence ont demandé la mise en place d'une séparation appelée « muraille de Chine » entre les deux entreprises afin qu'elles ne puissent pas se communiquer des informations sensibles. En pratique, cela nécessite la signature d'accords de confidentialité ou de non-divulgaration par les personnes qui possèdent des informations confidentielles en raison de leur rôle dans les deux entreprises. Cette solution vise clairement à empêcher l'échange d'informations confidentielles qui pourrait conduire à une coordination anticoncurrentielle des comportements commerciaux des deux entreprises. Elle a été mise en œuvre en particulier dans les cas où la participation minoritaire était assortie d'une représentation au conseil d'administration¹⁰⁴, mais peut l'être également à l'égard de détenteurs d'actions ordinaires (non assorties d'une représentation au conseil d'administration).
- *Élimination du cumul de mandats d'administrateur* : Si la participation minoritaire habilite le détenteur à désigner les membres du conseil d'administration de l'entreprise cible et que cela donne lieu à des situations où un ou plusieurs administrateurs siègent au conseil d'administration des deux entreprises en cause, les autorités ont demandé qu'il soit mis fin au cumul de mandats

¹⁰² Voir, par exemple, les décisions de la Commission européenne dans les affaires *Blokker/Toys 'R' Us* (affaire M.980), *Nordbanken/Postgirot* (affaire M.2567) et *Schneider Electric/Legrand* (affaire M. 2283).

¹⁰³ Voir par exemple la décision de la Commission européenne concernant l'affaire *Thyssen/Krupp* (affaire M. 1080). Aux États-Unis, voir les décisions concernant les affaires *Medtronics Inc.*, 63 Fed. Reg. 53,919-20 (7 octobre 1998) ; *Time Warner Inc.*, 61 Fed. Reg. 50,301 (25 septembre 1996) ; *U.S. v. Gillette Co.*, 55 Fed. Reg. 28,312 (10 juillet 1990) ; *U.S. v. Tracinda Inc. Corp.*, 477 F.Supp. 1093, 1098 (C.D. Cal. 1979) ; *Anaconda Co. v. Crane Co.*, 411 F.Supp. 1210, 1219 (S.D.N.Y. 1975).

¹⁰⁴ Voir par exemple les décisions de la Commission européenne dans les affaires *Blokker/Toys 'R' Us* (affaire M.980) et *Hoechst/Rhône Poulenc* (affaire M.1378).

d'administrateur¹⁰⁵. Cette mesure vise à empêcher les membres ordinaires des conseils d'administration d'avoir accès à des informations sensibles sur les deux entreprises, ce qui pourrait favoriser les comportements parallèles et la collusion. Elle est en général préférée à l'érection d'une muraille de Chine en raison de son caractère structurel et du fait qu'elle offre de meilleures garanties de séparation des choix concurrentiels des parties.

Ces correctifs visent principalement dissiper les craintes de voir les entreprises en cause, après une prise de participation, cesser d'agir indépendamment l'une de l'autre et commencer à coordonner leurs stratégies commerciales. Seul le premier correctif, soit la cession de la participation acquise, traite cependant avec efficacité le risque d'effets unilatéraux et d'effets coordonnés inhérents aux participations minoritaires actives et passives. De ce point de vue, il existe un argument solide en faveur de la cession des actifs comme étant le meilleur correctif à apporter face aux prises de participation qui risquent de réduire sensiblement la concurrence¹⁰⁶.

4.5 Traitement juridique des participations minoritaires -- Conclusions

L'examen de l'application des règles de concurrence aux participations minoritaires détenues par des entreprises concurrentes montre que les règles sur le contrôle des concentrations sont le principal outil présentement utilisé par les autorités d'application pour s'assurer que ces opérations ne créent pas d'effets anticoncurrentiels. Par comparaison, les acquisitions de participations minoritaires n'ont guère été examinées du point de vue des règles de concurrence sur les ententes horizontales et la monopolisation / l'abus de position dominante.

Selon la théorie économique, qui prédit seulement les effets anticoncurrentiels *possibles*, l'acquisition d'une participation minoritaire n'est pas considérée en soi comme une pratique restrictive de concurrence. Cependant, les autorités d'application des règles de concurrence sont de plus en plus préoccupées par les risques d'effets unilatéraux et d'effets coordonnés que les liens structurels entre des entreprises concurrentes sont susceptibles d'engendrer, en particulier sur des marchés oligopolistiques présentant de fortes barrières à l'entrée. Dans certains pays de l'OCDE, les participations minoritaires sont courantes dans des secteurs comme la banque et l'assurance et ce phénomène retient de plus en plus l'attention des autorités de concurrence.

L'analyse qui précède montre toutefois que l'évaluation des participations minoritaires du point de vue de la concurrence peut être complexe et pluridimensionnelle. Les règles de concurrence sur les concentrations, les ententes horizontales et les positions dominantes constituent un fondement juridique solide pour traiter les effets anticoncurrentiels possibles de nombreux types d'acquisitions de participations minoritaires, mais non de leur totalité.

5. Le traitement juridique du cumul de mandats d'administrateurs

Dans la deuxième partie de la présente note, nous définissons le « cumul de mandats d'administrateur » comme désignant les situations dans lesquelles une ou plusieurs personnes détiennent des responsabilités de direction dans deux ou plusieurs entreprises. Le cumul de mandats d'administrateur peut concerner des personnes occupant un siège aux conseils d'administration de sociétés qui entretiennent une relation commerciale horizontale ou verticale. Il peut être direct, ou indirect si les entreprises sont liées par le biais de différentes personnes. Il s'agit d'un phénomène très répandu dans de nombreux pays de l'OCDE et dans de nombreux secteurs d'activité. Ces accords peuvent se justifier d'un point de vue

¹⁰⁵ Voir par exemple les décisions de la Commission européenne dans les affaires *Allianz/AGF* (affaire M.1082) et *Generali/INA* (affaire M.1712).

¹⁰⁶ Voir Gilo (2000), p. 45-46.

commercial et économique, en particulier dans les secteurs qui connaissent une pénurie de personnes expérimentées et renseignées, mais ils soulèvent également des problèmes parce qu'ils suscitent des conflits d'intérêts qui risquent de conduire à l'exercice d'un contrôle centralisé sur l'économie¹⁰⁷.

5.1 Examen des principales préoccupations soulevées par le cumul de mandats d'administrateur

En général, l'application du droit de la concurrence est neutre quant à la composition des conseils d'administration des sociétés et dans la grande majorité des cas, celle-ci est considérée comme licite. En revanche, lorsque deux ou plusieurs entreprises concurrentes se trouvent liées par l'effet du cumul de mandats d'administrateur, des problèmes tenant à la qualité et à l'indépendance des décisions des conseils d'administration en cause peuvent se poser.

- Du point de vue du gouvernement d'entreprise, on peut se demander comment un administrateur peut être loyal envers les actionnaires d'entreprises concurrentes sans déroger à son devoir de loyauté ; la loyauté dont il doit faire preuve à l'égard d'une entreprise peut être incompatible avec celle qu'il doit à une autre entreprise.¹⁰⁸
- Du point de vue de la concurrence, étant donné qu'une concurrence vigoureuse sur le marché est fondée sur l'hypothèse selon laquelle les entreprises prennent des décisions commerciales indépendamment les unes des autres, le fait que des entreprises concurrentes soient dotées des mêmes administrateurs peut susciter des questions concernant l'indépendance des entreprises concernées et leur capacité à jouer le jeu de la concurrence sur le marché. Dans ces cas, le cumul de mandats d'administrateur risque de réduire ou d'éliminer la concurrence et de favoriser la collusion.

Du point de vue de la concurrence, ces accords risquent en particulier de conduire à une coordination horizontale des comportements commerciaux des entreprises concurrentes par le biais du partage des informations, des comportements parallèles, de l'élimination des concurrents, ou d'un certain nombre d'autres activités qui risquent d'entraîner des effets anticoncurrentiels, au détriment du bien-être des consommateurs. Les interpénétrations verticales font depuis longtemps l'objet de critiques au motif qu'elles peuvent conduire à un traitement préférentiel au détriment d'autres fournisseurs ou clients en facilitant les rapports de réciprocité ou d'exclusivité, les ventes liées et l'intégration verticale¹⁰⁹.

5.2 Mesures mises en oeuvre par les autorités de concurrence à l'encontre du cumul de mandats d'administrateur

Les mesures d'application prises par les autorités de concurrence à l'encontre du cumul anticoncurrentiel de mandats d'administrateur sont assez limitées¹¹⁰. Dans les principaux pays de l'OCDE, on n'a pas signalé d'application d'une règle horizontale sur les accords anticoncurrentiels ou sur les comportements unilatéraux à l'encontre du cumul de mandats d'administrateur. Cela n'implique pas que ces pratiques sont de droit ou de fait exclues du champ d'application des règles de concurrence, mais

¹⁰⁷ Selon Louis Brandeis, le cumul de mandats d'administrateur enfreint la « loi fondamentale selon laquelle on ne peut servir deux maîtres à la fois » (voir Brandeis, 1913, at 13).

¹⁰⁸ Voir Areeda et Turner, paragraphe 1300.

¹⁰⁹ Voir Areeda et Turner, paragraphe 1303.

¹¹⁰ La présente note ne prend pas en compte le fait qu'aux États-Unis, des règles internes peuvent être mises en oeuvre contre la concurrence déloyale, par exemple l'article 5 de la *Federal Trade Commission Act*. L'application de ces textes de loi au cumul de mandats d'administrateur est analysée par Areeda et Turner, paragraphe 1301b.

signifie néanmoins que les règles de concurrence ne permettent pas de les poursuivre facilement. En particulier, il peut être malaisé d'établir l'existence d'un accord entre des entreprises concurrentes ou simplement une pratique concertée ou d'association frauduleuse entre les entreprises concernées ; dans de nombreux cas, il n'y a souvent que des accords distincts entre l'administrateur et les différentes entreprises. De même, il n'est pas certain que les entreprises en cause occupent une position dominante ou disposent d'un pouvoir de marché significatif.

La majorité des problèmes liés au cumul de mandats d'administrateur se sont posés dans des affaires de contrôle des concentrations, dans lesquelles la présence des mêmes administrateurs dans différents conseils d'administration était considérée comme un facteur favorisant la coordination entre les entreprises en cause. On a vu que la plupart des cas de cumul de mandats d'administrateur interviennent dans le cadre d'acquisitions directes ou indirectes de participations minoritaires assorties de droits de représentation au conseil d'administration¹¹¹. En outre, la solution privilégiée la plupart du temps est l'élimination du lien structurel et du cumul de mandats d'administrateur, bien que dans certains cas les autorités de concurrence aient approuvé l'érection d'une muraille de Chine en tant que solution appropriée pour empêcher la coordination illicite. On observe cependant un scepticisme généralisé quant à l'efficacité des murailles de Chine pour contrer les risques de coordination associés au cumul de mandats d'administrateur¹¹².

Pour remédier aux problèmes posés par le cumul de mandats d'administrateur, certains pays ont adopté des dispositions législatives interdisant expressément cette pratique. Aux États-Unis, par exemple, l'article 8 de la loi Clayton est la principale disposition de loi de l'administration fédérale qui traite du

¹¹¹ Bien que le cumul de mandats d'administrateur ne soit habituellement qu'une des caractéristiques propres aux opérations qui autrement seraient apparentées à des fusions, on ne saurait écarter la possibilité que ce phénomène constitue en soi un élément notifiable dans le cadre des règles sur le contrôle des concentrations. Tel pourrait bien être le cas si cette pratique permet d'acquérir le contrôle d'une entreprise ou d'exercer sur elle une influence significative ou sensible.

¹¹² Voir par exemple la décision de la Commission européenne dans l'affaire *Blokker/Toys 'R' Us* (affaire M.980). Dans cette affaire, la Commission européenne a accepté le recours à une muraille de Chine mais seulement pendant une période limitée. Elle a estimé que « *le maintien de Blokker, sous forme d'une participation minoritaire de 20 % et de sa présence active au conseil d'administration de Speelhoorn, permettra, au moins pendant un certain temps, de prouver la confiance de Blokker dans la viabilité de l'entreprise et de garantir, au cours de cette période, la transformation de la société en une entreprise viable* » (paragraphe 132). Cependant, la Commission a décidé de réduire le cumul de mandats d'administrateur à une période spécifique et expliqué : « *Bien qu'il s'engage à ne pas entraver la liberté de Speelhoorn de déterminer sa politique commerciale en toute indépendance, Blokker continuera, du fait de sa présence au conseil d'administration, d'avoir accès aux informations concernant les décisions commerciales et pourrait les utiliser aux fins de sa propre stratégie concurrentielle, ainsi que dans le cadre des activités de Toys 'R' Us exploitées par Speelhoorn. Cette possibilité doit être évaluée plus particulièrement en ayant à l'esprit que, pendant un certain temps, Blokker aura exploité lui-même l'entreprise Toys'R 'Us et que, même à l'issue du désengagement prévu par les propositions, Blokker occupera une position dominante sur le marché. C'est pourquoi la Commission estime nécessaire, pour garantir le rétablissement d'une concurrence effective sur le marché, qu'il soit mis fin à la présence active de Blokker au conseil d'administration dès que la viabilité de la société aura été établie.* » (paragraphe 133). Voir également la décision de la Commission européenne dans l'affaire *Hoechst/Rhône Poulenc* (affaire M.1378).

cumul de mandats d'administrateur¹¹³. Il traite du recours à cette pratique dans le secteur bancaire et des entreprises et prévoit : « *personne ne peut simultanément être administrateur de deux ou plusieurs entreprises dont le capital, l'excédent et les bénéfices non répartis s'élèvent à plus de 1 000 000 USD [...] si ces entreprises sont ou seront éventuellement [...] concurrentes, de sorte que l'élimination de la concurrence par voie d'accord entre ces sociétés constituerait une violation de l'une des dispositions de la législation de la concurrence* ». D'autres pays, comme le Japon¹¹⁴, l'Indonésie¹¹⁵ et la Corée¹¹⁶, ont adopté des textes de loi similaires interdisant le cumul de mandats d'administrateur ayant pour effet de restreindre la concurrence sur le marché.

6. Conclusion

Un tour d'horizon de la théorie économique indique que dans certains cas, l'acquisition d'une participation minoritaire dans une entreprise concurrente risque de rendre les entreprises concernées moins disposées à se faire concurrence et davantage portées à adopter un comportement d'optimisation commune des bénéfices. Les entreprises unies par ces liens structurels peuvent être incitées à réduire unilatéralement leur production et à augmenter les prix au détriment du bien-être des consommateurs. De même, l'acquisition d'une participation dans une entreprise concurrente peut conduire à des effets coordonnés parce qu'elle accroît la transparence et a un effet négatif sur les incitations à se faire concurrence de l'ensemble des entreprises présentes sur le marché. Le risque d'effets coordonnés s'accroît si toutes les entreprises présentes sur le marché ont pris des participations dans au moins une entreprise concurrente ou si la prise de participation est le fait de l'entreprise franc-tireur. Le cumul de mandats d'administrateur

¹¹³ La loi a été adoptée en 1914 à la suite d'une enquête de l'administration sur le cumul de mandats d'administrateur dans des secteurs clés de l'économie américaine comme les chemins de fer, la sidérurgie et la banque qui avait révélé de nombreuses pratiques anticoncurrentielles. La crainte des abus résultant d'une telle concentration du pouvoir de direction est la principale raison qui a incité le Congrès à adopter l'article 8 et à durcir les dispositions antitrust de la loi Sherman. Voir Areeda et-Tuner, paragraphe 1301c. Pour un commentaire général sur le cumul de mandats d'administrateur aux États-Unis, voir également ABA (2006) at p. 425-431.

¹¹⁴ L'article 13(1) de la loi japonaise sur les monopoles prévoit qu'aucun dirigeant ou salarié d'une entreprise ne peut détenir simultanément un poste de dirigeant dans une autre entreprise lorsque cela aurait pour effet de restreindre sensiblement la concurrence. Voir la présentation écrite du Japon à l'occasion de la table ronde intitulée « *Antitrust Issues Involving Minority Shareholdings and Interlocking Directorates* » (DAF/COMP/WP3/WD(2008)7).

¹¹⁵ L'article 26 de la loi indonésienne sur la concurrence (Loi n° 5/1999) prévoit : « Nul ne peut exercer des fonctions d'administrateur ou de dirigeant dans plus d'une entreprise si ces entreprises : a) sont présentes sur le même marché pertinent ; b) mènent leurs activités dans des domaines étroitement liés ; ou c) sont conjointement en mesure d'exercer un contrôle sur la part de marché de certains produits et services, ce qui pourrait aboutir à des pratiques de monopoles et de concurrence déloyale ». Voir la présentation écrite de l'Indonésie à l'occasion de la table ronde sur intitulée « *Antitrust Issues Involving Minority Shareholdings and Interlocking Directorates* » (DAF/COMP/WP3/WD(2008)25).

¹¹⁶ La présence d'un dirigeant ou d'un salarié d'une grande entreprise (c'est-à-dire une entreprise qui possède un actif ou un chiffre d'affaires supérieur à deux mille milliards de won) au conseil d'administration d'une autre entreprise est soumise à une notification de concentration devant la *Korean Federal Trade Commission* (voir article 12 (1)-3 de la loi sur la réglementation des monopoles et de la concurrence (*Monopoly Regulation and Fair Trade Act*). Est également interdit le cumul de mandats d'administrateur occasionnant une concentration ayant pour effet de restreindre sensiblement la concurrence (voir article 7 (2)-2 de la *Monopoly Regulation and Fair Trade Act*). Voir la présentation écrite de la Corée à l'occasion de la table ronde intitulée « *Antitrust Issues Involving Minority Shareholdings and Interlocking Directorates* » (DAF/COMP/WP3/WD(2008)8).

comporte des risques similaires de coordination si les entreprises concernées se font directement concurrence sur le marché.

Ces effets anticoncurrentiels sont particulièrement susceptibles de se produire sur des marchés oligopolistiques présentant de fortes barrières à l'entrée. L'ampleur des effets anticoncurrentiels augmente si les liens structurels sont réciproques ou concernent plusieurs entreprises sur le marché. Les risques d'effets anticoncurrentiels découlent des participations minoritaires actives comme des participations minoritaires passives. Les participations minoritaires actives habilite leurs détenteurs à exercer une forme de contrôle ou d'influence sur l'entreprise cible. Les participations minoritaires passives sont des placements purement financiers dans les activités d'une entreprise cible et leurs détenteurs sont seulement habilités à participer aux bénéfices (ou aux pertes) de l'entreprise cible. L'acquisition des créances d'une entreprise concurrente peut donner lieu à des effets anticoncurrentiels comparables.

L'examen du traitement juridique des participations minoritaires montre que les autorités chargées de l'application du droit de la concurrence sont particulièrement attentives aux effets anticoncurrentiels possibles des participations minoritaires lorsqu'elles mettent en œuvre les règles sur le contrôle des concentrations. Au demeurant, peu d'affaires ont donné lieu à l'application des règles de concurrence sur les accords horizontaux, les monopoles et les abus de position dominante à l'encontre des participations minoritaires. Il semble qu'il y ait deux raisons principales à cela. Premièrement, la grande majorité (mais non la totalité) des opérations risquant de créer des problèmes de concurrence sont selon toute vraisemblance appelées à être examinées en vertu des règles sur le contrôle des concentrations. Cela souligne la nécessité des mesures d'application *a posteriori*. Deuxièmement, en raison des limites inhérentes à l'application des règles de concurrence, l'application des règles sur les accords horizontaux et les positions dominantes à l'encontre des participations minoritaires n'est pas toujours aisée.

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BELGIUM

1. How are minority shareholdings handled in your merger control regime? In which cases does the acquisition of a minority shareholding trigger the requirements for a merger notification and review under your merger rules?

As in EU merger control law, the acquisition of a minority shareholding will normally only trigger the requirement for a merger notification and a review under our merger rules in case it results in the acquisition of joint control, i.e. the right to block decisions that significantly affect the market behavior of the company.

The acquisition of a minority shareholding will of course also trigger the requirement for a merger notification and a review under our merger rules if, because of specific contractual provisions, it results in the acquisition of sole control, i.e. the right to take independently decisions that significantly affect the market behavior of the company

2. In your enforcement practice, do you distinguish between minority shareholdings representing a passive financial investment (i.e., no active participation or representation in the board) from minority shareholdings that allow some form of control (joint, sole or negative) on the target? If yes, how do you deal with these different situations?

Yes. The acquisition of passive minority shareholdings that do not allow for some form of control will not trigger the requirement for a merger notification. They will normally not cause any other competition law concerns unless they result in the access to sensitive information that may affect the competitive behavior of the acquiring company.

Please see the previous response in respect of minority shareholdings that allow for some form of control.

3. In your enforcement practice, do you have experience with minority shareholdings raising unilateral and/or coordinated effects? Do you have experience with minority shareholdings investigated under your domestic competition rules on restrictive agreements between competitors? Have you investigated dominant firms for holding shares in competing firms?

Unilateral and/or coordinated effects of minority shareholdings have been examined when reviewing notifications of joint venture agreements.

We have not examined the acquisition of minority shareholdings under our domestic rules on restrictive agreements or the prohibition of abuse of dominance.

4. Can you provide examples?

N/A

5. Does your jurisdiction have specific legal provisions dealing with interlocking directorates?

We have no specific provisions.

6. In your enforcement practice, do you have experience with interlocking directorates raising issues of tacit or explicit collusion? Can you provide examples?

We have no experience with interlocking directorates raising issues of tacit or explicit collusion.

7. In your enforcement practice, do you have experience in devising remedies for anticompetitive effects arising from minority shareholdings or interlocking directorates?

N/A

8. Can you provide examples? Does your merger control regime have a preference for structural remedies or conduct remedies for these issues?

In the absence of experience we can provide no examples.

Our merger control policy has, however, in line with the merger control policy of the EU Commission a certain preference for structural remedies.

CANADA

1. Introduction to Interlocking Directorships and Minority Interests

The general approach to interlocking directorships in the Competition Bureau's ("Bureau") merger review process is not explicitly set out in the legislation but rather in Bureau policy statements, most notably the 2004 Merger Enforcement Guidelines ("MEGs"). As described in the MEGs, the Bureau may assess the competitive effects of a merger resulting from interlocking directorships between and among the merging parties or their affiliates and their competitors, customers and suppliers.

For an interlocking directorship to be addressed under the merger provisions of the Competition Act ("the *Act*"), the transaction must be considered a "merger", where section 91 defines a "merger" as:

... the acquisition or establishment, direct or indirect, by one or more persons, whether by purchase or lease of shares or assets, by amalgamation or by combination or otherwise, of control over or significant interest in the whole or a part of a business of a competitor, supplier, buyer or other persons. [Emphasis added]

Unlike the relatively straightforward definition and determination of the term "control" as defined in section 2(4) of the *Act*, the meaning of "significant interest" is open to interpretation. Since the *Act* provides no guidance on the meaning of the phrase "significant interest", it is to be construed in the context of the *Act*¹. To this end, the MEGs provides the following guidance:

- 1.5 *In determining whether an interest is significant, the Bureau considers both the quantitative nature and qualitative impact of the acquisition or establishment of the interest. Given that the Act is concerned with the competitive market behaviour of firms, a "significant interest" in the whole or a part of a business is held qualitatively when the person acquiring or establishing the interest obtains the ability to materially influence the economic behaviour of the business (including decisions relating to pricing, purchasing, distribution, marketing, investment, financing or the licensing of intellectual property rights). [Emphasis added]*

Accordingly, should the transaction result in the ability to materially influence the economic behaviour of the business, the transaction is a merger, and subject to review.

While interlocking directorships are typically merely features to a transaction otherwise qualifying as a "merger", it is possible that the interlocking directorship itself could meet the significant interest test, independently triggering the Commissioner of Competition's ("Commissioner") jurisdiction to review.

Like interlocking directorships, minority shareholdings are examined by the Bureau as either an ancillary factor to a merger, or as the actual "merger" itself; the latter would arise in circumstances where the minority shareholding itself provides the ability to materially influence the economic behaviour of the business, thereby acquiring, in the purpose of the *Act*, a "significant interest" in the business.

¹ MEGs, paragraph 1.4.

This submission is organized as follows: Part II addresses the specific questions related to interlocking directorships and minority shareholdings posed by Working Party No. 3, to the degree that the Bureau has encountered them. Part III raises some issues for discussion regarding these emerging and challenging matters, and contains preliminary views of the Bureau.

2. Questions regarding issues of interlocking directorships and minority shareholdings

2.1 *How are minority shareholdings handled in your merger control regime? In which cases does the acquisition of a minority shareholding trigger the requirements for a merger notification and review under your merger rules?*

Pursuant to Part IX of the *Act*, pre-merger notification filings² are required for specified transactions³. In the case of an acquisition of voting shares of a public corporation, notification is required when the transaction results in the acquiring party owning more than 20% or 50% of the voting shares or, in the case of an acquisition of voting shares of a private corporation, more than 35% or 50% of the voting shares⁴.

While notification is not mandatory unless the notification thresholds are met, a transaction that does not trigger mandatory notification may nevertheless constitute the acquisition or establishment of a significant interest, should the person(s) acquiring the interest be able to materially influence the economic behaviour of the business⁵. As such, the transaction is subject to review.

With respect to the concept of “significant interest” in the context of an acquisition of voting equity interests, the MEGs describes “significant interest”, in part, as follows:

- 1.7 *The Bureau finds that a significant interest in a corporation exists when one or more persons, directly or indirectly, hold enough voting shares:*
- *to obtain a sufficient level of representation on the board of directors of the corporation to materially influence that board; or*
 - *to block special or ordinary resolutions of the corporation.*

- 1.8 *In the absence of other relationships, a direct or indirect ownership of less than 10 per cent of the voting interests in a business does not generally constitute ownership of a "significant interest". While inferences about situations that result in a direct or indirect holding of between 10 per cent and 50 per cent are more difficult to make, a greater level of voting interest is ordinarily required to materially influence a private company than a widely-held public company.*

...

² The Notifiable Transactions Regulations can be found on the Bureau’s website at www.competitionbureau.gc.ca.

³ It should be noted that all merger transactions, whether or not they are notifiable, are subject to examination by the Commissioner to determine whether they have, or are likely to have, the effect of preventing or lessening substantially competition in a relevant market.

⁴ In addition, notification is required when the parties to a transaction, together with their affiliates, have combined assets in Canada or annual gross revenues from sales in, from or into Canada greater than \$400 million in aggregate value, and when the acquired corporation has assets in Canada or annual gross revenues from sales in or from Canada greater than \$50 million.

⁵ MEGs, Paragraph 1.6.

2.2 In your enforcement practice, do you distinguish between minority shareholdings representing a passive financial investment (i.e., no active participation or representation in the board) from minority shareholdings that allow some form of control (joint, sole or negative) on the target? If yes, how do you deal with these different situations?

It is important to note that, provided the *ability to materially influence the economic behaviour of a business* exists, a passive minority shareholding may be enough to be considered as “significant interest” and, as such, subject to the merger provisions of the *Act*⁶.

The Bureau assesses transactions on a case-by-case basis and, in doing so, the Bureau examines any and all specific rights and attributes associated with the minority shareholdings, and assesses the nature and circumstances in which the rights (or potential rights) to the non-voting and convertible securities may be exercised. If the minority interest holder is the largest shareholder and, as a practical matter, can wield influence disproportionate to its shareholding, this can be of relevance to the Bureau in evaluating the significance and impact of the interest.

2.3 In your enforcement practice, do you have experience with minority shareholdings raising unilateral and/or coordinated effects?

As a general enforcement practice, in circumstances where the issue of an interlocking directorship arises (and indeed, this is likewise the case with minority shareholdings), the Bureau initially assesses and examines the transaction as a full acquisition. If the Bureau determines that a full merger would not be likely to raise anti-competitive concerns, *a fortiori*, the interlocking directorship in question could not raise such concerns.

The Bureau has taken steps, or accepted proposals pending a final determination, in transactions where interlocking directorships potentially did raise competition issues.

In the matter of the acquisition of Sogides Ltée by Quebecor Media Inc., of its business in the publishing and distribution of French-language trade books, the Bureau learned that Sogides’ president, Pierre Lespérance⁷ had an interest in Gestion Renaud-Bray Inc., a downstream retailer that competes with Quebecor Media Inc.’s downstream retailer Archambault Group Inc. bookstores. The Bureau’s preliminary concern was that such an information exchange could be detrimental to publishers and distributors with supplier relationships with Archambault and Renaud-Bray bookstores. Quebecor Media Inc. and Sogides signed a Consent Agreement with the Bureau to eliminate the possibility of information exchanges between Archambault and Renaud-Bray through Mr. Lespérance. The agreement required the resignation of Mr. Lespérance from Renaud-Bray’s Board of Directors, and the appointment of an independent agent to replace Mr. Lespérance on Renaud-Bray’s Board of Directors⁸.

In examining the restructuring of Loews Cineplex, the Bureau discovered a prior merger that had been effected between Galaxy Entertainment and Famous Players, caused through the establishment of a contractual relationship and arrangement between them. As Famous Players and Galaxy were direct competitors, the merger raised material competitive concerns. Following discussions with the Bureau,

⁶ For example, a passive minority shareholding may result in the change of incentives owing to the change in the profit maximizing function for the minority shareholding firm.

⁷ Upon the completion of the transaction, Pierre Lespérance was to be an employee of Quebecor Media Inc. in the book publishing and distribution business.

⁸ See the Technical Backgrounder of the Acquisition of Sogides Ltée by Quebecor Media Inc.

Famous Players, Canada's largest exhibitor, ceased its representation on Galaxy's Board of Directors, divested its interest in Galaxy, and terminated all ancillary agreements⁹.

Other notable transactions where interlocking directorships and minority interests were examined and assessed in detail include the acquisition of Fairmont Hotels by Kingdom Hotels International and Colony Capital, and the reorganization of Bell Globemedia with Torstar Corporation. During the investigation of both cases, the Bureau initially assessed each transaction as a full merger, but also took into account the nature of the interlocking directorships and minority interests on whether the transactions were likely to result in unilateral and/or coordinated effects. In each case, the Bureau concluded that the transaction was not likely to result in a substantial lessening of competition.

2.4 Does your jurisdiction have specific legal provisions dealing with interlocking directorships?

The *Act* does not contain specific legal provisions addressing interlocking directorships.

2.5 In your enforcement practice, do you have experience in devising remedies for anticompetitive effects arising from minority shareholdings or interlocking directorships? Can you provide examples? Does your merger control regime have a preference for structural remedies or conduct remedies for these issues?

As interlocking directorships and minority interest shareholdings are structural phenomena, the Bureau's position is that the most effective and preferred remedy in cases where a material issue arises is a structural one. This is illustrated in the two above-mentioned examples¹⁰ where, respectively, an interlocked director was replaced with an independent agent, and where the company in question ceased its representation on the board and divested its interest.

As mentioned in the Information Bulletin on Merger Remedies in Canada of September 22, 2006, structural remedies are typically more effective than behavioural remedies. Structural remedies are less costly to administer, readily enforceable, and the terms of such remedies are more clear and certain. Moreover, behavioural remedies in the specific context of interlocking directorships are particularly difficult to monitor and enforce; it is virtually impossible to monitor what goes on in a private board meeting. Furthermore, behavioural remedies do not necessarily stop an interlocking director's ability to influence decisions¹¹. As a general matter, and equally applicable in the interlocking directorships and minority interests context, the Bureau will not consider a standalone behavioural remedy unless the Bureau is satisfied that it will be sufficient to eliminate the likely substantial lessening or prevention of competition, there is no appropriate structural remedy, and it will require either no or minimal future monitoring by the Bureau.

⁹ See News Release – "Competition Bureau Review of Cinema Mergers Opens the Door to Competition", April 22, 2002.

¹⁰ Please refer to the acquisition of Sogides Ltée by Quebecor Media Inc., and the restructuring of Loews Cineplex.

¹¹ This could be achieved by an interlocked director's ability to signal information to others, or situations where the other directors on the board simply defer to or follow the interlocked director's voting. It may be worth noting that the oft-cited argument that comfort should be taken from the fact that directors owe fiduciary duties does not obviate our concerns. It may be, for example, that, in certain circumstances, in the very discharge of his duty to one company, the director is bound to share confidential information from the competing company on whose board he sits.

3. Conclusion

As noted above, to be reviewable, there must be a merger. Accordingly, in order for a minority interest and/or an interlocking directorship to be relevant to the Bureau, there must either be a merger, to which the minority shareholding and/or interlocking directorship is ancillary, or the minority shareholding and/or interlocking directorship must constitute the requisite level of influence to be a “merger”.

In reviewing a merger involving minority shareholding and/or interlocking directorship, the Bureau initially examines the transaction as a full acquisition. In each case, the Bureau examines the very specific nature and impact of the minority shareholding and/or interlocking directorship. In this respect, the Bureau has initiated an examination of its policies regarding merger reviews that involve minority shareholdings and interlocking directorships. Although not complete, below are some of the Bureau’s preliminary views.

The Bureau believes that there are three main factors that need to be assessed in examining issues involving minority interests and interlocking directorships:

- Ability to materially influence the economic behaviour of the business;
- Ability to seek confidential information; and
- Change to incentives (or the change in the profit-maximizing function).

Regarding these factors, the Bureau examines the following factors in assessing the competitive impact:

- Any attached rights to the minority interest shareholdings;
- The nature and characteristics of the industry¹²;
- Dividend share of the minority interest in comparison to its equity ownership share;
- Composition of the board on which the interlocked director sits¹³;
- Board meeting attendance and voting patterns;
- Composition and characteristics of other board members;
- The role and duty of the interlocked director;
- Information to which the interlocked director has access¹⁴;
- Any special powers, including voting or veto rights;

¹² This includes the nature of the relevant product market, remaining competition, pre-existing barriers to entry and concentration in the relevant market. In addition, the Bureau assesses whether the minority interest shareholdings or interlocking directorships are likely to result in unilateral or coordinated effects.

¹³ This includes the total number of board seats, and the number of seats that are allocated to the interlocked company.

¹⁴ For example; costs, revenues, bids, contracts, forward supply estimates, marketing campaigns and new product plans, investments, etc.

- Any agreements or arrangements that the interlocked director could use to influence company policy;
- The practical extent to which the interlocked director can impose pressure on the other company's decision-making process; and
- Relationship between the interlocked companies.

As stated above, the Bureau's enforcement approach in the context of minority shareholdings and interlocking directorships is a work in progress, the Bureau recognises the need for further study. We look forward to working and exchanging ideas with other jurisdictions, and encourage any comments that could better position the Bureau to understand the issues and special tensions arising in the context of interlocking directorships and minority shareholdings.

CZECH REPUBLIC

1. How are minority shareholdings handled in your merger control regime? In which cases does the acquisition of a minority shareholding trigger the requirements for a merger notification and review under your merger rules?

Generally, the base of a merger is the acquisition of direct or indirect control by one firm over another. The definition of “control” as it is understood by the Office for the Protection of Competition (hereinafter referred to as “the Office”) is stipulated by the Act on the Protection of Competition (hereinafter referred to as “the Act”). If the turnover criteria are fulfilled, it is necessary to notify a merger, subject of which is both the acquisition of control and the change thereof (it can be either exclusive or joint; or direct or indirect). It is not considered a merger when the principles of control change from direct to indirect. The obligation of notifying does not depend on the extent of the shares being acquired but on the change of control. It is a rule of principle that the decisive issue is the sole existence of possibility to perform control, not its actual performance.

2. In your enforcement practice, do you distinguish between minority shareholdings representing a passive financial investment (i.e., no active participation or representation in the board) from minority shareholdings that allow some form of control (joint, sole or negative) on the target? If yes, how do you deal with these different situations?

The general practice implies and the actual practice of the Office proves that the influence is almost certainly decisive if a firm owns more than half the share capital or is able to appoint more than half the voting rights. Minority shareholdings normally do not confer control, which is decisive influence on target company. In the absence of any control minority shareholdings are not subject of Czech competition law. However, voting rights fewer than 50% of the shares may be decisive, especially if the ownership of the rest of the share or rights is scattered over many different holders. Minority shareholding can be, aside from the aforementioned facts of the matter, of controlling nature, provided that such a partner can make use of special rights, or when the articles of the company give them the possibility to determine or to influence competition performance. Such a competitor can then dispose of the majority of voting power, or can have enough power to nominate the majority of members of governing (statutory) bodies of the company.

Even when the case might be that a minority shareholder is not represented in governing bodies of a company, they can participate in joint control along with other majority or minority shareholders. As stated above, a merger pursuant to Czech legislation is represented by a change in the nature of control. If a minority shareholder acquires joint or exclusive control over a company, such a change of control is considered a merger pursuant to Czech law. However from the point of view of a majority shareholder the fact of the matter is that when a minority shareholder acquires their share and they do not acquire rights related to joint control, such a transaction is not considered merger pursuant to the law, since there is no change of control involved, as the nature of control had been exclusive before the transaction, and stayed that way after the transaction.

In case of multiple transactions (for example when a partner leaves and their share is subsequently acquired by another shareholder), such procedures, if related, are considered as one merger.

Also, acquisition of a minority shareholding may lead to joint control of the target company, which is exercised together with one or more other undertakings, thereby creating a joint venture. In these cases the acquisition or the change of minority shareholding is subject of notification and review under national merger rules. And consequently the acquisition of minority share that do not constitute any form of control will not meet requirement for a merger notification.

It is necessary to mention that the principle of merger control is the orientation at transactions that represent a change of control in long-term perspective. Temporary acquisition of control is not subject to approval by the Office. Pursuant to this premise the law expressly stipulates that it is not considered a merger when the acquisition of control shows the element of short-term control.

Hence, it is not considered a merger pursuant to the law, if and when the companies which provide investment services acquire, for a temporary period of time that does not exceed one year, shares of another company for the purpose of sale(s) of these shares, provided that they do not execute their voting rights that are related to these shares with the purpose to determine or affect the competition performance of the company they control. When so suggested by a bank or by a company which is a provider of investment services, the Office can prolong the aforementioned one-year period if the claimant proves that the targets, for the purpose of which he had acquired shares in another company, could not be reached within one year due to objective circumstances.

Furthermore, it is not considered a merger when a bank acquires qualified share in a company as a result of the repayment of the issue price by a set-off of the bank's receivables from such company, if it has been held for a period of time that does not exceed one year. The conditions under which the aforementioned exceptions from the notification of merger apply are part of the decision-making practice of the Office.

Also, it is not considered a merger pursuant to Czech competition laws if and when some competences of governing bodies of a company are transferred onto persons who perform specific duties pursuant to special legal norms, such as liquidators or bankruptcy trustees.

3. In your enforcement practice, do you have experience with minority shareholdings raising unilateral and/or coordinated effects? Do you have experience with minority shareholdings investigated under your domestic competition rules on restrictive agreements between competitors? Have you investigated dominant firms for holding shares in competing firms?

Where the acquisition of minority share is used as influencing the commercial conduct of the companies so as to restrict or distort competition on the market, rules relating to anticompetitive agreement may be applicable. In other words and in respect of joint venture, when the joint venture has its object or effect the coordination of the competitive behaviour of undertakings which remain independent, such coordination will be appraised in accordance with the criteria mentioned in section of our competition law relating to restrictive agreement.

To this date, the Office has not dealt with any case in which acquisition of minority shares was being investigated as a prohibited agreement or as abuse of dominant position.

4. Does your jurisdiction have specific legal provisions dealing with interlocking directorates? In your enforcement practice, do you have experience with interlocking directorates raising issues of tacit or explicit collusion? In your enforcement practice, do you have experience in devising remedies for anticompetitive effects arising from minority shareholdings or interlocking directorates? Can you provide examples? Does your merger control regime have a preference for structural remedies or conduct remedies for these issues?

Czech legislation does not specifically acknowledge the issue of *interlocking directorates*. The Office, however, has dealt with several cases in which it imposed conditions that are related to the ownership of minority shares (specific cases are mentioned in this paper below). The purpose of imposing these conditions was to prevent the influence in a competitor's company, or to eliminate vertical integration and thus prevent potential restriction of competition. For example in the case of the merger on the power distribution market the Office has ruled for the sale of minority share of a subject vertically related to a company that is an operator of distribution network. In case of the merger on the gas industry market, by imposing the condition of the sale of minority share the Office tried to separate individual companies in potentially competitive position(s) and to contribute to the maintenance of competitive pressure. Both specific cases that are described in detail below, were related to markets that had been experiencing continual liberalization and on which the competitive environment was still shaping; the conditions that had been imposed significantly affected the structure of the market.

Aside from structural conditions, most usually those that related to the sale of minority shares, the Office has used behavioral conditions in its rulings, as well. For example in case of a merger in the sector of telecommunications the Office ordered the transfer of a contract of one of the undertakings, the subject of which was the collection of confidential data about subjects on the market for the the sectoral regulator, to a company that is not related to the merging parties. Otherwise the acquirer would have many advantages in relation to its competitors.

4.1 Selected cases:

4.1.1 Merger of ČEZ/regional power distributors

This merger took place in 2002 and was related to the governmental decree on the privatization of the state-owned shares of regional power distribution companies (STE, VČE, SČE, ZČE, SME, JME, JČE and PZE) via a direct sale to the ČEZ company that is the dominant producer of electrical energy. Following the merger in question, the ČEZ company was to acquire control over five of the eight companies (STE, VČE, SČE, ZČE and SME); and it was to acquire majority share in the remaining three (JME, JČE and PZE) in the amount of ca. 34%. In case of the aforementioned transaction it was a merger resulting in creation of a vertically integrated subject that would possess great economical and financial power and it would have dominant position on power distribution market. Considering the fact that the merger in question could significantly distort competition on the market of power distribution to eligible customers, as well as the power production market, the given merger of ČEZ and regional power distributors was approved with three conditions that would provide for the protection of effective competition:

- The first condition was the sale of 34% minority share owned by the ČEZ company in the ČEPS company (monopoly operator of the distribution network) prior to the realization of this transaction, for the purpose of a complete separation of the power distribution network and the dominant producer of electricity.
- The second condition was the sale of the minority share owned by the ČEZ company in the three distribution companies (JME, JČE and PZE), for the purpose of assurance of full independence of other market players – who are ČEZ's competitors.

- The last condition was the sale of one of the five distribution companies to a third legal entity, this was to serve as a minimal structural measure that would prevent the creation of a strong and dominant merged undertaking and that was to provide the strengthening of competitive environment and to increase the possibilities of market success to independent producers and providers of electrical energy.

As regards the first condition, it should be mentioned that after the realization of the planned reforms the ČEZ company was to control 34% of the ČEPS company which represents the so-called “blocking minority” that would give the ČEZ company the possibility, pursuant to the provisions of the Commercial Code or the Articles of the company, to block and therefore to affect some significant and some strategic decision-making processes of this power distribution network operator. The integrated subject that would be created by this merger could actively participate in the long-term strategy formation within the ČEPS company (being the monopoly operator of power distribution network) as the sole market player, in some cases in negative contexts (via the obstruction of some significant decisions of the General assembly). Whereas in principle it applies that the independent and unbiased functioning of the distribution network was a must for the purpose of the creation and existence of electrical energy market.

The detriment to competition that could result from the combination of 1) horizontal and vertical integration of merging parties that would result in the creation of a very strong subject in the sector of the production and distribution of electrical energy to the end consumers and 2) the blocking share of the integrated subject in the operator of the power distribution network, was removed by the realization of the measure that has been the condition for the approval of the merger: the transfer of the blocking minority share to the registered capital of the ČEPS company.

As for the second condition, it should be said that after the completion of the reforms of the Czech power production and distribution sector the ČEZ company was to acquire the blocking minority share in the following distribution companies: JME, JČE and PRE. When the evaluation process for the issue of approval had taken place, these companies were the most important providers of electric energy and after the realization of the planned merger they were to become the only instant and significant competitors on the relevant power distribution market in relation to the eligible customers. The existence of the blocking minority share of the ČEZ company in its most significant competitors would enable the ČEZ company, pursuant to the applicable provisions of the Commercial Code or the Articles of the company, to obstruct and therefore to affect some significant decision-making processes that have a great impact on the long-term competitive performance of these significant competitors via voting during General assembly sessions (even in negative contexts, via the obstruction of some significant decision-making processes). This fact could reduce motivation and the chances of the affected companies to be fully independent players on the market.

Due to the fact that the minority shares in these companies had been transferred, the ČEZ company was then no longer involved in any way in business activities of JČE, JME or PRE and these companies could well remain active competitors on the power production and distribution market.

4.1.2 Merger of RWE/Transgas/ regional gas distributors

In May 2002 the Office approved under conditions the merger of RWE GAS AG (RWE) with the Transgas company and with eight gas distribution companies. This merger was related to the realization of the strategies of the Czech government in the privatization of the gas industry. The subject of the merger was the acquisition of control over the following companies by the RWE company: Transgas, JMP, SMP, SČP, STP, ZČP and VČP. The entry of the significant global RWE Group was to represent economic and financial strengthening of the group of acquired companies.

The Office feared the competition would be distorted. Firstly, there was the risk that RWE would acquire the direct or indirect control (within one regional market) over the decision-making processes in two distribution companies that provide natural gas, heat and electrical energy (due to the fact that individual energy sources can be substituted, at least in part). Furthermore, the Office saw the possible danger in the potentially coordinated measure of the Transgas company and JMP in the execution of voting rights in the Moravské naftové doly (MND – Moravian Oil Mines¹) company, which would represent an obstacle in implementation of competition decision-making of MND, and therefore in MND becoming an independent competitor in the gas sector.

The merger in question was approved, but three conditions had to be fulfilled that would provide for the maintenance of effective competition. Namely:

- The RWE company can not increase, directly or indirectly, the current joint percentage share of JME and Transgas companies on the registered capital of the Moravské naftové doly (MND) company; or to acquire, in any form, direct or indirect control over the MND company, being a competitor of RWE.
- The RWE company can not obstruct the decision-making processes of MND in relation to its intentions that would obviously be of competitive nature in relation to RWE.
- Furthermore, prior to the completion of the privatization process in energy sector, the RWE company shall not acquire control shares in power distribution companies and heating distribution companies, or establish new power distribution or heating distribution companies in the Czech Republic for the period of up to 5 years.

The Office set out the first two conditions because of the following reasons. During the period the merger was being evaluated the MND company was an exclusive exploitation company (and at the same time as a potential alternative provider of natural gas in the Czech Republic) and an operator of an underground gas storage facility, whereas storing of natural gas was and potentially is a competitive activity in the Czech Republic. Within the territory of the Czech Republic there were only two companies doing business in relation to the storage of natural gas: Transgas and MND, whereas the merging parties jointly held shares worth ca. 47% share of the registered capital and of the voting rights of the MND company.

In relation to the aforementioned issues there existed the fear of distortion of competition as a result of the realization of the given merger. This distortion could manifest itself through the negative voting or abstention from voting of shareholders/merging parties during general assemblies of MND, in relation to issues of development programs of MND. Thus the MND company would lose its ability to react to changes in its business sector and it could be prevented from generating some competition pressure in relation to the entity formed by the merger.

In this regard it has to be said that after the realization of the aforementioned merger the sale of the shares of MND owned by the merging subject eventually took place, therefore the complete separation of the connection between the potential competitors on Czech natural gas market took place.

¹ Moravské naftové doly is one of the biggest oil and gas company in the Czech Republic. It conducts its activities on 21 production fields with daily oil of 5000 barrels and gas production of 250 thousand m³ a day. MND also operates underground gas storages of highest world standard with storage capacity of 180 mil. m³.

4.1.3 Merger of Telefonica/DELTA

In November 2007 the Office approved the merger of Telefonica O2 Czech Republic (Telefonica), who is a provider of fixed line and cell phone telecommunications network, with the DELTAX Systems (DELTA) company, who is a provider of services in the information technology sector, provided that a commitment on the side of the Telefonica company is fulfilled. This commitment was related to the assurance of the withdrawal of the DELTAX company from the participation on the realization of public contract - the Information system for the administration of interactive forms (IS ASDM) for the Czech Telecommunication Office (ČTÚ). ČTÚ is a state regulator for the telecommunications sector. The contract had to be transferred to an appointed third-party that has no personal or proprietary or other such links to the DELTAX company or Telefonica.

ČTÚ makes use of the aforementioned IS ASDM system to collect and process statistical data about electronic communications markets and to monitor the overall development of the markets. The reason why the Office imposed the said condition on Telefonica was to eliminate the fear of potential acquisition of access of the Telefonica company (via the participation of the DELTAX company on the realization of the said contract) to confidential data on telecommunications markets and on its competitors. In this way Telefonica would gain unacceptable advantage over its competitors in the telecommunications sector.

Based on negotiations between the DELTAX company and ČTÚ, before the Office's decision was issued, the realization of the contract related to the IS ASDM system between DELTAX and ČTÚ was terminated and transferred onto an independent entity. The commitment of the company had been fulfilled before the issue of the decision of the Office and the Office also verified that the legal entity with which ČTÚ had concluded the new contract on the realization of the IS ASDM system was objectively able to carry it out.

GERMANY

1. Introduction

Minority shareholdings and interlocking directorates may reduce competition between companies and result in significant anti-competitive effects. There may be various reasons for this, in particular a firm's strategic interest in a (potential) competitor with the effect that actual or potential competition between the companies involved is "muted". Furthermore, a minority shareholding may enable a company to obtain information relevant to the competitive behaviour of its competitor. Interlocking directorates may also facilitate information exchange between competitors and thus enable companies to set up and successfully maintain anticompetitive agreements. Furthermore, the bundling of interests in one undertaking may result in the anti-competitive foreclosing of markets to (potential) competitors.

To address these potential anti-competitive effects, German merger control law has, since its entry into force in 1973, contained provisions that address the acquisition of minority shareholdings. These provisions have been amended since to prevent circumvention. Furthermore, minority shareholdings may be subject to review under provisions addressing anticompetitive agreements.

The following focuses on the experience of the *Bundeskartellamt* as regards, in particular, minority shareholdings by introducing representative case examples in the areas of merger control law and anti-competitive agreements.

2. Merger control law and minority shareholdings/interlocking directorates

2.1 General remarks

In Germany, in recent years, merger control proceedings concerning the acquisition of minority shareholdings have been of particular importance in the energy sector. Since the beginning of the liberalization of the energy markets in Europe and Germany, the major players in the German energy markets, in particular RWE and E.ON, have pressed ahead with the acquisition of shareholdings in regional as well as local gas and electricity suppliers (municipal utilities). The *Bundeskartellamt* therefore critically examines whether even minority shareholdings can lead to a strengthening of a dominant position and would thus have to be prevented or cleared only subject to effective remedies. In view of the highly concentrated market structures of the gas and the electricity markets and the low degree of residual competition, even small strengthening effects may be of relevance and lead to structural changes in the market conditions. The *Bundeskartellamt* has investigated in detail a number of such merger projects in the last years, of which it has prohibited several and cleared others only subject to strict remedies. In the following, the relevant provisions of German merger control law will be described and important cases highlighted.

2.2 Transactions covered by German merger control law

Under German merger control law, the acquisition of minority shareholdings may be subject to merger control if the respective transaction is caught by the merger control provisions (provided that the

thresholds are met and no exception applies¹). Transactions relevant in the context of minority shareholdings are, firstly, the acquisition of at least 25% of the shares (capital or voting rights) in another undertaking (§ 37 (1) No. 3 lit. b Act against Restraints of Competition (ARC)), and secondly, other transactions enabling one or several undertakings to directly or indirectly exercise a competitively significant influence on another undertaking (§ 37 (1) No. 4 ARC)².

While the former type of transaction, the acquisition of at least 25% of the shares, is quite straightforward, the latter (§ 37 (1) no. 4 ARC) merits some more explanation: This catch-all clause was introduced into the ARC with effect from January 1, 1990. The practice of the *Bundeskartellamt* had shown that some undertakings intended to circumvent merger control by structuring acquisitions so that participations below 25% would be acquired but coupled with special rights with respect to the target undertaking. The newly introduced subsidiary provision § 37 (1) no. 4 ARC has closed this gap.

A competitively significant influence on another undertaking may exist due to any kind of link between two or more undertakings that allows the acquiring party to influence the competitive behaviour of the target in such a way that it is likely to reduce competition between the undertakings, to the degree that they will no longer act independently on the market. For a competitively significant influence it may also suffice for the target to adapt its competitive behaviour to the interests of the acquirer. A competitively significant influence may also arise from agreements on pre-emption rights, sales strategies and financial structures, as well as from legal possibilities to exert influence, such as the right to be consulted, information and disclosure rights, and not least the right to appoint representatives to the management bodies of the target. Personal interlocks in the form of having the same persons on the management boards of both companies may also lead to a competitively significant influence where these persons are entitled to exercise influence. A further possibility is the transfer of entrepreneurial responsibility for certain subdivisions of the company. Decisive in all cases is the factual possibility to exercise influence that is granted to the acquirer.

2.3 Case examples

2.3.1 Acquisition of at least 25% of shares

E.ON/Eschwege (2003)

In September 2003 the *Bundeskartellamt* prohibited EAM Energie AG, Kassel, a firm which belongs to the E.ON group, from acquiring a 30% share in the municipal utility Stadtwerke Eschwege GmbH. The merger was the first in a series of E.ON projects to acquire stakes in municipal utilities. The in-depth examination carried out by the *Bundeskartellamt* has shown that the planned participation would have been likely to strengthen the dominant positions held by the E.ON group both in the electricity and gas sales markets. Thus, the participation would have resulted in further market foreclosure effects.

¹ See § 35 Act against Restraints of Competition (ARC). An English version of the ARC is available at http://www.bundeskartellamt.de/wEnglisch/download/pdf/06_GWB_7__Novelle_e.pdf.

² In exceptional cases the acquisition of minority shareholdings may also, together with special rights, confer control on another undertaking (§ 37 (1) No. 2 ARC. The provision corresponds to Article 3 (1) lit. b EC Merger Control Regulation. In that regard, a minority shareholding alone does not suffice to acquire control. Rather, e.g. rights or contracts must confer decisive influence on the target to enable the acquirer to decide upon fundamental questions of competitive relevance concerning the target.

The Düsseldorf Higher Regional Court confirmed the decision in June 2007 on appeal³. Central to the proceedings were the fundamental questions of whether Germany's electricity markets are still dominated by a powerful duopoly of the two large energy companies E.ON and RWE and whether this duopoly is foreclosing markets and expanding its market power by a joint strategy of acquiring successive shares in municipal utilities. The court stated that “[t]here is no substantial competition against E.ON and RWE in the domestic electricity markets which could control the scope of action emanating from their paramount market position.” In the proceedings before the court the *Bundeskartellamt* based its opinion on two national surveys which it conducted on the market situation in the electricity markets in Germany. According to these surveys both companies hold a paramount position in the generation and distribution of electricity. More than 60% of the electricity consumed by industrial and household consumers in Germany is generated, imported and distributed by E.ON and RWE. Since electricity cannot be stored, these companies with their paramount position, both at the generation and distribution level, control the distribution of electricity to the consumers. This is possible because of the companies' large electricity parks with a broad mix of different plant technologies. Unlike municipal utilities and independent generators, they are in a position to cover all load levels such as base, medium and peak. By securing sales through acquisitions of stakes in municipal utilities the companies would be able to expand their dominant position and ultimately foil endeavours towards promoting competition in the transmission of electricity in regulated networks.

The findings of the court as to the market position of E.ON and RWE underline the importance of a thorough review of the acquisition of minority shareholdings to prevent mergers that would be competitively harmful.

EnBW/Ludwigsburg (2005)

In another case a subsidiary of EnBW AG (EnBW) planned to acquire a 35 % interest in Stadtwerke Ludwigsburg GmbH (Stadtwerke Ludwigsburg), a municipal utility. The parties to the merger project withdrew the notification after they had been informed about competitive concerns by the *Bundeskartellamt*. The *Bundeskartellamt*, in its preliminary findings had concluded that the merger would have been likely to result in the strengthening of a dominant position on the market for the supply of local gas distributors. It had to be expected that, out of consideration for its new partner, Stadtwerke Ludwigsburg would acquire gas from this partner with the effect that the local market for the supply of gas to end customers would *a priori* be closed to competitors of EnBW. Moreover, there would have been the danger of Stadtwerke Ludwigsburg strengthening its dominant position in the market for gas end customers due to the fact that the competitive pressure hitherto resulting from a potential market entry by EnBW would have ceased.

2.3.2 *Competitively significant interest*

Axel Springer/Stilke (1997)

The leading case on transactions that confer a competitively significant influence on other companies is Axel Springer/Stilke.

Axel Springer Verlag (ASV) is a major media group which is active in the publishing business with newspapers, magazines and books. Although ASV's intended participation in Stilke, a chain of railway station bookshops, only involved a minority participation of 24%, it still created a competitively significant influence due to the factual possibilities to exercise influence: Since another company participated in Stilke

³ Düsseldorf Higher Regional Court, decision of 6. June 2007, WuW/E DE-R 2094 *et seq.*, *E.ON/Stadtwerke Eschwege*.

only for investment interests, ASV would have been able to pursue its strategic interests in a joint venture. The *Bundeskartellamt* prohibited the intended minority participation of ASV in Stilke because it would have strengthened ASV's dominant positions on several reader and advertising markets. ASV's dominant position would have been strengthened because with the participation it would have gained a right to information, and thus could have used information on the situation in the sales markets to its benefit and to promote the sale of its own products.

The prohibition decision was confirmed as final by the Federal Court of Justice.⁴

Mainova/Aschaffenburg Versorgungs AG (2004)

In July 2004 the *Bundeskartellamt* prohibited the electricity and gas provider Mainova AG (Mainova) from acquiring a 17.5% stake in Aschaffenburg Versorgungs GmbH (AVG), the energy subsidiary of the Aschaffenburg municipal utilities. Mainova is a regional gas supplier, AVG a local distributor of gas.

The examination of the project showed that the planned participation was likely to result in a strengthening of the dominant positions of Mainova and AVG. In particular, the markets for the supply of gas to distributors and to small customers were affected, both horizontally and vertically. According to the consortium agreement, the participation of Mainova in AVG was meant to establish a "long-term strategic partnership". The partnership was aimed at finding mutual solutions for all competition-related and other economic questions. The planned cooperation was in the corporate interest of both parties to the merger who would no longer have acted independently on the market. Mainova's possibility to influence AVG's activities was also secured under corporate law through supervisory board mandates and pre-emption rights. Mainova held a dominant position in the regional market for the distribution of gas, AVG was dominant in the downstream local market for the supply of end customers with gas. The *Bundeskartellamt* came to the conclusion that the merger would have strengthened these positions. Mainova would, due to information rights resulting from its 17.5 % interest in AVG, have been in a position to influence negotiations for new contracts to its advantage. Mainova would have been able to obtain comprehensive knowledge of the supply offers of competitors. Consequently, it would have been possible for Mainova to make a counter-offer. Furthermore, it was to be expected that AVG and its municipal majority shareholder would respect the interests of its minority shareholder, Mainova, when concluding new contracts for the supply of gas. In turn, the dominant position of AVG would be strengthened through the connection with Mainova because it could be expected that Mainova, a potential competitor of AVG, would no longer contest AVG's market position by entering the market herself. A further strengthening of dominance would have increased the companies' scope for action, and thus also their leeway for setting prices, to the detriment of the consumers.

The decision was confirmed by the Düsseldorf Higher Regional Court in November 2005⁵.

2.4 *Distinction between minority shareholdings representing a passive financial investment and minority shareholdings that allow some form of control*

In principle, the reasons why an undertaking plans to acquire an interest in another undertaking are irrelevant for the application of German merger control law. An exception applies in the context of the so-called banking clause, § 37 (3) ARC. Irrespective of the level of participation, this clause exempts the acquisition of shares in an undertaking from merger control if the acquirer is a credit or financial institution

⁴ Federal Court of Justice, decision of 21 November 2000, WuW/E DE-R 607 *et seq.*, *Minderheitsbeteiligung im Zeitschriftenhandel*.

⁵ Düsseldorf Higher Regional Court, decision of 23. November 2005, WuW/E DE-R 1639 *et seq.*, *Mainova/StW Aschaffenburg*.

or an insurance company which intends to resell the shares within a period of one year, does not exercise the voting rights attached to the shares, and definitely resells the shares within this period. This rule largely corresponds with Article 3 (5) lit. a of Council Regulation (EC) No 139/04. Its purpose is to facilitate the transactions and dealing in securities by financial service providers. By acquiring shares within the context of their general operations these companies do not normally pursue any objectives which would be relevant to competition. The time limit of one year may, upon application, be extended by the *Bundeskartellamt*, if it can be shown that the resale was not reasonably possible within this period. If resale does not take place within one year and the time limit is not extended, the acquisition is subject to merger control. The same applies if the original plan to resell is abandoned or if the voting rights attached to the shares are exercised.

2.5 *Specific legal provisions dealing with interlocking directorates*

Specific legal provisions dealing with the anticompetitive effects of interlocking directorates do not exist in German competition law, *i.e.* the general rules as described above apply.

German competition law does, however, mention “links with other undertakings” as a factor to be taken into account when assessing dominance⁶.

2.6 *Remedies*

According to § 40 (3) ARC clearance may be granted subject to conditions and obligations. These shall not aim at subjecting the conduct of the undertakings concerned to a continued control. Thus, only structural remedies may be employed, in particular the divestiture of participations, operations or assets to third parties not associated with the merging companies. One of the main reasons why the legislator has refrained from allowing behavioural commitments is that a permanent supervision of whether behavioural remedies are observed would involve considerable problems for the competition authority.

3. **Anticompetitive Agreements, § 1 ARC and Article 81 EC**

3.1 *Horizontal agreements*

The *Bundeskartellamt* also assesses the acquisition of minority shareholdings under § 1 ARC (anticompetitive agreements) or, respectively, Article 81 EC if the respective agreement may affect trade between Member States of the EC.

So far the *Bundeskartellamt* has examined such agreements predominantly in the context of mergers that had been notified under merger control law. In its “Ostfleisch” decision the German Federal Court of Justice confirmed that the creation of joint ventures may not only be subject to merger control but may also constitute a restrictive agreement under § 1 ARC⁷. According to the decision of the Federal Court of Justice, § 1 ARC is applicable if, after the creation of the joint venture, the parent companies and their joint venture are active on the same product and regional market. The Federal Court of Justice has stated that in this situation it would have to be expected from undertakings acting in a commercially reasonable way not to pass on to consumers all cost advantages arising from the cooperation. Rather, they would be expected to coordinate their pricing behaviour with the effect that price competition between the undertakings would be reduced or eliminated⁸. In practice the *Bundeskartellamt*, if feasible, assesses a transaction under both

⁶ See § 19 (2) No. 2 ARC. Note that the scope of the provision is general and not limited to merger control law.

⁷ Federal Court of Justice, decision of 8. May 2001, WuW/E DE-R 711 *et seq.* – *Ostfleisch*.

⁸ *Ibid.*, at page 716.

merger control law as well as § 1 ARC/Article 81 EC in one proceeding. If this is not possible, the assessment under § 1 ARC/Article 81 EC will be reserved for subsequent examination.

3.1.1 Case example – Xella/Nord-KS (2006)

A case that was assessed exclusively under § 1 ARC and Article 81 EC concerned the minority shareholding of Xella Deutschland GmbH (Xella) in the joint venture Nord-KS GmbH + Co. KG (Nord-KS).

Xella belongs to the Haniel Group and is, both worldwide and in Germany, a leading producer of sand-lime brick and certain masonry materials. Xella (as well as another company that held a minority shareholding in Nord-KS) and the joint venture Nord-KS are active on the same product and geographic market, a regional market in northern Germany.

In the joint venture Nord-KS, Xella held an interest of 17.5%. Under the partnership agreement a large number of business policy decisions relating to the joint venture, e.g. the adoption of the annual investment and financial plan, required the approval of an advisory council in which Xella held 17.5% of the votes. The council's records revealed that Nord-KS's price and rebate policy had also been discussed within the council and that decisions had already been made to raise prices and reduce rebates. Although, with 17.5% of the votes, Xella did not have the possibility to block the council's decisions, its presence in this council gave the company an opportunity to gain knowledge of all the business strategy decisions of its competitor Nord-KS, and to influence these to its own benefit. The *Bundeskartellamt* concluded that it was to be assumed that the parent companies of the joint venture, which continued to be active in the market, coordinated their market behaviour. No dynamic price competition was to be expected from Nord-KS vis-à-vis its parent companies as secret competition had been eliminated. As a result the market position of the market leader Xella was strengthened by its minority participation in its competitor Nord-KS.

In 2006, in its decision based on § 1 ARC and Article 81 EC, the *Bundeskartellamt* concluded that the implementation of the partnership agreement violated these rules and, based on § 32 ARC⁹ (which is similar to Article 7 Council Regulation (EC) 1/2003), ordered Xella to withdraw from the joint venture within a time period of one year from service of the decision. The *Bundeskartellamt* also ordered as interim measures that Xella was not to participate in Nord-KS council meetings, exercise its voting rights in the council or request the submission or inspection of minutes of council meetings. It was also ordered that the other shareholders in Xella should not provide Xella with minutes of the council meetings.

The Düsseldorf Higher Regional Court confirmed the decision that the agreement was in violation of § 1 ARC but found that as it would not affect trade between Member States, the agreement was not in contradiction of Article 81 EC¹⁰. The court has also confirmed the interim measures ordered by the *Bundeskartellamt*.

On the other hand, the court also held that it was not proportionate to order Xella to withdraw from the joint venture. Rather, it held that it was Xella's decision how to react to the finding that the joint venture agreement was in violation of § 1 ARC and thus void.

The case is currently under appeal before the Federal Court of Justice.

⁹ Note that under § 32 ARC behavioural as well as structural measures to bring to an end the infringement are, in principle, possible, subject to the principle of proportionality.

¹⁰ Düsseldorf Higher Regional Court, decision of 20 June 2007, WuW/E DE-R 2146 *et seq.*, *Nord-KS/Xella*.

3.2 *Vertical agreements*

In principle, § 1 ARC and Article 81 EC are also applicable if an undertaking acquires a minority shareholding in a firm that is active not on the same market but where a vertical relationship exists. In such a situation, a firm may in particular use its influence on another firm in which it has an interest to foreclose rivals from the output or input of products or services. However, the *Bundeskartellamt* has not yet issued a decision on such a case.

IRELAND

1. How are minority shareholdings treated under the merger control regime? Does minority control trigger notification?

The merger provisions of the Competition Act 2002 employ the concept of decisive influence to delimit the scope of the Act with respect to mergers. Decisive control is the concept used by the EU and the Authority follows the European Commission's guidance in the concept as set out in the New Jurisdictional Notice. No quantitative threshold is set for percentage of shares required to exercise decisive control. However, situations of minority control that fall short of decisive control do not fall within the remit of the Act.

The Authority has recently addressed the issue of minority control in the context of the current review of the Competition Act. One solution to the problem of the minority control is the UK concept of material influence.

2. In your enforcement practice, do you distinguish between minority shareholdings as a passive financial investment from minority shareholdings that allow some form of control?

Minority shareholdings may be viewed as a potential breach of Section 4 of the Competition Act, which prohibits anti-competitive agreements or of Section 5, which prohibits the abuse of a dominant position.

Up until 2002 a notification system for agreements existed in Ireland and the Competition Authority made a large number of decisions on investment share purchases. These were all seen as benign so long as the firms were not actual or potential competitors. Restrictions in such agreements, such as non-compete clauses and post-termination non-solicit clauses were seen by the Competition Authority as ancillary.

The Authority took a very different view when the minority shareholding was between actual competitors.

In late 1994 the Minister asked the Authority to conduct a formal study of two issues in the newspaper industry, using the Minister's powers under the Competition Act, 1991. One of the issues to be considered was the acquisition by Independent Newspapers of an almost 25% shareholding in its competitor, the Irish Press. Another issue that was to be considered was the provision of loans. The Competition Authority reported back to the Minister that it viewed the arrangements as both an anti-competitive agreement and an abuse of a dominant position. The Competition Authority called on the Minister to use his right of action under the original competition act against the arrangements.

Of critical importance in this market was its oligopolistic structure, where the two firms involved were very significant players. A different view may have been taken if the firms involved would not be able to influence the market.

However, in the context of the newspaper market at the time, a shareholding at such a level enabled one firm to exercise some form of control through both its position as a very large shareholder and through its rights to call for extraordinary general meetings, to attempt to pass resolutions etc. This would enable one firm to be able to clearly influence the behaviour of its competitor on the marketplace, through calling into question certain strategic choices including investments etc.

In order to maintain the value of its investment in its competitor, the minority shareholder has a diminished incentive to compete vigorously with its competitor, unless it intends to bid for outright control. However, in many cases the minority shareholder would have realised that any outright take-over would likely run into competition difficulties. Hence, this further reduced the incentive to compete vigorously as this would only deliver the target company into the hands of a third party.

Of course, low levels of minority shareholdings by one competitor in another one raise much less competition concerns. However, even at this level there is an enhanced opportunity for firms to co-ordinate their behaviour. In any case, once a shareholding reached the critical mass required to call general meetings etc., there would automatically be concerns about co-ordination. This would arise even if the minority shareholder stated that it was a passive investor and would not attempt to exercise its rights. The mere fact that this opportunity exists is likely to change the behaviour of the competitor.

Direct attempts to influence competitor's strategy or behaviour on a market always raise a serious concern. However, few such blatant attempts will likely be made. More likely will be that future choices of the firm with the minority shareholder will be self censored, in that strategic options that may harm the shareholder are much less likely to be considered. In this way, the negative effects of such minority shareholdings may only manifest themselves by the absence of certain actions.

In conclusion on this point, minority shareholdings that are of a sufficient size to give the opportunity to influence the behaviour of the competitor raise concerns whether they are used actively or are passive investments. Active use of influence will be easier to monitor and to make timely interventions. Influence through a passive investment is much harder to detect and are not likely to be amenable to robust ex post competition control.

The Competition Authority recently had cause to consider whether minority shareholdings could be amenable to analysis as an anti-competitive agreement. Any agreement between competitors to hold shares in each other or to have cross directorships would clearly be open to scrutiny under the prohibition under the Competition Act, 2002. However, in the case where the shares are acquired in the public market from other third parties (many of whom may not be undertakings under our legislation) it would seem difficult to apply the prohibition on anti-competitive agreements. Hence, in many cases it would be difficult (if not impossible) to look at a series of transactions whereby one competitor became a minority shareholder in its competitor as a series of anti-competitive agreements between undertakings.

3. In your enforcement practice, do you have experience with minority shareholdings raising unilateral and/or coordinated effects? Do you have experience with minority shareholdings investigated under your domestic competition rules on restrictive agreements between competitors? Have you investigated dominant firms for holding shares in competing firms? Can you provide examples?

The Competition Authority has had no formal investigations that dealt with minority shareholdings.

Nonetheless, the Competition Authority has been monitoring a particular issue as it has developed over the last year. In this case the largest firm in a particular sector attempted to take-over its largest competitor. Both firms made up the vast majority of the market. This merger reached EU thresholds and was examined by the European Commission. The Commission eventually blocked the merger but a significant minority shareholding remained.

Of particular concern was the threatened use of the minority shareholder of their rights to attempt to influence key strategic choices of the target company. This raised the potential to soften the degree of competition between them. This could have occurred directly, by inducing the firm to roll back on certain

decisions. It may also occur indirectly into the future as there remains a danger that the target firm will not consider strategic options that are likely to be resisted by the minority shareholder.

Moreover, the company with the minority shareholding would have to take into account the impact that an aggressive strategy on the marketplace would have on share prices. This concern is heightened when the company is temporarily not allowed to make a second bid. In these circumstances, a fall in the target's share price is likely to invite interest from other third parties.

Hence, it is easy to see the risk that the incentives of firms in this situation could easily align against the normal competitive outcome. This raises the potential for a minority shareholding to create the circumstances whereby tacit co-ordination can be sustained. This could even happen in industries where the underlying characteristics of the sector would not normally raise a large risk of tacit co-ordination.

There has been a lot of recent academic economics research on the issue of passive investments or minority shareholding. This has traditionally not been regarded to be problematic in perfectly competitive markets. However, problems may arise where we are in an imperfect oligopolistic market, i.e. markets with only a few firms.

In imperfect oligopolistic markets the risk of tacit collusion is in general a threat. However, in these markets a passive investment will not always facilitate collusion. In general, it will have anticompetitive unilateral effects. The unilateral effects increase the incentives of firm X, who passively invests in firm Y, to increase prices because even though it might lose some clients that may switch to firm Y, it might recover part of that loss through the passive investments it has precisely on firm Y. Of course, this incentive is stronger the larger is the proportion of the market that is comprised by both firms.

Tacit co-ordination is generally seen as difficult to institute and even more difficult to sustain, even in a market that is a tight oligopoly. This is particularly so when one of the firms is perceived by the others in the industry as a maverick. The ability to tacitly co-ordinate is always limited by the firm's fears that the others will cheat. These fears will loom larger in an industry with a known maverick firm.

However, when the maverick firm¹ on the market is the one investing in the other competing firms in the market, i.e. "where the investment in the rival was made by the firm most eager to price-cut"², tacit co-ordination will be facilitated. Therefore, when the maverick firm in the market passively invests in the rivals the threat of tacit co-ordination emerging (and being sustained) must increase.

In the case the Competition Authority has been monitoring the firm holding the minority shareholding is actually the maverick firm of that market. Following Ezrachi and Gilo's arguments, the fact that the maverick firm has invested on its rival could facilitate tacit collusion.

Under EU case law tacit co-ordination is tackled under the notion of collective dominance under Article 82 of the Treaty. In the case of minority shareholdings, the two firms will not present themselves to the market place as if they were a single firm. Hence, the case law on tacit co-ordination is more important.

However, even in respect of this a lot of the accepted wisdom may have to be modified. Consider the criteria that the European Courts have laid down as needing to be fulfilled to sustain a common policy (i.e. the so-called Airtours criteria). The decision in the Airtours case tells us the following. Each undertaking

¹ A maverick firm is one that has a greater economic incentive to deviate than do most of its rivals and constitutes an unusually disruptive force in the market place. US Merger Guidelines (2.12).

² Ezrachi, A. and D. Gilo, "EC Competition Law and the Regulation of Passive Investments Among Competitors", Oxford Journal of legal Studies, Vol. 26, No. 2 (2006) pp. 327-349.

must be able to monitor the others (i.e. market conditions must be such that a co-ordinated policy is possible – such elements include price transparency, simple and stable economic environment, symmetries between the undertakings). There must be deterrent mechanisms preventing the undertakings from deviating from the co-ordinated policy; and the reaction of those outside the collusive oligopoly must not be able to undermine it.

The importance of a mechanism to monitor the true position that a rival is taking in the market place is very difficult to achieve when faced with the “noise” that is normally associated with market outcomes. In the normal course of events this requires that the firm is able to properly monitor its rival from the outside only using cues available in the normal course of business affairs. However, the firm with a minority shareholding may often be privy to secret information that normal competitors will not have access to. Whether information, that would indicate strategy, would flow in the other direction is an open question but at minimum another forum to potentially share information that would otherwise not be known to their rival has been created. Of course, a situation of interlocking directorates would provide the two-way flows of information that would make the use of external (and perhaps unreliable) signals of rival behaviour less necessary.

Nonetheless, despite the likely impact of minority shareholdings on demonstrating that a position of collective dominance existed, it would remain a difficult case to make.

4. Does your jurisdiction have specific legal provisions dealing with interlocking directorates?

No

5. In your enforcement practice, do you have experience with interlocking directorates raising issues of tacit or explicit collusion?

No

6. In your enforcement practice, do you have experience in devising remedies for anti-competitive effects arising from minority shareholdings or interlocking directorates? Does your merger control regime have a preference for structural remedies or conduct remedies for these issues?

Following on from our earlier answers, in our enforcement practice, we have no experience in calling for the Courts to impose remedies. However, it should be noted that under the Competition Act, the court may order the adjustment of a dominant position by sale of assets (if it has found an abuse). The Court can do this on its own initiative or on the application by the Competition Authority. The Competition Authority would likely seek such a structural relief in the cases of minority shareholdings or interlocking directorships.

In terms of the Competition Authority’s views on structural versus behavioural remedies under our merger regime it has also be stated that we have limited experience of minority shareholdings and cross ownership. The best example is the UGC/NTL merger (M/05/024) where concerned cross shareholding and cross ownership led to the imposition of a series of behavioural remedies. Although, the Competition Authority in general prefers structural remedies for the usual reasons, in this case it was considered proportionate to the problem in hand to agree to behavioural remedies.

7. Concluding thoughts

Tackling minority shareholdings and cross directorships under the Competition Authority’s enforcement powers would likely be a very difficult task. For this reason, the Authority has recently asked

the Minister (as part of his review of competition legislation in Ireland generally) to amend the Act so as to give the Competition Authority the power to review such situations where they result in a substantial lessening of competition.

ITALY

1. Minority Shareholdings and Interlocking Directorates in Italy

Under Italian law a merger has to be notified only if the merger leads to the acquisition of control of a company and the turnover thresholds are exceeded. Therefore in merger cases the problem of minority shareholding and interlocking directorates can only be addressed in the context of remedies, so as to impede a dominant position to be created or strengthened.

In recent years the Italian competition Authority has indeed addressed antitrust issues originating from minority shareholding and from interlocking directorates in a number of bank mergers (the major ones being: Banca Intesa and Sanpaolo IMI; BPU and Banca Lombarda and Piemontese, minoo now called UBI; Unicredit and Capitalia).

Minority shareholding is a stake in the capital of another firm (the target) that do not yield any control or material influence on its business. Included in this definition are cases in which an agreement among the key shareholders of the target firm is in place to which the firm owning the (minority) stake (the buyer) participates.¹ Minority shareholding can be an antitrust problem when the buyer and the target are rivals.

Interlocking directorates occur when single individuals sit on more than one board (or other governance body) of a firm. Interlocking directorates can be an antitrust problem when the “interlocked” firms are rivals.

Table 1 shows the most relevant minority shareholdings and interlocking directorates involving the firms affected by the three merger cases. Although banks and insurance companies often cooperate in the ‘production’ side of the insurance business through vertical cooperative JVs (bancassurance), they are nonetheless competitors in the distribution of insurance products².

Intesa Sanpaolo, the largest bank in Italy by number of branches, has a 2,2% stake in Assicurazioni Generali, which is the largest insurance company in Italy. Assicurazioni Generali has in turn a 5,1% stake in Intesa Sanpaolo. Assicurazioni Generali and Intesa Sanpaolo are also competitors in the life insurance market because they both sell their own insurance products in addition to Intesa Vita’s products, which is a cooperative JV between them. Assicurazioni Generali has a number of competitors among its shareholders, including Unicredit, Monte dei Paschi di Siena (MPS) and the Premafin Group.

UBI Banca, the fourth Italian bank by number of branches, is also a shareholder of Intesa Sanpaolo. Two of UBI’s core shareholders have relevant stakes in Intesa Sanpaolo; one of them is the private investor with the largest stake in Intesa Sanpaolo (5,9%).

¹ Shareholder agreements can be defined as pacts among blockholders to set a common voting policy and/or restrict their freedom to sell shares.

² For example, Unicredit sells through its distribution channels CreditRas Vita’s life insurance products, which is a cooperative JV between Unicredit and the Allianz Group. Unicredit does not own assets in the life insurance business. Unlike Unicredit, Allianz produces also insurance products that are sold through other channels in competition with Unicredit. For this reason, Unicredit is not one of Allianz’s competitors in the production of life insurance products but only on the distribution side. An exception to this rule is given by Intesa Sanpaolo, which produces insurance products on its own in addition to distributing the production with Intesa Vita (a JV with Assicurazioni Generali).

Unicredit is Mediobanca's largest shareholder and also one of Assicurazioni Generali's shareholders. It is worth to notice that Mediobanca, a leading Italian investment bank, with a stake of 15,7% in Assicurazioni Generali, de facto controls it. As a result, Mediobanca may be considered a player in the insurance business and thus as a competitor of Unicredit and the Premafin Group in the insurance market. This is highly relevant because Unicredit and the Premafin Group are among Mediobanca's core shareholders³.

Table 1: Key links among competitors observed in the latest work by the Italian competition Authority in the financial sector.

Cases	Minority shareholdings	Interlocking directorates
Intesa/Sanpaolo	– Assicurazioni Generali has a 5% stake in Intesa Sanpaolo	– Two of Assicurazioni Generali's top executives in the governance bodies of Intesa Sanpaolo (1 in the surveillance board, 1 in the management board)
	– Intesa San Paolo has a 2.2% share in Assicurazioni Generali	
BPU/Banca Lombarda (UBI Banca)	– 1,22% stake in Intesa Sanpaolo	– One of Intesa Sanpaolo's top executives in UBI Banca's governance bodies
	– Two relevant shareholders in common with Intesa Sanpaolo (a major competitor)	
Unicredit/Capitalia	– 4,7% stake in Assicurazioni Generali	– Three of Unicredit's top executives in Mediobanca's surveillance board
	– 18% stake in Mediobanca	

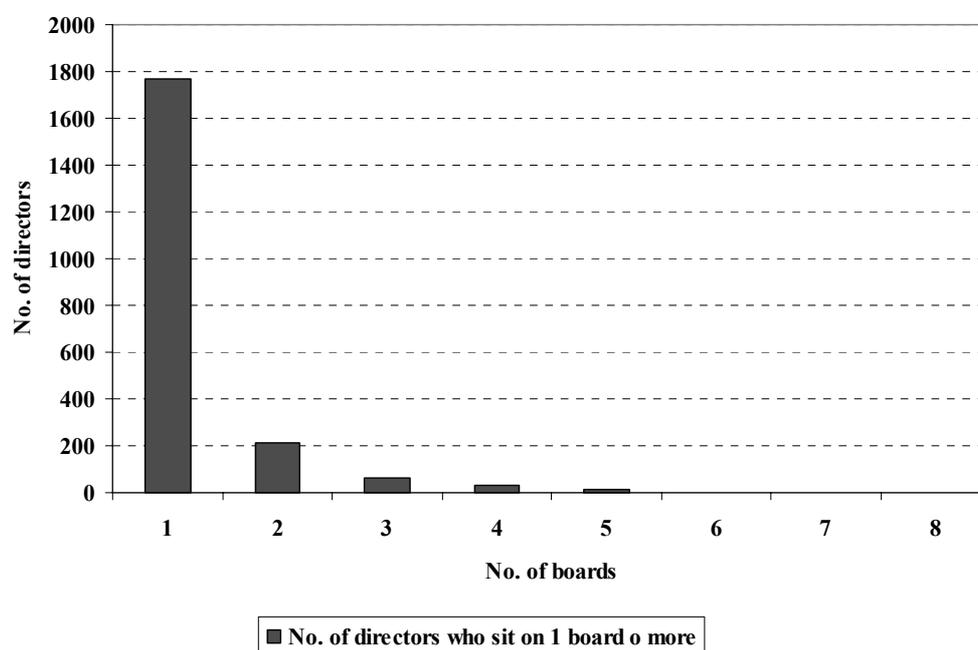
Table 1 also shows the number of interlocking directorates associated with these minority shareholdings. Beginning with the Intesa Sanpaolo merger, the governance bodies of the bank include two of Generali top executives (the chairman and one of the two CEOs), the former in the management board and the latter in the surveillance board). As we have seen before, Assicurazioni Generali and Intesa Sanpaolo are partners (in their cooperative JV) as well as competitors in the production and distribution of insurance products.

Intesa SanPaolo is also interlocked with UBI Banca as one of its top executives (the chairman of the surveillance board) is a member of UBI Banca's surveillance board.

Finally, five members of Unicredit's board sit in Mediobanca's surveillance board, some of them with very senior positions. Mediobanca is one of Uincredit direct competitors in the investment baking markets as well as the firm that de facto controls Assicurazioni Generali, probably Unicredit's strongest competitor in the insurance markets.

Figure 1, shows more generally the number of directors who sit on more than one board among the Italian listed companies in 2006. According to this data, there are 327 directors who sit on two boards or more, though not all of them can be considered as interlocking directorates because these firms do not operate in the same markets and thus they cannot be considered as truly competitors.

³ These shareholders are also part of the shareholder agreement on Mediobanca, which controls approximately 50% of the firm.

Figure 1: Number of directors who sit on one board or more in the Italian listed companies in 2006

Source: Santella et al. (2007), MPRA Paper No. 5649.

In the next section, we will discuss some issues arising from minority shareholdings and interlocking directorates that can be potentially harmful to competition.

2. Theories of Harm

In the context of merger control minority shareholding and interlocking directorates may increase the likelihood of a collective dominant position being created or strengthened.

2.1 *Minority shareholdings*

2.1.1 *Elimination of the incentives to compete aggressively*

The idea here is that owning a minority stake in a competitor may affect the incentives of the two companies to compete vigorously against each other. In particular, if a maverick firm has a stake in a consolidated competitor it would have lower incentives to compete aggressively since it would share some of the profits of the consolidated competitor. Thus, equilibrium prices in oligopolistic markets where firms have minority shareholdings would be higher than in absence of such shareholdings.

Reynolds and Snapp (1986)⁴ have studied minority shareholdings in a Cournot model and conclude that they lead to higher equilibrium prices. Flath (1991)⁵ extends these results to Bertrand models and finds that if oligopolists have silent partial interests in one another, equilibrium prices tend to be higher than in

⁴ Reynolds, R. J. and Snapp, B. R. (1986), "The Competitive Effects of Partial Equity Interests and Joint Ventures", in *International Journal of Industrial Organization*, Vol. 4, pp. 141-153, Elsevier Science Publishers (North Holland).

⁵ Flath, D. (1991), "When is it rational for firms to acquire silent interests in rivals?", *International Journal of Industrial Organization*, Volume 9, Issue 4, December 1991, pp. 573-583.

absence of such shareholdings. This result holds irrespectively of whether firms compete a la Bertrand or a la Cournot.

Thus, the idea that having minority shareholdings in competitor firms leads to higher prices levels appears grounded in the economics literature. The magnitude of this effect depends in practice on the size of the minority interest; the market share of the ‘target’; the degree of substitutability between the products of the ‘target’ and of the ‘buyer’ (and therefore the amount of demand that would be captured by the target in the event of a price increase by the buyer); and the extent of minority shareholdings in the market under study (i.e. the buyer and/or the target may have multiple cross-shareholdings).

The quantification of the price effects of such shareholding depends on the precise demand and cost conditions of the involved firms. Simulation work shows that such effects tend not to be large unless stakes are sizeable.⁶

2.1.2 *Coordinated effects*

A distinct question is to what extent holding a minority share (possibly reciprocally) in a competitor can facilitate tacit coordination. This could in principle happen through two mechanisms. The first is that minority shareholdings may affect firms’ payoffs and weaken the incentives to deviate from collusion – potentially favouring a more collusive outcome. Secondly, minority shareholdings can provide information that can assist explicit or implicit ‘agreement’ on a coordinated strategy, and the monitoring of such ‘agreements’. We consider each in turn.

On pricing incentives, minority shares (particularly cross-ownership stakes) make collusion more likely as they can alter the firm’s incentives to collude. They represent a sort of facilitating practice. For example, having a stake in rivals may reduce the firm’s incentives to deviate from a collusive agreement as the gains from deviating are lower than in absence of minority shareholdings⁷. The same goes for the incentive to punish. However economic analysis suggests that there are countervailing effects on firms’ incentives to ‘cheat’, and to ‘punish’ rivals who cheat. The net effect depends on the detailed facts – in particular on demand and cost conditions as well as on the extent and nature of the minority participation.

Minority shareholdings may also facilitate collusion through information exchanges among competitors. Having a minority share might allow the buyer to participate in the board of the target and therefore be informed on the target’s plans, costs etc. which it would not otherwise have. In other words, when a firm (the buyer) buys a stake in another (the target), the buyer may also acquire the right to appoint one or more directors on the board of the target (which is why it is important to make sure that minority holdings be turned into passive financial investments).

⁶ For ‘small stakes’ such effects are generally not large because they are ‘second order’ effects. This is because if, on the one hand, the firm owning a stake in a competitor may be more willing to increase its prices because it will recover some of the profits loss due to the price increase through its stake, on the other, only a *fraction* of lost profit will be recovered. This fraction tends to increase with the level of market concentration as the lower the number of competitors the larger the share of the lost demand that goes to the target firm. Larger effects can be obtained if the firm has stakes in a number of competitors. Thus, for these effects to be quantitatively significant the market has to be fairly concentrated and/or minority shareholdings need to involve a number of competitors in the concerned market. In this sense, a merger among competitors could increase the likelihood of such mechanisms because it increases the degree of market concentration.

⁷ This is because when (symmetric) firms own stakes in their competitors, market shares may differ from their shares of (total). So for example, if firm A has a stake in firm B, A’s share of total profit is given by A’s profit plus a fraction of B’s profits.

2.2 *Interlocking directorates*

Interlocking directorates can give access to sensitive and not publicly available information on firms' strategies, demand, costs, entry in other market segments and/or other geographic areas. This could facilitate various forms of coordination and thus be harmful of competition through:

- Enhancing coordination among firms (as successful coordination requires 'agreement' on the common strategy to be followed by the different market participants);
- Increased sustainability of implicit agreements between competitors (which depends also on the speed and accuracy with which 'cheating' can be detected).

Having established that interlocking directorates may cause harm to competition, it is also important to stress that this may not always be the case as their effects depend on the precise context where they take place. In particular, the potential harm caused by interlocking directorates is strictly related to the role and type of governance bodies where interlocks take place as well the on the functioning of such bodies.

2.2.1 *Role, functioning and types of governance bodies*

Regarding the governance bodies, a *necessary* condition for information exchanges to materialize is that the individuals holding positions in more than one competitors sit in the governance bodies that play an *active* role in the day to day management of the firm as well as in setting the corporate strategies. In addition to these requirements, the functioning of such bodies needs to be open and transparent so that decisions are the *actual* (and not only the formal) outcomes of meetings of these bodies.

In standard systems, the board of directors is the most prominent governance body as it is meant to monitor management on behalf of shareholders as well as to approve major business decisions and corporate strategy such as disposal of assets, investment or acquisitions, etc. This implies that having a seat on a *proper functioning* board of a competitor firm can indeed lead to an exchange of sensitive information, which can in turn be factored in the definition of its own corporate strategy (without necessarily ending up in a coordination of strategies).

Conversely, if boards end up "rubber stamping" the decisions of management instead of challenging them and/or asking for details or more information (as often is the case), it is quite unlikely that sensitive and detailed information is even discussed at board meetings even though key executives (e.g. the CEO) often sit on the board. In this situation interlocking directorates are less likely to be a concern.

So called dual systems are characterised by the presence of two distinct governance bodies (as opposed to the standard systems where only one governance body is in place, the board of directors), each with its own role. One body, the management board (MB), is composed of key managers of the firm and is in charge of the day to day management as well as to decide corporate strategies. The management board generally meets on a weekly basis.

The other body, the surveillance board (SB), is appointed by shareholders to monitor the behaviour of managers⁸. The surveillance board meets much more infrequently than the management board and approximately 3 to 4 times a year. Firm managers cannot be member of the SB. As a result, interlocking directorates are more likely to raise competition issues if they happen at the MB level

⁸ It is important to recall that the powers of the surveillance board show a degree of variation across firms. In some instances the corporate strategy of the firm on some selected matters (as defined by the management board) need to be approved by the surveillance board as well.

2.2.2 *Effects of information exchanges*

Before concluding this section on the potentially harmful effects of interlocking directorates, it is worth noticing that not all information exchanges have anticompetitive effects. In some instances information flows among competitors may not improve as a result of interlocks. For example, a representative of A entering the board of B, which in turn has a JV with C, may not necessarily improve the information A and C have about one another: for example, is there a credible channel through which B's ownership in the JV would allow A to have a better idea of C's actions? or be able to detect cheating by C more accurately, e.g. by making it easier for the relevant managers to communicate between them? Would the information be trustworthy?

There may also be instances in which information flows among competitors may have procompetitive effects. For example, joining the board of a competitor may have the effect of revealing a business opportunity that other firms had not spotted and this could generate some healthy competition for that business opportunity. This could be the case if this business opportunity leads to first mover advantages.

3. **Conditions imposed to clear the mergers**

Table 2 summarizes the conditions imposed by the Italian competition Authority to tackle the most relevant instances of minority shareholdings and interlocking directorates emerged in the merger cases we referred to earlier in the paper. These conditions have ranged from total and/or partial divestments of stakes in competitors (as in the Unicredit/Capitalia merger), to setting up procedures to control information flows and voting on selected matters for individuals with positions in competitor firms (Intesa Sanpaolo and Unicredit/Capitalia), to undertakings not to include individuals with positions in competitors firms in their management bodies (UBI Banca).

Table 2: Conditions imposed for approval of mergers.

Cases	Conditions	Issue tackled	Markets affected by the Authority conditions
Intesa/Sanpaolo	– Procedures to control information flows and voting on selected matters	– Interlocking directorates	– Life insurance
	– Procedures to control information flows and voting on selected matters	– Interlocking directorates – Minority shareholdings	– Life insurance – Investment banking
Unicredit/Capitalia	– Divestment of stakes in Assicurazioni Generali (pre-merger 4.7% post-merger 0) and Mediobanca (pre-merger 18%, post-merger 9%)		
BPU/Banca Lombarda (UBI Banca)	– Undertakings not to have management roles in rivals	– Interlocking directorates	– All markets in which the involved firms operate

4. Conclusions

The Italian financial system is characterized by a very articulated web of minority shareholdings and interlocking directorates. As suggested in this note, minority shareholdings can sometimes be anticompetitive. In the context of merger control a truncated analysis may be used: is the market competitive? Do members of the board participate in strategic decision making? If the answer to the first question is no and to the second yes, the probability that the sale of minority shareholdings could be a good remedy for authorizing an otherwise anticompetitive merger increases.

Of course a much more rigorous proof of harm would be needed in the antitrust (as opposed to merger) evaluation of agreements possibly facilitated by minority shareholdings or interlocking directorates. In any case, the fact that minority shareholding acquisitions do not need to be notified ex-ante creates a gap in the system.

JAPAN

1. Relevant Provisions in the Antimonopoly Act

The Antimonopoly Act (“AMA”), the Japanese competition law, has provisions that regulate shareholding by a company (Article 10) and interlocking directorates (Article 13) in the chapter IV on the regulation of business combinations. (The scope of Article 10 is not limited to “minority” shareholding.)

Article 10-(1) of the AMA stipulates that no corporation shall acquire or hold shares of any other corporations where the effect of such an acquisition or holding of shares may be to substantially restrain competition in any particular field of trade. (In addition, Article 10-(2) requires a corporation whose assets and total assets exceed certain thresholds to submit a written report to the JFTC within 30 days after it acquires or holds the shares of another corporation whose total assets exceed certain thresholds, if the voting right-holding ratio¹ exceeds 10%, 25% or 50% by this shareholding.)

Article 13-(1) of the Act stipulates that neither an officer nor an employee of a corporation shall hold a position at the same time as an officer of another corporation where the effect of such an interlocking directorate may be to substantially restrain competition in any particular field of trade.

2. Subject of the Review of Business Combinations

The AMA prohibits a business combination if its effect may be to substantially restrain competition in a particular field of trade. The Act regulates business combinations because they can have an impact on competition in the market through the forming, maintaining or strengthening of the relationship where more than one company conducts business activities in a united form, fully or partially by shareholding or through other transactions (this relationship is hereinafter referred to as a “joint relationship”). Accordingly, if two or more companies continue to engage in business activities as independent competitive units though there are shareholdings or interlocking directorates between them, there is little impact on competition. Thus, these types of arrangements should rarely be prohibited.

Based on this fundamental policy, the Japan Fair Trade Commission has published the Business Combination Guidelines, and has identified shareholding and interlocking directorates that are subject to the review of business combinations as follows.

2.1 *Shareholding*

2.1.1 *Shareholding by a Company*

A joint relationship is to be formed, maintained or strengthened between an acquiring company and an acquired one in the following cases:

- When the voting right-holding ratio exceeds 50%. However, if the acquiring company establishes the acquired company and the former acquired all of the voting rights of the latter concurrently with the establishment, it usually falls outside the scope of the review of business combinations; and
- When the voting right-holding ratio exceeds 25% and the acquiring company is the sole leading holder of voting rights.

¹ The ratio of voting rights for share held by an acquiring company to the overall shareholder’s voting rights in a share-issuing company (acquired company).

Other than in the cases described above, when the ratio of voting right-holding ratio exceeds 10% and the acquiring company is ranked among the top three voting right-holders, the following items will be taken into consideration in order to determine whether a joint relationship is formed, maintained or strengthened:

The extent of voting right-holding ratio;

- The rank as a voting right-holder, the difference in the voting right-holding ratios and distribution among the holders, and other relationships among holders;
- The cross-holding of voting rights (the acquired company concurrently holds voting rights of the acquiring company) and other mutual relationships among the companies involved (hereinafter referred to as “parties” in Part 2);
- Whether officers or employees of one of the parties are holding the position of officers of the other parties;
- The trading relationship between the parties (including the financial relationship);
- Relationships between the parties based on business alliance, technical assistance and other contracts or agreements; and
- Items (a) through (f), when including companies that already have joint relationships with the parties.

In the event of a joint investment company (a company which was jointly established or acquired by two or more companies through a contract to pursue necessary operations in order to achieve mutual benefits; the same hereinafter), trading relationships between the parties and relationships based on business alliance, contracts, etc. will be considered in order to determine whether the business combination should be reviewed. (As far as a joint relationship between the investing companies is concerned, a joint relationship is indirectly formed, maintained or strengthened through the joint investment company. Accordingly, if the business activities of the shareholding companies are integrated through the establishment of the joint investment company, this fact itself indicates that there will be an impact on competition.)

2.1.2 Shareholdings by a Person Other than a Company

“A person other than a company” means a person other than a joint share company, a mutual company, a limited liability company, an ordinary partnership, a limited partnership or a foreign company as prescribed by the Commercial Code and other laws and ordinances; it does not matter whether the person is an entrepreneur or not. Specifically, incorporated foundations, corporate juridical persons, special corporations, regional public bodies, cooperatives, associations, natural persons and all other persons that can hold shares are included. The existence of shareholdings by a person other than a company will be examined in accordance with item 1.1 above.

2.1.3 Scope of a Joint Relationship

If a joint relationship is formed, maintained or strengthened between the parties concerned through the shareholdings, a joint relationship is also formed, maintained or strengthened among the parties and the companies which already have a joint relationship with the parties.

2.1.4 *Shareholdings which do not fall within the Scope of the Review of Business Combinations*

In the case of a.) below, a joint relationship is not formed nor strengthened so that, in general, it does not fall within the scope of the review of business combinations. In addition, even in the cases of item b.) to item f.) as below, a business combination is not formed nor strengthened so that, in general, most of them are not considered to fall within the scope of the review of business combinations. However, in the case that a joint relationship is formed or strengthened between a company, a subsidiary² or with sister companies³ and other shareholders, such a joint relationship falls within the scope of the review of business combinations.

- a) The acquiring company establishes the acquired company and the former acquired all of the voting rights of the latter concurrently with the establishment;
- b) A company acquires the voting rights of the subsidiary of its subsidiary;
- c) A company acquires the voting rights of its sister company;
- d) A company acquires the voting rights of a subsidiary of its sister company;
- e) A company acquires the additional voting rights of another company more than 50% of whose total shareholders' voting rights are jointly held by the acquiring company and its sister company; and
- f) A company acquires the voting rights of another company where two or more sister companies jointly hold more than 50% of the total shareholders' voting rights of the acquiring and acquired company respectively.

2.2 *Interlocking Directorates*

2.2.1 *Scope of Officers*

An "officer" is defined in Article 2 (3) of the AMA as "a trustee, director, executive, partner with unlimited liabilities and executive power, an auditor or any person with a similar position, a manager or other employee in charge of the business of the main or branch office". Thus, officers are directors and auditors of joint share companies, limited liability companies and mutual companies; managers defined by the Companies Act (Article 10); and other employees in charge of business under the Companies Act (such as the general manager of a head office, a branch manager, the head of a business division) and the like.

A "person with a similar position" refers to a person who, while not a director or auditor, with the title of adviser, counselor, consultant or other, actually participates in the management of the company by attending board of directors' meetings or by handling other measures.

A person having only the title of division manager, department manager, section manager or supervisor is an employee, not an "officer".

Further, the restriction on interlocking directors will not apply if an officer or an employee of a company completes retirement procedures and is then appointed as an officer of another company.

² A company of which another company holds more than 50% of its total shareholders' voting rights.

³ Companies of which the same company holds more than 50% of their total shareholders' voting rights.

2.2.2 *Joint Relationships through Interlocking Directorates*

In the following cases, a joint relationship is formed, maintained or strengthened when an officer or an employee of a company serves concurrently as an officer of another company and that interlocking is within the scope of the review of business combinations:

- The officers or employees of one company comprise a majority of the total number of officers of another company; and
- Interlocking directorates hold the rights of representation of both companies.

Excluding item 16 above, the following items will be taken into consideration to determine whether a joint relationship is formed, maintained or strengthened:

- Whether there is an interlocking directorate formed by the full-time or representative directors;
- The ratio of officers or employees of one of the interlocking companies to the total number of officers of one of the other interlocking companies;
- Mutual holding of voting rights' conditions between the interlocking companies; and
- The trading relationships (including financial relationships), business alliance and other relationships between the interlocking companies.

2.2.3 *Scope of Joint Relationships*

When a joint relationship is formed, maintained or strengthened between interlocking companies through interlocking directorates, a joint relationship is formed, maintained and strengthened between the companies, including those companies who already have a joint relationship with the interlocking companies.

2.2.4 *Interlocking Directorates which are not within the Scope of the Review of Business Combinations*

In cases such as those following below, a joint relationship is not formed, maintained or strengthened so that in general it is not within the scope of the review of business combinations:

- Only those persons who do not have the right of representation serve concurrently as officers, and in either of the interlocking companies the ratio of officers or employees of the other company to the total number of its officers is 10% or less; and
- Only those persons other than full-time officers serve concurrently in companies with 10% voting rights holding ratios or less, and in either of the interlocking companies the ratio of officers or employees of the other company to the total number of its officers is 25% or less.

In the cases of items (a) and (b) below, a joint relationship is not formed or strengthened so that in general it is not within the scope of the review of business combinations. In addition, even in the cases of items (c) to (f) below, a joint relationship is not formed or strengthened so that in general most of them are not considered within the scope of the review of business combinations. However, in a case in which a joint relationship is formed or strengthened with other shareholders, such a joint relationship is subject to the review of business combinations.

- a) Interlocking directorates between a company and its subsidiary;

- b) Interlocking directorates between sister companies;
- c) Interlocking directorates between a company and a subsidiary of the company's subsidiary;
- d) Interlocking directorates between a company and a subsidiary of the company's sister company;
- e) Interlocking directorates between a company and a subsidiary whose total shareholders' voting rights are held, by more than 50%, by the company and its sister company; and
- f) Interlocking directorates between companies where two or more sister companies of an identical company hold jointly more than 50% of the total shareholders' voting rights of both interlocked companies, respectively.

3. Cases

Some example cases are provided below where the JFTC regulated shareholding and interlocking directorates through its legal decision or pointed out problems on minority shareholding and/or interlocking directorates in response to consultations from companies. These cases are rare.

3.1 Case where Shareholding and Interlocking Directorates were Regulated by a Legal Decision: Case against Hiroshima Electric Railway Co., Ltd. and its Executives and Employees (Consent Decision made in 1972)

3.1.1 Facts

Hiroshima Electric Railway was operating train, tram, bus and other businesses in and around Hiroshima City, and persons A, B, C and D were its executives or an employee. Hiroshima Bus was operating bus and other businesses there.

Eight other companies were operating bus businesses in Hiroshima City, but most of their routes were located outside the City and were suburban routes. On the other hand, passenger transportation by tram and bus in Hiroshima City was being provided largely through both Hiroshima Electric Railway's tram rails and bus routes and Hiroshima Bus's bus routes, and they were competing in major areas.

Hiroshima Bus's three executives asked Hiroshima Electric Railway to acquire Hiroshima Bus's shares that were owned by these executives. In response to this offer, Hiroshima Electric Railway acquired a total of 110 thousand shares, which accounted for approximately 85% of all 130 thousand issued shares.

In addition, persons A, B, C and D were selected as board members or an auditor at a Hiroshima Bus shareholders meeting, and they acceded to these posts while maintaining executive or employee posts in Hiroshima Electric Railway. The total number of board members and an auditor within Hiroshima Bus was five and one, respectively.

3.1.2 Application of Provisions

Conduct by Hiroshima Electric Railway and persons A, B, C and D would substantially restrain competition in the field of passenger transportation by tram and bus in the major areas of Hiroshima City. Hiroshima Electric Railway violated Article 10-(1) of the AMA, and persons A, B, C and D violated Article 13-(1) of the Act.

3.1.3 Remedies

- Hiroshima Electric Railway was ordered to sell 85 thousand shares of Hiroshima Bus out of 110 shares within seven days after the consent decision came into effect.
- Persons A, B, C and D were ordered to resign as board members or an auditor of Hiroshima Bus within twenty days after the consent decision came into effect.

3.2 Cases where Problems on Minority Shareholding and/or Interlocking Directorates were Pointed Out in Response to Consultations from Companies

3.2.1 Acquisition of the Shares of JSAT Corp. by NTT Communications Corp. (FY 2000)

NTT Communications was a dominant company dealing in private line services using ground networks. JSAT was a satellite communications provider. NTT Communications handed over its two satellites to JSAT and made an 18.6% investment for JSAT.

The JFTC pointed out to the parties that their conduct would enhance JSAT's total business capability and might substantially restrain competition in the field of domestic private line services using satellites.

In response, the parties reported that they would take the following measures:

- NTT Communications and JSAT would trade with each other under the same fair and appropriate conditions as those with other satellite communications providers;
- They would not jointly conduct material procurement, so that JSAT could not use NTT Communications' buying power;
- NTT Communications would not support JSAT through its unfair use of NTT Communications' selling power; and
- They would not tie up their advertisements. In addition, when JSAT made advertisements, NTT Communications would not support JSAT by using NTT Communications' advertising power, for example with NTT Communications' logo.

The JFTC judged that the parties' conduct would not substantially restrain competition in this particular field of trade if these measures were really carried out.

3.2.2 Dispatch of Board Members to Company B by Company A (FY 1997)

Company A was an influential manufacturer and distributor of product X. Company B was operating the same business as Company A. Company A dispatched two board members to Company B as the board members of Company B in order to restructure and stabilize Company B, whose business conditions had worsened due to intensive competition. Company A also owned approximately 30% of all issued shares of Company B and was the second largest shareholder.

The JFTC pointed out to the parties that Company A's conduct had formed a joint relationship between the two companies and might substantially restrain competition in the field of the production and distribution of product X.

In response, the parties reported that they would refrain from having the interlocking directorates and Company A would hold less than 25% of all issued shares of Company B.

KOREA

1. How are minority shareholdings handled in your merger control regime? In which cases does the acquisition of a minority shareholding trigger the requirements for a merger notification and review under your merger rules?

When a company having more than 100 billion won in total assets or turnover becomes to hold 20 percent or more (15 percent for a listed corporation) of the total number of stocks (excluding non-voting stocks pursuant to Article 370 of the Commercial Act) issued by a target company whose total asset or turnover exceeds 20 billion won, the company must notify the merger to the KFTC. (Article 12 (1) of the Monopoly Regulation and Fair Trade Act)

Upon a notification, the KFTC first determines whether acquisition in question creates any control over a target company. The KFTC sees that the acquisition creates a control over the target company, 1.) when an acquiring company holds 50% or more of the shares of a target company or 2.) when an acquiring company is in a position to exert substantial influence on the overall management of a target company considering distribution of shares, debtor-creditor relationship and supply of raw materials. (the Criteria of Merger Review V. M&A determining a creation of control relationship)

If the acquisition in question is found not to create controlling relationship, the KFTC presumes the merger to have no anti-competitive effect in principle and handles the case rapidly by applying a summary review procedure. (the Criteria of Merger Review III. for Merger Subject to Summary Review)

2. In your enforcement practice, do you distinguish between minority shareholdings representing a passive financial investment (i.e., no active participation or representation in the board) from minority shareholdings that allow some form of control (joint, sole or negative) on the target? If yes, how do you deal with these different situations?

In case of financial institutions specialized in venture or property investment through share acquisition such as Small and Medium-sized Enterprise Start-up Investment Companies, New Technology-based Investment companies and Real Estate Investment Trusts, the KFTC regards such share acquisitions as solely for investments and exempts them from merger notification. (Article 12 (3) of the MRFTA)

3. In your enforcement practice, do you have experience with minority shareholdings raising unilateral and/or coordinated effects? Do you have experience with minority shareholdings investigated under your domestic competition rules on restrictive agreements between competitors? Have you investigated dominant firms for holding shares in competing firms? Can you provide examples?

No.

4. Does your jurisdiction have specific legal provisions dealing with interlocking directorates?

In the case an executive or an employee of a large company (with more than two trillion won's total asset or turnover) concurrently serves as another company's director, the company must make a merger notification to the KFTC. (Article 12 (1)-3 of the Monopoly Regulation and Fair Trade Act)

In addition, if a merger through interlocking directorate substantially restricts competition in a given area of trade, the interlocking directorate is prohibited. (Article 7 (2)-2 of the Monopoly Regulation and Fair Trade Act)

5. In your enforcement practice, do you have experience with interlocking directorates raising issues of tacit or explicit collusion? Can you provide examples?

Yes.

As Samick Musical Instruments, a leading piano manufacturer of Korea, notified the KFTC of its acquisition of shares of its rival, Young Chang¹, the KFTC began a review of the merger case. During the review process, the KFTC received complaints that the two companies engaged in a price cartel and other unfair business practices through interlocking directorate and launched investigations apart from the merger review.

More specifically, Samick Musical Instruments acquired about 49 percent of Young Chang's shares in March 2004, after which Samick's executive director and director concurrently served as Young Chang's directors and Samick, in effect, led Young Chang's piano price increase, which resulted in a joint price raise by the two companies in May same year.

After conducting an investigation, the KFTC recognized that the two companies had become economically identical through interlocking directorates and Samick's acquisition of Young Chang's shares from March to September 2004, during which the two jointly raised prices. Accordingly, the KFTC decided to clear the two companies of suspicion.

Meanwhile, in September same year, the KFTC decided that Samick's acquisition of Young Chang's shares constituted an illegal merger with a potential to restrict competition in the Korean piano market and ordered Samick to dispose of the stocks (disapproval of the merger).

6. In your enforcement practice, do you have experience in devising remedies for anticompetitive effects arising from minority shareholdings or interlocking directorates? Can you provide examples? Does your merger control regime have a preference for structural remedies or conduct remedies for these issues?

When a large company's interlocking directorates have the effect of substantially limiting competition in a given area of trade, the KFTC can order resignation or dismissal of the concerned official as a corrective measure. (Article 16 (1)-3 of the Monopoly Regulation and Fair Trade Act)

¹ As the case constituted a post-merger notification, notification took place after Samick's acquisition of Young Chang's shares.

NETHERLANDS

1. Introduction

Where competing companies have links to each other, this may affect competition between these companies. The issue of links between companies is therefore of increasing interest to competition authorities.¹

The issue of minority shareholdings is very topical worldwide these days, as private equity funds buy interests in companies and do not want to stay passive like the traditional shareholders in the past. As these equity funds choose their markets it is likely that they will come to act in the same sector or even the same market in some cases. This new role of equity funds and institutional investors is often accompanied by an active participation or representation in the Board of Directors or Board of Commissioners. Increasing attention is being paid to the effects of this development with regard to competition. The Netherlands Competition Authority (NMa) welcomes the initiative to discuss this topic in Working party N. 3 on Co-operation and Enforcement.

After a general introduction outlining links between companies, this paper will go into the results of a survey held on the existence of interlocking directorates in some sectors of the economy. Finally, we will present our approach towards minority shareholding and interlocking directorates with respect to mergers and cartels.

Doing so may give rise to the idea that the NMa has ample experience in handling these situations both in merger control and cartel enforcement practice. With respect to the former we have some experience. However, when it comes to cartel enforcement our experience is limited. This means that in that respect our view will reflect a theoretical approach.

2. What is meant by links between companies?

Links between companies in a sector refer to various types of relationships – links between competitors (structural links) – within the sector. From the point of view of competition, it is relevant, of course, to distinguish between types of relationships that may be harmful to competition and types that are not. The Competition Act provides numerous starting points for discussion. Within the context of merger control, section 26 of the Competition Act understands ‘control’ to mean the possibility of exercising a decisive influence on the activities of a company on the grounds of *de facto* or legal circumstances.

Influence may be understood as something which exists in various gradations. After all, a company may have more or less influence on the commercial and strategic policy of another company. Control, however, does not come in gradations. A company either has or does not have control. As soon as

¹ NMa's *Financial Sector Monitor (FSM) 2003* already discusses an aspect of this, namely minority shareholdings. See also FSM 2004.

influence is exercised to such an extent that it proves decisive, control exists. Decisive influence may arise from both legal and *de facto* circumstances.²

Links between companies include the exercising of influence of various types between companies, varying from moderate influence to decisive influence (control). In literature, the following types of influence are distinguished: a passive (financial) minority shareholding, interlocking directorates and (informal) consultative structures. These types of links potentially have effects which restrict competition. In the decision-making practice of NMa, the first two types mainly occur. The potentially restrictive effect on competition of these types of links will be discussed further below.

3. Passive minority shareholdings

Where a company has a minority shareholding in other companies active on the same markets, profits or losses generated by these shareholdings are directly related to the profits or losses of these competitors. Customers lost due to a price increase may turn to competitors and the additional profit which the competitor makes returns to the company's own coffers through the shareholding. Through the same mechanism, attracting customers by means of a price reduction is done at one's own expense. Such minority shareholdings consequently have a strategic effect. In other words, they influence the company's strategy for maximising its profits, because of its expectations with regard to developments in the market and the behaviour of competitors.

The first articles to analyse the above effects of minority shareholdings on the basis of models were those of Reynolds en Snapp.³ Building on earlier work by Bresnahan en Salop,⁴ O'Brien and Salop⁵ developed an analytical framework to show how the effects of financial interests on competition through minority shareholdings can be distinguished from effects resulting from influence.⁶ The models used are

² For examples of control based on *de facto* decisive influence see, for instance, the decision of the Director-General of NMa of 13 December 2000 in Case No. 2169: ABP – VIP, the decision of the Director-General of NMa of 15 August 2002 in Case No. 3040: NPL – SUFA and the decision of the Director-General of NMa of 20 August 1998 in Case No. 768: VNU – Geomatic in which a minority of shares nevertheless resulted in control, according to NMa.

³ R. Reynolds and B. Snapp, 'The Competitive Effects of Partial Equity Interests and Joint Ventures,' *International Journal of Industrial Organization* 1986, 4, pp. 141-153.

⁴ T. Bresnahan and S. Salop, 'Quantifying the Competitive Effects of Horizontal Joint-Ventures among Competitors', *International Journal of Industrial Organization*, 1986, 4, pp. 155-176.

⁵ D. O'Brien and S. Salop, 'Competitive Effects of Partial Ownership: Financial Interest and Corporate Control,' *Antitrust Law Journal*, 2000, 67, pp. 559-614.

⁶ This analytical framework is criticised by J. Dubrow, 'Challenging the Economic Incentives Analysis of Competitive Effects in Acquisition of Passive Minority Equity Interest', *Antitrust Law Journal*, 2001, Vol. 69, pp. 113-145, to which D. O'Brien and S. Salop subsequently replied in: 'The Competitive Effects of Passive Minority Equity Interests: Reply', *Antitrust Law Journal*, 2001, Vol. 69, pp. 611-625. In parallel, economic analyses were made by D. Flath, 'Horizontal Shareholding Interlocks', *Managerial and Decision Economics*, 1992, Vol. 13, pp. 75-77; C. Maxwell and J. Parsons, *A Paradox in Measuring Corporate Control*, 1999, <http://ssrn.com/abstract=234428>; for the Dutch financial sector see E. Dietzenbacher, B. Smit and B. Volkerink, 'Horizontal Integration in the Dutch Financial Sector', *International Journal of Industrial Organization*, 2000, Vol. 18, pp. 1223-1242; G. Vega and J. Campos, *Concentration Measurement under Cross-ownership: An Application to Spanish Electricity Sector*, Working paper 2002-06, University of Las Palmas, 2002. In 2003 the Scandinavian competition authorities jointly made use of insights from the literature and applied these to the Scandinavian electricity market.

usually based on a Cournot assumption.⁷ In Cournot models, it is assumed that market parties respond to each other through adjustments to the quantity supplied. An important benchmark for competition in a Cournot model is the HHI, which expresses the concentration of a particular market.⁸ The effect on competition of a minority shareholding in a competitor may be estimated using a modified HHI.⁹ The issue of minority shareholdings played a role in the case Sdu – Ten Hagen & Stam, which will be presented below.

4. Interlocking directorates

A company may exercise influence on the commercial and strategic policy of a competitor in various ways without the existence of a hardcore cartel. This may occur because interlocking directorates (personal links at management level) exist between competitors or because competitors participate in the same consultative bodies.

In 2004, the NMa analysed the existence of (direct) interlocks¹⁰ in a number of sectors of the Dutch economy: the financial sector, the construction sector, the energy sector and interlocks between firms that are listed on the Amsterdam stock exchange (AEX). The results are presented in table 1.

⁷ Using a Bertrand premise also makes it possible to quantify the effect of a minority shareholding in the form of an amended Price Pressure Index (PPI). By doing so, the effect on individual companies can be represented (in contrast to the market-wide HHI). The outcome of the analysis, however, points in the same direction as that is based on the Cournot premise. A disadvantage of using the PPI compared to the HHI is the greater quantity of data required (in particular, estimates of marginal costs).

⁸ HHI stands for the Herfindahl-Hirschmann Index, the sum of the squares of the market shares.

⁹ Assume that four companies are active on a certain market, each with a market share of 25%. In this case, the HHI is $4 \times 25^2 = 2500$. After a merger between companies 1 and 2, the HHI would amount to $50^2 + 2 \times 25^2 = 3750$. The effect of a minority shareholding can be analysed against this background. Assume that company 1 acquires a minority shareholding of 25% in company 2. This results in a modified HHI of 2656, the equivalent of an increase equal to 1/8 of a complete merger between companies 1 and 2. In the event of cross-shareholdings in companies 1 and 2, which acquire a minority shareholding of 25% in each other, the modified HHI equals 2917 points, the equivalent of an increase of one third of the effect of a merger. The European Commission therefore asserts that the effect of minority shareholdings is stronger in the case of cross-shareholdings than in the case of single minority shareholdings.⁹ Furthermore, if the four companies hold 25% of each other's shares, it follows from the Cournot model that the four companies together produce the monopoly quantity resulting in a modified HHI of 10,000.

¹⁰ Direct interlocks mean interlocks at the level of the firms. Indirect interlocks occur more commonly found in the Dutch economy (e.g. construction: 498 indirect interlocks). These include all sorts of structures, for instance consultative bodies, but also membership of cultural institutions.

Table 1: Direct interlocks in a number of sectors in the Dutch economy¹¹

Sector	Financial	Construction	Energy	AEX
Number of firms considered	4	57	29	24
Number of direct interlocks, involving:	1	26	7	103
Board of Directors – Board of Directors	0	6	0	0
Board of Directors – Supervisory Board	0	2	5	20
Supervisory Board – Supervisory Board	1	18	2	83

Source: Reach database (2004)

The NMa did not find reason to act only on the basis of the above figures. The most serious form of direct interlocks – two firms that share a Director – is relatively uncommon. The obvious exception is construction. This sector has been heavily investigated (and fined) by the NMa, without the need to go explicitly into the subject of interlocking directorates. Table 1 provides a good illustration of the fact that the interests of some of the construction firms were closely knit, at least in 2004. The relatively high number of interlocks at the level of AEX firms is in itself neither surprising nor alarming, since most of the firms are not competing in the same relevant market.

5. Competition enforcement and links between companies

5.1 Merger control

Business are under the obligation to notify a merger if the concentration results in (legal or *de facto*) control. The NMa does not have to be notified of every minority shareholding in a competing company under current merger control regulation. The decision-making practice of the Commission, however, reveals two situations where types of linkages which do not result in control may nevertheless play a role in merger control.

Minority shareholdings may be included in the analysis of a merger case if the minority shareholding has the purpose of financing a (notifiable) transaction between competitors, for instance the acquisition of part of the company. In the case of Telepiu,¹² the Commission deemed itself competent to assess the effect of the minority shareholding because the acquisition of the minority shareholding was inseparably linked to the transaction. In the case of Sdu – Ten Hagen & Stam,¹³ the Director-General of NMa also deemed himself competent to assess the effect on competition of the minority shareholding which Wolters-Kluwer acquired in Sdu Uitgevers to finance the sale of Ten Hagen & Stam by Wolters Kluwer to Sdu. In this case, the NMa investigated, for instance, whether the minority shareholding of slightly less than 25%, which Wolters Kluwer held in its competitor Sdu, and the possible appointment by Wolters Kluwer of a supervisory director to Sdu, had the effect of restricting competition. The NMa distinguished between three potential problems: (i) a reduction in the incentive to compete with each other, (ii) the creation of opportunities to exchange information and (iii) restrictions on opportunities to enter the market for legal

¹¹ In the Netherlands, a two-tier system of corporate governance exists. The executive directors make up a separate body referred to as “Raad van Bestuur” (Board of Directors), while the “Raad van Commissarissen” consists of non-executive directors (Supervisory Board).

¹² See the Commission Decision of 2 April 2004 in Case No. 2876: Newscorp – Telepiu.

¹³ See the decision of the Director-General of NMa of 13 September 2004 in Case No. 4100: Sdu – Ten Hagen & Stam.

publications. After submitting a supplement to the notification, the parties stated that the relationship established between Wolters Kluwer and Sdu by means of the minority shareholding was temporary, was not of a long lasting nature and would no longer exist after the beginning of 2008. Furthermore, the parties set out in a contract that the supervisory director, who might possibly be linked to Wolters Kluwer, would not have sensitive competitive information at his disposal. On the grounds of the above, the Director-General of NMa decided that competition would not be obstructed in any significant way by the minority shareholding.

5.2 *Prohibition of cartels*

According to Struijlaart,¹⁴ it may be deduced from the Philip Morris¹⁵ ruling that the European Court of Justice concluded that an agreement to acquire a minority shareholding may infringe the prohibition of cartels under EC competition law (Article 81 of the EC Treaty) if it is part of a long-term plan to acquire control of the company or if it results in a restriction or distortion of competition in relation to the market structure and economic context.

As the Competition Act in the Netherlands lays down a general prohibition on anti-competitive agreements, concerted practices and decisions of associations of undertakings, the NMa will have to use this general prohibition as a starting point when assessing a situation of minority shareholders. A situation of competition will require that competitors make business decisions independent from each other. The question to address is whether a situation of minority shareholding or interlocking directorates will lead to non-independent decision-making that has anti-competitive effects on the Dutch market.

The fact in itself that a company has a minority share and/ or an interlocking directorate in a competing company is not enough to warrant a conclusion of non-independent decision-making. There must be a moment of information-sharing related to the shareholder relation or interlocking directorate that will influence the independent decision-making.

Of course, in cases of passive shareholders the chance that sensitive information will reach the competitor will be less than in cases of active shareholders or shareholders with some form of representation in the Board.

Interlocking directorates in the Netherlands mainly occur with respect to the Supervisory Board. In such instances, there is a risk that strategic information received in the company will be used, deliberately or unconsciously, when influencing the decision-making in the other company. From an enforcement perspective, it will be hard to prove the use of the relevant information in the decision-making process.

The survey mentioned before shows that interlocking directorates in the construction industry even appeared between Boards of Directors of competing companies. Particularly in the construction industry the NMa was able to put an end to massive/ nation-wide/ extensive cartels without having to go into these interlocking directorates. Nevertheless interlocking directorates will be a point of attention (like many others) when assessing possible cartel cases.

The NMa has also on one occasion made a brief reference to links (in this case, minority shareholdings) within the framework of section 6 of the Competition Act. In the case of ACS,¹⁶ the issue

¹⁴ See R.A. Struijlaart, *op. cit.*, pp. 10-16, for a more detailed discussion of the Philip Morris ruling.

¹⁵ See combined cases 142 and 156/84, *ECR* (1987), 4487 (BAT and Reynolds/Commission; 'Phillip Morris').

¹⁶ See the decision of the Director-General of NMa of 29 July 2004 in Case No. 318: ACS.

was the conversion of a joint venture into a subsidiary of a company in which two of its competitors would have a minority shareholding. In the decision on administrative appeal, the Director-General of NMA concluded that a licence for exemption was not required because ACS was not structured in this way with the purpose of allowing one of the companies to influence the behaviour of the other companies. Furthermore, it proved impossible to conclude that ACS's structure compelled the other shareholders to take each of those interests into account in determining their commercial policy or that their participation provided incentives which resulted in an appreciable restriction on competition.

6. Conclusion

Links between companies may result in restrictions on competition. In a recent merger case, NMA has analysed this. Little experience has been gained with respect to cartel cases. Needless to say, however, competition authorities must continue monitoring 'links between companies' closely with a view to possible risks and, where appropriate, it should take these into account when assessing cases.

NORWAY

1. Introduction

From economic theory, there is reason to believe that minority shareholding may have a detrimental effect on competition.¹ Any rational company will pursue a profit maximizing goal. If company A (the acquiring company) owns a share in company B (the acquisition candidate), part of the profit earned by company B will accrue to company A. Thus, it is in the interest of company A that company B earns as high a profit as possible. Company A will therefore emphasize the profit of company B in its objective function. If these companies are competitors in the same market, company A's minority shareholding in company B may affect competition in the market. Company A knows that by competing aggressively, it will reduce company B's profit, which in turn reduces the profitability of company A's share in company B. *Ceteris paribus*, minority shareholding may lead to reduced competition in such a situation.

Even though minority shareholding not necessarily implies a transfer of control between the involved companies, it may provide the acquiring company with some *influence* over the acquisition candidate. In particular, such influence may be obtained if the acquisition implies that the acquiring company earns one or more representatives in the acquisition candidate's board of directors. In such cases the minority shareholding could mean that the acquiring company gets direct influence on the other company's production and pricing decisions. Minority shareholdings including board positions obviously increase the possibility of negative competitive effects in the relevant market, as compared to a situation without board positions.

The abovementioned adverse effect on competition arising from minority shareholding refers to a situation in which the ownership is a *one-way relationship*, i.e. one of the companies has a *direct* financial ownership stake in another company. This leads to a *unilateral* effect on competition. Similar unilateral effects may also be caused by *indirect* ownership, e.g. when company A owns a part of company B, which in turn owns a part of company C (which also operates in the same market). Through its ownership in company B, company A then has an indirect ownership stake in company C. This ownership relation implies that company C's profit will indirectly be included in company A's objective function as company B's profit depends on company C' profit. Company B's acquisition of a share in company C will then affect not only its own competitive behavior, but also the behavior of company A. Hence it follows that a minority shareholding through indirect ownership may have a detrimental effect on competition.

Ownership relations may also involve a two-way relationship, e.g. where company A and company B have equity participation in each other. This is usually referred to as cross-ownership. While a one-way relationship between the two companies would mean that company B makes its price and quantity decisions without regard to its effect on company A, cross-ownership implies that also company B puts a positive weight on company A's profit function when making its decisions. Cross-ownership has the potential additional effect that it may facilitate information sharing which could give rise to coordinated effects. As for one-way ownership, cross-ownership including board positions would increase the

¹ For a recent contribution with extensive bibliographic references on the subject, see Chapelle, A. and A Szafarz (2002) "*Ownership and control: Dissecting the pyramid*", Working Paper WP-CEB 03/002, Universite Libre de Bruxelles, Bruxelles.

possibility for adverse competitive effects. Situations in which one or more companies have one or more members of their respective boards of directors in common, so-called interlocking directorates, may facilitate information sharing and lead to coordinated effects. Interlocking directorates will often arise as a result of cross-ownership.

As presented below, the Norwegian Competition Act specifically targets minority shareholding in its merger control. Board positions and interlocking directorates are possible consequences of minority shareholding that increase the possibility that such ownership relations may cause negative effects on competition. Hence, minority shareholding may in different ways lead to unilateral or bilateral influence between companies. The eventual effect on competition will be assessed by the competition authority in its evaluation of the particular acquisition.

In section 2 below, we describe the way the Norwegian Competition Act deals with minority shareholding. Section 3 provides some practical examples of the Norwegian Competition Authority's (NCA) application of the rules on the Norwegian electricity market.

2. The Norwegian Competition Act and minority shareholding

The legal regime for competition policy in Norway was subject to revision in 2004.² The Act on competition between undertakings and control of concentrations (Competition Act 2004)³ replaced the Act relating to competition in commercial activity (Competition Act 1993).⁴

With the revision in 2004, the Norwegian competition law regime was harmonized with the conduct rules in the European Union treaty and the EEA Agreement. The Competition Act 2004 did, however, not *fully* harmonize the Norwegian competition rules with the EU/EEA rules. Even though the Norwegian provisions on concentrations have many similarities with the rules embedded in Council Regulation (EC) No. 139/2004 on the control of concentrations (the Merger Regulation), the Norwegian rules differ from the Merger Regulation in several respects.⁵ Amongst these is the specific inclusion of minority shareholdings under the merger control.

Section 16 paragraph 1 of the Competition Act 2004 states as follows:

“The Competition Authority shall intervene against a concentration if the Competition Authority finds that it will create or strengthen a significant restriction of competition, contrary to the purpose of the act”.

The provision establishes two main elements for the assessment of competition. Firstly, the concentration must create or strengthen a significant restriction of competition. Secondly, the competition restriction must be contrary to the purpose of the Act.

² A description (text in Norwegian) of the new Norwegian Competition Act and some of its peculiarities as compared to the EU competition law is given in Nese G., and R. Solberg (2006): *“Den norske konkurranseloven – noen særegenheter”* in The Finnish Competition Authority's Competition Law Yearbook 2006 (“2006 Kilpailuoikeudellinen Vuosikirja”).

³ Act on competition between undertakings and control of concentrations of 5th March 2004 No. 12 (Competition Act 2004).

⁴ Act relating to competition in commercial activity of 11th June 1993 No. 65 (Competition Act 1993).

⁵ See *inter alia* NOU 2003:12 part 5.4.2.

The purpose of the Act appears from Section 1:

“The purpose of the Act is to further competition and thereby contribute to the efficient utilization of society’s resources.

When applying this Act, special consideration shall be given to the interests of consumers”.

This condition implies that the harmful effects of the concentration must be weighed against the positive effects.

The Competition Act 1993 provided the NCA with authority to intervene against minority shareholding. It appears from the legislative background of the Competition Act 2004, that the majority of a committee appointed by the Norwegian Government to evaluate Norwegian competition policy and make suggestions on the new Competition Act wanted to remove the part concerning minority shareholding.⁶ The majority argued that the potential adverse effect on competition from minority shareholding is different than where an acquisition results in a company gaining control of a competitor. The latter implies a structural change, while the former is a result of the companies’ conduct. Minority shareholding should therefore be handled by rules of conduct and not through merger control, the majority of the committee claimed. A minority of the committee voted against this proposition, suggesting continuing to include minority shareholding as part of the Competition Authority’s control with concentrations.

When implementing the new Act, the Ministry decided against the proposition of the majority of the committee.⁷ According to the Ministry, both economic theory and experience from practicing the Competition Act 1993 indicated a need for the Competition Authority to continue to have a possibility to intervene against minority shareholding. In addition, the Ministry wanted to cover the possibility that competition may be harmed through a series of minor acquisitions continuously increasing the influence of the acquiring company on the acquisition candidate. This is formalized in Section 16 paragraph 2 of the Competition Act 2004:

“The Competition Authority shall, on the same conditions as set forth in the first paragraph, intervene against an acquisition of holdings in an undertaking even if the acquisition will not lead to control of that undertaking. If an acquisition has been made through successive purchases, the Competition Authority may intervene against the transactions that have taken place within two years from the date of the most recent acquisition”.

Coordinated effects caused by cross-ownership or interlocking directorates are not mentioned specifically in the Norwegian Competition Act. However, if such effects arise as a consequence of acquisitions of minority shares, it will be covered by Section 16 paragraph 2 of the Competition Act, and potential coordinated effects will be included as a part of the Competition Authority’s evaluation of the acquisition’s competitive effects.

3. Dealing with minority shareholding in the Norwegian electricity market

3.1 Ownership relations in the Norwegian electricity market

Since the new Competition Act entered into force 1 May 2004, the NCA’s main focus regarding minority shareholding has been on the electricity market.

⁶ See NOU 2003:12 part 5.4.3.

⁷ See Ot.prp. no. 6 part 7.2.4

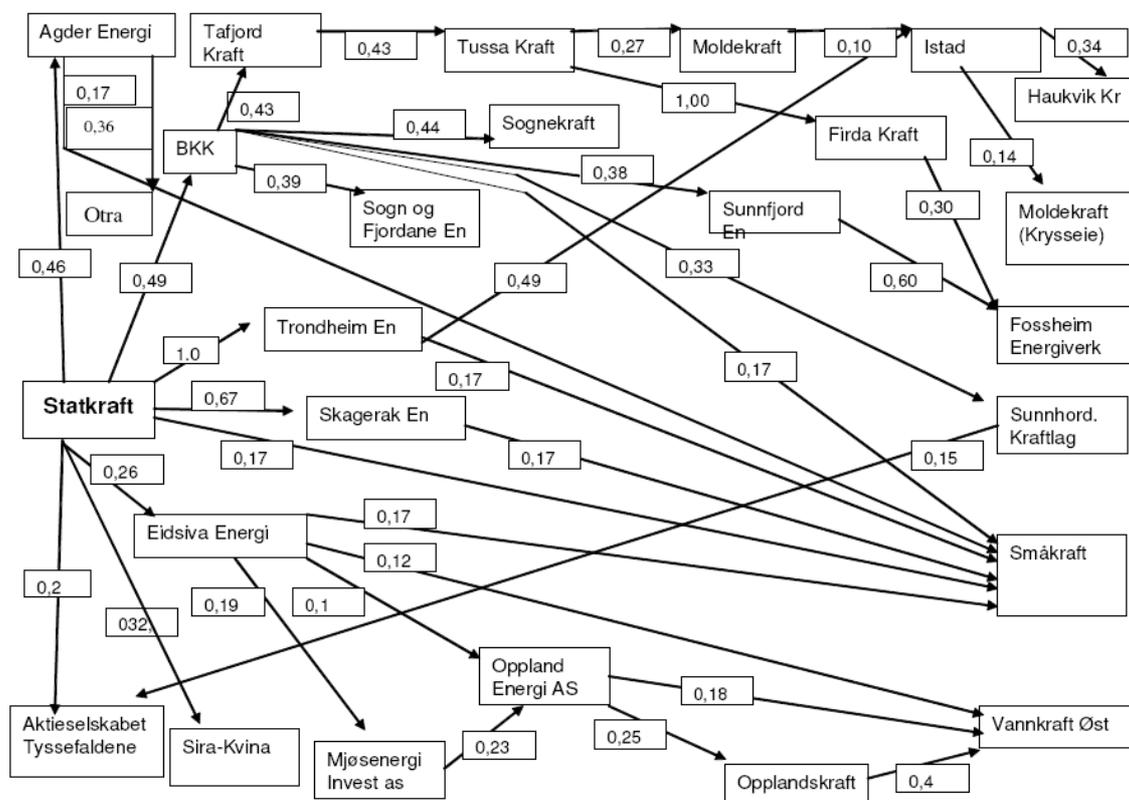
The Norwegian electricity market was liberalized already in 1991 and is today a part of the integrated Nordic electricity market. Norwegian electricity production is mainly based on hydro power.

During the recent years, the ownership structure in the Norwegian electricity market has changed significantly. A number of electricity producers that used to be owned by municipalities around the country have been turned into limited liability companies and ownership shares have been sold. There has also been a development towards larger regional companies through mergers and acquisitions. Statkraft, a 100 per cent state-owned company, has been leading this development by acquiring shares in a number of Norwegian companies.⁸ These mergers and acquisitions have reduced the number of independent players in the Norwegian electricity market.

Today, the Norwegian electricity market is characterized by high concentration of ownership and extensive direct and indirect ownership relations (minority shareholding, cross-ownership and joint ownership of production plants) between different companies. Statkraft is the largest Norwegian electricity producer and has direct or indirect ownership shares in a great number of companies. Statkraft's ownership is illustrated in figure 1 below. Under section 3.4 we will present a study that discusses how large the market share of Statkraft is depending on whether one adjusts for direct and indirect ownership or not.

⁸ See e.g. von der Fehr, N.H, E.S. Amundsen and L. Bergman (2005): "*The Nordic Market: Signs of Stress?*", Energy Journal (Special Issue: European Electricity Liberalization), 99-126.

Figure 1 Direct and indirect financial ownership relations of Statkraft in the Norwegian power market⁹



The ownership concentration can be particularly high in certain areas. Due to so-called bottlenecks in the transmission grid the Nordic electricity market can be split into separate price areas. This limits the number of suppliers able to supply electricity in a given area and could thereby restrict the competition in the market.

Both direct and indirect ownership implies a reallocation of control of production capacity owned by a company. The NCA has been worried that the extent of such ownership relations together with the bottlenecks in the transmission grid may lead to reduced competition and has therefore paid special attention to the electricity sector.¹⁰

⁹ Source: Singh, Balbir & Skjeret, Frode (2006) "Ownership relations and cooperation in the Norwegian power market", SNF Report No. 35/06, Institute for Research in Economics and Business Administration (SNF).

¹⁰ Several authors have investigated the competitive effects of mergers and acquisitions in the Nordic electricity market. See e.g. Amundsen and Bergman (2002): "Will Cross-Ownership Reestablish Market Power in the Nordic Power Market", The Energy Journal no. 23, 73-95. These authors conclude that partial ownership relations between electricity producers in the Nordic market tend to increase horizontal market power and thus also the market price of electricity.

3.2 *Statkraft ordered to sell minority share in E-CO Vannkraft AS*

In March 2002, the NCA prohibited Statkraft from acquiring 45.525 per cent of the shares in the power producer Agder Energi. In addition to the acquisition of shares, the parties had entered a share purchase agreement, a stockholder agreement and an industrial cooperation agreement. On basis of the size of the acquisition together with the agreements that the parties had entered into and the fact that Statkraft was the only stockholder with a considerable insight into the market conditions of the power market, the NCA concluded that Statkraft would gain a significant influence on Agder Energi. As a result, the companies would be able to co-ordinate their operations on the market after the acquisition of shares. Thus, this intervention was based on Statkraft gaining control over Agder Energi.

The NCA's intervention in Statkraft's acquisition of shares in Agder Energi was appealed to the Ministry of Labour and Government Administration. In October 2002, the Ministry gave Statkraft permission to implement the purchase of Agder Energi, albeit subject to stringent conditions. One of the conditions was that Statkraft was required to sell its 20 per cent stake in Norway's second largest power producer, E-CO Vannkraft AS (formerly Oslo Energi) by 31st December 2004. This minority share was considered to restrict competition in the market. Another condition was that Statkraft had to resign from the board of directors in E-CO Vannkraft AS from the time of the implementation of the acquisition of Agder Energi, and that the contact between Statkraft and E-CO Vannkraft AS should be limited to what is natural for a financial owner.

3.3 *Statkraft ordered to notify the NCA about all its acquisitions*

To enable the NCA to effectively supervise the structural developments in the electricity market, Statkraft, Agder Energi, Skagerak Energi and BKK (members of the Statkraft alliance) were in January 2003 ordered to notify all acquisitions of power plants in southern Norway. After the Ministry in February 2003 decided to uphold the NCA's intervention in the case of Trondheim Energiverk¹¹, Statkraft was in May 2003 ordered to also notify all acquisitions of power plants in mid and northern Norway.

This obligation to notify acquisitions was given based *inter alia* on the NCA's understanding of the Ministry's decisions in the cases of Agder Energi and Trondheim Energiverk. The decision provided a signal on how large the Statkraft alliance can become in the different Norwegian regions. In the view of the NCA, the Ministry's decision does not draw an absolute limit for further acquisitions by the members of the Statkraft alliance. However, every acquisition should be evaluated based on the Competition Act.

Therefore, the NCA ordered the abovementioned members of the Statkraft alliance to notify all acquisitions of power plants, including all acquisitions of minority shares. This order also applied to companies in which Statkraft, Agder Energi, Skagerak Energi and BKK had a direct or indirect ownership share of at least 20 per cent. The order to notify all acquisitions in southern, mid and northern Norway given by the NCA in 2003 expired 31st December 2007. Hence, the NCA has recently evaluated whether the order should be renewed or not. The NCA concluded that due to the continuing high ownership concentration of Statkraft and continuance of the special characteristics of the power market there is still reason to order Statkraft, Agder Energi, Skagerak Energi and BKK to notify all their concentrations, including concentrations leading to minority shareholding that not will lead to control and minor concentrations below the threshold limits for the ordinary requirement to notify concentrations. The renewed order is valid from 1st January 2008.

¹¹ In July 2002 the NCA intervened against Statkraft's acquisition of 100 per cent of the shares in Trondheim Energiverk, its largest competitor in central and northern Norway. Statkraft was ordered to dispose of Trondheim Energiverk's production operations or sell off other power production in the area. This decision was appealed to the Ministry of Labour and Government Administration.

3.4 Study commissioned by the NCA – “Ownership relations and cooperation in the Norwegian power market”

In 2006 the NCA commissioned a study from the Institute for Research in Economics and Business Administration (SNF) to outline the extent and nature of cooperation among electricity producers in Norway.¹² The report concerns ownership relations as well as different forms of cooperation between electricity producers. The study also includes a data set and a software tool that the NCA can use to conduct detailed analysis of the ownership concentration in the electricity market.

In the report adjustments are made assuming that capacity controlled by a company is in proportion to its actual and indirect financial ownership in the other companies. The study shows that adjusting for such direct and indirect financial ownership affects market shares and hence concentration to a considerable extent. As an example, assuming that control rights are proportional to ownership interests, the share of Statkraft – the major generator – in total annual energy production capacity is 35 888 GWh which gives Statkraft a market share of 30.2 per cent. When adjusted for direct and indirect ownership the share increases to 50 386 GWh, an increase in total annual energy production capacity of about 40.4 per cent, which corresponds to a market share of 42.4 per cent. Similarly, the concentration index HHI¹³ is almost doubled, to a value of 1 997, when corrected for financial ownership.

The study shows that other correction methods produce even higher concentration estimates. Such other alternatives for assessing control issues is to distinguish between the voting share of an owner as given by its financial ownership share and the owner’s voting power. Various voting power indices can be used to analyse the voting power of a given shareholder. Two common indices given in the report that are often computed in this context are Shapley Shubik Index (SSI) and the Banzhaf Index (BI). According to the study, for scenarios where the adjustments due to financial ownership are made assuming that capacity controlled by a company is in proportion to its voting power as reflected by SSI and BI in other companies gives an HHI of respectively 2 371 or 2 457, significantly higher than the HHI of 1 997 when only corrected for financial ownership.

The results also show that concentration differs between regions. While the HHI for the country as a whole (taking into account direct and indirect financial ownership) equals 1 997, the corresponding numbers are 1 783 and 3 116 for Southern and Northern Norway respectively.

The survey results indicate that many producers are involved in a range of cooperative arrangements, and the trend seems to be growing. Among the reasons given for cooperation were efficiency in operation (e.g. related to management of water-courses) and risk sharing in the development of capital-intensive projects. Membership in water management associations and joint ownership of plants were seen to restrict the commercial freedom of individual generators more often than other forms of cooperation agreements. The main channel for information exchange is through participation on the board of directors and through exchange of investment plans.

All in all, the SNF study confirms results from earlier studies that the Norwegian electricity market is considerably more concentrated than indicated by standard concentration measures.

¹² Singh, Balbir & Skjeret, Frode (2006) “Ownership relations and cooperation in the Norwegian power market”, SNF Report No. 35/06, Institute for Research in Economics and Business Administration (SNF).

¹³ The HHI is used as one possible indicator of market power or the degree of competition in a market. It measures market concentration by adding the squares of the market shares of all firms in the market. The higher the HHI for a specific market, the more output is concentrated within a small number of firms. In general terms, with a HHI below 1 000 the market concentration can be characterized as low, between 1 000 and 1 800 as moderate and above 1 800 as high.

SWEDEN

1. Introduction

Minority shareholdings of companies, including positions on the board, increase the risk of negative effects on competition. This may be the case not only in competing firms but also in related industries that are real or potential suppliers or customers. The effects can arise from the information about the target company's strategies and plans on the market and the influence that may be exercised from the ownership and/or position on the board.

This type of relationship tends generally to be more frequent in small economies for obvious reasons – the number of target companies or persons qualified for positions on companies' boards is more limited than in bigger economies with less concentrated markets.

2. The competition legislation

The Swedish national law does not contain any specific provisions or references to minority shareholdings or interlocking directorates.

Structural remedies, such as divestment of minority shareholdings, may be imposed on acquiring companies in order to solve the competition problems arising from a merger. Or the acquiring company may voluntarily propose such a remedy in order to get a clearance from the competition authority and to avoid court proceedings.

Violations of the prohibition against abuse of a dominant position may also be remedied by imposition of divestments of minority shareholdings. But structural remedies cannot be imposed under Swedish national law for abuses of a dominant position. However, this possibility exists when the Swedish Competition Authority applies article 82 of the EC Treaty.

Even though the Competition Authority has generally had concerns about negative effects on competition stemming from cross-ownership etc, on concentrated markets, there have been few cases investigated under the competition rules. The most recent case, in the nuclear power industry, is dealt with below. In a few merger cases examined by the Authority, the parties have voluntarily committed to disengage from representation in boards in directly, or potentially, competing companies. Even if access to information about competitors does not lead to legal enforcement actions by competition authorities, it may still be a cause for real concern. This was a clear message from contributions at the "Pros&Cons of Information Sharing" seminar arranged by the Authority in Stockholm in November 2006. And this was the reason for the actions taken by the Competition Authority in the case cited here below.

3. Co-ownership in the Swedish nuclear industry

The Competition Authority began in June 2006 investigating alleged infringements of the competition rules in the Swedish electricity market. One of the main issues was minority shareholdings in existing nuclear power stations.

The nuclear power companies in Sweden are jointly owned by two or more international energy companies: Vattenfall (wholly state-owned), E.ON and Fortum.

The joint ownership means that the part-owners decide upon the level of future production, loading and operation etc. In all nuclear power companies the decision process takes place in the same manner.

The investigation shows that up to 2001 planning of production to a certain degree took place through joint meetings between the three major owners mentioned above and representatives from the nuclear power stations. After 2001 the production planning-process changed and the strategic decisions are taken bilaterally between the minority shareholders and the individual nuclear power company. The main reason behind this alternative decision process has been to attain less transparency between the major competitors in the electricity market.

In May 2007 the Competition Authority came to the conclusion that grounds for legal actions against the anti-competitive co-operation that took place before the end of 2001 did not exist as the time frame for intervention had elapsed. At the same time the Authority concluded that the structural links through minority shareholdings still existing in the marketplace were jeopardizing an effective competition amongst the three major providers of electricity. A decision was taken not to take legal action as the companies now applied the bilateral decision process by the power stations. However, the Authority's concerns about co-ownership were presented to the Government, also owner of the biggest power company, Vattenfall.

In its letter to the government the Authority suggested the following steps in order to secure an effective competition:

- The joint ownership of nuclear power companies ought to be disengaged and the separate nuclear power stations should be distributed on an individual basis to each of the owners.
- If a complete separation of ownership would be deemed impossible, the nuclear power companies ought to be given higher degree of independence from their owners.
- The government ought to consider either to sell out some of Vattenfall's power plants, or broaden the ownership of Vattenfall.
- The nuclear power companies should be responsible for sharing information about production levels etc. to all market participants in an open and impartial manner through the Nordic Electricity Exchange, Nord Pool.
- Finally, the government ought to diminish the restrictions on investments in new power stations in the electricity market and strongly support entrance to the marketplace.

The minister responsible for the energy sector and competition policy announced recently in the media that the government will take an initiative to look into the joint ownership in Swedish nuclear power stations with the aim to increase competition. Two negotiators have been given the task to look over the co-ownership of nuclear power stations. The aim is to find solutions which eliminate the risks of anti-competitive co-operation between the major energy companies. This initiative is directly in line with the Competition Authority's opinion.

4. Interlocking directorates

Common members of the board in competing firms have raised competition concerns for a long period of time at the Competition Authority. Interlocking directorates could lead to a conscious exchange of strategic information aimed at coordinating competitor's market behaviour and reducing competition. But competition could also be affected through an unintended leakage of information which under other

conditions (no interlock) would have been deemed as business secrets. In short words, interlocking directorates may reduce the willingness to compete.

In 2000, The Competition Authority presented a major report, "Competition in Sweden during the nineties" (2000:1). In preparing this report, the Competition Authority conducted a limited survey which focused on the occurrence of so called direct interlocks. Nine sectors or product markets were selected, either because there had been a major change in the regulatory setting for the specific market in question, or merely because a lot of competition problems related to that industry.

One major finding of the survey was that interlocking occurred in five of nine markets and only four (4) of 25 registered interlocks were related to ownership. It should be noted that no general conclusions regarding interlocking directorates and their possible anti-competitive effects could be drawn.

Even though examples of interlocking directorates can be detected in many sectors of the economy it is not easy to evaluate the overall impact on competition. Furthermore, it is not obvious that interlocks in general ought to be regulated in a more rigorous fashion under competition law.

In general it seems hard to prove anti-competitive effects from interlocking directorates as such. On the other hand advocacy effects may well be the result of studies of interlocks carried out by competition authorities, thereby raising awareness of possible competition problems from interlocks. This in turn could lead to considerations and even self regulation in those parts of the business community where interlocks are widespread.

TURKEY

1. Introduction

Holding of minority shares between competitors and interlocking directorates may jeopardize competition. Minority shareholdings are considered under rules on mergers and acquisitions if they lead to change in the control of the undertaking in question. In this regard, they play an important role in substantive assessments under rules on mergers and acquisitions. However, minority shareholding may also play an important role in substantive assessments under rules on mergers and acquisitions even if they do not involve transfer of control. In the absence of change in control, minority shareholdings may still be subject to examination, but this time under rules on restrictive agreements if anti-competitive effects are realized in the market. Similarly, interlocking directorates are also considered under rules on restrictive agreements if they create anti-competitive effects in the market.

2. Minority shareholding under rules on mergers and acquisitions

2.1 *Minority shareholding and the transfer of control*

According to the rules on mergers and acquisitions¹, in order to consider a transaction as a merger or an acquisition, control is the decisive element in the sense that only transactions involving transfer of control require notification provided that certain thresholds are exceeded. Therefore, minority shareholding can only be regarded as an acquisition and triggers notification when it enables the holder to control the undertaking. For the purposes of the Communiqué No 1997/1, control can be constituted by rights, contracts or any other means which, either separately or in combination, de facto or by law, grant the opportunity of **exercising decisive influence on an undertaking**, and in particular by an ownership right or an operative right to use all or part of the assets of an undertaking, or by rights or contracts which ensure decisive influence on the composition or decisions of the bodies of an undertaking. Control shall be deemed to have been acquired by the holders of rights, or persons or undertakings entitled to use the rights under a contract, or in spite of not having such right and power, have de facto power to exercise such rights.

¹ Rules on mergers and acquisitions in Turkey are provided in the Act No 4054 on the Protection of Competition (Competition Act) and Communiqué on the Mergers and Acquisitions Calling for the Authorization of the Competition Board (Communiqué No 1997/1). The basic aim of the rules on mergers and acquisitions is to avoid creation or strengthening of dominance that decreases competition significantly in any market for goods or services in Turkey. Therefore, dominance test delineates the basic framework for merger review. According to Communiqué 1997/1, it is compulsory to take the authorization from the Competition Board in case the combined market share of the parties exceeds 25% in the relevant product market or, even though it does not exceed this rate, their total turnover exceeds YTL twenty-five million. Privatization transactions are subject to Communiqué numbered 1998/4 on the Procedures and Principles to be pursued in Pre-Notifications and Authorization Applications to be Filed with the Competition Authority in order for Acquisitions via Privatization to Become Legally Valid (Communiqué No 1998/4). However, provisions of Communiqué No 1997/1 are also applicable to acquisitions via privatization transactions provided that they are not contrary to Communiqué No 1998/4.

In line with the above mentioned definition of the term “control” in the Communiqué No 1997/1, minority shareholding would lead to (joint) control of the undertaking if it enables the holder to exercise decisive influence on the undertaking in question. For instance, if the holder of the minority shareholding can veto the “strategic commercial decisions” of the undertaking such as the ones regarding the appointment of the senior management, approval of the business plans, investments and the budget, then it is considered that minority shareholding leads to (joint) control and there is an acquisition within the meaning of the Communiqué No 1997/1. Such acquisitions therefore require filing and are assessed according to the criteria found in the Communiqué No 1997/1.²

However, if the minority shareholding does not lead to (joint) control, the transaction may still be considered under Articles 4 and 5 of the Competition Act prohibiting anti-competitive agreements, concerted practices and decisions, and providing exemption conditions for such anti-competitive conduct respectively. This may be the case, for instance, if the transaction is committed in an oligopolistic market where an undertaking may acquire minority shares in its rival.³ Coordinated effects of the relevant transaction are considered via such an analysis.

2.2 *Minority shareholding and substantive analysis under rules on mergers and acquisitions*

Minority shareholding may also be important in the substantive analysis under rules on mergers and acquisitions that aim to avoid creation or strengthening of dominance that decreases competition significantly in any market for goods or services in Turkey. For instance, in one case⁴ regarding privatization of İzmir port in Western Turkey through transferring its operating rights for 49 years, minority shares in the acquiring party played a crucial role in the analysis of the Competition Board who eventually blocked the acquisition. The acquirer in this case was a joint venture group comprising of three undertakings, namely Babcock and Brown Turkish Ports Ltd. (Bobcock), PSA Europe Pte. Ltd. (PSA) and Akfen Altyapı Yatırımları Holding A.Ş. (Akfen). Bobcock had single control of the joint venture group whereas PSA and Akfen only held minority shares. However, PSA and Akfen previously acquired the operating rights of another port, namely Mersin port in southern Turkey through a privatization transaction.

The Competition Board decided that although PSA and Akfen did not acquire the operating rights of İzmir port, it should be analyzed whether their minority shares in the acquiring joint venture group could restrain competition. First of all, both ports (Mersin and İzmir) were dominant in their respective hinterlands. The markets where port services were offered were characterized with limited competition due

² See Article 6 of the Communiqué No 1997/1 which provides that “... the structure of the relevant market, and the need to maintain and develop effective competition within the country in respect of actual and potential competition of undertakings based in or outside the country, ... the market position of the undertakings concerned, their economic and financial powers, their alternatives for finding suppliers and users, their opportunities for being able to access sources of supply or for entering into markets; any legal or other barriers to market entry; supply and demand trends for the relevant goods and services, interests of intermediaries and end consumers, developments in the technical and economic process, which are not in the form a barrier to competition and ensure advantages to a consumer, and the other factors ...” are to be taken into account in assessing mergers and acquisitions. It is obvious that the criteria are not exhaustive and are complemented by evaluations in the case law of the Competition Board.

³ In one case, the Competition Board considered *ex officio* a transaction where an undertaking acquired 25% of the shares of its main rival in an oligopolistic market. As the transaction involved no change in control, it was considered that the transaction could be examined under Articles 4 and 5 of the Competition Act. However, because the acquiring party decided to sell its shares to other shareholders of the company with a second transaction, the assessment was terminated without further examination. See *Orica* (29.3.2007; 07-29/268-98).

⁴ *Privatization of İzmir Port* (20.6.2007; 07-53/615-204).

to the nature of such services on one hand or high costs of building infrastructure similar to ports on the other. As economic policy considerations preferred the transfer of operating rights to private monopolies due to reasons based on either the nature of the market or the nature of the business, it was taken into account that any possibility of remaining competition in the market necessitated careful protection by the Competition Board. PSA and Akfen were in a dominant position in Mersin port in southern Turkey as a result of their control in this port. In this context, minority shares of PSA and Akfen, who were holding dominant position as a result of their control in Mersin port in southern Turkey, in their principal competitor (the joint venture group controlled by Bobcock) would have negative impact on the remaining competition. Although PSA and Akfen could not have direct control in İzmir port as Bobcock would have its sole control, it was considered that they would arrange their own conduct in a way refraining from competition. Such an attitude would be facilitated more as a result of information capabilities that could be obtained via membership in the board of directors resulting from minority shares, or other ways. This could make it easier for the two operators (PSA and Akfen on one hand and Bobcock on the other) to avoid competition in regions of the country within the common hinterlands of the two ports (Mersin and İzmir). Moreover, they could also refrain from competitive conduct that could be performed to have a share from international traffic. A dominant undertaking's involvement in acquisitions in a way to remove possibilities of competition would ensure continuation of its dominance as well as strengthening of it. The competitive relationship that could be removed through the transaction was the final piece of the remaining competition in the region overlapped with the hinterlands of both ports especially in the field of container handling due to lack of any other infrastructure with serious competitive potential. As a result, the Competition Board decided that building common interests by operators of Mersin port (PSA and Akfen) via minority shares in the joint venture group which would acquire İzmir port would strengthen their dominant position and decrease competition significantly. Thus, the Competition Board blocked acquisition of operating rights of İzmir port by joint venture group comprising of Bobcock, PSA and Akfen.⁵

3. Minority shareholding and interlocking directorates under rules on anti-competitive agreements and remedies

In one case⁶, three undertakings (Es Nevtur (EN), Lüks Göreme (LG) and Nevşehir Kapadokya Turizm (NKT)) operating in intercity passenger transport sector agreed to combine certain amount of their assets under another undertaking called Nevşehirliiler Turizm (NT) in return for certain amount of shares of this undertaking and not to create another undertaking to compete with NT. At that time NT was acting as an agent of Metro, another undertaking operating in the sector, and selling its tickets. Firstly, the Competition Board examined whether the transaction involved any change in control and therefore should be dealt under the rules on mergers and acquisitions. After extensive analyses, the Competition Board concluded that the transaction did not include change of control and therefore could not be dealt under rules on mergers and acquisitions. Rather, the Competition Board decided that the transaction was an agreement within the scope of Article 4 on restrictive agreements of the Competition Act.

In its assessments regarding coordination of competition between parties to the transaction and Metro, the Competition Board considered that NT was selling Metro's tickets before the transaction. Following the transaction NT not only continued to sell Metro's tickets as its agent, but also became Metro's competitor in intercity passenger transport market. It was taken into account that in a competitive market it was not possible for an undertaking to sell its competitor's tickets and this could only be possible if there was an institutionalized cooperation between them instead of competition. There was such an

⁵ It is also worthwhile to mention that in the draft contract which sets forth the conditions to participate in the bidding process of İzmir port prepared by the Privatization Authority, it is clearly mentioned that the acquirer of the operating rights of Mersin port should not bid for İzmir port either individually or within a group.

⁶ *Nevşehirliiler Turizm* (28.9.2006; 06-67/909-263).

institutionalized cooperation between NT and Metro and the most important link that enabled such cooperation was the fact that the director, who was holding minority shares in NT, also owned most of the buses operated by Metro. Actually, it was admitted by the director that prices were determined via talks with Metro. As a remedy, the Competition Board, in order to establish competition, asked NT to end its agency relationship with Metro, and in addition required the director either to sell its minority shares in NT or annul the contracts of his buses operated by Metro. Moreover, other operators party to the transaction, namely EN, LG and NKT, were also asked either to sell their shares in NT or conclude a partnership agreement compatible with the Competition Act and notify it to the Competition Board.

In another case⁷ involving a cartel among aerated concrete producers, the fact that one of the parties to the cartel had minority shares in a competitor and two members of its board of directors also had the same position in this competitor was regarded as a facilitating factor in infringing the Competition Act. For instance, these common members of the board of directors represented both of the undertakings in the meetings held among the cartel participants. The undertaking whose minority shares were held by its competitor realized concrete steps to end membership of the common members in its board of directors during the investigation stage and this was taken into account as a mitigating factor by the Competition Board.

Last but not least, in an investigation⁸ which was carried out in the “market for scheduled maritime transportation by ro-ro vessels carrying wheeled and mobile cargo”, the issue of interlocking directorates was discussed extensively. Two rival ro-ro shipping groups named ULUSOY Ro-Ro Group (ULUSOY Group) and UN Ro-Ro Group (UN Group) concluded a protocol not to change their tariffs and terms of payments without consent of the other party. The protocol that explicitly targeted coordination of prices was an anti-competitive agreement under Article 4 of the Competition Act.

There were 5 and 6 associated undertakings in UN Group and ULUSOY Group respectively. Mr. Saffet ULUSOY and Mr. Erol SOYLU respectively owned 20% and 5% of the shares of each of the associated undertakings within ULUSOY Group. In addition to that, ULUSOY Group owned 26,4% of the shares in the UN Group. Mr. ULUSOY was at the same time a member of the board of directors of all associated undertakings within ULUSOY Group while he was also the chairman of the boards of directors of the associated undertakings within the UN Group based on ULUSOY Group’s holding of 26,4% of the shares in UN Group. Finally, Mr. SOYLU was a member of boards of directors of all associated undertakings within the ULUSOY Group and he was also a board member in all of the associated undertakings within the UN Group.

According to the Competition Board, it was inevitable that common members in the boards of directors of the rival ro-ro shipping groups would have cooperative effects restricting competition. The fact that such an intertwined structure occurred in a sector where concentration level was very high facilitated and strengthened the cooperation and coordination. The Competition Board stated that it was not likely for these two ro-ro shipping groups to determine the prices they charged without any coordination among them although they paid attention not to increase the recent prices at identical amounts and on the same dates. As a result, the Competition Board decided that members of the boards of directors in those associated companies belonging to any group should not assume membership in the boards of directors of the companies within the other and thus common membership should be terminated.

⁷ *Aerated Cartel* (30.5.2006; 06-37/477-129).

⁸ *Ulusoy & UN Ro-Ro* (13.7.2005 05-46/668-170).

4. Conclusion

Rules on mergers and acquisitions in Turkey are applicable to minority shareholdings enabling a change in the control of the undertaking in question, whereas rules on anti-competitive agreements may be applicable for cases involving minority shareholdings falling short of ensuring a change in control but producing anti-competitive effects. Moreover, whenever common membership in the board of directors of rival undertakings (interlocking directorates) causes anti-competitive effects, this might also be subject to examination under rules on anti-competitive agreements. As remedies in cases of anti-competitive agreements, it is seen from the case law that the Competition Board prefers sale of minority shares and termination of common membership in the boards of directors. Finally, in case minority shareholdings might enable a dominant undertaking to strengthen its dominance and decrease competition significantly in the context of mergers and acquisitions, this might be a ground to block the transaction.

UNITED KINGDOM

1. Introduction

Acquisitions of non-controlling minority shareholdings have been caught by UK merger control since 1973. Under the Enterprise Act 2002 (EA02),¹ minority shareholdings are periodically scrutinised in practice under the UK's voluntary notification regime, typically when *prima facie* substantive issues arise. Obvious passive investments by non-competitors, in contrast, tend not to be notified or otherwise pursued *ex officio* by the OFT. In the four and a half years of the EA02, only a handful of cases with minority stake and/or interlocking directorship issues have raised concerns sufficient to prompt agency intervention – in most cases where the principal acquisition is one of control – but the benefits of intervention include substantial deterrent effects. Moreover, while the OFT is applying increased vigilance to these important issues, the burden on commerce for non-problematic transactions remains limited, in large part due to the UK's voluntary regime.

2. How are minority shareholdings handled in your merger control regime? In which cases does the acquisition of a minority shareholding trigger the requirements for a merger notification and review under your merger rules?

2.1 Statutory test for jurisdiction

UK merger jurisdiction requires, among other things, that '*enterprises cease to be distinct*', which arises when they are brought under '*common ownership*' or '*common control*' (cf. s 26 (1) EA02). This test embraces three levels of ownership interest: (i) a '*controlling interest*', understood as *de jure* control conferred by a greater than 50 per cent share of voting rights; (ii) the '*ability to control policy*' amounting to *de facto* control conferred by shareholdings below 50 per cent; and (iii) the lower level of the '*ability materially to influence the policy*' of the target firm (material influence). The focus of this paper will be on this latter category.²

The material influence category is noteworthy in part because it captures scenarios falling outside the EC Merger Regulation (Reg. 139/2004; ECMR) sphere of '*sole control*' – covering '*material influence*' acquisitions that fall below the ECMR threshold of '*decisive*' influence. Material influence overlaps with the ECMR concepts of '*joint control*' or '*negative control*' in scenarios with multiple substantial shareholders, e.g., joint ventures: one firm can hold material influence where others hold the same or higher degree of influence. Unlike the ECMR, however, UK merger law cannot capture a '*joint to sole control*' scenario where the acquirer already holds a controlling 50.1 per cent or more of voting rights.

¹ Under the EA02, the Office of Fair Trading (OFT) and Competition Commission (CC) conduct Phase I and Phase II merger respectively. Both agencies are independent of each other and government. Under the predecessor Fair Trading Act 1973 (FTA), decision-making was ministerial: the Secretary of State for Trade and Industry made decisions at Phase I taking into account OFT advice and Phase II decisions taking into account the report of the CC and subsequent OFT advice. While the substantive test was one of 'public interest', a succession of ministerial statements had emphasised since the mid-1980's that mergers would be assessed primarily on competition grounds, which gave the OFT's and CC's advice and reports greater weight. The EA02 entered into force in June 2003, introducing the 'substantial lessening of competition' test and transferring decision-making to the OFT and CC, save for certain exceptional public interest (national security, media plurality) cases.

² We interpret the focus of this topic to be non-controlling minority stakes, rather than situations of outright *de facto* control based on a non-majority shareholding.

2.2 Agency guidance and practice

The jurisdictional test of *'material influence'* over the *'policy'* of a company is a prime example of the general UK approach to merger jurisdiction, which emphasises investigative flexibility over binary or bright-line thresholds. Decisional practice under the parallel regulatory regime for water industry transactions and the earlier FTA regime of 1973-2003 still provides the basis for the current approach to merger jurisdiction, as codified in the OFT's EA02 merger guidance. In stipulating a case-specific approach, the guidance starts with the bright-line question of the absolute level of the shareholding:

A shareholding [of] **25 percent or more** of the voting rights in a company generally enables the holder to block special resolutions; consequently, a 25 per cent share of voting rights is likely to be seen as presumptively conferring the ability materially to influence policy – even when all the remaining shares are held by only one person. The OFT may examine any case where there is a shareholding of **15 percent or more** in order to see whether the holder might be able materially to influence the company's policy. Occasionally, a holding of **less than 15 percent** might attract scrutiny where other factors indicating the ability to exercise influence over policy are present.³

The *'policy'* of a company is not defined in the guidance, but the CC recently interpreted this term as 'the management of [the target's] business, *in particular in relation to its competitive conduct ... includ[ing] the strategic direction of a company and its ability to define and achieve its objectives.*'⁴

Under the EA02, a case featuring a 15 per cent share – including a right to appoint a director – has been the lowest shareholding over which the OFT asserted jurisdiction. Unusually, this arose in a vertical case, but in a sector with a record of antitrust issues.⁵ At shareholdings below 25 per cent, the presence of 'plus factors' – suggesting the acquirer's influence over the target is more significant than the nominal shareholding indicates – are particularly important. In OFT practice, **board representation**, usually but not necessarily an **interlocking directorship**, has been the most obvious and decisive plus-factor. In the absence of a board seat(s), the issue of other asymmetries between the acquiring shareholder and other shareholders assumes greater importance, notably the relative position and industry expertise of shareholders and any other distinguishing veto or special rights of the acquirer, or considerations based on voting turnout or voting patterns at shareholder meetings. In some cases, the acquirer's creditor status or the presence of supply or cooperation agreements have also been plus-factors.

As a general policy matter, if the OFT becomes aware of any acquired structural links between close competitors or oligopolists, it will, when reasonable, apply close scrutiny and assert merger jurisdiction in order to review the transaction. However, scrutiny is on a case-by-case basis: for example, based on likely subsequent events and knowledge of the sector, the OFT did not initiate an inquiry when Nasdaq acquired material influence via a more than 25 per cent share of the London Stock Exchange; instead, it reviewed the subsequent bid for control, which it cleared.⁶

³ See OFT *Mergers – Substantive Assessment Guidance* (2003) at http://www.offt.gov.uk/shared_offt/business_leaflets/enterprise_act/oft516.pdf

⁴ CC, *Report on the acquisition by British Sky Broadcasting plc of 17.9 per cent of the shares in ITV plc*, December 2007 (*BSkyB/ITV* report) para. 3.33 (emphasis added); see <http://www.competition-commission.org.uk/inquiries/ref2007/itv/index.htm>

⁵ OFT, *Completed acquisition by First Milk Limited of a 15 per cent stake in Robert Wiseman Dairies plc*, 22 April 2005 (transaction affecting fresh and processed milk sector, cleared at Phase I); see http://www.offt.gov.uk/advice_and_resources/resource_base/Mergers_home/2005/firstmilk

⁶ OFT, *Anticipated acquisition by the Nasdaq Stock Market, Inc. of the London Stock Exchange Group plc*, 18 January 2007; see http://www.offt.gov.uk/advice_and_resources/resource_base/Mergers_home/2007/Nasdaq

2.3 Examples of decisional practice

The following two high-profile cases are examples of minority share acquisitions that raised substantive competition issues:⁷

- *Gillette/Wilkinson Sword (Stora/Swedish Match/Gillette)* (1991). Gillette, with a 60 per cent market share in UK wet-shaving products, had acquired important rights and interests pertaining to its main rival, Wilkinson Sword – with a 20 per cent market share – via the latter’s parent firm, a leveraged buy-out vehicle. The Monopolies and Mergers Commission (MMC, the CC’s predecessor) held that Gillette enjoyed material influence due to: (i) its industry position and ‘prime mover’ status in the transaction; (ii) its ability to convert 22 per cent of equity in non-voting loan stock to ordinary voting stock in certain circumstances; (iii) its pre-emption rights over the sale of equity to a third party and over the company’s assets; (iv) its status as major creditor of the company, owed about 12 per cent of debt. In reaching its jurisdictional finding, the CC observed that prudent management of the target would constantly take Gillette’s position into account.⁸
- *BSkyB/ITV* (2007-8). BSKyB, the leading UK pay-TV provider, acquired a 17.9 stake in ITV, the leading commercial free-to-air broadcaster. The CC found that with this stake BSKyB would, in practice, have the ability to block special resolutions, given historic ITV shareholder attendance levels and voting patterns. This veto would, in the CC’s view, limit ITV’s strategic options, for example its ability to raise funds; BSKyB’s importance and stature as an industry player, together with its position as the largest shareholder, would give additional weight to its views.⁹

3. In your enforcement practice, do you distinguish between minority shareholdings representing a passive financial investment (i.e. no active participation or representation in the board) from minority shareholdings that allow some form of control (joint, sole or negative) on the target? If yes, how do you deal with these different situations?

It is the mere ability to exert material influence, rather than the intent or the actual exercise of such that establishes jurisdiction.¹⁰ In practice, a true passive financial investment would militate against – but would not in principle preclude – a finding of material influence under the UK’s case-specific approach. As noted above, because in practice the UK regime is voluntary and the OFT would not pursue such cases *ex officio*, merger review of such cases is rare. The UK authorities have, however, rejected claims that investments in significant horizontal competitors are passive, most recently in *BSkyB/ITV*. On agency intervention to convert an ‘active’ shareholding into a ‘passive’ one, see also partial divestiture remedies, below.

⁷ Since review is conducted on a case by case basis, these investigations are merely examples among a broader spectrum of instances where the OFT may review a transaction.

⁸ MMC, *Stora Kopparbergs Berslags AB/Swedish Match/The Gillette Company*, March 1991, para.7.72; see http://www.competition-commission.org.uk/rep_pub/reports/1991/301storakopparbergs.htm#full

⁹ While the OFT also identified the potential for an interlocking directorship as an additional factor relevant to the assessment of material influence the CC, on further review, could not conclude it was more likely than not that a BSKyB director would be appointed to the ITV board and did not, therefore, take this into account in its jurisdictional finding of material influence. See BSKyB/ITV report and http://www.of.gov.uk/advice_and_resources/resource_base/Mergers_home/2007/BSkyB

¹⁰ CC, *Vivendi SA and BSKyB plc*, April 2000; see <http://www.competition-commission.org.uk/inquiries/completed/2000/index.htm> at para 2.19.

4. In your enforcement practice, do you have experience with minority shareholdings raising unilateral and/or coordinated effects? Do you have experience with minority shareholdings investigated under your domestic competition rules on restrictive agreements between competitors? Have you investigated dominant firms for holding shares in competing firms? Can you provide examples?

Perhaps due in part to the breadth of merger jurisdiction applicable since 1973, the UK does not have substantial experience of minority shareholdings prosecuted under non-merger antitrust law. The following therefore focuses on merger control under the EA02.

4.1 Unilateral effects

Although not decisive to the outcome, in *Anglo-American/Johnston* (2004)¹¹ the OFT took into account the pre-merger influence on Anglo-American's unilateral pricing incentives in asphalt plants operating in relevant local markets due to its 50 per cent and 49 per cent stakes respectively in two JVs also operating in those markets. It apportioned market share and HHI figures between the JV parents in proportions to their equity shares and assumed diversion ratios in proportion to market shares. The OFT raised competition concerns based on unilateral effects arising from the acquisition of control. The transaction was abandoned when Phase I remedies were rejected by the OFT.

4.2 'Strategic' unilateral theories

Under the EA02, *BSkyB/ITV* is the only example of an OFT or CC finding of a substantial lessening of competition where the principal transaction is acquisition of a non-controlling shareholding.¹² As noted, BSkyB is the predominant subscription-based pay-TV provider that had acquired partial (17.9 per cent) ownership of the leading free-to-air TV provider. The CC determined that the material influence that BSkyB wielded over ITV would substantially lessen competition in the market for 'all-TV' by preventing or influencing strategic moves by ITV relating to content, technology, or partnerships aimed at strengthening the proposition of free-to-air digital TV (to the detriment of BSkyB's pay-TV offer).

The focus of the analysis was shaped by the 'two-sided' nature of the TV market, with both consumers (free-to-air viewers/pay-TV subscribers) and advertisers as distinct customer groups. In this case, while raising the strategic concerns explored by the CC, the OFT at Phase I dismissed classic unilateral effects concerns, for example, in TV advertising, where the relatively low level of BSkyB's shareholding meant that recoupment of sales lost to ITV if BSkyB raised price was small and – by way of dividends or share price appreciation – indirect and uncertain. In other fact patterns in future, it is possible that more emphasis may be given to standard unilateral effects analysis.¹³

¹¹ OFT, *Anticipated acquisition by Anglo-American plc of Johnston plc*, 29 September 2004; see http://www.of.gov.uk/advice_and_resources/resource_base/Mergers_home/2004/anglo

¹² The case is unusual, not least in that BSkyB – a News Corporation entity – is in any event prevented from acquiring more than 20 per cent of ITV due to plurality (cross-media ownership) legislation. Plurality issues also triggered an inaugural public interest intervention under EA02, transferring ultimate decision-making authority to the relevant minister: although the CC's substantive competition analysis is binding, remedies are at ministerial discretion. On 29 January 2008 the Secretary of State for Business, Enterprise and Regulatory Reform accepted the CC's remedial recommendations in this case.

¹³ Decisional practice on these issues under the pre-EA02 regime is only occasionally analogous to modern economics-based merger analysis. In most cases rooted in an antitrust approach, the analysis is generally qualitative and in some cases asymmetric, focusing on the material influence that A has over B – diminishing B's ability and/or incentives to compete – rather than a change to A's incentives to compete. See Annex.

4.3 *Coordinated effects*

In *Aggregate Industries/Foster Yeoman* (2007), the principal transaction led to the acquirer (AI) gaining control of the target (FY). However, one competitive overlap featured a minority shareholding that, on a stand-alone basis, would have met the material influence test: AI acquired FY's 33 per cent stake and veto rights in a production JV in which another 33 per cent shareholder was Lafarge. AI and Lafarge are a duopoly accounting for around 90 per cent of asphalt supply in the relevant market, and the two-thirds of JV capacity not allocated to Lafarge accounted for the remainder. The OFT found that the risk of (enhanced) collusion via the structural link – including, for example, vetoing JV expansion and sensitive information flow – warranted remedial action (see below).

4.4 *Non-horizontal theories*

In Euronext's bid for the London Stock Exchange (2005), the key substantive issue was foreclosure of rival stock exchanges from on-book equities trading in the UK due to the merged firm's influence over access to essential post-trade infrastructure.¹⁴ While the LSE had no interest in the UK equities clearing-services provider, LCH.Clearnet, Euronext held (i) 41.5 per cent of its shares, with its voting rights capped at 24.9 per cent; and (ii) four of the 18 board seats. Moreover, over 60 per cent of LCH.Clearnet's total fee income was dependent upon the clearing of trades made on Euronext exchanges (compared to 10 per cent in relation to the LSE). Despite certain governance arrangements, the combined effect of these factors led the CC to conclude that it expected the merged firm to have the ability to influence LCH.Clearnet's strategic decisions. This informed the CC conclusion that the merged firm would have the *ability* – as well as the incentive – to foreclose upstream entry and protect the LSE's near-monopoly share of on-book equities trading.

5. **Does your jurisdiction have specific legal provisions dealing with interlocking directorates?**

The UK does not have an equivalent, for example, to the U.S. Clayton Act §8 that governs interlocking directorates. While a plus-factor in a shareholding case (see above), the OFT is not aware of examples of material-influence-based merger jurisdiction, let alone enforcement, based on directorships alone. It would be untested waters for the OFT to assert jurisdiction in a case, for example, featuring no shareholding but one or more positions on the target's board.

6. **In your enforcement practice, do you have experience of interlocking directorates raising issues of tacit or explicit collusion? Can you provide examples?**

As explained above, although not an 'interlock', the combination of AI and Lafarge members on the JV board were instrumental to the collusion concerns raised in the *Aggregate Industries* case.

This issue also arose at the purchaser approval stage of Phase I remedies in *CGL/Fairways* (2006),¹⁵ a local funeral service case. The OFT rejected the purchaser, Southern Co-op, because its CEO sat on the supervisory board of the acquirer CGL. The OFT concluded that the purchaser was not 'independent of and unconnected to' the merging parties, taking into account coordinated effects concerns based on the risk of sensitive information flow via the conduit of the interlocking directorship: evidence included a statement from CGL that '*a competitor would relish*' the information available to board members. The OFT was upheld on judicial review brought by CGL (see *CGL v OFT* [2007] CAT 24).

¹⁴ CC, *Deutsche Borse AG, Euronext NV and London Stock Exchange plc*, November 2005; see http://www.competition-commission.org.uk/rep_pub/reports/2005/504lse.htm

¹⁵ OFT, *Completed acquisition by Co-operative Group (CWS) Ltd of Fairways*, decision of 20 July 2006; see http://www.of.gov.uk/advice_and_resources/resource_base/Mergers_home/2006/coop2

Concerns based on interlocking directorships between firms in music promotion were raised but merger effects dismissed at Phase II by the CC in *Academy/Hamsard* (2006).¹⁶ On directorships raising issues of influence over the target, see also the remedies examples in cases involving BSKyB, below.

7. In your enforcement practice, do you have experience in devising remedies for anticompetitive effects arising from minority shareholdings or interlocking directorates? Can you provide examples? Does your merger control regime have a preference for structural remedies or conduct remedies for these issues?

7.1 *Minority shareholdings*

Under EA02 agency guidance the UK merger authorities have an explicit – but not absolute – preference for structural remedies in merger control.

7.1.1 *Complete divestiture*

The OFT favours a complete divestiture – or ‘clean break’ – approach to problematic minority shareholdings. For example, in *Aggregate Industries/Foster Yeoman*, the OFT accepted a Phase I remedy of total divestiture of the shareholding, and exit from the relevant JV, including board representation. In five pre-EA02 examples included in the Annex, the MMC also recommended complete divestiture.¹⁷

7.1.2 *Partial divestiture below the level of ‘material influence’*

The complete divestiture approach is not an absolute doctrine in the UK, however, due in part to the emphasis given in UK practice to proportionality considerations. CC merger guidance states that ‘if the [CC] is choosing between two remedies that are equally effective, it will choose the remedy that imposes the least cost or is least restrictive’ and, consistent with this principle, that divestiture of an acquired shareholding in a target company ‘will usually need to be reduced to a specified maximum level below which the [CC] judges there could be no possibility of material influence’.¹⁸

- In *Euronext/London Stock Exchange* the CC considered that neither structural nor behavioural elements alone were sufficient to be effective on a stand-alone basis; rather, the CC secured a combined package whose structural elements stipulated that (i) Euronext reduce its holding and voting rights to a maximum of 14.9 per cent and its board representation to one seat with no more than 14.9 per cent representation; and (ii) no reserved matters exist for Euronext's benefit other than the basic rights of a minority shareholder.
- In *BSkyB/ITV*, the only EA02 case where the principal acquisition was of a minority shareholding, the OFT submitted to the CC that its preferred remedy would be complete divestiture, based on its assessment of international best practice (or alternatively divestment to a *de minimis* cap proposed at 3 per cent). The CC agreed that total divestiture of the 17.9 per cent

¹⁶ CC, *Hamsard and Academy Music: a report on proposed acquisition of a controlling interest in Academy Music Holdings Ltd by Hamsard 2786 Ltd*, January 2007; see <http://www.competition-commission.org.uk/inquiries/ref2006/hamsard2786/index.htm>

¹⁷ In *Gillette/Wilkinson Sword*, the MMC recommended total divestiture of Gillette's various interests and rights in the LBO parent vehicle of WS. In each of *BUPA/Salomon/CHG* (26.8 per cent), *Stagecoach/SBH* (20 per cent), *Pleasurama/Grand Metropolitan* (20 per cent) the MMC recommended total divestiture and in *BSkyB/Manchester United* the MMC recommended prohibition.

¹⁸ *Merger References, Competition Commission Guidelines*, June 2003 (CC2), paras. 4.9 and 4.24; see http://www.competition-commission.org.uk/rep_pub/rules_and_guide/pdf/cc2.pdf

stake would be an effective remedy, but concluded that equally effective and more proportionate remedy would be a divestiture down to a level of below 7.5 per cent. At this level, it concluded that there would be no realistic prospect of BSkyB being able to exercise material influence in relation to ITV's strategy and that 'ITV would therefore be able to design and implement its strategy unfettered by a competitor' thereby removing all of the CC's substantive concerns. As the CC did not establish coordination or sensitive information flow concerns arising from the 17.9 per cent equity interest, it follows that the lower 7.5 per cent recommendation did not present the CC with such concerns.

7.2 *Interlocking directorships*

The UK agencies favour a 'clean break' structural approach to directorships that raise competition concerns.

- The most notable example of this preference is the OFT refusal to accept CGL's offer of a 'firewall' or recusal remedy applicable to the individual director concerned in *CGL/Fairways*, which included proposed *ex post* compliance reports filed by KPMG. The OFT rejected this remedy because it raised long-term monitoring and enforcement concerns associated with behavioural or conduct remedies, not least that enforcement action could not undo the harm caused by a breach. The OFT's reasoning on this issue was specifically upheld by the Competition Appeal Tribunal on appeal in *CGL v OFT*.
- In *BSkyB/ITV*, while the CC did not assume in its assessment of material influence that BSkyB would obtain board representation, it observed that 'if BSkyB did in fact obtain board representation, this might give rise to concerns regarding BSkyB's influence over ITV' and therefore recommended that 'BSkyB should give undertakings that it will neither seek nor accept board representation' supplementary to its recommended partial divestiture of the shareholding. A similar undertaking was given following the non-horizontal effects prohibition in *BSkyB/Manchester United* (see Annex).
- Non-public examples also arise: in a recent OFT case, for example, one party has abandoned board representation simply to avoid a material influence finding.

ANNEX

**SELECTED PRE-EA02 MINORITY ACQUISITION CASES RESULTING IN AGENCY
RECOMMENDATIONS OF REMEDIAL ACTION ON COMPETITION GROUNDS
(1980-2003)**

Pleasurama/Trident/Grand Metropolitan (1983)¹ – a 20 per cent share by Grand Met, which was ‘approaching dominance’ in the London casino market – in rival Pleasurama was ‘clearly adverse to the maintenance and promotion of effective competition’;

Tate & Lyle/Ferruzzi/Berisford (1987)² – a 23.7 per cent shareholding by Ferruzzi in Berisford was found to restrict the ability of UK sugar merchants to import sugar from the rest of the Community and consequently to raise the ultimate ceiling of UK sugar prices.

Gillette/Wilkinson Sword (1991) – the transaction (see above) reduced competition in the supply of wet shaving products and enabled Gillette to prevent deals such as a sale of Wilkinson’s business or assets to a competitor or a potential entrant.

Stagecoach/SBH and *Stagecoach/Midland Mainline* (both 1995)³ – a 20 per cent stake by Stagecoach in SBH, the largest bus operator in areas of Scotland eliminated the likelihood of competition between them; a 20 per cent share in Midland Mainline reduced actual and potential bus competition in South Yorkshire.

BSkyB/Manchester United (1999)⁴ is an unusual example of intervention based on the effects of a ‘minority shareholding’ in the English Football Association Premier League (FAPL). While the bid was one for control of one team, this acquisition would have given B SkyB a minority stake – one vote out of 20 – in England’s top football division. Proceeds of FAPL rights sales are divided between the FAPL teams, with Manchester United having a disproportionate influence. In analogy to recoupment of lost sales in a unilateral effects case, every payment made by B SkyB for FAPL rights would, in part, have been a payment to itself, materially increasing the risk that it could outbid rivals and thereby entrenching its downstream market power on viewing markets.

¹ MMC, *a report on the proposed merger of Pleasurama PLC and Trident Television PLC and on the merger situation between Grand Metropolitan PLC and Trident Television PLC*, December 1983.

² MMC, *Tate & Lyle PLC and Ferruzzi Finanziaria SpA and S & W Berisford PLC, A report on the existing and proposed mergers*, February 1987.

³ MMC, *a report on the merger situation between Stagecoach Holdings Plc and Mainline Partnership Limited*, March 1995; MMC, *a report on the merger situation between Stagecoach Holdings plc and S B Holdings Limited*, April 1995.

⁴ MMC, *British Sky Broadcasting Group Plc and Manchester United Plc: A report on the proposed merger*, July 1999.

*BUPA/Salomon Int'l/Community Hospitals Group (2000)*⁵ – a 26.8 per cent stake, held by Salomon but financed by BUPA, limited the potential of CHG as an important competitor to BUPA in the private medical services market and in deterring other prospective bidders for CGH.

*SRH/GWR/VRSL/Galaxy (2003)*⁶ – GWR gained material influence over Galaxy, via its 49 per cent stake in an acquisition vehicle controlling the target, thereby reducing competition in local radio advertising in certain UK areas.

⁵ CC, *a report on the proposed merger: British United Provident Association Limited and Community Hospitals Group Plc and a report on the existing mergers: British United Provident Association Limited, Salomon International LLC and Community Hospitals Group Plc; and Salomon International LLC and Community Hospitals Group Plc*, December 2000.

⁶ CC, *Scottish Radio Holdings plc and GWR Group plc and Galaxy Radio Wales and the West Limited: A report on the merger situation*, May 2003.

UNITED STATES

A firm's partial ownership of a competitor, or its sharing member(s) of their respective boards of directors, can sometimes pose competitive concerns. In the United States, minority shareholding and interlocking directorates can implicate three areas of antitrust law: Section 1 of the Sherman Act, which covers agreements between companies; Section 7 of the Clayton Act, which governs mergers and acquisitions (along with the Hart-Scott-Rodino Premerger Notification Act, which provides the antitrust enforcement agencies time and tools to investigate mergers before they are consummated); and Section 8 of the Clayton Act, which deals with interlocking directorates. This paper discusses each of these statutory provisions and provides recent related case examples.

1. Section 1 of the Sherman Act, and common ownership issues

In exploring the array of indirect shareholding connections that may link two corporations, the threshold question that must be answered before Section 1 can be applied is whether the firms are, within the meaning of the Sherman Act, two separate entities, such that they are legally capable of entering an agreement, or whether they are instead a single business entity.

In the United States, the Supreme Court established the basic framework for this analysis in its 1984 decision in the *Copperweld* case.¹ The Court held that “the coordinated activity of a parent and its wholly-owned subsidiary must be viewed as that of a single enterprise for purposes of § 1 of the Sherman Act.”² If these two firms constitute a single functional entity, then, as a legal matter, “they are incapable of conspiring with each other....”³

The Court determined that this resolution reflected the underlying goals of antitrust enforcement: “A parent and its wholly owned subsidiary have a complete unity of interest.... [T]here is no sudden joining of economic resources that had previously served different interests....”⁴ This conclusion was warranted even if the parent had previously permitted its subsidiary some scope for independent action. U.S. corporate law allows the parent in such a case to reassert full control over the subsidiary at any moment that the subsidiary fails to act consistently with the parent's interest. For these reasons, the *Copperweld* Court found that there was only a single entity for Section 1 purposes. By recognizing the parent's ownership rights in this way, Section 1 allows complex corporate organizations to utilize whichever form of internal communications they consider most efficient.⁵

This issue becomes more complex when a subsidiary is not direct and wholly-owned. The question in such cases is whether the underlying economic reality remains one of common management and control. Thus, U.S. courts have found that Section 1 does not apply to agreements between two wholly-owned subsidiaries of a common parent,⁶ or between two corporations owned by the same small group of

¹ *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984).

² 467 U.S. at 771.

³ *Id.* at 777.

⁴ *Id.* at 771. *See also id.* at 769.

⁵ *Cf.* 467 U.S. at 771 (“Indeed, a rule that punished coordinated conduct [among company divisions] would serve no useful purpose but could well deprive consumers of the efficiencies that decentralized management may bring”).

⁶ *See Eichorn v. AT&T*, 248 F.3d 131, 139 (3rd Cir. 2001); *Greenwood Utilities Comm'n v. Mississippi Power Co.*, 751 F.2d 1484, 1497 n.8 (5th Cir. 1985).

individuals.⁷ In neither of these circumstances would one normally expect the companies to be independent competitors.

When common control becomes less clear, however, the availability of the *Copperweld* defense becomes less certain. Thus one court has held that there was no longer a single enterprise once the alleged parent had only a minority, 20, or 30 percent interest in its subsidiaries.⁸ Similarly, the *Copperweld* doctrine is more difficult to apply once the asserted unifying force is a common or shared purpose rather than actual or effective control through corporate ownership. For this reason, the courts have been divided as to whether hospitals and their medical staffs are, in their peer-review process, acting separately or as a single entity.⁹ In cases in which the firms are eventually found to be separate entities, the enforcement agencies must turn to the antitrust merits, asking whether the particular connections among the firms will have anticompetitive consequences that should be condemned.

2. Section 7 of the Clayton Act

When enforcing Section 7 of the Clayton Act, antitrust authorities in the U.S. recognize that partial acquisitions of horizontal competitors can have anticompetitive effects analogous to the effects of horizontal mergers. In both types of transactions, an acquiring firm gains a financial interest and may gain some control over a target firm. The competitive concerns arising from partial acquisitions are qualitatively the same as in a complete merger, but (usually) quantitatively smaller.

When firm A acquires a financial interest in a competing firm B, firm A may have a unilateral incentive to compete less aggressively because it benefits through its ownership of firm B when firm B faces less competition. Firm A's incentive to compete less aggressively tends to be greater when it has a greater financial interest in Firm B and when firms A and B have higher market shares. If firm A's acquisition carries a degree of control or influence over firm B, there may be an additional unilateral effect arising from firm A's incentive to use its control to make firm B compete less aggressively. Firm A's control over firm B is more likely to lead to anticompetitive effects if the two firms have high market shares and if firm A has a greater degree of control over firm B. The same factors—financial interest and control—are relevant to an analysis of the unilateral effects of mergers.

Partial acquisitions can also raise the risk of coordination among competitors. If the partial acquisition confers control, the effective reduction in the number of independent competitors can make it easier for firms to coordinate their strategies and alter the benefit-cost calculus of defecting from a cartel so as to make the cartel easier to sustain. It may also make it easier for firms to detect defections from a cartel. The methods for analyzing these issues are analogous to methods used to analyze the coordinated effects of mergers.

⁷ See *Century Oil Tool v. Production Specialties*, 737 F.2d 1316 (5th Cir. 1984) (common ownership by three individuals).

⁸ See *Sonitrol of Fresno v. AT&T*, 1986-1 Trade Cas (CCH) ¶ 67,080, at 62,566-57 (D.D.C. 1986) (ownerships in two corporations of 23.9% and 32.6%). In this case a conspiracy was found possible even though the parent company was the largest single shareholder and exercised effective control over the subsidiaries. The court noted that the subsidiaries' directors still had an independent fiduciary obligation to act in the interests of the subsidiaries' shareholders.

⁹ Compare *Oksanen v. Page Memorial Hospital*, 945 F.2d 696, 703 (4th Cir. 1991) (en banc) (hospital and medical staff could not conspire because staff acted as hospital's agent in peer review process), with *Bolt v. Halifax Hospital Medical Center*, 891 F.2d 810, 819 (11th Cir. 1990) (en banc) (hospital and individual staff doctors are legally separate entities and are capable of conspiring).

2.1 *KMI/Carlyle/Riverstone*

In a recent case involving partial acquisition, the FTC challenged the acquisition of interests in Kinder Morgan, Inc. (KMI) by private equity funds managed by The Carlyle Group (Carlyle) and Riverstone Holdings LLC (Riverstone).¹⁰ The case demonstrates that the antitrust agencies are willing to act against acquisitions of partial interests in competing firms in situations in which competition likely would be diminished. KMI was an energy transportation, storage, and distribution firm, and Carlyle and Riverstone held interests in Magellan Midstream, a competitor of KMI in the terminaling of gasoline and other light petroleum products in the United States.¹¹

The Commission's complaint alleged that the proposed acquisition would violate Section 7 of the Clayton Act and Section 5 of the FTC Act because investment funds controlled by Carlyle and Riverstone would hold interests in both KMI and Magellan, leading to a reduction in competition in the terminaling of gasoline and other light petroleum products in eleven metropolitan areas in the United States.¹² In addition, the FTC alleged that the proposed acquisition would reduce competition because Carlyle and Riverstone would have the right to board representation at both firms, the right to exercise veto power over actions by Magellan, and access to non-public competitively sensitive information from or about KMI or Magellan. The Commission also stated that the transaction would make it easier for the acquirers to exercise unilateral market power because many of KMI's and Magellan's terminals were customers' first or second choices, and other terminals would be either unable or unwilling to replace the competition that would be lost through the transaction. Finally, the transaction would increase the likelihood of coordinated interaction between competitors in the eleven markets, as it would combine, through common partial ownership, two of the primary independent participants in these markets, the FTC stated.

Under the consent agreement, Carlyle and Riverstone were required to (1) remove all of their representatives from the Magellan Board of Managers and its boards of directors, (2) cede control of Magellan to its other principal investor, Madison Dearborn Partners, (3) not influence or attempt to influence the management or operation of Magellan, and (4) establish safeguards against the sharing of competitively sensitive information between KMI and Magellan.¹³

2.2 *Dairy Farmers of America/Southern Belle*

The DOJ's lawsuit challenging Dairy Farmers of America's (DFA's) significant partial investment in two rival dairies (Flav-O-Rich and Southern Belle) also illustrates how partial ownership investments might reduce competition. DFA is a multi-billion dollar cooperative of thousands of dairy farmers. Its primary mission is to secure a steady sale of raw milk for its farmers at the highest price. To further that mission, DFA began vertically integrating and investing in dairies that process raw milk into fluid milk, ice cream, and other milk products. DFA preferred not to wholly acquire and manage the dairies, but to take 50% ownership and largely leave daily operations to business partners with more experience. DFA used

¹⁰ In the Matter of TC Group, L.L.C., No. 061-0197 (Jan. 25, 2007) (decision and order), *available at* <http://www.ftc.gov/os/caselist/0610197/decisionorder.pdf>.

¹¹ See Federal Trade Comm'n, Press Release, FTC Challenges Acquisition of Interests in Kinder Morgan, Inc. by The Carlyle Group and Riverstone Holdings (Jan. 25, 2007), *available at* <http://www.ftc.gov/opa/2007/01/kindermorgan.shtm>.

¹² In the Matter of TC Group, L.L.C., No. 061-0197 (Jan. 25, 2007) (complaint), *available at* <http://www.ftc.gov/os/caselist/0610197/complaint.pdf>.

¹³ In the Matter of TC Group, L.L.C., No. 061-0197 (Jan. 25, 2007) (decision and order), *available at* <http://www.ftc.gov/os/caselist/0610197/decisionorder.pdf>.

its dairy investments both to secure a steady source of processing and distribution for its farmers' raw milk and to capture some of the profits of the dairy processing business.

Prior to February 2002, DFA held a 50% equity stake in the company that owned and operated the Flav-O-Rich dairy. The other 50% equity stake was held by the Allen Family Limited Partnership, a long-time business partner of DFA that maintained the day-to-day responsibilities for operating Flav-O-Rich. In February 2002, DFA acquired 50% of the voting stock of Flav-O-Rich's biggest competitor, the Southern Belle Dairy. The two dairies had a history of antitrust issues, including a decade-long bid-rigging conspiracy, in which they had agreed not to bid aggressively for each other's school milk customers.

For many school districts, Southern Belle and Flav-O-Rich were the only two school milk competitors. For school districts located farther away from the two dairies, often only one other dairy competed. Southern Belle and Flav-O-Rich price discriminated in their school milk bids to school districts based on the school districts' competitive options. The acquisition created no efficiencies; DFA actually argued that the two dairies would be operated independently. The critical issue was whether DFA's investment in both companies would result in either greater coordination between them or in a unilateral anticompetitive effect.

Because both dairies could raise prices to school districts by reducing competition against each other, DFA's 50% interest in each dairy's profits gave DFA a strong incentive to reduce competition. DFA also had an incentive to facilitate unilateral price increases, irrespective of coordination between the dairies. Because of DFA's half ownership of both dairies, it would not matter to DFA if customers of either dairy switched to the other dairy in response to a price increase. Through the governance provisions of the companies that operated the dairies and DFA's ownership interests, DFA also acquired the ability to influence its chosen dairy managers so that DFA could cause the dairies to act in DFA's interest to reduce competition.

DOJ sued DFA, alleging that DFA's partial acquisition of the Southern Belle dairy gave it both the economic incentive and the ability to reduce competition between the dairies. The complaint alleged that the dairies were the only two competitors for a significant number of customers, that entry or expansion would not prevent increased prices and a reduction in service, and that the transaction yielded no efficiencies to outweigh the likely competitive harm. Prior to trial, DFA decided to improve its litigation position by changing its governance rights. DFA turned its common voting stock in the companies that operated both dairies into non-voting stock. As a result, it lost its rights to set salaries or to veto corporate decisions such as capital expenditures. DFA then filed a motion stating that it had no control over the dairies and therefore its ownership interests could not reduce competition. The trial court agreed with DFA and granted DFA's motion for summary judgment, ruling that DFA did not have the ability to control the dairies.

DOJ appealed. In response to DFA's alteration of the original agreement, DOJ argued that DFA violated the law when it first acquired its interest in Southern Belle under the original governance agreement. DOJ argued that the trial court was wrong to ignore DFA's violation of the antitrust laws during the period of the original agreement, and that in doing so the trial court had effectively permitted DFA to evade review and impose an inadequate remedy of its own choosing. In contrast to DFA's self-selected relief, DOJ sought complete divestiture of DFA's interest in Southern Belle.

The Court of Appeals ruled that, assuming DOJ ultimately proved its factual allegations, DFA's original investment in the Southern Belle dairy would violate the antitrust laws.¹⁴ The court ruled that it was error for the trial court to ignore the original agreement. Under the original terms, DFA could use its

¹⁴ *United States v. Dairy Farmers of America, Inc.*, 426 F.3d 850 (6th Cir. 2005).

ownership interests and governance rights to reduce competition between the two dairies. More important, the appellate court also held that DFA's voluntary relinquishment of its voting rights did not remedy the violation. The court explained that DFA could still reduce competition because it had installed managers in the companies who would be loyal to DFA's interests. Additionally, Southern Belle was beholden to DFA for additional capital (given that DFA held all the debt in the company). Further, DFA maintained control over Southern Belle's and Flav-O-Rich's raw milk supply – each dairy plant's most vital input – and could use that control to further influence the dairies to reduce competition. The appellate court held that the appropriate remedy for DFA's overlapping partial ownership interests was DFA's complete divestiture of its interests in one of the two dairy plants. After the appellate court's decision and before trial, DFA and the Allen Family Limited Partnership agreed to sell the Southern Belle dairy plant to another firm.

2.3 *Premerger Notification*

In the U.S. merger control regime, the Hart-Scott-Rodino Act¹⁵ generally requires that any acquisition of voting securities (and/or assets) that meets the size of transaction threshold (and the size of person threshold, if applicable) must be reported to the antitrust enforcement agencies – and a waiting period be observed – prior to consummation.¹⁶ The HSR Act and the implementing rules, however, exempt several categories of acquisitions from HSR notification and waiting requirements. Many of these exemptions are based on the view that transactions of certain types are extremely unlikely to raise antitrust concerns; indeed, in addition to the HSR exemptions contained in the statute, the antitrust enforcement agencies are authorized to exempt from HSR requirements classes of transactions that “are not likely to violate the antitrust laws.”¹⁷

Section (c)(9) of the HSR Act exempts from HSR requirements the acquisition of 10 percent or less of an issuer's voting securities if such acquisition is made “solely for the purpose of investment.” HSR Rule 801.1(i)(1) provides that voting securities are acquired “solely for the purpose of investment” if the acquirer “has no intention of participating in the formulation, determination or direction of the basic business decisions of the issuer.”¹⁸ The U.S. agencies are considering whether it would be appropriate to

¹⁵ 15 USC 18a.

¹⁶ The size of transaction test measures the value of the voting securities or assets that the acquiring person will hold as a result of the acquisition. The size of person test considers the size of the parties to the transaction.

¹⁷ 15 USC 18a(d)(2)(B).

¹⁸ Rule 802.64 (16 CFR 802.64) exempts certain acquisitions of 15 percent or less of an issuer's voting securities by institutional investors “made solely for the purpose of investment.” For purposes of this rule, an institutional investor includes: a bank as defined by the US Code; a savings bank; a savings and loan or building and loan company or association; a trust company; an insurance company; an investment company registered with the SEC under the Investment Company Act of 1940; a finance company; a broker-dealer as defined by the US Code; certain companies regulated by the Small Business Administration; a stock bonus, pension or profit-sharing trust as defined by the Internal Revenue Code; a bank holding company as defined by the US Code; an entity controlled by the institutional investor; an entity that holds only controlling interests in institutional investors; and a non-profit entity as defined by the Internal Revenue Code. For this exemption to apply, the acquisition of 15 percent or less of an issuer's voting securities must be made directly by an institutional investor in the ordinary course of business solely for the purposes of investment. This exemption does not apply when the acquisition involves institutional investors of the same type or when an entity that is not an institutional investor within the institutional investor already holds shares of the target.

expand the exemption from HSR notification and waiting requirements in the future, by exempting small-percentage acquisitions without regard to the acquiror's intent.¹⁹

3. Section 8 of the Clayton Act

Section 8 of the Clayton Act,²⁰ as amended by the Antitrust Amendments Act of 1990, prohibits certain director and officer interlocks between competing business corporations. Additionally, the FTC has applied Section 5 of the FTC Act,²¹ which prohibits unfair methods of competition, to enforce the "spirit and policy" of Section 8.²²

Subject to certain minimum thresholds, Section 8 prohibits a person from serving as a director or an officer, elected or chosen by the board, of two or more corporations if the corporations are "by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the antitrust laws."²³ Competitor corporations are covered by Section 8 if the combined capital, surplus, and undivided profits of each of the corporations exceeds an inflation-adjusted multiple of \$10 million.²⁴ Exempted from Section 8's prohibitions are interlocks for which (1) the competitive sales of either corporation are less than an inflation-adjusted multiple of \$1 million,²⁵ (2) the competitive sales of either corporation are less than 2 percent of that corporation's total sales,²⁶ or (3) the competitive sales of each corporation are less than 4 percent of that corporation's total sales.²⁷ This removes from the coverage of interlock prohibitions arrangements that pose little risk of significant antitrust injury.

Section 8 requires the existence of a horizontal market relationship.²⁸ In a recent case described below, CommScope Inc.'s acquisition of Andrew Corporation raised both Section 7 and Section 8 issues.

¹⁹ The antitrust enforcement agencies have brought civil penalty actions under the HSR Act for failures to observe the Act's notification and waiting requirements in instances in which parties acquired ten percent or less of an issuer's voting securities and did not make the acquisition "solely for the purpose of investment." See, e.g., *United States v. Smithfield Foods*, 2004-2 Trade Cas. (CCH) Par. 74,614 (D.D.C. 2004); *United States v. Pennzoil Co.*, 1994-2 Trade Cas. (CCH) Par. 70,760 (D.D.C. 1994); *United States of America (for the Federal Trade Commission), Plaintiff, v. James D. Dondero, c/o Highland Capital Management, L.P., Defendant*, (D.D.C. FTC File No.: 051-0184); *United States of America (for the Federal Trade Commission), Plaintiff, v. ValueAct Capital Partners, L.P., Defendants*, (D.D.C. File No. 051 0204).

²⁰ 15 U.S.C. § 19.

²¹ 15 U.S.C. § 45.

²² See *Kraftco Corp.*, 89 F.T.C. 46, *remanded on other grounds sub nom. SCM Corp. v. FTC*, 565 F.2d 807 (2d Cir. 1977), *appeal after remand*, 612 F.2d 707 (2d Cir.), *cert. denied*, 449 U.S. 821 (1980).

²³ 15 U.S.C. § 19(a)(1)(B).

²⁴ As of January 2008, the threshold was set at \$25,319,000.

²⁵ The threshold was set at \$2,531,900 as of January 2008.

²⁶ 15 U.S.C. § 19(a)(2).

²⁷ *Id.*

²⁸ See *Borg-Warner Corp.*, 101 F.T.C. 863, 932 ("[T]he relevant inquiry . . . is whether the parent company should be regarded as a 'competitor' of the subsidiary's competitors, and whether an interlocked director is . . . able to exercise control or even to substantially influence decisionmaking . . . so as to dampen competitive relationships") (citation omitted), *modified*, 102 F.T.C. 1164 (1983), *rev'd on other grounds*, 742 F.2d 108 (2d Cir. 1984).

3.1 *CommScope/Andrew*

In June 2007, CommScope Inc. (CommScope) entered into an agreement to acquire Andrew Corporation (Andrew). CommScope is a major manufacturer of wire and cable products, including drop cable and hardware products used in drop cable installations.²⁹ Andrew is a major producer of antenna and cable products and products for wireless communications systems; it manufactured drop cable until it sold this business to Andes Industries, Inc. (Andes), shortly before its agreement with CommScope. Andrew held 30% of Andes' equity, a warrant to acquire additional Andes stock, and several notes of indebtedness from Andes. It also held numerous governance rights over Andes, including rights to designate members of Andes' board of directors. When Andrew sold its drop cable business to Andes, Andrew licensed Andes to use the intellectual property associated with a special dry anti-corrosion feature of drop cable.

The Department of Justice's competitive concerns centered on the drop cable market. The relevant geographic market was the United States. The market was highly concentrated, with only four companies supplying cable TV companies. CommScope had a market share of between 60 and 70 percent. Andes was the third largest manufacturer, with only a 4% market share, but was making a significant market impact because of its lower pricing and ability to offer drop cable with dry anti-corrosion protection.

The full line of products offered by CommScope and Andes made them each other's closest competitors for many customers. Of the four manufacturers of drop cable, only CommScope and Andes offered it with the dry anti-corrosion protection, a feature of particular importance to some cable TV customers. Andes and CommScope competed with each other in product innovation, such as development of the dry anti-corrosion feature. The prices charged by Andrew and Andes generally had been 5 to 10% lower than those charged by CommScope and other producers.

The DOJ found that if CommScope were allowed to acquire Andrew's minority holdings in Andes, Andes would no longer be an independent drop cable competitor. Successful entry into the drop cable market would not be timely, likely, or sufficient to offset the substantial lessening of competition. The DOJ concluded that

CommScope's substantial ownership in Andes would reduce its incentive to compete with Andes. In addition, ... CommScope would obtain substantial governance rights over Andes. Once CommScope completes its acquisition of Andrew, Andes' board of directors will have seven members. CommScope will then have rights to appoint two members of that board, and jointly with another Andes' shareholder, to appoint two more. In addition, CommScope's consent will be required ... for a range of corporate actions by Andes, and CommScope will hold extensive rights to access Andes' confidential business information. These governance rights, combined with its 30 percent ownership stake and other interests in Andes, would give CommScope both the incentive and the ability to coordinate its activities with those of Andes, and/or to undermine Andes' ability to compete on price and innovation.³⁰

On December 6, 2007, DOJ filed a complaint and proposed consent decree in federal district court that would require the parties to divest Andrew's entire ownership interest in Andes, the intellectual property concerning the dry anti-corrosion product, and all notes of Andes' indebtedness held by Andrew

²⁹ Drop cable is coaxial cable used by cable television companies to connect their transmission systems with customers' premises and equipment inside the customers' premises.

³⁰ Competitive Impact Statement, *United States v. CommScope, Inc.*, at 7, available at <http://www.usdoj.gov/atr/cases/f228300/228364.htm>.

and warrants to acquire additional Andes stock.³¹ With regard to the alleged interlocking directorates, the parties were required to renounce their contractual governance rights, including the rights of CommScope to appoint members of Andes' board.

³¹ *United States v. Commscope, Inc.*, No. 1:07-CV-02200, (D.D.C. filed Dec. 6, 2007).

EUROPEAN COMMISSION

I. Introduction

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

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

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. *Thirdly*, the acquisition of a minority stake may be regarded as anti-competitive if it seems likely to have

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.

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*

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)*

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.

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).

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

2.3 *Minority shareholdings in the competitive assessment*

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

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."

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.

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.

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.

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 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.

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.

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.

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.

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.

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.

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*.

3. Minority shareholdings under articles 81 and 82 EC treaty

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.

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.

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".

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.

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

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.

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.

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.

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

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 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.

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.

BRAZIL

1. Introduction

Brazilian antitrust legislation (Law 8,884/94, art. 54, ¶ 3) determines that "acts aimed at any form of economic concentration are covered by this Law, including through merger or incorporation of companies, constitution of a company for purposes of controlling companies or any form of stockholding structure that implies participation of a company or group of companies resulting in 20% (twenty percent) of a relevant market, or in which any one of the participants has registered gross annual earnings equivalent to R\$ 400,000,000.00 (four hundred million reais) in its most recent balance sheet. (Text given by MPV 1,620-34, dated 02/12/98)"

Note that current legislation draws no distinction among the types of operations that can be subjected to analysis by the Brazilian Competition Policy System (BCPS). However, Bill no. 5,877/05, now before the National Congress, has the objective of altering Law no. 8,884/94 by introducing precise criteria for defining the nature of economic concentration. According to that bill, an act of concentration occurs in cases of mergers, incorporations, direct or indirect acquisitions of control and formalization of association contracts, consortia or joint ventures. An act of concentration does not occur when acquisition of participation is temporary in nature and: (i) when there is no possibility of influencing competitive behavior and (ii) when voting rights are exercised exclusively for purposes of preparing the sale of the company acquired:

Art. 91. For purposes of art. 89, an act of concentration occurs when:

I- two or more previously independent companies merge;

II - one or more companies directly or indirectly acquire control or parts of one or other companies through purchases or exchanges of shares, quotas, bonds or securities convertible into shares, or tangible or intangible assets, by means of contractual instruments or any other means or form;

III - one or more companies incorporate another company or other companies; and

IV - two or more companies formalize an association contract, consortium or joint venture.

Paragraph. For purposes of art. 89, transactions and trading operations of a temporary character involving shares, quotas or other securities, when carried out at one's initiative or by third parties, or stock participation acquired for purposes of resale will not be considered acts of concentration, provided that the acquiring parties:

I - do not directly or indirectly hold decision-making power or, furthermore, the capacity to influence the competitive behavior of the acquired company; or

II - only exercise voting rights with the exclusive objective of preparing the total or partial sale of the company acquired, its assets or such stock participation, with the stated sale to occur within the regulatory period."

The new text proposed by the aforementioned bill makes it clear that acquisition of minority stock participation that does not have direct or indirect decision-making power or the capacity to influence the competitive behaviour of the company acquired does not constitute an act of concentration.

Since this bill has not yet been approved by the Brazilian government and in an attempt to come to a common understanding that does not overload the BCPS with analyses of cases that clearly do not hamper competition, the Administrative Council for Economic Defense (CADE) published¹ digest no. 2 toward the end of 2007, determining that "Acquisition of minority stock participation in relation to voting capital by the partner that already holds a majority stock position does not constitute an act that requires notification (Law no. 8,884/94, art. 54), if the following circumstances are present: (i) the seller did not hold powers consequent upon legislation, bylaws or contracts to (i.a) indicate the administrator, (i.b) define commercial policy or (i.c) veto any company-related issues and (ii) the juridical act of acquisition (ii.a) does not involve noncompetitive clauses with terms of more than five years and/or territorial scope greater than that covered by the effective activities of the company in question and (ii.b) does not give rise to any type of power of control among the parties after the operation".

2. Discussion of relevant influence

The question of acquisition of minority stock participation in other companies involves a discussion of the concepts of relative influence and dominant influence². Recently, the concept of relevant influence was discussed in several CADE decisions, according to which it exists in situations in which a company possesses mechanisms of control over strategic variables of another company, even when it holds only minority participation in that company. According to Carvalho (1995)³:

"The effective or potential exercise of this determinant influence is what will generate unification of decision-making centers. In this case, there is no need for proprietorship of more than half of the voting shares. From this point of view, the concept of determinant influence is broader than that of power of control - though, as already seen, the latter is also quite broad. In ultimate analysis, determinant influence can be exercised to diminish or eliminate competition without the stockholder having authority to utilize the properties of the company. It is enough to be able to influence price definition in the company in which that person holds a minority stock position."

In his revised vote presented in Act of Concentration no. 08012.010293/2004-48⁴, Councilor Ricardo Villas Bôas Cueva noted that "from the competitive standpoint, relevant influence exists whenever, based on the union of decision-making centers in specific and strategic areas, it becomes possible to presume cooperative behavior among companies, which does not presuppose holding of a majority voting stock position."

The same Councilor states that, to identify relevant influence, "one must first have (i) interest in investing in the market activities of the company. Having gone beyond this stage, one must have (ii) the

¹ Published in the "Diário Oficial da União", dated 08/27/2007, no. 165, Section 1, page 28.

² Dominant influence refers to the power to influence business planning decisively in areas of market relevance, such as production, sales, investment, technology, R&D and distribution. This is not necessarily linked to stock control. Professor Calixto Salomão affirms that dominant competitive influence must be significantly more stable than stockholding-based influence or, in other words, the influence must be constant and overriding and, furthermore, that "to be dominant, the influence must necessarily be endowed with the power to decide autonomously. Joint voting or veto rights do not characterize dominant influence", but rather "relevant influence from the competitive point of view". FILHO, Calixto Salomão, "Direito Concorrencial – As estruturas". 2nd ed. Malheiros: São Paulo, 2002.

³ CARVALHO, Nuno T.P. "As Concentrações de empresas no direito antitrust". Editora Resenha Tributária: São Paulo. 1995, page 99.

⁴ Decision published on 02.24.2006.

possibility of exercising or (iii) effective exercise of influence in business decisions. From the point of view of interest, a high level of stock participation is evidently an important indicator, but can not be considered a general and objective criterion."

According to Cueva, the presumption of interest in strategically intervening in the company must be rooted in more concrete facts, such as, for example, coincidence of business objectives between the stockholder and the company, leading one to infer interest in influencing specific behaviors with greater certitude and inevitably presupposing interest in influencing the sphere of economic interests. Another hypothesis would be the existence of contractual bonds between the two, making it possible to presume interest rooted in external factors, depending on the nature of the bond and the dependence generated by the contractual relations.

With regard to the possibility or effectiveness of exercising relevant influence, it would not be reasonable to infer this from the mere existence or presumption of interest, in other words, without the stockholder effectively or legally being entitled to a prerogative or privilege that grants decision-making power. The reason for this is that, to be truly significant, influence must be stable and prolonged over time, as clearly stressed by Calixto Salomão "the power to determine the business planning of an economic agent requires constant and broad influence"⁵.

According to CADE, to determine whether the influence is constant and broad, the antitrust authority must consider the following factors individually and cumulatively:

"(i) the possibility of electing members of the Council of Administration and Board of Directors who will be charged with administration of the company, provided that they have powers sufficient to determine the company's market behavior;

(ii) whether stock participation is distributed among many stockholders, making it possible for a stockholder with small participation to exercise power of control. This is clear when one considers that if 10% of the stock has very little "weight" in situations in which stock distribution is concentrated in the hands of few stockholders, these same 10% will be highly significant in a structure in which stock is spread out among many stockholders.

(iii) predominance in recent General Stockholder Meetings, demonstrating not only the possibility of exercising influence, but also its effectiveness and continuity - which are more important considerations. This is the criterion adopted by the National Monetary Council in Resolution 401/76, which states that the minority that has exerted control in the three most recent meetings will be considered the controlling stockholder⁶. Though it has already been revoked and was originally issued to discipline the national financial system, the aforementioned

⁵ FILHO, Calixto Salomão. "Direito Concorrencial – as estruturas". 2nd ed. Malheiros: São Paulo, 2002, page 257: "The power to determine the practice of an isolated act is not enough (as occurs in corporate law, in which a single act can cause asset losses to the company, its minority stockholders, creditors and employees). (...) For this reason, the possibility or even probability of influencing an isolated act is not enough to characterize dominant influence (in the competitive sense). This power must have stable structural foundations, leading to the presumption that it will last over time."

(...) internal control, when held by minority shareholders, must be accompanied by some qualifier that ensures or at least makes it possible to presume the existence of lasting influence."

⁶ (...) IV - In a company in which control is exercised by a person or group of persons who are not holders of an absolute majority of voting capital, for purposes of this Resolution, the controlling stockholder is considered to be the person or group of persons, joined by a stockholder agreement or subject to common control, holding shares that ensure an absolute majority of votes of the stockholders present at the last three General Stockholder Meetings of the company.

Resolution can be viewed as a parameter, since it reflects one more interpretation of the notion of control put forward in Law 6,404/76, based on the experience of that entity.

(iv) whether there exists a stockholder agreement that grants power to deliberate on certain matters to the minority stockholder;

(v) the existence of a contractual bond containing a special clause or defining sufficient interest and bargaining power to influence the behavior of the company. This possibility would consist of so-called external control - which is more rarely found and difficult to define;

(vi) provisions of any nature set down in bylaws that make it possible for minority stockholders to participate more actively, granting them veto rights or something similar - a question that would require a close analysis of the bylaws."

Both American and European legislation have parameters that make it possible to define whether acquisition of stock participation is a mere financial investment or generates effective influence in the company, which is the factor that would identify economic concentration. According to Cueva, both systems give due consideration to the intention underlying the acquisition or, in other words, whether it has a lasting character or not, as well as the effective exercise of the powers resulting from the acquisition or, more specifically, whether the purpose is to guarantee the value of the investment or whether it is designed to interfere in a lasting manner in the commercial strategies of the company. The essential point in determining the inexistence of concentration is the transitory nature of the act. However, in the United States, the volume of the participation acquired is also given consideration, while European authorities link the intention of exerting a lasting influence to sale of the stock position within a period of one year⁷.

Therefore, one perceives that Brazilian antitrust authorities deal with this question in a manner quite similar to international practice, since they are also concerned with whether influence is lasting in character or not, considering that, as already stated above, to be truly significant, this influence must be stable and lasting over time.

3. Case Studies

3.1 Ideiasnet and Flynet

In analyzing Active Concentration no. 08012.010293/2004-48, involving the Ideiasnet S.A. and Flynet S.A. companies, CADE discussed this question of relevant influence.

Based on an exchange of stocks, the act consisted of incorporation by Ideiasnet S.A. ("Ideiasnet") of stock participation in Autômatos International Ltda., Spring Wireless Ltda., Virtualab Participações S.A., Proteus Soluções S.A., Visionnaire Informática S.A., BP Participações e Administração S.A. and Padtec S.A., previously indirectly controlled by the Pactual Internet Stock Investment Fund (Fundo de

⁷ Study of comparative Law carried out by former Councilor Ronaldo Porto Macedo Júnior, in his revised vote in Act of Concentration no. 08012.006619/2001-90:

"Initially, one should recall that notification exemptions in the United States and Europe are not specifically designed for the use of private equity funds but rather for acquisition intention (whether of a lasting character or not) and exercise of the powers acquired (for the sole purpose of guaranteeing the value of the investment or in such a way as to intervene in the commercial strategies of the company). Whether the investment has a lasting character or not is given by the period for selling and the volume of participation acquired - the legislation of both areas stipulates transitory nature as an essential factor in defining whether economic concentration has occurred. While American authorities identify this on the basis of 10% participation, creating the presumption that acquisitions of up to 1/10 of voting capital of a company do not require notification, the Europeans are somewhat stricter and create a bond between the intention of durability and sale of the stock within a period of one year."

Investimento em Ações Pactual Internet) (“Fundo”). In this operation, the Fund, the controller of Flynet S.A.(“Flynet”), received 36.12% of the capital stock of Ideiasnet.

On that occasion, the Petitioners alleged that Ideiasnet stockholders belonged to groups that may have obtained revenues of more than R\$ 400 million in Brazil during the same period. However, they stressed that none of these stockholders held individual or shared control of Ideiasnet, since no single stockholder held more than 50% of the voting capital nor was there a stockholder agreement defining a specific bloc of controlling stockholders. In this framework, they petitioned that CADE take a position on whether there is or is not a need for submitting the operation to the BCPS, in light of the terms of paragraph 3 of article 54 of Law no. 8,884/94.

The shareholding structure of Ideiasnet before and after the operation was as follows:

BEFORE OPERATION		AFTER OPERATION	
Stockholder	Share	Stockholder	Share
7227 Participações Ltda.	25.43%	FIA Pactual Internet	36.12%
Carlos Mário Gomes de Almeida	13.70%	7227 Participações Ltda.	16.24%
Lorentzen Business Development S/A	12.25%	Carlos Mário Gomes de Almeida	8.75%
Romanche Inv. Corporation LLC	5.44%	Lorentzen Business Development Ltda.	7.83%
George Eduardo Rheingantz Ellis	5.24%		
Others	37.94%	Others	31.06%
Total	100%	Total	100%

In his vote, Councilor Ricardo Villas Bôas Cueva noted that control was concentrated in the hands of the five largest stockholders before the operation, dropping to just four after the operation, with the remaining stock being dispersed among various other stockholders, since the company is an open capital corporation listed on the exchange. Parallel to this, there was no stockholder agreement, leading the Councilor to the conclusion that stock dispersion was not sufficient to infer power of influence on the part of one of the stockholders with relevant participation, nor was stock concentration sufficient to define control.

According to CADE, information was not available in the records that would allow one to presume real interest on the part of any stockholder in intervening specifically in the company's market operations, mainly in light of the fact that these stockholders do not operate in the same sector as Ideiasnet.

Analysis of the Ideiasnet Bylaws shows that a single stockholder with at least 12% of the company's capital could elect a member to the Council of Administration, though, in this case, it would be necessary to increase the number of Councilors which was then set at a minimum of 6 (six) and a maximum of 9 (nine). However, the Councilor noted in his vote that there was no sign that the minority stockholders had made use of this prerogative, since, at the time, the Council was operating with the minimum permitted number of members. Parallel to this, even if an election were to occur on the basis of the provision in the bylaws, the effort to elect a member to the Council would lead one to presume a priori only the stockholder's interest in the company's administration which, though it can be taken as an indication of evidence, would not yet be sufficient to conclude as to the exercise of relevant influence from the competitive point of view, according to the conclusion drawn by the Councilor.

The minutes of the three most recent Extraordinary Stockholders Meetings were analyzed and all of them took place at first convocation, with the presence of more than 2/3 of the stockholders, as follows: (i) in the first, 9 (nine) stockholders were present, and decisions were taken by unanimous vote; (ii) in the second, 17 (seventeen) stockholders were present, representing 71.12% of voting capital and decisions were taken with the approval of 71.09% of the voting capital and, finally, (iii) in the third, 31 (thirty-one) stockholders were present and decisions were taken by unanimous vote.

Consequently, one can presume that the decisions were taken in an equitable manner, with large and effective participation of stockholders with no dominance on the part of one or a few of them. In other words, there was no single stockholder present who in any way exercised some type of control over the companies.

In his vote, Councilor Cueva concludes that the operation is not admissible, since it is not covered by the hypotheses set down in art. 54, ¶ 3 of Law 8,884/94, judging the process extinct with no judgment of merit. By majority vote, the plenary CADE session voted against admission of the operation, which was filed with no judgment of merit.

3.2 *Geral de Concreto and Holcim*

Act of Concentration no. 08012.010786/2004-88, Holcim acquired several concrete production operating units from Geral de Concreto, located in the cities of Nova Iguaçu (RJ), Vespasiano (MG), Juiz de Fora (MG), Sete Lagoas (MG) and Divinópolis (MG).

The operation resulted in horizontal concentration since the Holcim Group held 15% participation in the capital stock of Topmix and 22% in Brasmix, both of which operated in the concrete production service market.

The Secretariat for Economic Monitoring (SEAE) affirmed in its position statement that the decision to analyze the effects of horizontal concentration among the companies in which the Holcim Group directly or indirectly held stock participation was not covered by the notion of power of control in corporate legislation. According to SEAE, in antitrust legislation, this notion should be differentiated from the concept of control in Brazilian corporate legislation and, therefore, is not equivalent to the relationship between control and the possibility of making use of the company's assets and dividends. From the standpoint of antitrust law, the relevant question would be linked to the capacity to affect or influence management of the company's activities or, in other words, the market conduct of the companies in question.

The concept of "relevant influence" was applied to the situation in which there was internal minority control, considered a relevant scenario for analysis of the case, or external control. Therefore, SEAE opted to analyze the impacts of the horizontal concentration found among the units acquired and the companies connected to the Holcim Group (Topmix and Brasmix), albeit with minority positions. Concern was focused on the presumption that relevant market decisions of the companies could be influenced by others, leading to cooperation among them. With this, the question does not refer to control or veto rights, but rather to focal points of minority or external control.

Adopting a conservative stance, SEAE decided to analyze the question, presuming that the Holcim Group had relevant influence in the decisions of the companies in which it held stock participation in the concrete production service market or, more specifically, Brasmix and Topmix. Though a detailed analysis of the influence of the Holcim Group in the commercial policy of these companies was not performed, it was SEAE's understanding that the stockholding structure in effect could, at the very least, allow for an exchange of information among the different units acquired by the Holcim Group and the companies in which the Group already had minority participation. As a result, SEAE concluded that the Holcim Group had influence on the commercial policies of Topmix and Brasmix and that both companies were considered as belonging to the Holcim Group in the calculation of market share.

The CADE has agreed with the arguments raised by SEAE and also considered the participation of the enterprises as belonging to the group Holcim.

4. Conclusion

Since Brazilian competition legislation draws no distinction between the types of operations that must be submitted to analysis of the Brazilian Competition Policy System (BCPS), there is concern that the current criterion on notification is excessively broad, since even operations with insignificant impact on the Brazilian economy must be notified. Consequently, the System has become congested by this type of operation, often with no need for analysis, since they do not involve cases of economic concentration or are evidently incapable of hampering competition.

This was the concern underlying bill no. 5,877/05 submitted to the National Congress, in determining that acquisitions of minority stock positions, without direct or indirect power to determine nor capacity to impact the competitive behavior of the companies acquired, do not represent acts of concentration. At the same time, the concern that the current criterion covering notification of operations is excessively broad, resulting in congestion at the BCPS involving cases in which there is no significant impact on the Brazilian economy, led CADE to publish digest no. 2, determining that "acquisition of minority participation in voting capital by a partner that already holds a majority share does not constitute an act requiring obligatory notification (art.54 of Law no. 8, 88 4/94)".

INDONESIA

1. Introduction

The most common and popular business type used in Indonesia is called Perseroan Terbatas (Limited Liability Company), to be further referred as “Perseroan”. Board of Directors of Perseroan is an organ with essential and important daily tasks, as it has role and authorities to manage and represent the Perseroan. Perseroan, as an artificial business entity is not allowed to conduct any legal actions on its own. It shall be represented by individuals in Board of Directors. Perseroan cannot be involved in any legal interactions without Board of Director’s member. The existence of directors in Perseroan is mandatory, as its role allows the Perseroan to perform its activities.

In practice, authorities of management are defined in the clauses in the Deed of Establishment of Perseroan, (that also includes its Article of Association). Board of Directors has the authorities to manage all legal aspects of any activities as stipulated in the goals and aims of Perseroan. The so called authorities are among others the authorities to conduct other activities that may not written clearly in the Article of Association, but may have relations to the purposes and objectives of the related Perseroan.

Board of Commissioners functions as an organ of Perseroan with authorities to perform supervisory role and provide guidance to the Board of Directors, in relations to the implementation of management and representation performed by the Directors. Board of Commissioners even has a right to temporarily suspend the member of Board of Directors, if they are viewed breaking the Article of Association and or across the authorities line given to them based on the Article of Association.

Understanding the authorities and tasks of Board of Directors and Board of Commissioners, it cannot be argued, that any types “interlocking directorate” of Directors and or Commissioners, vertical, horizontal or conglomeration may lead to the monopoly practices and unfair business competition.

2. “Interlocking Directorate” according to Indonesian Competition Law

Most of international law scholars viewed “interlocking directorate” is related to four aspects, that is, control, collusion, financial discretion and cultural aspect. Taking all these aspects into account, it is then not surprising, that “interlocking directorate” is considered an action that against the Indonesian Competition Law (The Law No. 5/1999).

Article 26 of the Law No. 5/1999 stated that,

“A person concurrently holding a position as a member of the Board of Directors or as a Commissioner of a company, shall be prohibited from simultaneously holding a position as a member of the Board of Directors or a Commissioner in other companies, in the event that such companies:

- are in the same relevant market; or
- have a strong bond in the field and or type of business activities; or
- are jointly capable of controlling the market share of certain goods or services,

which may result in monopolistic practices and or unfair business competition.

Under this article, “interlocking directorate” is prohibited if it refers to the Directors or Commissioners of one single company and at the same period of time also perform as Directors or Commissioners in another company, when the so called companies are in the same market or have a close link in business scope or type that allows them to dominate market share of particular goods and or services. Therefore by this definition, Indonesian Competition Law only prohibits interlocking position merely to the Board of Directors and or Board of Commissioners.

This is based on the argument, that the management of Perseroan is performed by Board of Directors or Commissioners that generally lead by the President Directors, thus, Directors have interlocking tasks and authorities, namely to manage and represent the Perseroan. The authorities of the Directors cover every legal action related to the objective of Perseroan, as written in its Article of Association. Authority to represent the company is not limited to lead and implement daily activities, but also to take any initiatives and make a future plan of the Company. Directors’ authorities are not limited to the legal actions written in the Article of Associations but to include any secondary actions that regularly, properly and generally comply with the objective of the Company. Thus, Board of Directors is an independent legal subject.

However, it is also important to understand that Indonesian Competition Law does not give any clear definition on Board of Directors and Commissioners and accordingly, it has to be referred to another related law. In other words, the position of Directors and Commissioners are closely related to the shares ownership in two or more companies. Therefore, indirectly, on interlocking position will closely relate to the conditions on shares ownership and on merger and acquisition of companies.

3. Another regulation on Interlocking Positions

Other than Competition Law, prohibition on interlocking directorate is also written in another law, on particular sectors, namely:

- Law No. 19 year 2003 regarding State Owned Enterprises, states that Commissioners are not allowed to be in interlocking position, as a) Directors of State Owned Enterprises, Region Owned Enterprises, Private Enterprises and any other position that may lead to conflict of interest and/or b) other position stipulated by the laws.
- Central Bank Regulation No. 2/7/2000 regarding General Bank, as written in the Article 22, that Board of Commissioners may only have interlocking position as a) commissioners of at the most 1 (one) other bank or BPR; or b) commissioners, directors or executives that perform fully at the most in 2 (two) other foundations/non-bank companies or non-community loan bank (BPR).
- Regulation of Capital Market Supervisory Agency (hereafter refer to “Bapepam”) No. V.A.1 regarding License of Securities Company, Attachment of Regulation of Bapepam No. Kep-24/PM/1996 dated 17 January 1996 that are amended by the regulation No. Kep-45/PM/1997 dated 26 December 1997 that stipulate other conditions to be fulfilled by Directors and Commissioners, that Securities Company are not allowed to have any interlocking positions in any other Securities Company.

It is certain that the prohibition aims to make Commissioners and Directors to be fully concentrated in performing their tasks and authorities to achieve Company’s goal as well as to prevent any conflicts of interests. Furthermore, regulations in banking industry, the approach was to take interlocking condition as a fully prohibited action. The prohibited condition is applied once the company is established, so interlocking directorate would not necessarily be assessed or proven. In the case of strong tendency of interlocking directorate, either for Directors or Commissioners, this may be concluded as a violation. Conclusively, in banking industry, interlocking position is an illegal practice (per se illegal).

4. Analysis on Interlocking Position according to Indonesian Competition Law.

As previously stated, prohibition on interlocking directorate is written in the Article 26 of the Law, which says: anyone who is Directors or Commissioners of a Company, at the same time is prohibited to be directors or commissioners in another company, if the companies:

- are in the same market; or
- have a close relation in the same business scope and or business type
- with together might dominate a particular goods and or service market.

that may cause monopolistic practices and or unfair business competition.

If we refer to this arrangement, we may conclude that prohibition on interlocking directorate in Indonesian Competition Law is rule of reason, that is, it still requires proofs on prohibition. Proofs are needed to ensure the business competition supervisory agency that:

- that interlocking directorate are made in the same related market or
- that interlocking directorate are made in the closely related companies in the similar goods or services market
- that interlocking directorate may lead the companies with together to dominate a particular certain goods or services market.

If one of those three above mentioned condition is occurred, it will potentially lead to the monopolistic practices or unfair business competition. Thus, based on this article, it can be concluded that verification on interlocking directorate takes complicated process.

Another important aspect on interlocking directorate in Indonesian competition law is that the violation of this article will be highly related to another article of the Law, such as articles on oligopoly, price determination, boycott, cartel, oligopsony, vertical integration, abuse of dominant power and shares ownership. Therefore, on the investigation of interlocking directorate, violations on another article are often found too or vice versa.

5. Cases Study

KPPU's decision in the case on interlocking directorate showed "rule of reason" approach/consideration of the Commissioners.

5.1 *Interlocking Position in the case of CIF, SPE and NSR (Case No. 5/KPPU-L/2002)*

KPPU has found interlocking directorate (in movie distribution market) (under the names of HL and SS, in relations to their position as Directors and/or Commissioners) as the violation of the Law No. 5/1999, taken by CIF, SPE and NSR, those are: In KIR, HL as President Director and SS as President/Chief Commissioner,

- In GAP, HL as Director and SS as Chief Commissioner,
- In SUM, HL as President Director and SS as Chief Commissioner,

- In PANMS, HL as Commissioner and SS as Chief Commissioner,
- In LIAAS, HL as President Director and SS as Chief Commissioner,
- In PPB, HL as President Director and SS as Chief Commissioner,
- In KMA, HL as Commissioner and SS as Chief Commissioner,
- In IM, HL as President Director and SS as Chief Commissioner.

While there was a fact that before Commissioners (of KPPU) made their decision, HL has tendered his resignation from his position as (i) Commissioners in 2 (two) companies in under the Holding Company, (ii) Chief Commissioner in 1(one) company under Holding Company and (iii) Director in 4 (four) companies under Holding Company. SS has also tender his resignation from the position as (i) Chief Commissioner in 4 (four) companies under Holding Company.

Based on these facts, Commission decided that the reported party CIF and NSR was not proven violating the article 26 of the Law. However, the Commission stated that HL and SS that had interlocking positions in several strategic positions in some companies may lead to monopoly and unhealthy business practices. Yet, the Commission argued that until the completion of inspection, the commission did not have sufficient proof that the interlocking positions have caused monopoly and unhealthy business practices. Commission was also decided that the resignation of HL and SS as Director or Commissioner in some companies may be noted as a good intention to minimize the potential of any misuse of interlocking position.

5.2 *Interlocking Position in the case of JICT, KSO, TPK, KOJA and PP II (Case No. 4/KPPU-2/2003)*

In this case the Commission found that WSW has interlocking directorate (in port service market) as President Directors in 2 (two) companies with dominant influence in the related market, namely JICT and OTP. JICT as a Reported Party 1, is a company provide service on discharging container in TP port. Between JICT and KSO, TPK, KOJA (Reported Party 2) it is known there are some attempts to deliver service on discharging in TP Port together. OTP is a part of KSP TPK KOJA.

According to the article 26 (a) of the Law, it is written that a person who is Director or Commissioner of a company, at the same time, may not be a Director or Commissioner in another company, if the companies are in the related market. The question, was then, whether the interlocking position of President Director in JICT and in OTP (both are in the related market) was against the article 26 (a) of the Law?

The panel decided that the interlocking directorate of WSW is against the Article 26 (a) of the Law, based on the consideration:

- KSO, TPK, KOJA (Reported Party 2) is a business entity operated through cooperation of 2 (two) legal entities, namely, PPI II (Reported Party 3) and OTP, with the competence in same service management of discharging container.
- OTP as a part of Reported Party 2 may be classified as business player that implement the same activities with JICT, Reported Party 1.
- WSW admit that in the same time he had interlocking positions in 2 (two) companies, as a President Director in JICT and OTP.

- That the so called interlocking position should meet the essential element that may cause monopoly or unhealthy business competition.
- That the draft of letter made by JICT – Reported Party 1 and the use of letter head of the Reported Party 1 in the year 2002, signed together with JICT, Reported Party 1 and KSO TPK KOJA – Reported Party 2, that sent to the one of service user, reflected the effect of interlocking position by WSW as the director of 2 (two) companies in the same related market. The letter may be interpreted as an attempt to hamper business competition, as defined in the article 1 (6) of the Law. Therefore, the essence of creating unhealthy competition was fulfilled.

Consequently, elements of interlocking directorate as Directors or Commissioners in more than 1 (one) company at the same time, in the related market, appeared to create unfair business competition as written in the article 26 (a) of the Law. Based on this, the Panel decided that WSW has legally and convincingly proven against the article 26 (a) of the Law.

6. Conclusion

Indonesian Competition Law states that interlocking directorate as a “rule of reason” article that needs economic analysis in its proof verification. However, the limitation of time and proof tools may affect the quality of verification applied by competition authority. On the other hand, economic verification on interlocking directorate is often argued on the appeal courts. Those conditions made article on interlocking directorate becomes a debate for legal experts on business competition in Indonesia.

ISRAEL

The following report summarizes the Israel Antitrust Authority (hereinafter: IAA) experience with respect to minority shareholdings and interlocking directorates. The subject of minority shareholdings is partly regulated by the Israeli Restrictive Trade Practices Act, 1988 (hereinafter: Antitrust Act) itself, and has been addressed on several occasions by the IAA and the Israeli Antitrust Tribunal. The subject of interlocking directorates is not regulated by specific legislation, but has been addressed by the IAA, particularly in the area of merger remedies.

1. Minority Shareholdings

1.1 Minority Shareholdings in Israeli Merger Control Regime

The Israeli Antitrust Act (Article 1) defines a "Merger of Companies" as follows:

"Including the acquisition of most of the assets of a company by another company or the acquisition of shares in a company by another company by which the acquiring company is accorded more than a quarter of the nominal value of the issued share capital, or of the voting power, or the power to appoint more than a quarter of the directors, or participation in more than a quarter of the profits of such company; the acquisition may be direct or indirect or by way of rights accorded by contract."

According to the Antitrust Act, any acquisition that crosses the 25% threshold constitutes a merger by definition, regardless of whether the acquired firm holds a minority block of shares¹. It is worth noting that the same principle applies to any acquisition which result in crossing the 25% threshold of any of the rights specified by the Israeli Antitrust Act (hereinafter: "the rights"), even if the relevant transaction involves the acquisition of a smaller block of shares. For example, an increase in equity from 24% to 26% would be regarded as a merger although the transaction itself involves only a 2% increase.

The term "*including*", used deliberately at the beginning of the definition, has been construed by the IAA to imply that a merger may be created in more ways than those explicitly stated by the definition. The IAA Merger Guidelines (hereinafter: "the Guidelines") which final version was recently issued by the General Director, clarify the reporting procedures of mergers as well as other aspects of the merger review process under the Antitrust Act².

The Guidelines broadly refer to the issue of acquisition of minority shareholdings. More specifically, the Guidelines clarify the situations in which acquisition of even less than 25% of one of the above-mentioned rights will fall within the definition of a merger, for example, in instances whereby acquisition of minority shares leads to the creation of a significant block of shares with relation to other shareholders as will be discussed hereunder. A second example is when an acquisition of less than 25% of the rights is accompanied by other elements such as the right to veto decisions concerning core issues (e.g. prices of the

¹ The legal discussion over the definition of the duty to notify a merger and submit a formal request for approval to the IAA, and hence the question of its legality, depends on variables such as turnover threshold or market share, and is not the focus of the current discussion.

² The final version was issued and published on January 9th 2008 following a public hearing process that was carried out during 2007.

acquired company's products). Another instance is when the transacting parties are engaged in a debtor-creditor relationship due to a debt or loan contract between the acquirer and the acquired company. The subsequent paragraphs illustrate how the IAA addressed this issue in the Zovar Golkal case which involved a merger between two firms in the area of import and distribution of grain³.

The parties to merger were Zovar Trading Company Ltd., (hereafter: "Zovar"), grain importer, most of whose merchandise was sold to local distributors and a small amount to factories, and Golkal 1992 Ltd. (hereafter: "Golkal"), a grain distributor that purchased a considerable amount of grain from Zovar. The merger was carried out in two stages, as follows: In the first stage, the controlling shareholders in Golkal acquired Zovar shares either for themselves or in trust for Golkal; in the second stage, the shares were intended to be transferred to Golkal, apparently in order to complete the merger transaction. Before the second stage was consummated, the managers of Golkal became directors in Zovar, and were involved to a great extent in the latter's financial business.

On 17 September 1998 The IAA issued a decision with respect to Zovar-Golkal in pursuance of Section 43(a)(3) of the Antitrust Act. The decision states that when a person holds less than 25% of all the rights in a firm by the end of a transaction, under circumstances in which the person has no potential or actual influence on decisions in the relevant firm, in the absence of special rights in the articles of association, in the absence of the authority to appoint a director and in the absence of other special circumstances, the transaction will probably not constitute a "merger of companies".

It should be noted, however, that this legal criterion designed to identify "safe harbours" (i.e. instances which certainly do not fall under the definition of "merger") is indeed very narrow, and limited to instances where a party is not directly involved in the management of the firm via its board of directors, even through a minority representation in the board.

Another subject dealt with in the Zovar-Golkal decision was cross-shareholding by owners of one firm in another firm. The decision explicitly refrained from setting a minimum threshold of shareholdings that is required to constitute a merger. It does, however, specify several indicators which are relevant to assess whether the transaction constitutes a merger, including the actual distribution of shares among shareholders in the firm; the type of rights attached to those shares; agreements between shareholders; the firm's articles of association and so forth.

2. Passive financial Investment, investment with management rights and minority shareholding leading to control

The Antitrust Act explicitly refers to both active and passive rights⁴ in a firm. Subsequently, the IAA examines any transaction involving passive rights in the course of the merger review process. The Antitrust Act includes an irrevocable presumption that any transaction exceeding the 25% threshold constitutes a merger. In some cases, a transaction may be reviewed solely on the basis of the acquisition of passive rights. The following illustrates the IAA experience in relation to purchase of minority shares in the Israeli newspaper industry.

³ There are various types of grain for different types of use, such as: wheat, barley, corn, durra, hay for fodder, rye, oats, soybeans, sunflowers, grape seeds and more that are used for human and cattle consumption, to produce oil, flour and a variety of other uses. Most grain for consumption is imported from Mediterranean countries via Israeli importers who buy the commodity from foreign suppliers and sell it to local producers, whether directly or through marketing agencies.

⁴ As stipulated by the Antitrust Act merger definition active rights may include the right to appoint directors and right to vote in shareholder meetings, whereas passive rights generally refer to the right to receive dividend payments and financial profit.

The Baron-Fishman group was the controlling owner of Globes - a financial daily newspaper, when it acquired nearly 30% of the right to profits and about 12% of the voting rights in another daily newspaper – Yedioth Ahronot (hereinafter – Yedioth) which is the major daily newspaper, as well as a declared monopoly in the market for daily newspapers in Hebrew.

The IAA blocked the merger between Globes and Yedioth. However, the parties transferred the shares to a trustee who was supposed to sell the shares to a third party. For several reasons, the shares were not sold in due time. Subsequently, the IAA filed a motion to the Antitrust Tribunal seeking an injunction that will order Baron-Fishman to divest its shares in Yedioth. The IAA and the parties have reached a settlement in which it was decided that Baron-Fishman would divest itself of any shares entitling it (directly or indirectly) to over 25% of Yedioth's profits. In addition, interim measures were taken to minimize Baron-Fishman's influence on Yedioth until the shares were fully divested.

The Antitrust Tribunal, upheld the compromise settlement. In its decision to approve the settlement, the Tribunal referred to the status of active management rights in a merger review based solely on the purchase of passive rights. In this case the active rights included the right to appoint directors in Yedioth⁵. Yedioth argued that the IAA was not authorized to impose a condition with respect to the representation of Baron Fishman directors in Yedioth's board of directors, since the merger only resulted from acquisition passive rights (a share of the profits). The Antitrust Tribunal rejected this argument, and explained that a solely passive financial investment, with no management rights whatsoever was indeed different from acquiring passive rights by a party who has active management rights. That is, because a party that holds both passive and active rights, even a small (around 12% in that case) block of active (management) rights may use those active rights to influence the way the firm conducts its business. The Antitrust Tribunal therefore decided, that it was within the power of the IAA and the Tribunal to impose a condition relating to the use of active management rights in the interim period until the relevant block of shares was sold.

A different category altogether relates to cases in which minority shareholdings actually represent a strong foothold in the firm, parallel in its intensity to the 25% threshold mentioned in the Antitrust Act or even stronger. In some cases, those minority shareholdings may even grant full control over the firm. Such is the case in the example mentioned by the Guidelines, where control over a company is decentralized, and shares are dispersed among many shareholders. In such instance, according to the Guidelines, acquisition of even a small percentage of shares may provide the acquirer with real influence over the firm.

Those were the factual circumstances in a recent merger reviewed by the IAA, where 23% of the shares of a public company traded on the Tel-Aviv Stock Exchange (TASE), were purchased by the parent company of a competitor. The IAA viewed this transaction as a merger which must be subject to review and approval. The parties thought that the transaction would give them the majority of votes in the acquired firm's shareholder meeting, and hence the actual ability to appoint most or all of the board of directors. In this case, therefore, the minority shareholding was sufficient to significantly influence the acquired company's conduct and hence was not in fact a "typical" minority, in the sense that the minority had a great degree of power *de facto*.

In another case, which is currently pending before the Antitrust Tribunal, the IAA challenged an illegal merger between two companies in the business of tomato processing. In that case, the acquiring company purchased 24.8% of its competitor's (100%) parent company (established solely for that purpose), thereby acquiring at least 24.8% of the rights in its competitor. However, the IAA claims, in that case, that the other shareholders in the parent company were foreign residents, who showed little or no interest in the

⁵ According to the Antitrust Law, a merger which needs not be notified is legal *per-se*. The IAA and the General Director have, on several occasions, stated that a merger below the notification threshold may constitute a restrictive arrangement; however this issue has yet been decided by the Judiciary.

company, and on the other hand the acquiring firm's CEO became the dominant figure in the business conduct of its competitor. Based on these findings, the IAA argued that the acquiring firm was allowed considerable control over its competitor, albeit without formally acquiring over 25% of any rights. The IAA further argued that the transaction was an illegal merger as it was carried out without the necessary IAA approval and in violation of the Antitrust Act. As mentioned earlier, this is an ongoing case, which has not yet been decided by the Antitrust Tribunal. However, the Antitrust Tribunal granted a preliminary injunction forbidding the acquiring company from interfering with the business management of the acquired firm, and removing the acquiring firm's officers from the acquired firm's grounds.

From an economic perspective, the concern is that as a result of the transaction the acquiring firm's profit function would adjust to incorporate the performance of its competitor whose shares were bought. Subsequently, the acquiring party might compete less vigorously *vis a vis* its former competitor since its goal would be to maximize profits from the aggregate holdings in both firms. This concern is relevant also when the share holding is less than the 25% threshold. Whenever the share holding exceeds 25% there is an additional concern that the acquiring firm would actively intervene in the strategic decisions taken by its competitor as often is the case. Therefore, any economic assessment would take into account the ownership structure, firm's size and profitability as well as its ability to increase the prices they charge and/or reduce their supply.

In its decision to block the merger between Baron-Fishman and Yedioth, the IAA stated, that the fact that one competitor had the right to receive over a third of its competitor's profits, creates a very significant financial interest for the acquiring firm in its acquired competitor. The IAA also took into account, in that particular case, the fact that Yedioth (whose shares were acquired) was also a declared monopoly in the Hebrew daily newspapers market. It was explained, as mentioned earlier, that the acquiring firm would take into account the combined profits of both firms, rather than focus on maximizing its own profits. In addition, the decision mentioned that acquisition of right to profits in a competitor could function as a way of signaling. The signal allows the latter to take into account the fact that the acquiring firm takes both firms' profits into account when conducting its business. This signal, the IAA stated, has special importance in an oligopoly market where competitors are few, and a supra-competitive equilibrium might be established or maintained.

The Antitrust Tribunal accepted the IAA's reasoning, namely that since Baron-Fishman had an unmistakably clear financial interest in both competitors, it will take into account, when making its business decisions, the combined profits it derives from the operations of both entities:

"The fact that Baron-Fishman has an unmistakably clear financial interest in both competing firms, may influence its judgment when making decisions which have consequences in the field of competition between the firms. Because, considering its financial interest in both firms it might regard in its decisions not each firm in itself, but the combined profits it derives from both firms, which may lower the incentives of both firms to compete each other".⁶

A second important issue which stems from the economic assessment relates to the concern over collusion among the parties. This concern is emphasized in the context of highly concentrated markets with few competitors where one of the competitors has a representative in another competitor. The main concern is over information spillovers and information sharing, in addition to the risk of collusion among oligopoly members.

⁶ The Antitrust Tribunal's decision dated Jan. 13 2004, par. 15.

Clearly, the fact that there is a person who is engaged in, or at least exposed to, the operations of both parties might enhance the stability of an anti-competitive equilibrium. This risk is regardless of whether the minority shareholders hold less than 25% of the shares and hence do not have any control over the acquired corporation. This issue shall be discussed also in next section, with respect to interlocking directorates and office holders.

The IAA stated in the past that holding minority shares in a competitor may count as a prohibited restrictive agreement that has to be either exempted by the IAA or submitted to approval by the Antitrust Tribunal. It is well worth noting that the IAA block exemption, with respect to agreements that have a *de minimis* effect on competition, explicitly stipulates that it does *not* apply to the acquisition of a "right" in a competing company. A "right" for that matter is defined very broadly as holding shares, the ability to appoint officeholders such as directors and corporate executives, the right to vote in the shareholder meeting or to instruct others how to vote for instance by way of voting agreement, the right to receive part of the profits or assets when the corporation is dissolved, and so forth. While this implies that such acquisition may be a restrictive agreement, it is important to stress that this specific issue has yet been interpreted by Israeli Courts and the Antitrust Tribunal.

3. Interlocking directorates and office holders

The Antitrust Act does not explicitly prohibit or limit the existence of interlocking directorates. Nevertheless, the issue of interlocking directorates and other interlocking corporate executives has raised significant competitive concerns, which were addressed by the IAA as well as the Antitrust Tribunal.

In the Baron-Fishman case, the Antitrust Tribunal emphasized the significant effect that interlocking directorates inflict on the competitive outcome of the merger. A director in a competitor's board, the Tribunal stated, may have access to sensitive corporate information in terms of competition, and may also encourage collusion between the competing firms.

The IAA has recently expressed the opinion, that interlocking directorates may, under certain circumstances, constitute a restrictive agreement under the Antitrust Act. Nonetheless, the IAA has yet taken any actual measures against parties to such an agreement.

4. Remedies and Interlocking office-holders

As for the remedy, in the Baron-Fishman case, the IAA and the Baron-Fishman group reached an agreement, according to which Baron-Fishman's voting rights in the Yedioth's board were to be limited as long as it did not divest itself of a certain part of its rights in Yedioth. That settlement was, interestingly enough, challenged from another point of view with relation to Israeli Corporate Law. Yedioth claimed that a director owes fiduciary duties, namely duty of loyalty and duty of care, towards the firm. It was claimed that abstention from the exercising the right to vote in the board for reasons other than the clear interest of the firm, may breach the director's duties towards the firm. It was therefore decided, that a suitable solution will be for Baron-Fishman to refrain from appointing any director in Yedioth. Baron-Fishman was allowed, however, to appoint an ad-hoc director for those limited votes in which it was bound to participate, such as the approval of certain transactions with the controlling owners of the firm, when the deal was not allowed to go through without the consent of a certain part of the minority shareholders. It was decided that under such circumstances Baron-Fishman would be allowed to appoint an ad-hoc director, and that director was to be relieved of his duties immediately after the board meeting.

The IAA sought after solutions to permanent rather than temporary situations, particularly in cases which are less problematic in terms of competition than the merger between Baron-Fishman and Yedioth.

The IAA has on numerous occasions saw fit to approve transactions subject to the condition of non-interlocking office.

The sort of non-interlocking office conditions imposed in those cases are perceived by the IAA as quasi-structural remedies. As is the case in many other members of the OECD competition Committee, the IAA tends to prefer structural remedies over behavioral remedies, for various reasons, including the fact that structural remedies are often clear, easier to apply and allows the parties and the public greater legal certainty. A remedy of non-interlocking office, although not purely structural, does not suffer from the usual ailments of behavioral remedies. Such a remedy is usually very clear and relatively easy to apply, and violations are easy to detect in terms of monitoring. In addition, such conditions allow for transactions that would otherwise be competitively harmful to go through without raising concerns over potential harm to competition. For this reason, the IAA has used this type of remedy several times in the past.

It is worth noting, though, that this kind of remedy was usually found suitable in cases of mergers or joint ventures creating a platform for collaboration between competitors, rather than in instances where one competitor directly acquires rights in the other. In the latter cases, it must have been assumed, that direct control or foothold was acquired, and it could not be assumed, that the acquired firm could act independently of the acquiring firm, with or without interlocking officers.

LITHUANIA

1. How are minority shareholdings handled in your merger control regime? In which cases does the acquisition of a minority shareholding trigger the requirements for a merger notification and review under your merger rules?

The Law on Competition of the Republic of Lithuania defines concentration as¹:

- merger when one or more undertakings which terminate their activity as independent undertakings are joined to the undertaking which continues its operations or when a new undertaking is established out of two or more undertakings which terminate their activity as independent undertakings
- acquisition of control, when one and the same natural person or persons already controlling one or more undertakings, or one or more undertakings, acting by contract, jointly set up a new undertaking or gain control over another undertaking by acquiring an enterprise or a part thereof, all or part of the assets of the undertaking, shares or other securities, voting rights, by contract or by any other means.

Control² is defined as any rights arising from laws or contracts that entitle a legal or natural person to exert a decisive influence on the activity of the undertaking, including:

- ownership or the right to use all or part of the assets of the undertaking;
- other rights which confer decisive influence on the decisions or the composition of the undertaking's managing bodies.

Decisive influence³ means the situation when the controlling person implements or is in the position to implement its decisions regarding the economic activity or the decisions or composition of the management bodies of the controlled undertaking

Controlling person⁴ means a legal or natural person having or acquiring control over an undertaking. A controlling person may be a citizen of the Republic of Lithuania, a foreign national or a stateless person, or any other undertaking, as well as public and local authorities. Spouses and their underage (adopted) children shall be considered as one controlling person. When two or more legal or natural persons, acting under contract, exercise control over an undertaking which is subjected to concentration, each of the legal or natural persons shall be considered a controlling person

¹ Article 3(14) of the Law on Competition of the Republic of Lithuania.

² Article 3(15) of the Law on Competition of the Republic of Lithuania.

³ Article 3(17) of the Law on Competition of the Republic of Lithuania.

⁴ Article 3(16) of the Law on Competition of the Republic of Lithuania.

The intended concentration must be notified⁵ to the Competition Council (CC) when:

- one undertaking acquires all or a part of the assets of the undertaking or a part of its shares which, including all previous acquisitions, constitute 1/4 or more of the authorised capital, or confer 1/4 or more of all the voting rights.
- the undertakings operating on the basis of an agreement, jointly set up a new undertaking, or establish a common management body or any administrative subdivision, also of those which, due to the decisions taken, will have a half or more of the same members in supervisory board, administrative board or other management body, or of those which commit themselves to co-ordinate among themselves decisions concerning their economic activity or to transfer to each other the whole or a certain part of profit, or of those which confer to each other the right to dispose of all or a part of their assets, or one or several undertakings of which by contract or otherwise acquire control of another undertaking.
- the long-term lease of the assets is tantamount to acquisition;
- an acquisition of less than 1/4 of the assets shall be deemed concentration where the joint control is acquired (a shareholders' agreement concerning the joint decision on certain issues, appointment of a member of the Board, etc. is concluded).

A concentration shall not be deemed to arise⁶ where commercial banks, other credit institutions, intermediaries of public trading in securities, investment companies and insurance companies acquire more than 1/4 of shares in another enterprise or insurance company with a view to transferring them, provided that they do not exercise voting rights in respect of those shares and that any such disposal takes place within one year of the date of acquisition. In the opposite case the concentration is considered to arise and be subject to the requirement of the concentration notification.

A concentration shall not be deemed to arise⁷, where the composition of the existing shareholders and the existing control do not change. This provision states that such internal reorganisation (restructuring) or the creation of a new company within the group of associated undertakings is not deemed to constitute a concentration.

It shall be considered that no concentration is performed where only an insignificantly larger part of shares is acquired that does not entitle the shareholder to any additional rights including the right to appoint more members of the bodies of management and therefore the existing control is not changed (or strengthened).

The 1/4 share of shares or votes has been selected with a view to ensuring the compliance with the *veto* rights of the shareholders established in other Laws (negative control). Under the current Lithuanian legislation the veto right corresponds to the holding of 1/3 of all votes, although in individual cases the corporate management agreements may provide for a share of 1/4. Therefore in practice notifications on concentration are most often submitted by persons who acquire 33.4 percent or more of the shares. A smaller acquisition of shares is normally related with additional rights that are incorporated in certain agreements (e.g., the shareholders agreement, management agreement, etc.). Such agreements would

⁵ Article 10 of the Law on Competition of the Republic of Lithuania.

⁶ Article 10(5) of the Law on Competition of the Republic of Lithuania.

⁷ Resolution No. 45 of 27 April 2000 of the Competition Council of the RL on the procedure for the submission and examination of notification on concentration and of calculation of aggregate turnover.

normally define the elements of joint control. In each individual case upon receipt of a concentration notification the Competition Council shall examine the acquisitions also from the point of view of the control to be acquired.

2. In your enforcement practise, do you distinguish between minority shareholdings representing a passive financial investment (i.e., no active participation or representation in the board) from minority shareholdings that allow some form of control (joint, sole or negative) on the target? If yes, how do you deal with these different situations?

Except for the above cases defined in the Law on Competition when acquisitions are effected by financial investors, all other cases are deemed to constitute concentration that is subject to the notification requirement involving the obligation to obtain a concentration authorisation.

In practice there occur cases where the undertaking (other than financial investors) submit notifications on concentration, and for the purpose of obtaining an authorisation for the acquisition of a block of shares treats such acquisition only as financial investment with the purpose to sell the shares acquired at the same time seeking to acquire all other management rights granted by the shares.

Further we are presenting an example of a concentration deal. In 2003, the Competition Council was investigating a case of concentration in the dairy sector where *Rokiškio sūris* acquired a 35.3 percent block of shares of *Panevėžio pienas*. This case under investigation was also important for the purpose of determining the nature of control and defining the markets.

2.1 Acquisition of 33.5% of shares by Rokiškio sūris in Panevėžio pienas

The concentration notification was submitted on four occasions, while it was three times withdrawn each time indicating a different size of the block of shares intended to be acquired and emphasizing that the principal purpose of the concentration implemented by *Rokiškio sūris* – acquire an influence in *Panevėžio pienas* enabling the acquirer to make influence on the strategic commercial decisions of the company, and at the time ensuring that the value of the shares will not decrease. In the assessing of this concentration it was taken into account the other important fact, that the another principal shareholder of *Panevėžio pienas* was *Pieno žvaigždės* which owned 50.2 percent of shares and votes.

2.2 Assessment of the acquisition of control

The most important assessment of control was performed in the case of the submission of a notification concerning the acquisition of 33 percent of the above company while claiming that the control will not be acquired since the *veto* rights will not be acquired.

Attention should be drawn to the fact that the concepts of control and the decisive influence as defined in the Law on Competition includes the acquisition of rights, where in this case irrespective of whether or not the person acquiring the control actually exercises the rights. The important aspect hence is the fact of acquisition and the possibility to exercise such rights.

In this case it was defined that sole control changed into joint control. It is to be noted that undertaking is jointly controlled where two or more undertakings or persons have a possibility to exercise the decisive influence upon the company, i.e., a possibility to veto actions determining strategy of the economic activity of the undertaking. Such shareholders must arrive at an agreement concerning the common business strategy of the target undertaking, as otherwise there is a possibility to enter a deadlock arising from the situation where the controlling undertakings reject the proposed strategic commercial decisions.

In this case it was defined that minority shareholding has rights for blocking the decisive decisions for the strategy of business policy of the target undertaking, such as the decisions concerning the budget, significant investment, business plan.

In general, it is considering that the decisions concerned with the protection of the rights of minority shareholders are related to the decisions such as amendment of the Articles of Association (statute of company), increase or reduction of capital or liquidation of the company.

Since *Rokiškio sūris* withdrew the notification concerning the acquisition of 48.3% of shares (and accordingly the votes), the issue to be assessed is the acquisition of 33% of shares. The acquisition of 33% of shares of *Panevėžio pienas* by itself would not mean the acquisition of control, i.e., the acquisition of decisive influence. However, in this particular case even the acquisition of 33% of shares is relevant, since there is a possibility, that when voting at the General Meeting of Shareholders *Rokiškio sūris* will acquire more than 1/3 of all votes and will be able to exercise the *veto* rights. Another possibility arises of a possible limiting of the part of the voting rights of another shareholder of *Pieno žvaigždės* (i.e., according to the ruling of the court or in cases provided by laws of the Republic of Lithuania⁸). The probability of the use of this possibility is assessed as an additional argument allowing a conclusion on the existence of control. Furthermore, it has been established that when voting at the General meeting of shareholders the votes of minority shareholders count to the benefit of *Pieno žvaigždės* and *Rokiškio sūris*, i.e., making it highly probable that *Rokiškio sūris* will acquire 1/3 of votes.

As an additional argument is the actions performed by *Rokiškio sūris* seeking to acquire an additional part of shares (which is also testified by the repeated submission of the notification on the intended concentration). It follows, that the acquisition of 33 % of the block of shares is assessed as the acquisition of the joint control.

2.3 Decision

All three companies mentioned above operate in the same markets, i.e., milk purchase and the dairy products markets. The concentration being implemented was assessed as a horizontal concentration significantly changing the degree of concentration in the relevant markets of milk purchase and the unskimmed dairy products markets. Since in these markets *Rokiškio sūris* and *Pieno žvaigždės* (associated with *Panevėžio pienas*) would hold, respectively, about 61 % and about 60 % of the market, the only strong competitor in the market being *Žemaitijos pienas*, and other market participants quite small, thus the concentration would result in a creation of a dominant position and a significant weakening of competition in the markets concerned. Since all three companies operate in the same markets, i.e., milk purchase and the dairy products markets, there is an increased probability that all of them will start exerting a common strategy or otherwise coordinate their actions in the markets, that may include agreements concerning the payment for the milk purchased, sharing of the zones of milk purchase, dairy products realisation prices and trade discounts application.

The Competition Council passed the decision whereby *Rokiškio sūris* was authorised to acquire up to 35.3 % of *Panevėžio pienas* subject to certain conditions and obligations:

⁸ For example, Article 15(8) of the Law on Securities Market of the Republic of Lithuania stipulates: The person who fails in the time limit established in par. 1 of this Article shall for the period of two years have no right to hold in the General meeting of shareholders more votes than the last threshold of which he had provided a correct information. Besides, the decision of the court may revoke all decisions taken from the moment of the acquisition of the block of shares until the submission of correct information where such decisions concerned the changing of the managers of the company or infringed the property or non-property rights of shareholders”.

- *Rokiškio sūris* obligated to cancel the voting by all votes of the previously acquired and the additional shares of *Panevėžio pienas* in the general meeting of shareholders on the following issues: decisions on profit allocation; to form, reduce or cancel the reserves of retained earnings; to sell, put in pledge or mortgage the certain specified assets and etc.
- When effecting the additional acquisition of the shares of *Panevėžio pienas* and (or) performing other actions of concentration (e.g., coordinating the decisions concerning the activity between the shareholders of *Panevėžio pienas* and the associated undertakings), the company is obligated to apply to the Competition Council and obtain permissions for such activities.

Rokiškio sūris acknowledged the “veto“ rights as the fact of the acquisition of joint control. The Competition Council duly considered the expressively hostile position of *Pieno žvaigždės* – another principal shareholder of *Panevėžio pienas* in respect of actions of *Rokiškio sūris* and the possible difficulties of the company being acquired in the face in the confrontation of the interests. The company was authorised to perform the concentration transaction assessing the acquisition of the block of shares as investment (financial) seeking to sell all shares of *Panevėžio pienas*.

3. In your enforcement practise, do you have experience with minority shareholdings raising unilateral and/or coordinated effects? Do you have experience with minority shareholdings investigated under your domestic competition rules on restrictive agreements between competitors? Have you investigated dominant firms for holding shares in competing firms? Can you prove examples?

The process of minority shares acquisition (until 24.99 percent and without any additional rights) is not cover by the Competition Law. It should be noted, that such acquisitions may have significant impediment on competition in the certain markets. By obtaining the interest in rival’s company, undertakings may loss incentives for effective competition by the reasons of more possibilities for getting information about competitor’s predictable commercial strategy, pricing and other important for business information, and also for possibilities for getting some part of earnings in the same market, which supposedly (perhaps) would not get by enforcing theirs company activity. So opportunities formed for lessening common leverage of competition in certain markets (especially where is a little amount of market participants).

For instance, it would be considered cases when financial investor (investment fund, bank, insurance company and etc.) acquire minority shares stake (with adequate management rights) in the same and/ or related markets. In that case, jeopardy arises that those investors would be interested to obtain as more as possible investment returns avoiding competition between companies. In the following way such investor even can fill a role of coordinator/ initiator for coordinated interactions in the market.

In general, assessing the notified concentrations the Competition Council applies a presumptive test of the dominant position as 40 percent share of the relevant market. The concept of joint dominance may be also applied.

3.1 Collective dominance

Several undertakings hold a collective dominance where the undertakings may exercise a unilateral decisive influence in the relevant market effectively restricting competition. This possibility occurs, first, if

there is not efficient competition between the group concerned and the remaining undertakings in the market, and, second, in case the members of the group do not compete efficiently among themselves⁹.

Where 2 or 3 (or more) undertakings hold the largest shares of the relevant market and jointly account for more than 70 percent of the market and the shares of the remaining competitors are significantly smaller, there is a significant possibility that such undertakings, taken as an entirety, may operate sufficiently independently in the market in respect of other undertakings, and therefore, not compete among themselves.

When assessing whether the members of a group efficiently compete among themselves the Competition Council seeks to establish whether the members of the group act in a parallel manner, i.e., whether they follow one another acting in the same manner and avoiding mutual competition, and in particular – performing similar or identical restrictive actions in respect of other undertakings.

The Competition Council, acting in accordance with Article 14(1) of the Law on Competition refuses to issue the concentration authorisation and obligates the undertakings participating in the concentration or controlling persons to perform actions specified in the law, where the concentration may result in a creation or strengthening of a dominant position or a significant restriction of competition in the relevant market. The dominant position of one undertaking created or strengthened as a result of the concentration is one of the reasons the presence of which allows a reasoned conclusion that the concentration may substantially restrict competition in the relevant market. The concept of the dominant position includes the case of joint dominance therefore very often the assessment of the consequences of concentration is based on the determination of the presence of the dominant position.

When establishing whether the restriction of competition is significant the Competition Council will consider the market shares of the undertakings participating in the concentration, also whether they are close competitors, whether the buyers have limited possibilities to substitute the supplier, whether the merged undertaking may obstruct the development of the competitors, whether the concentration concerned removes from the market any important competitor, etc.

4. Does your jurisdiction have specific legal provisions dealing with interlocking directorates?

A standard concentration notification form¹⁰ shall include the data on the undertakings participating in the concentration including the data on the affiliated undertakings¹¹ and the natural persons controlling them:

- The list of the shareholders of the undertakings participating in the concentration including the undertakings affiliated to them that hold not less than 10 percent of voting rights, issued shares or other securities specifying the share of each of them in percent;
- The list of all other undertakings engaged in economic activity in each market affected by the concentration and in which all persons (specified above) individually or jointly have not less than 10 percent of voting rights, issued shares and other securities specifying the share of each of them in percent;

⁹ The following actions are analyzed– group symmetry, market transparency, links between undertakings, etc.

¹⁰ Resolution No. 45 of 27 April 2000 of the Competition Council of the RL on the procedure for the submission and examination of notification on concentration and of calculation of aggregate turnover.

¹¹ Definition is provided in Art.3(12) of the Law on Competition.

- The list of the members of supervisory boards, boards and other bodies of management of all undertakings participating in the concentration that are at the same time the members of supervisory boards, boards and other bodies of management engaged in economic activity in each market affected by the concentration specifying the names of the undertakings and the positions of the members.

5. In your enforcement practise, do you have experience in devising remedies for anticompetitive effects arising from minority shareholdings or interlocking directorates? Can you provide examples? Does your merger control regime have a preference for structural remedies or conduct remedies for these issues?

When assessing the concentrations and the possible arising competition concerns, for the purpose of resolving the anticompetitive effects the Competition Council imposes both structural and/or behavioral remedies.

It is worth mentioning that the competition concerns may arise from horizontal concentration effects on market and vertical concentration, and both together. For instance, the interesting merger case in alcoholic beverages market the Competition Council investigated in 2003. Another important case was in telecommunications sector in 1998.

5.1 *Alcoholic beverages market*

5.1.1 *Stumbras / Mineraliniai vandenys (2003)*

In 2002, when analysing the compliance of the actions of *Stumbras* in granting the discounts and effecting the settlement for the advertising services with the provisions of the Law on Competition the Competition Council established that *Stumbras* was holding the dominant position in the markets of strong alcoholic beverages. *Mineraliniai vandenys* had become the winner of the public privatization tender held by the State Property Fund. *Mineraliniai vandenys* was operating in the wholesale market for trade in alcoholic beverages (imported as well as locally produced). Furthermore, the competition authority established a possible concerting of actions of competitors in the relevant markets concerning the 12.5 percent block of shares of *Artrio-2* owned by *Stumbras* and the respective participation in the management of the company. The principal activity of *Artrio-2* is the wholesale trade in alcoholic beverages. 12.5 percent of the holding in *Artrio-2* was also owned by *Alita* equally involved in the management of *Artrio-2*. *Alita* is the second largest strong alcoholic drinks producer in Lithuania and the leading producer of sparkling wines. *Artrio-2* was participating and declared a successful tenderer in the tender for the privatization of *Anykščių vynos* held by the State Property Fund. *Anykščių vynos* is another producer of strong alcoholic beverages and selected kinds of vines. The provisions of the Law on Alcohol Control of the RL established the State monopoly of the production of strong alcoholic drinks effective until 1 January 2004. Therefore it is only after the market of strong alcoholic beverages was properly liberalised that the competition in these markets could be triggered, since part of the producers of alcoholic and non-alcoholic beverages could start producing strong alcoholic beverages without any relatively large investment. The substitutability of the supply of imported strong alcoholic drinks was relatively limited on account of the price that considerably differed from the average prices of the domestic strong alcoholic beverages and the quality standards, in addition to the priority assigned by the Lithuanian consumer to the domestic production. However, following the joining by Lithuania of the EU and the elimination of all trade restrictions, *Stumbras* is expected to enter into competition with the production of not only EU but also the neighboring States upon which the EU applies a zero rate customs duty.

On the basis of conducted analysis, it was concluded that the notified transaction could become a significant impediment to competition at two different levels of supply chain, that is between producers and distributors respectively.

Having considered the circumstances as above described the Competition Council resolved to authorise *Mineraliniai vandenys* to implement the concentration deal by acquiring up to 100 percent of shares of *Stumbras* in accordance with the submitted concentration notification subject to the following conditions for the implementation of the concentration and the obligations:

- *Mineraliniai vandenys* obligated to sell all shares of *Artrio-2* held by it upon the acquisition by *Mineraliniai vandenys* the control of *Stumbras* and the taking over of the management of the company;
- *Mineraliniai vandenys* obligated to recall the representative delegated by *Stumbras* from the Board of *Artrio-2* upon the acquisition by *Mineraliniai vandenys* the control of *Stumbras* and the taking over of the management of the company;
- To sell the shares of *Artrio-2* to an undertaking not related, in terms of the Law on Competition, with *Mineraliniai vandenys*.

Furthermore, *Stumbras* was obligated in the agreements with other undertakings to establish the prices and the conditions comparable to those established in the agreements with *Mineraliniai vandenys* in order to avoid discrimination and prevent the appearance of the possibilities to discriminate.

5.2 Telecommunications sector

5.2.1 Omnitel/ Telia&Sonera (1998)

Before the supposed transaction of acquiring 100 percent of *Omnitel* shares, *Telia AB* and *Sonera Corporation* (via *Amber Teleholding JV*) were jointly controlling *Lietuvos Telekomas* which was the fixed telecommunications incumbent in Lithuania holding the monopoly position. The mobile services in the market were provided by 2 operators: *Omnitel* (about 60 percent of the market) and *Bite GSM* (accordingly about 40 percent of the market). *Lietuvos Telekomas* had intention to entry into mobile telephone services market and for this purpose obtained 2 licences (and appropriate frequencies): GSM 900 and DSC 1800, besides it owned minority (28 percent) of shares of mobile operator *Bite GSM*.

The transaction was cleared only after *Telia* and *Sonera* agreed to sell 28 percent of shares of *Bite GSM* owned by *Lietuvos Telekomas* and to waive the licences and the appropriate frequencies held by *Lietuvos Telekomas* for the provision of the mobile telecommunications services.

Upon the discharge of these obligations (1999), the possibility was opened for the third operator *Tele 2* to enter the market following which and the selling of the *Bite GSM* shares by *Lietuvos telekomas* and in that relation the waiving of the right of the participation in the management (in the view of joint control) the competition in the market was largely strengthened. As clear indications of that were the significant lowering tariffs, improved service quality and the increased service diversity. The increased number of the participants in the market reduced the possibility to enter for the companies into various agreements able to distort the market relations and at the same time inflict damage to the consumers.

ROMANIA

The present paper explores the scope of the application of the Romanian competition rules to minority shareholdings and interlocking directorates between competitors.

The general principles of Romanian competition law that regulate minority shareholdings are set out in its Merger Control Regime.

1. The merger control and the threshold of the “decisive influence”

The basis for applicability of the Romanian Merger Regulation to minority shareholdings lies in the concept of control whereby control, according to art. 10(1) of Competition Law is considered to be conferred when an undertaking exercises directly or indirectly “decisive influence” over another undertaking. So, the key issue for the analysis of minority shareholders’ participation in the companies’ capital is that the mere possibility to exercise decisive influence triggers the applicability of Romanian Merger Regulation.

Therefore, the possibility for minority shareholders to exercise sole or joint control either *de jure* or *de facto* through a qualified minority requires the notification to the Romanian Competition Council (hereinafter called RCC). In such cases, the turnover thresholds¹ laid down in the Competition Law have to be also met.

There are several ways in which sole or joint control by minority shareholders can be achieved.

In particular, *de jure sole control* can be established when specific rights exist that “enable the minority shareholder(s) to determine the strategic commercial behaviour of the target company. *Thus, de jure sole control* may be conferred upon a minority shareholder who is granted **preferential shares** on the basis of which the minority shareholder holds the majority of voting rights or **is vested the power to decide on the commercial behavior of the target undertaking** (such as the appointment of more than half of the senior management).

De jure sole control over an undertaking may be achieved by a minority shareholder also in the particular case when it benefits from veto rights over the undertakings’ strategic decisions although it is not vested the power to impose such decisions.

De facto sole control may be obtained by a minority shareholder in those situations where the remaining shares are largely dispersed and the minority package offers the majority of the votes in the shareholders’ meeting. A minority shareholder may also exercise *de facto* sole control if the shareholder has the right to make the undertaking’s decisions and to determine the target undertaking’s market behavior.

¹ As provided by the Romanian Competition Law, an economic concentration has to be notified if the combined worldwide turnover of all the undertakings concerned is more than the national currency equivalent of EUR 10 million and the Romania-wide turnover of each of at least two of the undertakings concerned is more than the national currency equivalent of EUR 4 million.

Joint control by minority shareholders is established when – mainly by virtue of a previous agreement – they have **the possibility to exercise veto rights over the most important decisions of the company** in such a way that they are able to exercise decisive influence over it (the controlled undertaking).

Therefore, **a de jure or de facto joint control** generally arises where minority shareholders are granted **equal voting rights** or **equal voting rights to nominate executive bodies** (senior management) or where shareholders are granted **veto rights** in relation to the companies' strategic decisions and in particular the appointment of the senior management, the approval of the budget, the business plan or the adoption of future investments).

At the same time, Merger Control Regime in Romania recognizes that the normal protection of the rights of minority shareholders (veto rights “related to decisions on the essence of the joint venture”) does not confer joint control over an undertaking.

Another instrument used to **legally acquire joint control** over a company is through a binding agreement between two or more minority shareholders to pool their voting rights in order to achieve either the majority of the voting rights or a sufficient minority-blocking share.

De facto joint control over an undertaking can be exercised by two or more minority shareholders also in those situations where the remaining shares are largely spread and the minority package offers the majority of the votes in the shareholders' meeting.

In exceptional circumstances, the RCC can establish the existence of a **de facto joint control** based on concerted practices that reflect the existence of strong common interests and strategies for the future of the joint venture. Accordingly, in these circumstances, although there will be no formal and legally binding agreement, the RCC – in particular, in the presence of previous connections between the minority shareholders, of concerted actions in a newly-created joint venture and when each of the shareholders in question is providing a vital contribution to the joint venture– may consider the hypothesis that on a purely factual basis the minority shareholders will find themselves obliged by economic or strategic reasons to act in a coordinated way in order not to prejudice their interests in the undertaking concerned.

The second element scrutinised by RCC is the composition of the shareholders of the target undertaking. Under this parameter, the legal framework makes a clear distinction between minority shareholders who act as small investors of a speculative nature and minority shareholdings that allow some form of control. The latter type of minority shareholdings that triggers the notification obligation under the Romanian merger control regime was previously presented.

As regards **the passive financial investment**, according to art 11(b, c) of the Competition Law, it is not deemed to be considered a concentration if the controlling package of shares was acquired with a view to be resold, provided that the shareholder does not exercise voting rights in respect of those shares with a view to determining the competitive behaviour of the respective undertaking or it exercises such voting rights only with a view to preparing the disposal of all or part of those shares and that any such disposal takes place within one year of the date of the shares' acquisition. That period may be extended by the Romanian competition authority on request where the shareholder can show that the disposal was not reasonably possible within the period set.

A peculiarity stemming from the practical experience of RCC as concerns passive financial investments deserves to be addressed here. In the past, we had cases where shareholders acting as small investors of speculative nature did not benefit from the exception provided by art. 11 (b, c) of the Romanian Competition Law. In fact, the volatility of the markets at that time prevented the passive

financial investors from reselling profitably their participations within the timeframe provided by Romanian Competition Law. Accordingly, passive financial investments fell under the scope of the Romanian Merger Regulation. That means that RCC had to consider that passive financial investors behaved as undertakings that would exercise control and had the responsibility to notify the transactions as economic concentrations.

Thus, in case of a passive financial investment through several financial vehicles, RCC considered those vehicles as belonging to the same group, so all participations in the vehicles' equity were aggregated.

In the meantime, the behaviour of financial passive investors has suffered significant changes. Today, we have noticed that the penetration of a passive financial investor in the shareholding structure of an undertaking is usually made by taking over joint control with the previous majority shareholder of the target company.

A possible legal tool in the hand of RCC in order to ensure and monitor that minority capital participations of the undertakings involved in a concentration and interlocking directorates in competing companies are not conducive to competition concerns consists in the fact that they are included in the overall assessment of the economic concentrations according to Article 12 of Competition Law².

In this regard, it has to be said that a clear sign in this direction has been given by the Romanian Merger Regulation in its Notification Form, which fully complies with the Regulation 802/2004 implementing the EC Merger Regulation (Section IV of Form CO).

Section 3 completed by section 5 of the Romanian Notification Form states that “for each of the parties to the concentration provide a list of all undertakings belonging to the same group. This list must include: [...] a list of all other undertakings which are active in affected markets in which the undertakings, or persons, of the group hold individually or collectively 10% or more of the voting rights, issued share capital or other securities; a list [...] of the members [...] of management who are also members of the boards of management or of the supervisory boards of any other undertaking which is active in affected market”.

This requirement means that on one side, minority participations below 10% of the capital are considered by RCC of pure financial interest and, on the other side, that all the other participations might constitute aggravating circumstances in the assessment of the anti-competitive effect of the concentration.

2. Applying Merger Control Regime to minority shareholdings

The case below illustrates RCC's experience in analyzing anticompetitive effects arising from minority shareholdings that confer control.

This was the case in a transaction that took place on the oil market, where the RCC reviewed the acquisition by a company of the sole control over another company. As part of the analysis, RCC acknowledged that the acquirer held a minority participation in a third company. Furthermore, the analysis revealed that a real overlap existed between the activities of the target undertaking and this third company on two affected markets, i.e, the Romanian market of distribution and selling petrol products.

² A concentration which would significantly impede effective competition in the Romanian market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with a normal competitive environment.

In order to resolve the competition concerns arising from the transaction, the acquirer submitted to the attention of RCC proposal of commitments.

In order to be granted the clearance of the transaction, the acquirer committed itself to divest the minority stake it previously held in the rival's target company. Furthermore, the acquirer committed not to use its minority shareholding to influence the market behaviour of the operator in which it held the stake or not to use its voting rights until divestiture is implemented.

The RCC's review of the commitments envisaged to prevent a possible consolidation of a dominant position on the affected markets. Thus, the analysis revealed that the commitments offered by the acquirer were sufficient for clearing the transaction. Those commitments would eliminate also, the potential risk of coordination between the two firms competing in the affected markets that could have arisen post-merger.

In this specific case, RCC considered the divestiture of minority shareholdings as an adequate and sufficient commitment in order to *clear* the transaction and make it compatible with a normal competitive environment.

3. Possible anticompetitive effects of Minority Share Acquisitions that do not confer control

There are particular circumstances when even without conferring control rights over a company (the power to exercise *decisive influence* according to the Romanian Merger Control Regulation), minority share acquisitions could still have an effect on competition.

The case below shows that minority participations of a firm's controlling shareholder in the equity of this firm's competitor even when it does not grant control, can generate, in particular circumstances, coordinated effects. That means that we acknowledge that, in particular situations, operations involving minority shareholdings, have the potential to lessen competition and even can facilitate a horizontal anticompetitive agreement.

3.1 Background information

The case is related to the privatisation of the state owned company, active in the field of marketing of both industrial products and food products by means of an ascending auction organized by the Romanian Authority for State Assets Recovery (RASAR, called, at the time, The State Ownership Fund) for the sale of the shares it owned in the state-owned company.

The bidders in the auction were company X³, company Y and Z. Y won the auction, by offering the highest price, and signed the privatisation contract.

The privatisation contract was annulled as Y did not pay the price for the shares within the period provided for in the contract. Therefore, a second ascending auction was organised. The participants in this second auction were company A and company B. The two companies participated in the auction as independent bidders.

Due to the fact that none of the bidders offered the opening price, the second auction turned into a descending one, as provided by the relevant regulation. The auction was won by company B, at its first offer. During the auction, company A did not bid at all.

³ For a better understanding and an easier reading of the case, the real names of the companies involved will be replaced with X, Y, Z, A and B.

3.2 *Proceedings of the case*

The Romanian Competition Council found several links between A and B, among which:

- both B and its' sole shareholder were minority shareholders of company A, even if they did not hold the controlling interest;
- there were family links between the executive management of company A and the sole shareholder of B;
- A and B had a long history of active cooperation in their commercial activities, both on a formal, as well as on an informal basis.
- B's sole shareholder was also the sole shareholder of company Y that won the first auction and did not accomplish the contractual clauses of the privatisation.

In addition, the Competition Council found that company A facilitated the participation of its competitor B in the auction. To make possible B's participation in the auction, company A provided real estate company assets as security collaterals for the bank's letter issued in favour of company B specifically for the second auction. This cooperation was a decisive evidence of the anticompetitive agreement between the two so-called "competitors" and their pursuance of a common goal.

Moreover, once entered in the auction, both bidders refrained from bidding for the opening price, forcing the auction into a descending one. Company A took on a passive role and did not bid altogether, facilitating for company B to win the auction at a much lower price than the start-up price.

Given the evidence in the case and the behaviour of the undertakings involved, the Competition Council found that company A and B had an anticompetitive horizontal agreement and fined them for the infringement of article 5(1) f) of the Romanian Competition Law. The effects of the second auction, including the privatisation contract were also annulled.

SOUTH AFRICA

1. Introduction

The South African economy is highly concentrated, and minority shareholding and especially interlocking directorships are a common feature. It is the stated objective of the Competition Act 89 of 1998, as amended (“the Act”) to promote a greater spread of ownership. The socio-political environment in South Africa, arising from the history of economic exclusion is such that companies are expected to be sensitive and contribute to the vision of a nonracial society by, amongst other things, appointing persons from the historical disadvantaged groups (such as blacks and women) into their boards of directors.

South African competition law does not prohibit a firm from holding a minority shareholding in a competing firm, or interlocking directors amongst competitors. However, competition authorities, recognizing that competing firms are not supposed to share competitively sensitive information, are grappling with the matter.

For convenience, this presentation is in two parts: one focusing on enforcement and the other on merger regulation.

2. Enforcement

As far as prohibited practices are concerned, issues involving minority shareholding and interlocking directorates are in part dealt with under Section 4 the Act. Section 4(1)(b) contains the so called *per se* prohibitions applicable to firms that are in a horizontal relationship. The section prohibits agreements or concerted practices which involve price fixing, market division and collusive tendering between competitors. Section 4(2) further stipulates that:

An agreement to engage in a restrictive horizontal practice referred to in section 4(1)(b) is presumed to exist between two or more firms if -

- a. *any one of those firms owns a significant interest in the other, or they have at least one director or substantial shareholder in common; and*
- b. *any combination of those firms engages in that restrictive horizontal practice. [emphasis added]*

The above presumption can be rebutted by the firm, shareholder or director concerned by showing that a reasonable basis exist to conclude that its conduct was a normal commercial response to market conditions.

The section creates a rebuttable presumption against firms to the effect that if, for an example, there are five firms with interlocking directors or substantial common shareholding, and two of the firms have been found to have agreed to collude, then all the firms are presumed to be party to such an agreement, unless the others show that their conduct was a normal commercial response to market conditions.

There have not been many cases where this section has been applied and it has so far not had a practical effect. It is also somewhat vague, there are likely to be disputes on when would shareholding or interest be regarded as “*significant*”.

The presumption is also not helpful where, as in most instances it is the case, the cross shareholdings and interlocking directorships involve only two firms.

A case that is worth mentioning in relation to enforcement is *Pro Sano v Community Hospital Group (P/L) ("CHG") and Netcare Hospital Group (P/L) ("Netcare")*.¹

In this case, Netcare had developed the Netcare Scale of Benefit tariffs ("the NSOB tariffs"). The NSOB tariffs were adopted by CHG. The complainant alleged that the adoption of the NSOB tariffs by CHG, for the purposes of determining private hospital service fees, constituted an agreement between Netcare and CHG not to compete on prices and that this practice amounted to a contravention of section 4(1)(b)(i) of the Act. Netcare had 43,75% shares in CHG.

The Commission regarded Netcare and CHG as competitors, as they were both owning and managing private hospitals. However, the respondents argued that they were members of a single economic entity. The respondents argued that section 4(1)(b) did not apply to them, as they fell within the exception provided for under section 4(5)(b) of the Act. Section 4(5) states that *the provisions of subsection (1) do not apply to an agreement between, or concerted practice engaged in by,-*

1. *A company, its wholly owned subsidiary as contemplated in section 1(5) of the Companies Act, 1973, a wholly owned subsidiary of that subsidiary, or any combination of them; or*
2. *The constituent firms within a single economic entity similar in structure to those referred to in paragraph (a).*

The Commission held that the test in determining whether the relevant firms constituted a single economic entity was whether there is a complete unity of ultimate economic interest in the firms in question. After considering a number of authorities,² the Commission concluded that there was no relationship of a parent and wholly owned subsidiary between Netcare and CHG. It was further noted that the mere fact that there were multiple shareholders meant that there could not be a parent and wholly owned subsidiary relationship.

The respondents argued that alternative to being a single economic entity, the 43,75% shareholding acquired by Netcare, at the very least, constituted a legitimate joint venture with another shareholder, Community Healthcare Holding Limited ("CHH"), which also had 43,75% of CHG. However, the Commission found that the conduct complained of did not constitute a fully integrated legitimate joint venture. The Commission found that CHG was owned by a number of shareholders. Furthermore, Netcare's acquisition of the 43,75% shareholding in CHG had not been notified to and approved by the Competition authorities.

The Commission found that the respondents were not members of a single economic entity, but two independent firms that rendered private hospital services in competition with each other. The Commission found the respondents' conduct constituted price fixing in contravention of section 4(1)(b)(i) of the Act. A consent order was reached between the Commission and the respondents, and confirmed by the Tribunal, in terms of which the respondents had to pay an administrative penalty.

¹ Mr. C Vorsatz, acting on behalf of Pro Sano Medical Scheme Vs. Community Hospital Group (P/L) and Netcare Hospital Group (P/L). Case no.: 2005Jun1659

² Patensie case quoting the Copperweld case (467 US 752 (1984) at 771 , Fishman v Wirtz (807 F2d 520 (7th Cir 1986), Century Oil Tool Inc v Production Specialties (737 F.2d 1316 (5th Cir)

3. Merger regulation

Section 12(1) (a) of the Act provides that:

a merger occurs when one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another firm. In addition, Section 12(2) states that a person controls a firm if that person –

- a. beneficially owns more than one half of the issued share capital of the firm;*
- b. is entitled to vote a majority of the votes that may be cast at a general meeting of the firm, or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that person;*
- c. is able to appoint or to veto the appointment of a majority of the directors of the firm;*
- d. is a holding company, and the firm is a subsidiary of that company as contemplated in section 1(3)(a) of the Companies Act, 1973 (Act No. 61 of 1973);*
- e. in the case of a firm that is a trust, has the ability to control the majority of the votes of the trustees, to appoint the majority of the trustees or to appoint or change the majority of the beneficiaries of the trust;*
- f. in the case of a close corporation, owns the majority of members' interest or controls directly or has the right to control the majority of members' votes in the close corporation; or*
- g. has the ability to materially influence the policy of the firm in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in paragraphs (a) to (f). [our underlining]*

In the merger between *Primedia Ltd* (“Primedia”) & *Capricorn Capital Partners (Pty) Ltd* (“Capricorn”) and *New Africa Investment Ltd* (“Nail”), Nail’s (the target firm) only significant asset was a 24,9% interest in *Kaya FM Holding (Pty) Ltd* (“Kaya FM”), a commercial radio station in a highly concentrated regional market of Gauteng, (a province incorporating Johannesburg). Primedia (the acquiring firm) also had significant commercial radio interests in Gauteng. In its investigation the Commission found that there was a likelihood that the merger would create incentives for coordination amongst competitors in the Gauteng market and therefore approved the merger subject to conditions, which prohibited the acquiring firm from appointing a representative on the Kaya FM board. The merging parties challenged the imposition of the condition at the Competition Tribunal (“Tribunal”), wherein the Commission then argued for the probation of the merger. The Tribunal found in favour of the merging parties, largely on the basis that the sole or joint control of Nail, which owned 24.9% of Kaya FM, did not amount to the acquisition of control of Kaya FM by the acquiring firm.³ However, an intervener backed, by the Commission, reviewed the decision of the Tribunal before the Competition Appeal Court (“CAC”), which set aside the Tribunal’s decision and ordered that the impact of Primedia’s minority stake in the

³ See Competition Tribunal case number 39/AM/MAY06, 12 February 2007.

commercial radio broadcasting market be fully considered.⁴ The Tribunal is yet to make its finding on the matter.

In the case of merger regulation the Act does not make specific provisions against interlocking or cross-directorships. However, competition authorities in South Africa do take into account the impact of interlocking directorships in their assessment of mergers - be it through unilateral or coordinated effects.

From its early days the Tribunal in the assessment of the merger of *Two Rivers Platinum Ltd* (“Two Rivers”) [a joint venture between *Impala Platinum* (“Implats”) and *Anglovaal Mining Ltd* (“Avmin”)] and *Assmang Ltd* (“Assmang”) questioned the prevalent interlocking directorships in the platinum group metals sectors given high concentration levels.⁵ Although the Tribunal sanctioned the merger, it did note that “several significant JVs and common shareholdings ... would unquestionably facilitate intelligent forecasting of one’s competitors supply responses”.⁶

In the matter of *Momentum Group Ltd and African Life Health (Pty) Ltd* the Tribunal approved the merger subject to a remedy which provided “both the resignations of the existing directors who serve on the board of both groups and to prevent cross directorships in the future”.⁷ However this decision was turned down on appeal before the Competition Appeal Court on the grounds that the Tribunal did not show that the transaction would substantially prevent or lessen competition in the relevant market but assumed a “notional possibility” of such.⁸

In the matter of *Barmac (Pty) Ltd and ATC (Pty) Ltd (Telecoms) and Aberdare Cables (Pty) Ltd* (“*Aberdare*”) the Tribunal accepted the Commission’s recommendation to approve the merger subject to a remedy, accepted by the merging parties, which sought to eliminate cross-directorships between competitors.

The problem of interlocking directorships also arose in *Main Street 333 (Pty) Ltd Kumba Resources Ltd*⁹, in which the Commission imposed a remedy sought to address interlocking directorships between major suppliers (*Anglo American, Eyesizwe, BHP Billiton and Kumba*) of thermal coal in South Africa, accounting for about 70% of the national market. Despite noting the kind of information discussed in meetings of these firms such as those relating to “supply availability, how firms had performed against budget predictions, future strategy etc”¹⁰, which has largely been the basis of the Commission’s decision, the Tribunal did not find any adverse effect presented by existing interlocking directorships. In particular, the Tribunal concluded that the merger did not “meet the test required of strengthening the existing coordination”. The Tribunal further observed that, to the contrary, the merger inhibits this possibility, because it complicates the possibilities for the exchange of information and monitoring, and it changes the

⁴ Competition Appeal Court decision in *African Media Entertainment Limited and David Lewis NO and others*, CAC case number 68/CAC/MAR/07 / Tribunal case number 39/AM/MAY06, 19 November 2007.

⁵ See Competition Tribunal case number 54/LM/SEP01, 15 November 2001.

⁶ Ibid, page 10.

⁷ See Competition Tribunal case number 87/LM/SEP05, 3 January 2006, page 13.

⁸ Competition Appeal Court decision in *Momentum Group Ltd and others and The Chairperson, Competition Tribunal and others*, CAC case number 58/CAC/DEC05 Tribunal case number 97/LM/SEP05, 14 February 2006.

⁹ See Competition Tribunal case number 14/LM/feb06, 14 September 2006.

¹⁰ Ibid, page 20.

incentives of all firms who may have been party to any pre-existing coordination”.¹¹ The Tribunal was however not ambiguous about the necessity of the Commission being weary of “the competition problems posed by interlocking directorships between rival firms”.¹²

On merger regulation the effect of a minority shareholding and interlocking directorship is assessed on a case by case basis. Although jurisprudence on the matter is yet to settle, there is no doubt that competition authorities do recognize the need to assess effect of the structural links between competitors.

4. Conclusion

From the above discussion, it is evident that the South African competition authorities’ approach to cross directorships and minority shareholding is still evolving. In mergers, where the matter has arisen from time to time, competitive effects (unilateral or coordinated) are assessed on a case by case basis. Although the jurisprudence on the matter is yet to settle, the current position seems to be that acquisition of minority shareholding without control is not a problem, although it is a relevant factor in assessing the change in incentives of competitors. It is also accepted that for interlocking directorships to be a problem, the test is whether the post merger situation will be made worse by the merger. It is also apparent from the previous cases that behavioral remedies are largely preferred in addressing problems of interlocking directorates, but it is early days to make any firm conclusions.

There has been very little that has occurred in enforcement on this subject, but given the prevalence of the structural links, one expects that this would be an issue soon.

The above discussion illustrates that South African competition authorities are concerned and grappling with issues involving minority shareholding and interlocking directorates, but our jurisprudence on the subject is in the early stages of its evolution.

¹¹ Ibid, page 23. At page 18, it is noted that “the essential differences [between the pre and post merger structure] ... are that Anglo has a reduced holding in its erstwhile Kumba coal assets”.

¹² Ibid, page 23.

CHINESE TAIPEI

1. Introduction

The term “minority shareholding” is not defined in Chinese Taipei’s Fair Trade Act, regulations or guidelines, but the interests of minority shareholders and the cross-ownership of shares among corporations are regulated by the Company Act. Article 172-1 of the Company Act which was amended in 2006 stipulates that shareholder(s) holding one percent (1%) or more of the total number of outstanding shares of a company may propose to the company a proposal for discussion at a regular shareholders’ meeting, provided that only one matter shall be allowed in each single proposal, and in case a proposal contains more than one matter, such proposal shall not be included in the agenda, i.e., the minority shareholder(s) have rights to actively participate in the business operations of a company. In addition, the shares of a holding company that are held by its subordinate company shall have no voting power was stated in Article 179 of the Company Act, yet such provision concerning the cross-ownership of shares among corporations should be non-retroactive.

Article 192-1 of the Company Act illustrates that any shareholder holding 1% or more of the total number of outstanding shares issued by the company may submit to the company in writing a roster of director candidates, provided that the total number of director candidates so nominated shall not exceed the quota of the directors to be elected. It means that any shareholder holding 1% or more of the total number of outstanding shares issued by the company may become a director of the company once a director candidate represents a prevailing number of votes through vote, and therefore has the power to influence the company’s business operations as he/she participates in resolutions of the board of directors pursuant to the provisions of Article 206 of the Company Act.

In effect and practice, if the merging enterprises are affiliated or one company acquires a majority of the seats for directors and supervisors of another company or one company acquires minority shareholding of another company, it could be capable of affecting the management of the personnel or business operations of another company. Paragraph 5, Article 6 of the Fair Trade Act, which qualifies an enterprise gaining a direct or indirect control over another enterprise as a type of merger, could be applicable under this circumstance.

The term “affiliated enterprises”, as defined in Article 369-1 of Company Act, refers to enterprises which in legal formality are independent economic entities but are interrelated in either of the following manners: 1. having controlling and subordinate relationship, including direct or indirect control over the management of the personnel, financial or business operations of another company; or 2. having cross-investment relationship. According to Article 369-3 of Company Act, it states that “under any of the following circumstances, it shall be concluded as the existence of the controlling and subordinate relationship: 1. Where a majority of executive shareholders or directors in a company are contemporarily acting as executive shareholders or directors in another company; or 2. Where a majority of the total number of outstanding voting shares or the total amount of the capital stock of a company and another company are held by the same shareholders.

The purpose of the merger control system under the Fair Trade Act is to promote competition; however, the regulations of affiliated enterprises under Company Act aim to protect subsidiary companies,

minority shareholders and creditors of a company as well as to increase the duties of a controlling company and the responsible person of the controlling company.

As defined in Article 6 of the Fair Trade Act, the term “merger” refers to a situation where:

- an enterprise and another enterprise are merged into one;
- an enterprise holds or acquires the shares or capital contributions of another enterprise to the extent of more than one-third of the total voting shares or total capital of such other enterprise;
- an enterprise is assigned by or leases from another enterprise the whole or the major part of the business or properties of such other enterprise;
- an enterprise operates jointly with another enterprise on a regular basis or is entrusted by another enterprise to operate the latter’s business; or
- an enterprise directly or indirectly controls the business operations or the appointment or discharge of personnel of another enterprise.

For any merger that falls within any of the following circumstances, a notification shall be made to the Fair Trade Commission (FTC) prior to the realization of the merger:

- as a result of the merger the enterprise(s) will have one-third of the market share;
- one of the enterprises in the merger has one-fourth of the market share; or
- sales for the preceding fiscal year of one of the enterprises in the merger exceeds the threshold amount publicly announced by the central competent authority.

If a merger is pursued without prior notification, regardless of the FTC’s decision to allow or prohibit such merger, or if the merger fails to perform the undertakings required by the FTC, the FTC may prohibit such merger, and if so, it may prescribe a period for such enterprise(s) to split, to dispose of all or a part of their shares, to transfer a part of their operations, to remove certain persons from position, or make any other necessary disposition. For enterprise(s) violating the disposition made by the FTC in the above case, the FTC may order the dissolution of such enterprise(s) or the suspension or termination of their operations.

Enterprises in the same industries can share each other’s profits by means of cross-ownership of shares and, thereby, enterprises have incentives to decrease competition and to earn more profits by increasing prices. The ownership link among corporations in the same industries may result in potential anti-competitive effects. If an enterprise acquires the shares of another enterprise (competitor) and serves as a director of another enterprise or the general manager of a competitor serves as a representative on the enterprise’s board of directors, the two enterprises will have opportunities to exchange market information through shareholders’ meeting and the board of directors and could reach a “mutual understanding” to prevent price or quantity competition.

As an enterprise becomes the minority shareholder or director of another enterprise or the cross-ownership of shares among corporations, it will not engage in price or quantity competition through a “meeting of minds” rather than by contract or agreement to maximize the profits. A “meeting of minds”, such as through the communication of business information, will likely lead to joint actions that result in there being no other competitors or potential competitors in the relevant market and competition will no

longer exist between competing enterprises. Interlocking directors or minority shareholders could make use of their positions to engage in concerted actions through the exchange of sensitive market information related to competition and the communication of operating strategies. Such actions are governed by the Fair Trade Act which prohibits concerted actions.

Article 14 of the Fair Trade Act prohibits enterprises from partaking in concerted actions, save for specific conduct that is listed as exceptions and beneficial to the economy as a whole and are in the interests of the public at large. In those cases, the parties may apply to the FTC for approval. The term “concerted action,” as defined in Article 7 of the Fair Trade Act, refers to the conduct of any enterprise, by means of contract, agreement or any other form of mutual understanding, with any other competing enterprise, to jointly determine the price of goods or services or to limit the terms of quantity, technology, products, facilities, trading counterparts or trading territory with respect to such goods and services, etc., and thereby restrict each other’s business activities. Aside from this, it further defines a “concerted action” as being limited to horizontal concerted action at the same production and/or marketing stage which would affect the market function of production, trade in goods or supply and demand for services. In addition, the term “any other form of mutual understanding”, as referred to here, means a meeting of minds other than by contract or agreement, whether legally binding or not which would, in effect, lead to joint actions.

2. Cartel Case: Cable TV

2.1 *Cable TV Market*

The Government Information Office (hereinafter the GIO) is the competent authority for the cable television market and many related industries, including upstream cable television channel providers and downstream cable television broadcasting system operators. The Cable Radio and Television Act lifted the restrictions limiting the number of cable television broadcasting system operators in the same service area to five. Today most of the existing 51 cable television service areas have only one, or perhaps two, cable television broadcasting system operators, which continues to substantiate an earlier claim that cable TV subscribers’ choices of system operators were quite limited. In addition, the Cable Radio and Television Act still stipulates that cable TV system operators can only operate (their businesses) in their respective service areas originally approved by the GIO.

The use of contracts, agreements, or other forms of mutual understanding by competing cable TV system operators to jointly decide on trading counterpart in the same service area has been governed by the Fair Trade Act which prohibits concerted actions. There is a case where cable TV system operators engage in conspiracy practices in their service areas through cross-ownership of shares among corporations and interlocking directorates. It is recognized that such concerted actions have the effect of limiting market competition, thereby impeding the adjustment of subscription fees, and harming consumer benefits.

2.2 *Factual Context and Problems*

The FTC received complaints from the public in 2003 claiming that no cable TV services were available in the newly-constructed national housing area where they lived. The building administration committee requested that Chin Pin Tao Corporation (CPT Corporation) provide cable TV services. Yet, the service personnel from the CPT Corporation told the complainants that the building was located in the service area covered by its competitor, namely, Chang Te Corporation (CT Corporation) and used the inconvenience of installing an additional network facility as an excuse to refuse the request to equip the complainants’ building with cable TV services.

CPT Corporation and CT Corporation were operating in Chungshan district, and the subscription fees charged by the CT Corporation were preferable to those of the CPT Corporation for group subscribers in

the same residential buildings during the early stages. However, CT Corporation decided to raise subscription fees with each passing year and, afterwards, no differences in subscription fees were found between the 2 cable TV system operators. If the subscribers within the same residential building expressed an intention to choose a different cable TV operator, CPT Corporation and CT Corporation always gave excuses regarding the inconvenience in installing a distribution network and refused to provide the services. The FTC's investigation showed that CPT Corporation's internal network layout plan referred to the complainants' building area as "Chang Te building", and that during the past five years, this area had no cable TV subscribers of CPT Corporation. Both the CPT Corporation and CT Corporation had no reasonable grounds to explain why the respective corporation did not install a network facility in the competitor's service area and had failed to engage in fee competition since 2001.

The two system operators had been found to engage in concerted action by the FTC in 1998. Subsequently, to evade the regulations of the Fair Trade Act, both system operators reached a consensus not to practice price competition without using any written agreement.

CPT Corporation and CT Corporation respectively belong to the two largest MSOs (Multiple System Operators), namely, the Eastern Group and Giga Group in Chinese Taipei. In 2001, the Eastern Group held 25 percent of the shares of CT Corporation through a number of its employees and those who served as directors of CT Corporation. The Eastern Group transferred its shares to Eastern Media Technology Corporation in 2002. In 1998, CT Corporation held 1.86% of the shares of CPT Corporation, and transferred these shares in 2001 to Chinalife Corporation which belongs to affiliated enterprises of Giga Group. Furthermore, the general manager of CPT Corporation served as a director on the CT Corporation's board of directors and this gave CPT Corporation the opportunity to participate in the board meetings of its competitor, which created a conduit between the two enterprises to coordinate their business operating strategies and facilitate the formation of concerted actions on allocating subscribers and sharing the profits from subscription fee increases.

2.3 *Actions and Final Outcomes*

The penetration rate of cable television services has exceeded eighty per cent in most areas, meaning that watching cable television programs has become a major pastime for the public and an important source of information as well. Today, most of the existing 51 cable television service areas have only one, or perhaps two, cable television broadcasting system operators. For this reason, cable TV subscribers do not have many options of choosing their system operators. Consequently, should a cable TV operator engage in improper conducts, it is quiet likely that the rights and benefits of numerous subscribers will be affected and no competitively meaningful alternatives are available for them to turn to. The power enjoyed by a dominant product supplier enables him to ignore the needs of customers.

The CPT Corporation and CT Corporation are two competitors in an oligopolistic market. They had cross-ownership of shares starting in 2001 and the general manager of CPT Corporation served as a director on the CT Corporation's board of directors. The two cable TV system operators did not compete for trading opportunities through favourable subscription fees, quality, services or any other terms that were beneficial to their subscribers. Instead, they divided the trading counterparts between themselves and engaged in profit-sharing practices, which limited the right of their subscribers to choose. This affected the function of demand and supply in the cable TV markets in Chungshan district. The FTC later ruled that the actions of CPT Corporation and CT Corporation were concerted and were in violation of Article 14 of the Fair Trade Act. The FTC ordered the two cable TV system operators to cease such actions pursuant to Article 41 of the Fair Trade Act. In addition, the FTC separately imposed an administrative fine of NT\$6 million on both CPT Corporation and CT Corporation.

3. Merger Case: Cable TV

In 2003, Fu Yang Investment Co., through its control of the boards of directors and supervisors, had direct or indirect control of the business operations or the appointment or discharge of personnel of A Co. and B Co., thereby meeting the merger criteria as defined in Subparagraph 5, Paragraph 1, Article 6 of the Fair Trade Act. Furthermore, A Co. and C Co. had 44.91 percent and 55.09 percent market shares in Tamsui district, respectively. B Co. and D. Co. had 23.53 percent and 76.47 percent market shares in Sinjhuang district, respectively. In 2002, Fu Yang Investment Co. held controlling interests in C Co. and D. Co., respectively. A Co., B Co., C Co. and D Co. were all cable TV system operators. If the combined market share of the merging parties is larger than one third, or one of the merging parties' market share exceeds one-fourth, this kind of merger should be notified to the FTC in advance pursuant to Article 11 of the Fair Trade Act. In this case, Fu Yang Investment Co. failed to notify the FTC before implementing the merger with A Co. and B. Co in violation of Article 11 of the Fair Trade Act. The FTC imposed an administrative fine of NT\$500,000 on Fu Yang Investment Co.

Fu Yang Investment Co. changed its name to Fu Yang Media Technology Co. in April 2005. After the disposition by the FTC in 2003, the FTC found that Fu Yang represented B Co. to sign the contract with related cable TV channel providers on 31 December 2004. In addition, Fu Yang, through its control of a majority of directors and supervisors starting in April 2005, continued to have direct or indirect control of the business operations or the appointment or discharge of personnel of B Co. Even so, Fu Yang still did not cease and rectify its aforesaid conduct or take necessary corrective action according to the FTC's disposition in 2003. Fu Yang still failed to notify the FTC prior to the merger with B Co. and therefore violated Article 11 of the Fair Trade Act. According to Articles 13 and 40 of the Fair Trade Act, the FTC ordered Fu Yang to remove certain persons from their positions in B Co. until there was no substantial control in B Co., and imposed an administrative fine of NT\$4 million on Fu Yang.

After the disposition by the FTC in 2003, the FTC found that Fu Yang Media Technology Co. represented A Co. to sign the contract with related cable TV channel providers on 31 December 2004. In addition, Fu Yang, through its control of a majority of all directors and supervisors starting in April 2005, continued to have direct or indirect control of the business operations or the appointment or discharge of personnel of A Co. Fu Yang still did not cease and rectify its aforesaid conduct or take necessary corrective action according to FTC's 2003 disposition. In December 2006, A Co. had a 57.45 percent market share in Tamsui district. The merger in this case meets the criteria defined in Subparagraph 2, Paragraph 1, Article 6 of the Fair Trade Act, which states that "an enterprise holds or acquires the shares or capital contributions of another enterprise to the extent of more than one-third of the total voting shares or total capital of such other enterprise." The controlling enterprise Fu Yang still failed to notify the FTC and therefore violated Article 11 of the Fair Trade Act. According to Articles 13 and 40 of the Fair Trade Act, the FTC ordered Fu Yang to remove certain persons from their positions in A Co. until there was no substantial control in A Co., and imposed an administrative fine of NT\$4 million on Fu Yang.

BIAC

1. Introduction

The Business and Advisory Committee (BIAC) to the OECD appreciates the opportunity to submit these comments to the OECD Competition Committee's Working Party No. 3 (WP3) for its roundtable on "Antitrust Issues Involving Minority Shareholding and Interlocking Directorates" on 19 February 2008.

Industry does recognize that minority shareholdings can have an influence on the policy of companies. This is obviously true of minority shareholders who exercise joint control in joint ventures, but some form of influence can also be exercised through so-called "passive" shareholdings where no access to the corporate governance bodies, such as seats at the Board of Directors or contractual veto rights, is provided. The latter situations are themselves usually regulated by corporate law, providing for example disclosure obligations in respect of share ownership beyond certain thresholds or shareholders agreements, or shareholders approval of agreements between companies having interlocking directors.

Passive minority shareholders being in a position to exercise influence is probably a trend which has increased recently. Indeed a more active participation of minority shareholders is generally encouraged as part of the worldwide effort to improve corporate governance practices. This was for instance one of the themes developed by the "Report of the High Level Group of Company Law Experts on a Modern Regulatory Framework for Company Law in Europe"¹. BIAC is of course in support of that movement for proactive minority shareholders. On the other hand, the well-publicised growing influence of funds, both as a result of the multiplication and size of their investments and because of their willingness to play a more active role, is also an important development. Private equity funds reportedly raised more than \$400 billion of investment capital in 2006 alone, and spent nearly twice that much - over \$740 billion - on corporate buyouts². Thus, BIAC views this topic to be particularly timely for study by the Working Party.

Industry also recognises that such influence of minority shareholders can have anti-competitive effects in some circumstances. Economic literature and practical experience show that it is not uncommon that a company holds a minority share in another with which it has market relations, whether in horizontal or vertical situations and that in certain cases these shareholdings are reciprocal. Situations in which a third party (e.g. an investment fund) owns minority shareholdings in undertakings having between themselves horizontal competitive or vertical relationships are also not infrequent. Cross-shareholdings can be found in sectors as diverse as banking, insurance, energy, air travel and automotive. There are usually perfectly valid reasons for these situations: the preference of investors for sectors that they know well, the need for a transition stage in a progressive divestiture scheme, the desire to give equity support to a legitimate co-operation agreement, etc. One can quote a case where (admittedly in very specific circumstances) competition authorities themselves have recognized that minority shareholdings by competitors (including

¹ Final Report of the High Level Group of Company Law Experts on a Modern Regulatory Framework for Company Law in Europe, Brussels 4 November 2002. The full text of the Group's report can be found at: http://ec.europa.eu/internal_market/company/docs/modern/report_en.pdf

² See David Weidner, Study: Investors' Expectations Rising for Private Equity, Dow Jones News Serv., Jan. 17, 2007.

a dominant market player) can have pro-competitive effects (the *Blokker/Toys''R''Us* decision of the European Commission³).

It is therefore not in dispute that in certain circumstances a minority shareholder can have an influence that is not restricted to the protection of its investment, but extends to the determination of the company's market policy. And, even if the investment remains passive, i.e. not supported by interlocking directorship (reciprocal or not) or veto rights, this can lead to express or tacit collusion.

Accordingly, BIAC has no objection in principle to the basic positions taken by the U.S., the European Union and certain national competition authorities regarding their ability to investigate and regulate the potential anti-competitive effects of minority shareholding and interlocking directorates, as they result respectively from the application of Section 7 of the Clayton Act (and in some cases Section 1 of the Sherman Act), the so-called "Philip Morris doctrine" in its continued enforcement and certain national regulations like the German Act against Restraints to Competition.

Nor does BIAC object in principle to the applicability of competition law to minority-owning funds. This was recently confirmed in Europe by the Commission's Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings of 10 July 2007 (para. 14 and 15). Similarly in the US there have been noted cases such as *Kinder Morgan*⁴, and the recent filing of a civil action by the DOJ against ValueAct Capital Partners, a powerful reminder that the Clayton Act is applicable to financial investors. BIAC understands however that the funds may have worries as to a possible misconception of the nature of the "control" they exercise by virtue of their shareholdings, which may lead to indiscriminate appraisal of their levels of ownership in the calculation of thresholds for merger notification purposes, but it seems that at least the above-referenced Consolidated Jurisdictional Notice recognises that the variety of the forms under which they exercise control or influence must be analysed in detail.

It is important, in this regard, to note that competition agency enforcement is appropriate in those circumstances where legitimate concerns about impacts on competition are *likely to occur* as a result of cross ownership. The likelihood of such an adverse effect occurring can be measured against well known merger standards. Typically, this would require either (1) the removal of a key barrier to coordination in the industry, or (2) a likely unilateral effect that would provide an incentive for the parties to limit the extent of their competition. In the context of cross-ownership interests, the circumstances in which such effects can be expected are limited and, indeed, extremely unlikely where an investor owns a minority interest in both of the competing companies⁵. In any event, even in cases where investors are competitors of the target firm, anti-competitive effects could only arise in highly-concentrated markets.

Enforcement action may also be appropriate in situations where there is a high risk of "spillover collusion" due to interlocking directorates or significant involvement in management of competing companies. In this regard, however, we would note that spillover collusion should not be presumed to result from cross-ownership where that ownership is passive with respect to at least one of the companies at issue.

³ Commission decision 98/663/EC- *Blokker/Toys''R''Us* of 26 June 1997, OJ L 316 of 25 November 1998 P. 0001 – 0019.

⁴ In the Matter of TC Group, L.L.C., a limited liability company, Riverstone Holdings LLC, a limited liability company, Carlyle/Riverstone Global Energy and Power Fund II, L.P., a limited partnership, and Carlyle/Riverstone Global Energy and Power Fund III, L.P., a limited partnership, File No. 061 0197, Docket No. C-4183, available at <http://www.ftc.gov/os/caselist/0610197/complaint.pdf>.

⁵ Cf. *United States v. Univision Communications, Inc.*, Civil Action No. 1:03CV00758, Complaint available at <http://www.usdoj.gov/atr/cases/f200800/200878.htm>.

Finally, a safe harbour can be established where the investment is passive – i.e., where it is both small in relation to the overall shareholding of the company and does not result in the direct involvement by the investor on either the board of directors or in the day to day management of the company.

2. Clarification of European and National Laws and Policies Would Benefit Investment

A clarification of the policy with respect to the permissibility of cross-ownership and agency enforcement intentions would benefit investment, and thereby enhance consumer welfare. Uncertainty in this area creates the risk that investors will withhold funds that might usefully be placed into increasing innovation, reducing costs and otherwise enhancing competitiveness of firms.

A four part methodology would be most beneficial. This would consist of: (1) clear guidance on the *de minimis* thresholds of investment that will not result in agency scrutiny or concern; (2) an explanation of the circumstances under which the agency will deem cross-ownership interests to constitute a threat to competition; (3) an indication of the circumstances under which the agency will challenge cross-directorships between corporations, including subsidiaries and affiliates; and (4) an indication of the potentially acceptable remedies considered if it is found that the minority shareholding can indeed have anti-competitive effects.

The United States exhibits a relatively clear instance of three of these policies. First, the Hart-Scott-Rodino Act (Section 7A of the Clayton Act) provides for an “investment only” exemption that serves, in effect, as a safe harbour for partial equity investors. Under this regulation, an acquisition of voting securities is “exempt from the requirements of the act [...] if made solely for the purpose of investment and if, as a result of the acquisition, the acquiring person would hold ten percent or less of the outstanding voting securities of the issuer, regardless of the dollar value of voting securities so acquired or held.”⁶ Second, Section 7 the Clayton Act and the enforcement actions of the agencies provides relatively precise guidance as to the thresholds at which the agencies will challenge cross-ownership interests. The agencies take a strict view on cross-ownership among competitors, generally prohibiting the practice in such matters under its review, except in those cases where the cross ownership pre-dates the horizontal competition or where the relationship among the parties also bears elements of pro-competitive vertical integration⁷. In such cases, the agencies generally will permit a *de minimis* level of cross-ownership with a nominal cap of 10%. Third, Section 8 of the Clayton Act is clear on the question of interlocking directorates and the level at which such matters are considered *de minimis*. The basic prohibition restricts any person from serving as an officer or director of any two corporations which “by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the antitrust laws.” This effectively restricts interlocks among any two companies that compete at any level. The narrow *de minimis* exception applies if (1) the competitive sales of either corporation are less than \$2,531,900; (2) the competitive sales of either corporation are less than 2 per centum of that corporation's total sales; or (3) the competitive sales of each corporation are less than 4% of that corporation's total sales⁸.

While BIAC regards the threshold levels established by the U.S. laws and policies, in general, to be too stringent and therefore potentially inhibiting of pro-competitive investment, we nonetheless recognize the approach to be comprehensive and clear. In particular, BIAC views the “investment only” threshold of the HSR statute, and the *de minimis* threshold of the Clayton Act – both of which were established decades

⁶ 15 U.S.C. § 18a(c)(9) (2000); 16 C.F.R. § 802.9 (2001).

⁷ See, e.g., *United States v. Univision Communications, Inc.*, <http://www.usdoj.gov/atr/cases/f202100/202184.htm>

⁸ 73 Fed. Reg. 5192 (Jan. 29, 2008), see also <http://www.ftc.gov/opa/2008/01/clayton.shtm>

ago without the benefit of economic learning on the subject – as being far too low to reflect current economic and institutional thinking. Short of outright cartel agreements, the construct under which such arrangements are likely to harm competition at this level (principally unilateral effects concerns) exist only in a theoretical vacuum. The confluence of own price elasticities, sales diversion levels and lack of competitive alternatives that would have to exist in order to support such competitive harm are unlikely to occur in any real world settings.

In Canada, critics point out that it is difficult to know why the acquisition of a 20% interest in a public company triggers a notification obligation while the higher threshold of 35% applies to investments in closely-held companies (while in addition the Merger Enforcement Guidelines adopt the view that any equity investment of 10% or more will be reviewed as the acquisition of a "significant interest").

There are probably more problems in European jurisdictions where companies face a variety of sometimes inconsistent policies. It is clear and acceptable that minority stakes that confer control are concentrations under the Merger Regulation, but the situation is less satisfactory when the minority stake does not confer control. It has been pointed out by several authors that there are pieces missing in the European Commission's jigsaw. While the Philip Morris doctrine makes it clear that a non-controlling minority shareholding can be used to anti-competitive effects, there is no specific tool to enforce the doctrine. Case law shows that such situations have been analysed either in application of the Merger Regulation although it came into force after the Philip Morris case (*Tetra Laval/Sidel*⁹, *Eurostar*¹⁰, *Toshiba/Westinghouse*¹¹), article 81 (*BT/MCI*¹², *Olivetti/Digital*¹³, *Hudson's Bay/Finnish Fur Sales "Hudson's Bay II"*¹⁴) and article 82 of the Treaty of Rome (*Warner-Lambert/Gillette*¹⁵). These three "tools" pursue different purposes, which does not help consistency. Moreover, there might be instances where none of the three apply, respectively because there is no "change in control", no "agreement between undertakings" (or, more broadly, no co-ordinated effect), and no dominant position.

There are also apparent contradictions in the application of EC law. In some cases the minority shareholding is viewed as a danger requiring remedies or even result in the failure of a transaction. However, that is not to say that minority shareholdings by competitors are always viewed in a negative light like in *Warner-Lambert/Gillette*¹⁶: in others they are viewed as harmless or even pro-competitive¹⁷. Unfortunately, it is not possible to see in the series of decisions a clear trend attributable to the differences in the levels of the stakes held by the minority shareholders, nor to the nature of their contractual rights. The new Consolidated Jurisdictional Notice, which focuses on the concept of "control", does not bring much additional clarity on the subject of "influence", and this was perhaps a missed opportunity.

⁹ Commission decision Case No COMP/M. 2416 *Tetra Laval/Sidel*.

¹⁰ IV/M. 1305 Eurostar of 9 December 1998 (1999/C 256/04).

¹¹ COMP/M.4153 (2007/C 10/01).

¹² Commission Decision of 27 July 1994 (OJ L223/36 of 27 August 1994).

¹³ Commission decision 94/771/EC *Olivetti- Digital* of 11 November 1994 OJ L 309 of , 02 December 1994 P. 0024 – 0031.

¹⁴ 19th Report on Competition Policy Part 2 1989.

¹⁵ Commission Decision 93/252/EEC *Warner- Lambert/Gillette and Others* of 10 November 1992, OJ L 116, 12 May 1993 P. 0021 – 0032.

¹⁶ Ibid.

¹⁷ See above note 3.

Uncertainties and contradictions can also be found in the enforcement by national authorities: in particular, it seems odd that Germany and Austria (together with Lithuania according to the accepted interpretation of the law) should stand alone in imposing a notification obligation for acquisitions of minority shareholdings above 25% (irrespective of the rights conferred on the holder of the stake, and of market circumstances), while also stating that the acquisition of a “competitively significant influence” qualifies as a concentration. Poland, which had a similar rule, removed it in 2007.

It is then not surprising that the business community, always in search of legal certainty, should consider the necessity of guidelines to clarify both the nature of the situations which require analysis and the range of remedies to be considered if it is found that the minority shareholding can indeed have anti-competitive effects.

However the business community is also always wary of over-regulation and increased burdens on undertakings, and it may be argued that yet another set of guidelines, even if not binding, is useless. There seems to be remarkably few litigation cases in Germany, denoting a small number of competition issues related to minority shareholdings, despite the large number of filings generated by the extensive criteria of the Act against Restraints of Competition. The apparent contradictions pointed out above may simply reflect the variety in the legal regimes of Member States and the particular circumstances of each individual case, especially as the number of cases at hand is rather small. Finally, where there has been an attempt to provide guidelines, like for instance in the Substantive Assessment Guidance document for Mergers published by the UK’s Office of Fair Trading, they give little more than general common sense advice and preserve maximum flexibility.

3. The Potential Contents of Guidelines

BIAC considers that, while steering clear of a *per se* approach, the European Commission should issue some form of guidelines, if only to make sure that national agencies across Europe apply consistent policies. BIAC further submits that, at the very least, these guidelines should meet the following criteria.

Again, one should remain wary of over-regulation and increased burdens on undertakings, and not impose unnecessary new notification requirements. Hence a preference for guidelines: a Commission Notice could be the appropriate tool, or perhaps more simply an amendment to the Consolidated Jurisdictional Notice rather than an amendment to the Merger Regulation, as suggested by some authors¹⁸. Also, it is likely that taking the route of the amending to the Regulation would almost inevitably affect the concept of control which is one of the bases of the Merger Regulation, thus creating fresh legal uncertainty.

One should also remain conscious of the fact that in its decision-making process, the investor is confronted with various concepts of control, which are not limited to competition law approaches to concentration and have different consequences not only depending on jurisdiction, but also on the area of the law under consideration. Indeed when preparing a potential investment decision, the investor often begins its analysis by assessing the consequences from a consolidation point of view, which if plain majority control or joint control is not reached may imply an analysis of “significant influence” under the specific criteria of accounting rules, which is assumed when the interest in voting rights is superior to 20% and determines the application of the so-called equity accounting method. On the other hand, in corporate law various interest thresholds draw various consequences, and they differ from country to country. For instance minority interests above 5% in the U.K., 10% in Germany and approximately 0.50% for large listed companies in France permit minority shareholders to submit resolutions at shareholders meetings. Qualified majorities required for certain “qualified resolutions” (including generally any modifications to

¹⁸ See A. Ezrachi and D. Gilo, "EC Competition Law and the Regulation of Passive Investments among Competitors", Oxford Journal of Legal Studies, Summer 2006, 348.

the by-laws) give minority shareholders with shareholding exceeding 25% in the U.K. and Germany, 33.3% in France the right to veto such resolutions. The stock exchange regulations impose certain obligations of disclosure and even the compulsory submission of bid offers above certain interest thresholds, again not the same in all countries: 30% in the U.K. or Germany, 33.3% in France. Even when specific thresholds are not set by corporate law, the concept of directors' fiduciary duty is in itself a strong obstacle to interlocking directorates between competitors. Criminal law also draws consequences from the holding of certain minority stakes above certain thresholds: under the Third "anti-laundering" European Directive, a 25% (plus one share) ownership in a legal entity is deemed equivalent to "control" and may trigger disclosure requirements¹⁹. Finally, tax law derives various consequences from various minority ownership levels. All these non-antitrust limitations help reducing the number of situations where anti-competitive minority "influence" can develop. Adding a new series of obligations specific to competition law purely because certain minority thresholds are crossed (as it is the case in Germany or Austria) would unnecessarily increase the administrative burden on undertakings.

If guidelines are issued, they should certainly not be limited to the definition of rigid thresholds in terms of percentage of interest above which there would be a presumption of "influence" of the minority shareholder over the company. It is not simply that, where they exist in current legislation, these thresholds are too low: one can even question the relevance of quoting shareholding levels in itself. If we consider the German/Austrian position, commentators often complain that the plain 25% criterion (which admittedly would provide by itself a formidable degree of legal certainty) ends up imposing filing obligations in many cases where the transaction has no potential effect on competition. Understandably, the law has been drafted in such a way as to permit the competition authorities to investigate the acquisition of a smaller interest in circumstances where, due to the presence of additional factors likely to confer a "competitively significant influence", they deem it appropriate to review a particular transaction more closely. This of course does reduce the legal certainty advantage. In the U.K. as well, there is a 25% threshold, applied in a different manner, since although there is a presumption of "material influence" irrespective of the status of the rest of the company's equity the notification remains voluntary. But the OFT Guidelines²⁰ also quote a 15% threshold above which such influence can be exercised under certain circumstances, and reserves the OFT's right to investigate "occasionally" under that latter threshold. Indeed acquisitions of a shareholding of less than 10% have on rare occasions been examined by the UK regulators; however, these did involve media mergers and neither resulted in a prohibition decision (BSkyB/Leeds Sporting²¹, NTL/Newcastle United²²). Despite the rather comprehensive and clear definition of the factors that the OFT takes in consideration to assess the material influence, all this does not give a safe harbour, or even much practical guidance, to the investor.

In any case, if interest percentage thresholds are defined because of their attractiveness from a legal certainty point of view, they should be used in conjunction with an analysis of the level of concentration on the market, since in the (rare) cases where anti-competitive effects of minority shareholding and interlocking directorates may be observed, it is in oligopoly circumstances. Tools do exist to bring a level

¹⁹ Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (OJEU 25.11.2005 L309/15).

²⁰ "Mergers-Substantive Assessment Guidance", May 2003.

²¹ Decision of the OFT of 3 February 2000, published on the Regulatory News Service.

²² Competition Commission Report on the Merger Situation, presented to Parliament by the Secretary of State for Trade and Industry by Command of Her Majesty, July 1999.

of reliability to this kind of analysis (HHI) and would be appropriate in horizontal competition situations, but they should be used with a high degree of flexibility²³.

A more useful approach would be to provide guidance focusing on the assessment of “influence”, in order to restrict investigation and enforcement to those circumstances where legitimate concerns about impacts on competition are *likely to occur* as a result of the minority ownership. This is especially topical as the national authorities’ approach to the concept seems to vary: does the British “material influence” differ from the German “competitively significant influence”? This assessment should inevitably take stock of the conceptual efforts made to define “joint control” by the Commission itself in its Consolidated Jurisdictional Notice. U.S. and German case law probably provide a useful analysis of the various tools (directorship, veto rights, access to information) that can confer such influence. But guidelines would greatly help the investors in finding their way since case law provided by European and national authorities and courts is for the moment insufficient.

The same flexibility is required with respect to the guidance which is required as to the range of available remedies if it is established that the minority shareholding can have anti-competitive effects. While divestiture is less dramatic for a minority holding than for a merger, U.S. practice shows it is generally unnecessary, and it should remain a last resort solution, particularly given the risk of serious losses being incurred. The remedies should therefore focus on the rights granted to the minority shareholder by the operation of law (to the extent they can be waived) or contractually. The panel of available measures is well known: limitation of veto rights to subjects directly related to investment protection, forbidding interlocking directorates, “firewalls” to prevent the flow of sensitive market information, etc. In doing so however, the influence of a director’s seat on decision-making or exchange of information should not be overrated: in large companies, boards are by nature confined to high-level decisions, remote from the details of the market, and the exchange of information between competitors is increasingly under the competition authorities’ watch anyway. It should be kept in mind that, to be efficient, “firewall” provisions should be carefully drafted.

BIAC is conscious of the difficulty in finding a happy medium between legal certainty in a system relying on rigid thresholds and/or a list of legal factors triggering a presumption of “competitively significant influence”, which inevitably results in a number of unnecessary notifications, and the need to take into account complex and very diverse sets of circumstances. Of course no legal regime will ever accommodate the wide range of shapes and forms that acquisitions of minority shareholdings can take. However, that does not mean that the current regimes (whether at European or national level) could not be improved, and we would encourage the European competition authorities to initially at least recognize the need for clarification and consistency.

²³See A. Ezechia and D. Gilo, *loc.cit.*, 346.

SUMMARY OF DISCUSSION

The Chair opened the Roundtable and thanked the member countries and observers for the significant number of contributions. The Chair observed that one possible reason why minority shareholdings and interlocking directorates raised such an interest is the growth of entities such as private equity funds which make a business out of this type of investments. The Chair mentioned the BIAC submission which suggested that in 2006 private equity funds had raised around US \$400 billion and had invested US \$750 billion, underscoring that this was a very important phenomenon and one that was likely to be around for some time.

The Chair explained that the Roundtable would address several issues, including (i) the legal tools and the analytical framework various competition agencies have applied to minority shareholdings and interlocking directorates; (ii) examples of cases that member countries and observers have dealt with; and (iii) what types of remedies have been applied to these cases. In this context, the Chair thanked the Secretariat for the background paper which summarises the issues involved with structural links between competitors and highlights the various themes that were also covered in the submissions.

To start the roundtable discussion, the Chair turned to the Norwegian delegation and noted that the Norwegian submission indicated that some industry sectors are characterized by very extensive direct and indirect links between competitors. He asked the Norwegian delegation to present the conclusions of a study that the Norwegian Competition Authority had commissioned concerning the ownership relations and cooperation in the Norwegian power market and to discuss the extent to which these structural links affect competition in this industry.

The representative of Norway explained that Norway had liberalised its electricity market very early. Liberalisation occurred in 1991 and today Norway is part of the integrated Nordic Electricity Market. In recent years, the ownership structure of this market has changed tremendously, mainly because a number of electricity companies that were previously owned by local municipalities around the country have been turned into limited liability companies selling ownership shares. There has also been a trend towards the development of larger regional companies through mergers and acquisitions. In particular the largest Norwegian electricity producer, Statkraft, which is 100% owned by the Norwegian state, has been leading this trend and has acquired shares in a number of Norwegian companies. These mergers and acquisitions have reduced the number of independent players in the Norwegian electricity market, which today is characterized by a high concentration of ownership, an extensive degree of minority shareholdings, cross ownership, and joint ownership of production plants. Against this background, the competition authority has been concerned that the extent of structural links among companies may lead to reduced competition. Therefore, it has paid special attention to the electricity sector.

In 2006, the competition authority commissioned a study from the Institute for Research in Economic and Business Administration to document the extent and nature of cooperation among electricity producers in Norway. The report concerned ownership relations as well as different forms of cooperation among electricity producers. At least three conclusions can be drawn from the report:

- First, taking direct and indirect financial ownership into account can affect market shares and hence concentration to a considerable extent. For example, the market share of Statkraft based on production capacity owned by individual companies was 30.2%, but when adjusted for direct and indirect ownership among companies the market share increased to 42.4%. Similarly, the concentration index, HHI, almost doubled, to a value close to 2000, when corrected for financial ownership.

- Second, taking additional factors into account can produce even higher concentration levels. For example, it can be assumed that capacity controlled by a company is proportional to the company's actual voting power in other companies, and not just the voting share of an owner, as given by its financial ownership share. Such methods result in substantially higher HHI values than HHI values that reflected financial ownership.
- Third, the study indicated that many producers were involved in a range of cooperative arrangements and that trend seems to be growing. According to the study the main channel for information exchanges and financial ownership relations was through participation on the board of directors.

All in all, the study confirmed results from previous studies that the Norwegian electricity market is considerably more concentrated than indicated by standard concentration measures. The representative from Norway explained that this meant that the competition authority is still concerned that competition may be hurt by these structural links. The Norwegian Competition Act specifically provides the competition authority with the powers to intervene against minority shareholdings even if the shareholding does not lead to control. The competition authority has used these powers and has ordered Statkraft and, in addition, three other electricity producers in Norway to notify all their acquisitions, including minority shareholdings, that do not lead to control. Hopefully, this will enable the competition authority to supervise effectively the structural developments in the Norwegian electricity market.

The Chair thanked the representative from Norway for the presentation. He then mentioned that one of the topics discussed by the representative from Norway had to do with control. Whether a minority shareholding actually confers some sort of control over the target entity is an important issue addressed in many submissions. The Chair pointed out that the issue of control had been discussed in detail in the European Commission's submission. The Commission's submission explains that only acquisitions of active minority shareholdings constitute a concentration under the merger control system of the European Union. Whether or not a concentration exists affects whether or not a filing needs to be made, which is obviously a very important issue in terms of the Commission's ability to know about and investigate a minority shareholding acquisition. He asked the Commission to explain the circumstances in which minority shareholdings are subject to merger control review, and the Commission's approach to minority shareholdings in the competitive assessment of mergers.

The representative of the European Commission started with a brief explanation of how European Community law applies to the acquisition of minority shareholdings. First, under the EC Merger Regulation, minority shareholdings are examined *ex ante* only if the acquisition of the minority shareholding results in a change of control of the target company. This would typically involve situations in which the Commission would find "joint control". Joint control typically exists when an entity has two or more shareholders none of which has the majority of the shares, but where arrangements are in place between them which gives rise, typically, to a quality of voting rights, or appointment to the board of directors, veto rights which go to the strategic decision making of the company, and arrangements concerning the joint exercise of the voting rights. That would be the usual situation in which a minority shareholding might give rise to an *ex ante* assessment under the EC Merger Regulation. In less typical situations, one might have the acquisition of a minority shareholding resulting in what the Commission calls *de facto* control of the target company. Those kinds of situations occur from time to time when the minority shareholding would, for example, be so significant that the acquiring company would be by far the largest shareholder in the target company. The rest of the shares, for example, may be dispersed and it may be clear on the basis of historical voting that the acquiring company will have effective control of the target company.

These are not the only circumstances, however, in which minority shareholdings could be relevant under the EC Merger Regulation. The Commission, as most jurisdictions, assesses a merger by comparing the post merger scenario and a counterfactual, which is generally the present circumstances or the reasonably foreseeable future circumstances; in making this assessment it takes into account the existence of minority shareholdings, which might be considered as having an effect on the competitive dynamics of the market. The Commission had quite a few examples of situations where the remedy which was ultimately obtained in order to allow the merger to go ahead involved in some way the divestment of a minority shareholding, or some other structural or behavioural undertaking, which in some way diminished the anticompetitive impact of the minority shareholding. The representative of the Commission pointed to the acquisition by Siemens of VA Tech as an example. The main competitor of VA Tech in one of the markets where the Commission had concerns was a company in which Siemens had a significant minority shareholding. The Commission concluded that it was likely to lead to serious competition concerns and the remedy involved the divestment of that shareholding.

The representative of the Commission then explained that in certain circumstances the Commission can also apply its behavioural rules, Articles 81 and 82 of the EC Treaty, to minority shareholdings *ex post*. The Commission added that this raised the interesting issue that sometimes the Commission may reach competition problems related to minority shareholdings by way of a remedy in a concentration, but the entry door to this approach is of course that first there has to be a concentration which requires a change of control. That in turn raises the question of whether this regime is sufficient or whether merger control should start already below the level of control. Should there be a merger control below the level of control? Or, if not, should there not be another mechanism to control the negative effects of minority shareholdings? This is an important issue because, in the Commission's view, if the only door of entry is a merger which requires a change in control, there is a risk of a gap in the protection of competition.

The Chair followed up on the presentation by the Commission by asking how the Commission and the parties deal with a situation where the question of whether there is a change in control may be disputed between the Commission and the parties. In other words, if the parties did not believe there was a change of control but recognized that the Commission may have a different view, and that question determined whether or not the parties must file to begin with, how would the Commission deal with that uncertainty? Would the filing become an admission that there was a change of control even though the parties might not have wanted to concede the issue?

The representative of the Commission responded that it was not unusual for these kinds of discussions to take place prior to a filing. Firms seek for legal certainty and their typical reaction is to avoid risks. For this reason, if the Commission's view remained firm that a change of control was taking place, companies tend to file the transaction. Of course, a company is always free to take a risk, but the Commission might challenge that situation as a non-notified transaction. It was even conceivable that a third party might take an action in those circumstances, but it is unusual to reach a point where those kinds of proceedings would be contemplated. The Commission often has intensive pre-filing discussions about whether or not a change in control is taking place and these situations are not always straightforward.

The Chair then turned to the Czech delegation which described in its submission several merger cases involving minority shareholdings, and asked it to describe the role that minority shareholdings played, in particular, in the 2002 privatization of the regional power distribution companies and how the Office for the Protection of Competition assessed them in its merger reviews.

The representative of the Czech Republic said that the role played by the minority shareholdings in the 2002 privatization of the regional power distribution companies was very important. The representative explained that the transaction involved the acquisition of the state shareholdings in eight distribution companies by another state-owned company, ČEZ, which was the electricity generator incumbent in the

Czech Republic. Five of the eight distributors were controlled by the state, whereas the other three were independent. All of them behaved independently on the market before the transaction. ČEZ was to acquire control of the five state controlled distributors and acquire a minority shareholding in the remaining three independent distribution companies. The distribution companies were not only monopolists in their respective distribution area but, importantly, they were the most important traders of electricity to eligible consumers. Focusing only on the minority shareholdings in the three independent distribution companies, there were two basic concerns that were connected with the minority shareholdings:

- First, the incumbent, ČEZ, was to acquire a so-called blocking minority shareholding, which, according to Czech commercial law, is a shareholding that does not amount to joint control but enables the company or the holder of the shares to block certain important decisions. The Office thought that this could negatively influence the ability of the independent companies to compete aggressively against ČEZ.
- Second, the Office was concerned that the blocking minority shareholdings provided the holder with access to a broad range of commercial sensitive information about its competitors and feared that this structural link could contribute to the creation of coordinated effects after the consolidation had taken place.

The representative of the Czech Republic also mentioned that ČEZ was to acquire minority shareholdings in ČEPS, the monopoly operator of the transmission grid. Although the concerns were very similar as to those relating to the other minority shareholdings, this transaction raised an additional issue as ČEZ would have been the only shareholder with experience in the electricity business. The other shareholders were either the state, or ministries, with no real interest in competition; they were only interested in getting money from the business. The representative of the Czech Republic explained that those were the Office's thoughts about minority shareholdings and the reason why it had approved the merger with conditions requiring the divestiture of the minority shareholdings in four companies. Today, five or six years after the merger, there is aggressive competition among the three independent companies and the merged entity. The representative did not claim that the only reason for this was the conditions imposed by the Office but pointed to the general fact that the liberalization of the electricity sector in the Czech Republic was more successful than the liberalisation of gas in the Czech Republic.

The Chair then turned to the Lithuanian delegation and asked it to explain its case in the milk products and dairy sector, which involved the assessment of a minority shareholding, in particular how it assessed the acquisition under the Lithuanian merger rules.

The representative of Lithuania explained that the case was an interesting one because it was notified on four occasions and three times withdrawn. Each time the acquirer, Rokiškio sūris, indicated a different number of shares to be acquired. Each time Rokiškio sūris also emphasized that the principal purpose of the concentration was to purchase an influence in the target company, Panevėžio pienas, thereby enabling Rokiškio sūris to influence the statutory commercial decisions of Panevėžio pienas, and ensuring that the value of its shares would not decrease. Thus, the acquisition of shares should be considered a financial investment. In assessing the concentration, it was also taken into account that the principal shareholder of Panevėžio pienas owned 50.2% of Panevėžio pienas' shares.

The most important assessment of control carried out in this context related to the notification concerning Rokiškio sūris' acquisition of 33% of Panevėžio pienas while claiming that the acquisition would not lead to control because veto rights would not be acquired. The representative of Lithuania explained that the concept of "control and decisive influence" as defined in the Law on Competition includes the acquisition of rights, irrespective of whether or not the person acquiring the control actually exercises those rights; the important aspect being the acquisition and the possibility to exercise such

control rights. In the case at hand, it was determined that the sole control changed into joint control. The minority shareholdings had the right to block decisive decisions concerning the statutory business policies of Panevėžio pienas such as decisions concerning the budget, significant investments and decisions concerning the business plan. The assessment contained an analysis of the structure of the shareholdings and it was evaluated whether the minority shareholdings could exercise veto rights at the shareholders' meeting. It was established that it was enough to have 33% to obtain veto rights because according to the facts not all natural shareholders were present to vote at shareholding meetings and Rokiškio sūris could, therefore, obtain more influence than its 33% interest suggested.

Another very important point was the analysis of the company statutes, which commonly provide for rights of minority shareholders. In this case, the right to block decisive decisions concerned the budget, significant investments and the business plan. The constitution of the management board was also analyzed: the acquirer had the right to appoint three out of seven persons on the management board. Taking into account the situation on the dairy product and milk market, which was very serious because there were only three companies and each held about one third of the market, it was likely they would agree on a common strategy or otherwise coordinate their actions on the markets including agreements concerning the payment of the milk purchased; sharing of the zones for milk purchases; discount price for dairy products; and trade discount applications. The Competition Council adopted a decision whereby Rokiškio sūris was authorized to go ahead with the acquisition subject to certain conditions and obligations: Rokiškio sūris had to refrain from exercising voting rights in Panevėžio pienas during the general shareholders meeting on decisions to allocate profits; form, reduce or cancel the reserves of retained earnings; sell, put in pledge or mortgage certain specified assets, etc. The Competition Council also required that in order to ensure that the shareholding constituted a financial investment, Rokiškio sūris had to sell the shares within a certain time period, which Rokiškio sūris did.

The Chair explained that the topic for discussion had so far been the issue of minority shareholdings and the acquisition of control. As the European Commission had pointed out, however, there obviously can be such acquisitions that do not confer control which raise the question as to whether merger control laws should be extended to situations where there is no change of control. Some call this "passive minority shareholdings" as opposed to the "active minority shareholdings". The Chair then turned to the delegation from the United Kingdom, which has had some relevant experience in this area, as UK merger rules allow for the review of acquisitions of minority shareholdings below the threshold of control. The Chair asked the representative of the United Kingdom to explain the legal framework that applies to such acquisitions and, if possible, to provide some examples on its application.

The representative of the United Kingdom pointed out that when talking about the framework of the UK merger control two elements are very important. The first element is that the UK is one of the few voluntary merger review regimes and, therefore, anything that it catches in its jurisdiction net is not subject to compulsory evaluation and the costs involved. The second element is that the UK merger system has a very flexible jurisdiction net, which is wider than at the European level, and this allows the enforcement agency to be selective in the cases that it looks. Those two elements have gone together since 1973 when merger control was introduced. In terms of a wide jurisdiction net, in addition to decisive influence control scenarios and controlling interest above 50%, the UK merger control system also includes scenarios where "material influence" is acquired.

The term "material influence" is a term that the legislation does not define but the UK has almost 35 years of decisional practice to flesh out what the concept means. In addition, guidance that was introduced in 2003 with the new regime draws on experience under the old regime. The concept of material influence takes a shareholding centric approach as a starting point; shareholdings above 25% are usually presumptively deemed to confirm material influence, among other things because they enable the shareholder typically to block special resolutions at shareholder meetings. The guidance makes clear that

the UK looks also at shareholdings in the 15 to 25% range and, occasionally, below 15%; there is no safe harbour at the lower end. The analysis is very much one of looking at the cumulative significance of all the interests and links between the parties. Apart from the absolute level of the shareholding, the agency would look at, and take into account, the most obvious plus factors: the directorships, which do not have to be interlocking with the acquirer but they often could be, and various other asymmetries (for example if the acquiring shareholder interest is much larger than the interests of the other shareholders or, if they have any special veto rights or commercial arrangements), or whatever other facts and circumstances there are. It is a very flexible test and has the advantage, obviously, from an agency perspective, that one can analyze some scenarios that may raise competitive concerns that a bright line test might not capture other than in the context of an ancillary issue, which arise when the main transaction is one of control; the UK has those scenarios as well.

The most significant example of a transaction where the main action is the acquisition of a minority shareholding, as opposed to that issue arising in an ancillary way, is the recent BskyB/ITV case. The BskyB/ITV case was remarkable for two reasons: it is a minority shareholding material influence case, the first such case under the Enterprise Act regime that the UK has operated for the last five years; it is also a media plurality case and the UK system enables media mergers to be looked at in parallel with the competition aspects. The BskyB/ITV case is a combined competition and media plurality case in which, after the Competition Commission had come to a decision, the final decision was taken by the government and the Secretary of State for Business took a decision under both aspects. The minority shareholding at stake in this case was a single shareholding of 17.9% and on the facts the Competition Commission found that that gave rise to the ability to materially influence the policy of the target company. It also found on the facts that there was a substantial lessening of competition in the TV market as a result of that situation.

The Chair next pointed out that the Israeli Competition Act has an express reference to passive financial investments and asked the Israeli delegation to explain how the Israeli Antitrust Authority reviews these investments and to provide some actual case examples.

The representative of Israel explained that the Israeli Antitrust Act defines a merger in a very broad manner. A transaction which involves the acquisition of any rights that exceeds a 25% threshold constitutes a merger, regardless of whether the acquiring firm holds only a minority block of shares. In this respect, the law does not distinguish between active rights, such as the right to vote or appoint directors, and passive rights, generally rights to profits. Because the wording of the definition of a "merger" starts with the term "including," the Israeli Antitrust Authority's (IAA) merger guidelines stipulate: "under certain circumstances acquisition of even less than 25% could constitute a merger whereby such an acquisition leads to material influence." In other words, while the law includes an irrevocable presumption that transactions that cross the 25% threshold constitute a merger there is, similarly to the UK, no safe harbour for transactions that do not cross this threshold. In light of this situation, companies often ask the IAA for pre-rulings or they consult with competition law experts in cases of doubt; the outcome generally depends on indicators such as the corporate ownership pattern, whether shares are concentrated or widely dispersed, the type of rights attached to the shares, shareholder voting agreements as well as other features in the articles of association. In a recent decision, the Supreme Court encouraged firms to engage in such consultations; especially since the law provides for criminal sanctions for parties to an unlawful merger.

Over the years, the IAA intervened in several cases involving passive rights. One recent example is the transaction between the two daily newspapers *Globes* and *Yedioth Ahronot* that involved the acquisition of 30% of the right to profits and 12% of the voting rights. In that case, the outcome was that the acquiring newspaper had to divest parts of the rights to profits as well as to restrict its ability to exercise its voting rights. Another case which is currently pending before the Antitrust Tribunal concerns the processed tomato product market. In this case, one company purchased 24.8% of its competitor's parent company, which was established solely for the purpose of the transaction. The majority shareholder

in the parent company exercised no control whatsoever and granted full managerial discretion to the minority shareholder. Following intervention and investigation by the IAA, the Antitrust Tribunal issued a preliminary injunction forbidding the acquiring company from interfering with the business management of the acquired company. The economic rationale behind the IAA's policy in relation to minority shareholdings and passive rights has been endorsed by the Antitrust Tribunal; the underlining argument is straightforward: a minority shareholding of a given company in its competitor is expected to reduce the company's incentive to vigorously compete because its goal would be to maximize the aggregate profits stemming from the combined holdings in both firms. In addition, the acquisition of minority shareholdings could be viewed as a signalling device, particularly in an oligopoly market. In such cases, the risk of information spill-over and collusion cannot be easily overlooked. To this end, the representative of Israel considered the economic framework offered by O'Brian and Salop – also referred to in the background paper by the Secretariat - with respect to the competitive effects of partial ownership in terms of financial interest and corporate control very helpful and very relevant to the Roundtable.

The representative of Israel also added that the IAA asserted in a case some time ago that holding minority shares in a competitor might also have constituted a restrictive arrangement and not just a merger, and as such it was prohibited by the law. However, this issue has not yet been addressed by Israeli courts; nevertheless, in 2007 the IAA stated in a pre-ruling decision that it would not allow a leading insurance company to buy a 20% equity interest in Israel's largest credit card company because the transaction would have taken away an actual potential competitor from the credit card market and frustrated competition.

The Chair thanked the Israeli delegation and turned to the United States. He asked the US delegation to explain how US agencies approach minority shareholdings and to provide some examples.

The representative from the U.S. Department of Justice explained that a number of different statutory provisions can be implicated by minority shareholdings. A statutory provision that tends to come up most frequently is Section 7 of the Clayton Act, which is usually discussed in a context of mergers but on its face is not limited to mergers. It actually states that any acquisition of assets or voting securities that may result in a substantial lessening of competition or that may tend to create a monopoly is unlawful. The U.S. Supreme Court held on multiple occasions that Section 7 reaches beyond mergers and reaches any form of corporate amalgamation: any form of acquisitions of securities by one corporation by another whether it is full control majority share or minority share. Section 7 also has the benefit of Section 7(a) which is the Hart-Scott-Rodino pre-merger notification process, which allows the agencies to be informed of these types of acquisitions, even if they affect just a minority share. Section 7 has certain significant exemptions which the U.S. submission explains in some detail. Most notably, the acquisition of up to 10% of another issuer “solely for the purpose of investment” is exempted from the HSR process. In this case, the discussion is usually about whether the holding is purely for investment purposes or not. Because the acquisition of shareholdings is examined under Section 7, the analysis is quite similar to the analysis of a merger: there is the risk of unilateral effects and coordinated effects; particularly if the companies are horizontal competitors.

The U.S. Justice Department had a case in December 2007 involving minority shareholdings as well as interlocking directorates (which are covered by Section 8 of the Clayton Act). This was the acquisition by CommScope Inc., a wire and cable company, of Andrew Corporation ("Andrew"), a company that makes communications equipment and systems. Not long before the acquisition the two companies had been competitors in the drop cable market (drop cable is a type of cable used to, among other things, connect homes to television services). In addition, they were two of only four companies in the United States that sold this product; they were also the only two that had the particular technology which protects cables from corrosion, which is something very important to customers. Not long before the acquisition, Andrew had sold its cable business to a company called "Andes Industries" ("Andes") in return for a 30% shareholding in Andes that included with it the right to name individuals to the Andes board. The U.S.

Justice Department investigated this transaction as it would have investigated any merger under Section 7 of the Clayton Act and determined that the acquisition of Andrew, and through Andrew of the 30% holding in its new competitor, Andes, presented a potential competition problem. It examined it as a straightforward resolution and the remedy was also quite straightforward: in a consent decree that was filed along with the U.S. Justice Department's complaint, Andrew and the parties were required (i) to divest the 30% shareholding in Andes and (ii) to divest the intellectual property that in the original construction Andes had the right to use.

The representative from the U.S. Federal Trade Commission added examples of cases in this area. The representative from the FTC explained that the question really was whether the acquisition of a minority ownership would lessen competition, or in the terms of the statutes "substantially lessen competition". So the inquiry of the FTC really does focus on substance rather than form. It is not necessary that there is a concentration, or a complete merger or even a transfer of control. There are two main analytical issues in these types of cases. One is the unilateral effects type of analysis, where the FTC asks whether the acquisition of a minority ownership has changed incentives in a way that will lessen competition. The second, the FTC looks at whether the acquisition would lead to some kind of coordinated effects. The fact that the acquisition does not result in a merger or does not transfer control would not prevent the FTC from moving forward. At the same time, though, obviously there has to be a finding of a substantial lessening of competition. The mere existence of links, or the mere acquisition of an ownership interest, the mere acquisition by a firm of a minority ownership interest or a competitor, does not mean that there has been a substantial lessening of competition.

To illustrate the points he made, the representative from the FTC pointed to the *Kinder Morgan Inc.* 2007 case. Both unilateral and coordinated effects were present in that case. The market was the distribution of gasoline to retailers; there were two companies competing against each other in the market: Kinder Morgan and Magellan Midstream ("Magellan"). The case involved two investment groups that had shareholdings in both of them. There are two noteworthy facts about this case: first, it was not simply a direct investment in a competitor (i.e., the two investment groups, Carlyle and Riverstone, jointly held a 50% ownership in Magellan and through various investment vehicles held a minority ownership in Kinder Morgan); second, the combined share in Kinder Morgan was only 22%. The FTC made no finding that there had been any transfer of control in Kinder Morgan. The concerns raised related both to unilateral effects and coordinated effects. The FTC was concerned that the investment in Kinder Morgan by the investment group would incentivise it to cause Magellan to pull its competitor's punches in various ways that might benefit Kinder Morgan. The FTC was also concerned about the possible flow of information between the two competitors in the market place. The remedy was to require the investment group to drop its representation on the board of one of the two competing companies and the FTC also imposed a fire wall against any improper flow of information.

The Chair explained that the Working Party had been discussing the assessment of minority shareholdings in the context of merger review, but that, as a number of submissions had noted, these acquisitions also can raise issues and be subject to scrutiny under antitrust rules on horizontal agreements and abuse of dominance. The Chair said that this suggested that agencies have a range of options in terms of how to review potentially anticompetitive minority shareholding acquisitions. To start discussing these issues, the Chair called on the delegation from Mexico, which in its submission had highlighted an interesting difference, or an asymmetry, between a corporate governance role applicable to private companies and those applicable to publicly traded companies when it came to the rights and obligations of minority shareholders. He asked the representative of the delegation to explain some of those differences and more generally how minority shareholdings would facilitate information exchanges and potentially collusive arrangements.

The representative of Mexico explained that the different treatment of minority shareholders in publicly and privately traded companies originate in two laws: one is the relatively recent (2006) Stock Market Law that regulates public companies; the second law regulates private companies since 1934. These different statutes are the reason of the asymmetry. In the case of public companies, the Stock Market Law creates much more transparency with regards to the rights and obligations of board members, as well as extensive oversight by independent directors or members of the board. This relatively new law provides much less scope, in comparative terms, for hiding illegal behaviour because the law attributes more responsibility to the board if such behaviour occurs. According to the Mexican representative, the real problem in Mexico comes from the fact that wealth is much concentrated; this implies that cross ownership and interlocking directorates are relatively common and provides an important base for coordination and information exchange. He pointed to the Mexican submission where one can see some examples of when the Competition Commission has intervened to try to alleviate this in merger cases. There are two telecoms cases, both related to Telmex the biggest fixed line company. One case concerned the merger between *SBC* and *AT&T*. *SBC* was a shareholder of Telmex and *AT&T* was the shareholder of a smaller fixed line company. The Competition Commission decided to impose "Chinese Walls" in order for the smaller company to survive even though *SBC* and *AT&T* had already merged. The second case involved the largest broadcaster in Mexico, Televisa, which was buying the second largest cable operator. This case also involved Telmex because the Competition Commission sought to separate the fixed line network from the cable network. It decided to dissolve the interlocking directorates between Telmex and Televisa. Those cases are the most important in the merger context.

The Chair then turned to Germany and pointed out that the German submission refers to a recent case in which the Federal Cartel Office (Bundeskartellamt) applied German antitrust rules as well as Article 81 of the EC Treaty to a minority shareholdings. He asked the German representative to describe the *Xella/Nord-KS* case, the concerns identified and how they were addressed.

The representative from Germany explained that the *Xella/Nord-KS* case concerned Xella Deutschland GmbH's ("Xella") 17.5% minority shareholding in the joint-venture Nord-KS GmbH ("Nord-KS"). Xella is a leading producer of sand-lime brick and masonry materials. Nord-KS was active on the same product and geographic market as Xella, a regional market in Northern Germany. Transport costs play a significant role in the industry. According to the partnership agreement concluded by Xella and its partners in the joint venture Nord-KS, major policy decisions concerning the joint venture, such as the adoption of the annual investment plan and the financial plan, were to be discussed in an advisory council. While Xella with 17.5% of the shares and the same voting rights was not able to block the advisory council's decisions, its presence in the advisory council gave it the opportunity to gain knowledge of its competitor Nord-KS's business strategy decisions and the opportunity to influence these to its own benefit. The Bundeskartellamt found that the advisory council had already taken decisions to raise prices and reduce rebates. The Bundeskartellamt assumed that the parent companies of the joint venture, which continued to be active on the market, coordinated their market behaviour. The Bundeskartellamt came to the conclusion that the market position of Xella was strengthened by its minority participation in its competitor Nord-KS; competition was significantly distorted; and that no dynamic price competition was to be expected from Nord-KS vis-à-vis its parent companies as secret competition has been eliminated. The Bundeskartellamt then ordered Xella to withdraw from the joint venture within one year from service of the decision; as interim measures Xella was ordered to no longer participate in meetings of the advisory council; exercise its voting rights; or request the submission or the inspection of minutes of the advisory council's meetings. Moreover, it was also ordered that the other shareholders not provide Xella with the minutes of the advisory council's meetings. Upon appeal, the Düsseldorf Higher Regional Court confirmed the decision concerning Section 1 of the German Competition Act but found that the agreement would not affect trade between the member states and, consequently, the agreement was not in contradiction with Article 81 of the EC Treaty. The Court also confirmed the interim measures ordered by the Bundeskartellamt but held that it was not proportionate to order Xella to withdraw from the joint venture;

rather, the Court held that it was up to Xella to decide how to react to the finding that the joint venture agreement was in violation of Section 1 of the German Competition Act.

The Chair then turned to Chinese Taipei whose submission refers to the application of antitrust rules to minority shareholdings in the cable TV market. He asked the representative of Chinese Taipei to describe the actions taken by the Fair Trade Commission and the outcome of those investigations.

The representative of Chinese Taipei explained that with respect to the issue of minority shareholdings and interlocking directorates, the law of Chinese Taipei is quite similar to that of other jurisdictions present at the Roundtable. Acquiring shares of another company could be reviewed under merger control rules and it could violate the rules concerning cartels or collusion. The representative of Chinese Taipei emphasized that in determining whether an activity constitutes a merger or an unlawful agreement, the amount of shares that have been acquired is one of the factors that are taken into consideration but it is not decisive. Usually, the facts are verified to see whether the share acquisition has empowered the acquirer to exercise *de facto* control of another company. In several cases, the Fair Trade Commission found that companies had used employees, friends, colleagues, family members and even in-laws to become a shareholder director and they actually exercised control over another company. Of the two cases described in the submission, one concerns a merger between two cable TV companies, each of which had appointed employees and family members to the other company to act as shareholder directors. The reason why the FTC considered this to constitute a merger even though the acquired shareholding amounted to less than 5% is that it found direct evidence demonstrating that the two companies were *de facto* under single control. For example, one of the cable TV companies used the competing company's lawyers to negotiate the supply programs with the upstream program supplier and even signed a contract for the downstream system operator. In the FTC's view this was a very clear indication that both companies had single control of some kind of companies. Another relevant factor was that the FTC found that both companies used the same uniform financial statement form and even used the form to recall the dispatch of maintenance personnel; they did not have separate documents for each company. Based on these two findings, the FTC took the view that the two companies were one company and that the share acquisition constituted a merger under the law of Chinese Taipei.

The second case is about collusion and it also took place in the cable TV industry. The case was initiated by a complaint filed by customers that were refused cable TV service when they moved into a newly constructed building. The explanation put forward by the cable TV company was that it would cost the company a lot to install a network. The complainants, however, thought the main reason for the refusal was that the cable TV company had entered into some kind of market allocation scheme with its competitor; they filed a complaint with the FTC. After the investigation, the FTC found some indirect and direct evidence which could be used to support the finding of collusion. With respect to the direct evidence, the FTC found internal documents with the reference "we should respect the competitor's turf and we should not invade the service area of the other company". Regarding indirect evidence, the FTC found that the subscription fees charged by the companies two years prior to the filing of the complaint had kept on rising and, eventually, both companies charged identical subscription fees. The representative of Chinese Taipei explained that the FTC thought of this as a clear indication that both companies had entered into some kind of agreement or some conscious kind of arrangement with each other to fix the subscription fees. The FTC found that the service during the years prior to the complaint had not significantly improved or was at least not proportional to the fee increases. The cable TV market in Chinese Taipei is an oligopolistic market; usually each service area is serviced at most by two companies, which facilitates information sharing between rivals. Based on all these findings, the FTC concluded that the companies had engaged in collusion. The representative of Chinese Taipei explained that during the investigation the FTC relied on the paper written by Professors Reynolds and Snapp, also mentioned in the background note of the Secretariat, which was of significant help when it had to establish arguments against the companies' behaviour. The representative also mentioned that the case was still on appeal.

The representative of Chinese Taipei concluded his presentation by explaining the challenge which Chinese Taipei is facing with regard to minority shareholding and interlocking directorates: i.e. the *ex post* monitoring of compliance. In each case the FTC requires interlocking directorates to resign from their posts, or it requires a sale of shares, but it does not have enough resources to carry out *ex post* monitoring. The representative of Chinese Taipei mentioned that he knew of some delegations present at the Roundtable that have established some kind of monitoring group within the agency and the representative mentioned that the FTC is considering similar arrangements for the future.

The Chair turned to the Romanian delegation whose submission refers to a case in which structural links amongst competing bidders facilitated collusion at an auction.

The representative from Romania explained that in the Romanian submission reference is made to a case where structural links between competing bidders required the intervention of the Romanian Competition Council (the "RCC") under the competition rules on restrictive agreements among competitors. The representative mentioned that the case relates to the privatization of a state owned company by means of an ascending auction organized by the so-called State Ownership Fund for the sale of the shares it owned in the state owned company. Three companies participated in the auction; the winning company offered the highest price and concluded the privatization contract. However, the company did not pay for the shares within the time frame provided for in the contract; a second ascending auction had to be organized. The participants in the second auction were company A and company B; both participated as independent bidders. Once the companies entered into the auction they refrained from bidding for the opening price and thus forced the auction into a descending one. The situation was made worse by the fact that during the course of the second auction company A took a passive role and did not bid at all, thereby making it easy for company B to win the auction at a price much lower than the starting price.

Against this background, during the proceedings, the RCC found evidence that several structural links existed between company A and B that had the potential to lessen competition and even facilitate collusion among the bidders. Evidence showed that both company B and its sole shareholder were minority shareholders in company A, even if they did not hold the controlling stake. The RCC found that there were family links between the executive management of company A and the sole shareholder of company B and that both companies had a long history of cooperation, both on a formal and informal basis. Furthermore, the sole shareholder of company B was also the sole shareholder of the company that had won the very first auction and could not pay on time. In addition to these findings, the RCC also noticed that company A facilitated company B's participation in the auction by providing real estate assets as security collaterals for a bank letter which was issued in favour of company B. This element was decisive evidence of an anticompetitive agreement. Given the evidence in this case, the conduct and the companies involved, the RCC concluded that company A and company B were parties to an anticompetitive horizontal agreement and fined them for collusion. The second auction and the privatization were annulled. The representative from Romania stressed that in the view of the RCC this demonstrates that there are particular circumstances when, even without conferring control rights over a company, a minority share acquisition could still have an impact on competition and should be subject to constant monitoring activity all over the world.

The Chair thanked the Romanian delegation and turned to the Netherlands. He explained that the submission of the Netherlands refers to the risks for competition that minority shareholdings and interlocking directorates can raise with respect to potential horizontal collusion and highlights that it can be difficult to prove how such structural links can negatively affect individual incentives to compete. The Chair asked the Netherlands to explain more about its experience, in particular in the ACS case.

The representative of the Netherlands suggested that before going into the details of the *ACS* case it should be emphasized that the Netherlands Competition Authority faces difficulties when looking at structural links if those structural links do not result in a merger. Of course, the NMa can look at other possibilities provided by its national law such as the prohibition of agreements and concerted practices that prohibits or limits competition. In the Dutch law, structural links in themselves are not *per se* prohibited; the NMa has to provide factual evidence that the structural link in question, for instance a minority shareholding, limits competition. Basically, the NMa has to answer the question of whether a decision of a company that has a structural link to a competing company would have been made differently if there was no such structural link to that other company. This is a question that the NMa has to answer with factual evidence; it cannot rely only on theory, which imposed a heavy burden of proof on a competition authority. When the structural link is more significant, if there is a possibility for a minority shareholder to block certain decisions or have priority voting, it is more likely that this can be used as evidence; in other circumstances it will be a very hard case to prove.

Turning to the *ACS* case, the case concerned a request for an exemption from the application of the competition rules and was made prior to the modernization of EC law when exemptions were still possible. In that case, the NMa, in order to prove that the agreement on the minority shareholding fell within the prohibition of anticompetitive agreements, had to demonstrate that this minority shareholding had the capacity in practice to restrict competition and that information obtained because of the minority shareholding was being used to limit competition. The way the minority shareholding and the constitution of the company were drafted made it very hard for the parties involved to use the information in their own decision making process; therefore, it was impossible for the NMa to prove that the information would be used in an anticompetitive manner.

The Chair thanked the Dutch delegation for its intervention. The discussion had so far been concerned with how to deal with the issues of minority shareholdings and interlocking directorates under merger control rules, then under rules on horizontal agreements and abuse of dominance. The Chair explained that the Irish submission spoke about the fact that the traditional rules are sometimes not well suited to deal with minority shareholding arrangements. For this reason, the Irish Competition Authority has solicited amendments to the Competition Act to address these issues. The Chair asked the Irish delegation to describe the reasons for considering legislative fixes and, more precisely, what solution the Irish Competition Authority suggested.

The representative of Ireland started with some general comments, noting that there is not much dispute about the potential harm of unilateral or coordinated effects. He suggested that there are two aspects of merger control: one is the notification scheme; the second is the application of substantive merger law. Some systems use the notification as the threshold to look to apply the substantive merger test and to determine whether there would be a substantial lessening of competition. This is the system in Ireland, which follows the European Commission's model. If a merger does not meet the threshold to notify, the agency has no jurisdiction to look at the merger. In the United States, on the other hand, there is a separate jurisdiction for looking at mergers: the Clayton Act, Section 7. There is also the Hart-Scott-Rodino Act; a company may or may not have to file, but it might still be subject to the Clayton Act, Section 7. The merger notification system is really about not imposing too heavy a burden on businesses. That is why, generally speaking, notification often has very high thresholds. In the European systems, if there is no control the agency does not have jurisdiction to look at the case. This can create a problem, as there may be harm from either unilateral or coordinated effects. Generally, a lot of time is spent in debates to see if a shareholding is active or passive; these discussions are all designed to really turn on the issue of what kind of notification system we want and what substantive merger scheme we want.

The representative of Ireland then turned to discuss Articles 81 and 82 of the EC Treaty. With regard to Article 81, there have been only a handful of cases where the circumstances are such that one can find

an agreement. Obviously, if the acquiree is selling shares from its treasury to the acquiror there is an agreement. An example of an attempt to find an agreement to provide a justification for applying Article 81 EC (or section 4 of the Competition Act in Ireland) is reliant on Section 25 of the Irish Companies Act of 1963 which provides that memorandum and articles of associations of a company are deemed to be signed by each member (each shareholder). An argument was made that whenever somebody buys a share, the buyer becomes a signatory of this memorandum and articles of associations and therefore there is an agreement for the purposes of Article 81 EC. If one successfully attacks the agreement under Article 82, then the result would be that the agreement is void. This means that no agreement exists. That would have catastrophic effects under company law. Much time is spent trying to be ingenious to find an agreement but all this means that one is trying to avoid what the real issue is: a problem with the minority shareholding.

The issue about passive and active minority shareholdings is very complicated because sometimes a passive investment can be an active one. An agency would not want to start imposing conditions allowing, for example, a company to buy 25% but not to exercise voting rights, as it requires a tremendous amount of effort to monitor this. The Competition Act of 2002 is under a five year review and the Minister for the Department of Enterprise, Trade and Employment has asked for public submissions. The ICA filed a submission and one of the issues mentioned in the submission is minority shareholdings. The ICA has been reflecting on whether a system with a material influence standard, as in the UK, would be right for Ireland. However, in the UK system there is no compulsory filing, which offers tremendous flexibility. The question is how to mix that system with a system that provides for compulsory filing if the thresholds are met. The submissions of Austria and Germany respectively describe that the threshold for intervention is 25%; even the UK submission indicated that the 25% threshold may be significant. Maybe that is the threshold the ICA should be pursuing rather than having an Irish threshold which will be different from the German or the Austrian ones.

The Chair passed the floor to BIAC. The representative of BIAC explained that BIAC recognizes that minority shareholdings between competitors, minority shareholdings in a competitor by third parties, or interlocking directorates among competitors, may have anticompetitive effects in certain circumstances. However, it is BIAC's view that these structural links have to be regulated only when anticompetitive effects are likely to occur: either in situations where they remove a barrier to coordination, including by facilitating the exchange of sensitive information, or when there are unilateral effects providing incentives for the parties to limit competition. BIAC pointed out that the United States has a relatively clear policy regarding the application of Section 7 of the Clayton Act with a safe harbour for investment-only situations with *de minimis* thresholds (which BIAC incidentally finds too low), and appears to be concentrating on tracking mainly interlocking directorates. The policy in Europe, in contrast, is fairly inconsistent: first, at the European level the Philip Morris doctrine involves, as was explained earlier, three different tools: the merger regulation, Article 81 of the EC Treaty and Article 82 of the EC Treaty. These tools pursue different purposes and do not cover all situations (that is the gap that was referred to by the representative of the European Commission earlier). In a similar way, it seems that at national level different policies are applicable: ranging from systems that provide for compulsory notification above certain shareholding thresholds, as in Germany or Austria, to systems where the agency has no visible track record in controlling minority shareholdings.

In order to promote legal certainty, BIAC favours a clarification of what policy is to be applied, probably by means of guidelines instead of regulations, e.g. as a complement to the Consolidated Jurisdiction Notice. The guidelines should not be based only on the absolute level of the shareholding but should help determining whether the shareholding reduces the incentive to compete, or creates an ability to influence, or facilitates some form of coordination mainly through the exchange of sensitive information. BIAC recommends the development of criteria of analysis which would help address first and foremost the market situation, because it is generally agreed that the anticompetitive effects of minority shareholdings

mainly occur in oligopolistic markets, and the tools used to exercise influence: directorships, veto rights and similar rights, and access to information. In BIAC's view there should also be guidance on acceptable remedies such as the withdrawal from directorships or veto rights and the encouragement of firewalls, but it also recognizes that there may be problems relating to the monitoring of remedies. BIAC is conscious of the difficulty of putting together fairly clear guidelines and also recognizes that it may not be the top priority for agencies who may be more concerned with other issues such as hard core cartels.

The Chair explained that he would like to move the discussion to the separate but related issue of interlocking directorates. He asked the Turkish delegation to explain how it applied traditional antitrust rules to interlocking directorates.

The representative of Turkey discussed a 2005 case in the maritime transport sector. Although Turkey does not have a specific provision concerning interlocking directorates, Article 4 of the Turkish competition law (which is similar to Article 81 of the EC Treaty) contains a non-exhaustive list of situations that can be covered by that article. Interlocking directorates could be discussed within the framework of Article 4. In the 2005 case, there were two rival companies active in the shipping business. They concluded a protocol not to change their tariffs and their terms of payment without the consent of the other party. The protocol was explicitly targeting the coordination of prices and considered anticompetitive under the Turkish Competition Act. In addition, because of the share structure of the two companies, the two boards had directors in common. This was the reason why the issue of interlocking directorates was discussed extensively in this case. The Competition Board concluded that having members of the board of directors in common would inevitably lead to cooperation between the two companies. The fact that such an intertwined structure occurred in a very concentrated sector not only facilitated, but also strengthened, cooperation and coordination between the two rival companies. Therefore, the Board stated that neither company was likely to determine prices without the consent of the other, although the companies paid attention not to set identical prices or announce increases at the same point in time. The Board ordered the unwinding of the interlocking directorates, in other words the interlocking directorates were prohibited by the Board. This remedy was regarded as sufficient by the Board and no divestiture was requested.

The Chair explained that the Japanese Antimonopoly Act does have specific provisions dealing with interlocking directorates and asked the Japanese delegation to briefly describe its statutory provisions and how they have been enforced by the Japan Fair Trade Commission.

The representative of Japan explained that Article 13.1 of the Antimonopoly Act stipulates that neither an officer nor an employee of a corporation shall hold a position at the same time as an officer of another corporation where the effects of such an interlocking directorate may be to substantially restrain competition in any particular field of trade. The Japan Fair Trade Commission (the "JFTC") has published Business Combination Guidelines and has identified interlocking directorates that are subject to the review. There are only a few examples of cases where the JFTC has taken decisions on interlocking directorates. One example is the case of Hiroshima Electric Railway Co., Ltd. ("HER") and its executives. HER was operating trains, trams, buses and other businesses in and around Hiroshima City and persons A, B, C and D were executives or an employee of the company. Hiroshima Buses was a company operating buses and other businesses in the same area. At that time, passenger transportation by tram and bus in Hiroshima was being provided largely by HER (trains, trams and bus routes) and Hiroshima Buses (bus routes) and they were competing in major areas. HER acquired 85% of the shares in Hiroshima Buses. In addition, persons A, B, C and D became board members or an auditor at Hiroshima Buses, while maintaining executive or employee posts in HER. Hiroshima Bus had five board members and an auditor in total. Based on these facts, the JFTC concluded that HER's acquisition of shares and the interlocking directorates by persons A, B, C and D would substantially restrain competition in the field of passenger transportation by tram and bus in the major areas of Hiroshima.

The Chair turned to the final topic, i.e. the issue of remedies. He explained that the general view appears to be that the structural links in terms of shareholdings and/or interlocking directorates are best addressed by structural remedies. He noted that there seemed to be instances where behavioural remedies such as confidentiality agreements or firewalls had been used by some agencies. The Chair then turned to the Canadian delegation and asked the delegation to talk about the Competition Bureau's approach in this area and the types of remedy that it had considered in two merger cases involving minority shareholdings and interlocking directorates discussed in the Canadian contribution.

The representative of Canada explained that under Canadian law there is no specific provision for reviewing minority interests or interlocking directorships except for the ultimate and determinative question of whether the effect will be a substantial lessening or prevention of competition. As to the Competition Bureau's jurisdiction, its ability to look at structural links turns merely on the question of whether there is a merger. A merger could either be a consequence of an acquisition of control, or the acquisition of a significant interest. As in the UK, "significant interest" is not defined in the Canadian Act but rather is explained in guidelines and is the subject of a number of decisions over the years. It really amounts to an ability to materially influence the economic behaviour of the other entity. These links could be examined by the Bureau in two situations: it could be the actual merger itself in the sense that the acquisition of a minority interest would amount to the acquisition of the ability to materially influence; or it could be merely - as is often the case - an ancillary or environmental factor of an otherwise constituted merger. The Bureau would look at this particular feature of the merger and how it might ultimately impact on the question of the likely competitive effects. In evaluating the ability to materially influence, specifically in the context of voting rights, the Bureau is looking for additional aspects that determine what the shareholders may be able to do, for example, whether it will be able as members of the board to materially influence, or block, a special or ordinary resolution. There is a safe harbour of sorts in the Canadian guidelines, a 10% voting interest in the absence of other factors is not going to be problematic.

The representative of Canada then noted that the Bureau seeks to remedy the structural phenomenon of minority interests and interlocking directorships with structural remedies. This is for all the same reasons for which most agencies have some concerns about behavioural remedies in terms of how effective they are at curing structural problems. Particularly in the context of interlocking directorships the Bureau focuses on the difficulty of monitoring an enforcement action; because of the context of a private board meeting it is very difficult for the Bureau to be aware of what is going on there. As a general matter, behavioural remedies are not necessarily something the Bureau would not entertain, but, as a general matter and quite outside this context exclusively, the Bureau would not consider a behavioural remedy as a standalone remedial measure unless it was satisfied that it will eliminate the substantial lessening of competition.

The representative of Canada then briefly discussed two cases mentioned in the written submission. The first case concerned an acquisition of *Sogides Ltée* ("Sogides") by *Quebecor Media Inc.*, ("Quebecor"). In this case, both parties were active in the publishing and distribution of French language trading books. The President of Sogides sat on the board of one of the two downstream retailers of these publications and the other downstream retailer was owned by Quebecor. The Bureau was concerned whether the information exchanges between the two publishers and distributors might be detrimental to the remaining one or two competing publishers and distributors in their supply arrangements with the downstream retailers. In that case, the Bureau did not get very far in its investigation as the parties offered to remove the President of the Sogides from the downstream retailer's board and to substitute an independent director in his place. The second case concerned structural links between theatre chains in Canada. When looking at the restructuring of one of these chains, the Bureau discovered that there had been contractually organized structural links between the second and third largest theatre chains and that these links that were sufficient to constitute a merger. There was not only an ownership interest, which was only at the level of 6%, but

there was significant board representation and there were important contractual links. In that case, following discussions, the two chains agreed to dissolve those arrangements.

The Chair thanked the Canadian delegation and brought the Roundtable to a close. He considered that the roundtable had addressed important issues which many agencies around the world are confronting on a regular basis. He thanked all participants for their interventions.

COMPTE RENDU DE LA DISCUSSION

par le Secrétariat

Le président déclare ouverte la Table ronde et remercie les pays membres et les observateurs pour le nombre important de contributions transmises. Le président observe que l'une des raisons pouvant expliquer l'intérêt suscité par les participations minoritaires et les cumuls de mandats d'administrateurs réside dans le développement de structures comme les fonds de capital-investissement dont le métier consiste à réaliser ce type d'investissements. Le président mentionne la contribution du BIAC qui indique qu'en 2006 les fonds de capital-investissement ont collecté 400 milliards USD et ont investi 750 milliards USD, ce qui témoigne de la très grande importance du phénomène et du fait qu'il existe sans doute depuis un certain temps déjà.

Le président explique que la Table ronde sera consacrée à plusieurs questions, notamment (i) les instruments juridiques et la grille d'analyse que les diverses autorités de la concurrence ont appliqué aux participations minoritaires et aux imbrications de conseils d'administration par cumul de mandats d'administrateurs ; (ii) les exemples d'affaires traitées par les pays membres ou observateurs ; et (iii) les types de mesures correctrices appliquées dans ces affaires. À cet égard, le président remercie le Secrétariat pour son document de référence qui résume les problèmes posés par les liens structurels entre concurrents et met en relief les différents thèmes également couverts dans les contributions.

Pour entamer les débats, le président s'adresse à la délégation norvégienne et note que la contribution norvégienne indique que certains secteurs se caractérisent par un très vaste réseau de liens directs et indirects entre concurrents. Le président demande à la délégation de présenter les conclusions d'une étude commandée par l'autorité norvégienne de la concurrence à propos des relations actionnariales et de la coopération au sein du marché norvégien de l'électricité et d'indiquer dans quelle mesure ces liens structurels affectent la concurrence dans ce secteur.

Le représentant de la Norvège explique que son pays a libéralisé très tôt son marché de l'électricité. Cette libéralisation est intervenue en 1991 et la Norvège fait actuellement partie du Marché nordique intégré de l'électricité. Ces dernières années, la structure actionnariale de ce marché a énormément changé, principalement parce qu'un certain nombre de compagnies d'électricité appartenant précédemment à des collectivités locales dans tout le pays ont été transformées en sociétés à responsabilité limitée vendant des parts sociales. On a en outre observé une tendance à la formation de sociétés régionales de plus grande envergure par le biais de fusions et acquisitions. Plus précisément, le premier producteur norvégien d'électricité, *Statkraft*, qui appartient à 100 % à l'État norvégien, a pris la tête de ce mouvement et a acheté des actions d'un certain nombre de sociétés norvégiennes. Ces fusions et acquisitions ont réduit le nombre d'intervenants indépendants sur le marché norvégien de l'électricité qui se caractérise actuellement par une forte concentration de l'actionnariat, d'importantes participations minoritaires, des participations et des contrôles croisés et la copropriété de centrales. Dans ce contexte, l'Autorité de la concurrence a craint que l'ampleur de ces liens structurels entre sociétés ne freine la concurrence. Elle s'est donc particulièrement intéressée au secteur de l'électricité.

En 2006, l'Autorité de la concurrence a commandé une étude à l'Institut d'études économiques et d'administration des entreprises pour examiner l'ampleur et la nature de la coopération entre producteurs d'électricité en Norvège. Le rapport porte sur les relations actionnariales ainsi que sur les différentes

formes de coopération entre producteurs d'électricité. On peut tirer au moins trois conclusions de ce rapport.

- Premièrement, la prise en compte des participations financières directes ou indirectes peut influencer dans une large mesure sur les parts de marché et donc la concentration. Par exemple, la part de marché de *Statkraft*, calculée sur la base des capacités de production appartenant aux différentes entreprises, était de 30.2 %, mais lorsqu'on la corrige des participations directes et indirectes entre entreprises, elle passe à 42.4 %. De même, l'indice HHI de concentration s'en trouve presque multiplié par deux, pour atteindre une valeur proche de 2000, lorsqu'on le corrige des participations financières.
- Deuxièmement, à prendre en compte d'autres facteurs, on risque d'aboutir à des niveaux de concentration encore supérieurs. Par exemple, on peut considérer que les capacités contrôlées par une entreprise sont proportionnelles aux droits de vote effectifs détenus par cette entreprise dans d'autres sociétés et non pas simplement à la part des droits de vote d'un actionnaire telle qu'elle ressort de sa participation financière. L'application de telles méthodes aboutit à des valeurs substantiellement supérieures du HHI que celles qui reflètent les participations financières.
- Troisièmement, l'étude indique que de nombreux producteurs étaient impliqués dans une série de mécanismes coopératifs et que cette tendance semble aller croissant. D'après l'étude, le principal vecteur d'échanges d'information et de relations de participations financières réside dans la participation aux conseils d'administration.

En fin de compte, l'étude confirme les résultats de travaux précédents montrant que le marché norvégien de l'électricité est plus concentré que ce qui ressort des indicateurs classiques de concentration. Le représentant de la Norvège explique que l'Autorité de la concurrence continue donc de craindre que la concurrence ne soit affectée par ces liens structurels. La Loi norvégienne sur la concurrence attribue spécifiquement à l'Autorité de la concurrence le pouvoir d'intervenir contre des actionnaires minoritaires même lorsque leur participation n'aboutit pas à contrôler l'entreprise. L'Autorité de la concurrence a usé de ces prérogatives et a ordonné à *Statkraft* ainsi qu'à trois autres producteurs d'électricité de Norvège de notifier toutes leurs acquisitions, y compris les participations minoritaires, qui n'aboutissent pas au contrôle de l'entreprise concernée. On peut espérer que cela permettra à l'Autorité de la concurrence de surveiller efficacement les évolutions structurelles sur le marché norvégien de l'électricité.

Le président remercie le représentant de la Norvège pour son exposé. Il note ensuite que l'un des thèmes abordés par le représentant de la Norvège concernait le contrôle. La question de savoir si une participation minoritaire confère dans les faits une certaine forme de contrôle sur l'entité visée est importante et elle est abordée dans nombre de contributions. Le président souligne que la question du contrôle a été traitée dans le détail par la contribution de la Commission européenne. Cette contribution explique que seules les acquisitions de participations minoritaires actives sont constitutives d'une concentration aux termes du régime de contrôle des fusions de l'Union européenne. L'existence ou non d'une concentration affecte la nécessité ou non d'une notification, ce qui est manifestement une question très importante pour la capacité de la Commission d'être informée de l'acquisition d'une participation minoritaire et d'enquêter sur sa nature. Le président demande à la Commission d'expliquer les circonstances dans lesquelles des participations minoritaires sont soumises à un examen dans le cadre du contrôle des fusions ainsi que la démarche de la Commission vis-à-vis des participations minoritaires pour l'évaluation des fusions au regard de la concurrence.

Le représentant de la Commission européenne commence par une brève explication des modalités d'application du droit communautaire aux prises de participations minoritaires. Premièrement aux termes du Règlement de la CE sur les fusions, les participations minoritaires ne sont examinées *ex ante* que si

l'acquisition de la participation minoritaire aboutit à un changement de contrôle de la société cible. Il s'agit généralement de situations dans lesquelles la Commission constate l'existence d'un « contrôle conjoint ». On parle normalement de contrôle conjoint lorsqu'une entité a deux actionnaires ou plus dont aucun ne détient la majorité des actions, mais dans laquelle des dispositions ont été convenues entre ces actionnaires, ce qui aboutit normalement, par le jeu d'une différenciation des droits de vote ou de nominations au conseil d'administration, à des droits de veto sur la formulation de la stratégie de l'entreprise et à des arrangements concernant l'exercice conjoint des droits de vote. C'est le cas de figure classique dans lequel une participation minoritaire peut donner lieu à une évaluation *ex ante* aux termes du Règlement de la CE sur les fusions. Dans des situations moins classiques, l'acquisition d'une participation minoritaire peut aboutir à ce que la Commission qualifie de contrôle *de facto* de la société cible. Ces situations se présentent parfois lorsque la participation minoritaire est par exemple si importante que l'entreprise acquéreuse devient de loin le plus gros actionnaire de la société cible. Le reste de l'actionnariat peut par exemple être dispersé et il peut ressortir clairement des antécédents en matière de vote que la société acquéreuse détient le contrôle effectif de la société cible.

Ce ne sont cependant pas les seules situations dans lesquelles les participations minoritaires peuvent être pertinentes pour le Règlement de la CE sur les fusions. Comme la plupart des juridictions, la Commission évalue une fusion en comparant le scénario post-fusion et une situation servant de contre-exemple, qui correspond généralement aux circonstances présentes ou à des circonstances futures raisonnablement prévisibles. Dans le cadre de son évaluation, la Commission tient compte de l'existence de participations minoritaires dont on peut considérer qu'elles ont un effet sur la dynamique concurrentielle du marché. La Commission peut évoquer un certain nombre de situations dans lesquelles les mesures correctrices qui ont été obtenues en dernier ressort pour permettre à la fusion de se poursuivre supposaient une certaine forme de désinvestissement de la part des actionnaires minoritaires ou une autre forme d'engagement structurel ou comportemental qui ont en un certain sens réduit l'impact anticoncurrentiel de la participation minoritaire. Le représentant de la Commission évoque l'exemple de l'acquisition par *Siemens* de *VA Tech*. Le principal concurrent de *VA Tech* sur l'un des marchés qui préoccupait la Commission était une société dans laquelle *Siemens* détenait une participation minoritaire importante. La Commission a conclu que cela risquait de poser de graves problèmes de concurrence et les mesures correctrices ont notamment prévu le désinvestissement de cette participation.

Le représentant de la Commission explique ensuite que dans certaines circonstances, la Commission peut aussi appliquer *ex post* ses règles comportementales, à savoir les articles 81 et 82 du Traité de Rome, à des participations minoritaires. La Commission ajoute que cela pose un problème intéressant, à savoir qu'elle peut parfois aborder les questions de concurrence concernant les participations minoritaires au moyen d'une mesure correctrice concernant une concentration, mais que cette démarche est naturellement d'abord subordonnée à l'existence d'une concentration imposant un changement de contrôle. On peut dès lors se demander si ce régime suffit, ou si le contrôle des fusions doit commencer avant même que l'on parvienne au stade du contrôle. Doit-il y avoir examen des fusions en-deçà de ce stade du contrôle ? Ou sinon, faut-il prévoir un autre mécanisme pour contrôler les effets négatifs des participations minoritaires. C'est un aspect important car, pour la Commission, si la seule voie d'accès réside dans l'existence d'une fusion qui suppose un changement de contrôle, la protection de la concurrence risque de présenter une faille.

À l'issue de l'exposé de la Commission, le président demande comment la Commission et les parties traitent une situation où la question de savoir s'il y a changement de contrôle peut prêter à controverse entre la Commission et lesdites parties. En d'autres termes, si les parties ne pensent pas qu'il y a changement de contrôle tout en admettant que la Commission peut avoir un avis différent et que cette question est déterminante pour savoir si les parties doivent ou non commencer par notifier leur projet, comment la Commission règle-t-elle cette incertitude. La notification reviendrait-elle à admettre qu'il y a eu changement de contrôle même si les parties ne voulaient pas le reconnaître.

Le représentant de la Commission répond que ce type de discussions n'est pas rare avant la notification d'une fusion. Les entreprises veulent avoir des certitudes juridiques et leur réaction normale consiste à éviter les risques. Pour cette raison, si le point de vue de la Commission reste ferme quant à l'existence d'un changement de contrôle, les sociétés ont tendance à notifier l'opération. Certes, une entreprise est toujours libre de prendre un risque, mais la Commission peut contester sa démarche pour absence de notification. On peut même imaginer qu'un tiers entame un recours en pareille circonstance, mais il est rare que l'on parvienne au point d'envisager de telles procédures. La Commission a souvent d'intenses discussions avant notification sur la question de savoir s'il y a ou non changement de contrôle et ces situations ne sont pas toujours simples.

Le président s'adresse ensuite à la délégation tchèque qui décrit dans sa contribution plusieurs dossiers de fusion impliquant des participations minoritaires et lui demande de préciser le rôle que ces participations ont joué, notamment lors de la privatisation en 2002 des sociétés régionales de distribution d'électricité, et la façon dont l'Office de protection de la concurrence les a évaluées dans le cadre de son contrôle des fusions.

Le représentant de la République tchèque déclare que le rôle joué par les participations minoritaires lors de la privatisation en 2002 des sociétés régionales de distribution d'électricité a été très important. Il explique que la transaction impliquait l'acquisition de la participation de l'État dans huit compagnies de distribution par une autre entreprise publique, la ČEZ, le producteur historique d'électricité de la République tchèque. Cinq des huit distributeurs étaient contrôlés par l'État, les trois autres étant indépendants. Toutes ces entreprises se comportaient de façon indépendante sur le marché avant la transaction. ČEZ devait obtenir le contrôle des cinq distributeurs publics et acquérir une participation minoritaire dans les trois autres entreprises indépendantes. Ces sociétés de distribution étaient non seulement en situation de monopole dans leur secteur respectif, mais surtout il s'agissait des plus importants négociants en électricité auprès des consommateurs habilités. Du seul point de vue des participations minoritaires dans les trois entreprises indépendantes, ces participations pouvaient susciter deux craintes essentielles :

- Premièrement, l'opérateur historique, ČEZ, devait acquérir une participation minoritaire de blocage, ce qui, en droit commercial tchèque, est une participation qui, sans être équivalente à une situation de contrôle conjoint, permet à l'entreprise ou à l'actionnaire de bloquer certaines décisions importantes. L'Office pensait que cela pouvait affecter négativement la capacité des entreprises indépendantes à livrer une concurrence agressive contre ČEZ.
- Deuxièmement, l'Office craignait que les participations minoritaires de blocage ne donnent à leur détenteur l'accès à tout un ensemble d'informations commercialement sensibles sur ses concurrents et que ce lien structurel ne contribue à la création d'effets coordonnés une fois la fusion réalisée.

Le représentant de la République tchèque indique aussi que ČEZ devait acquérir une participation minoritaire dans ČEPS, l'opérateur monopolistique du réseau de transport d'électricité. Bien qu'il s'agisse d'un problème très voisin de ceux des autres participations minoritaires, l'opération a suscité un problème supplémentaire, car ČEZ aurait été le seul actionnaire ayant une expérience du métier de l'électricité. Les autres actionnaires étaient l'État ou des ministères, pas vraiment intéressés par la concurrence ; ils n'étaient intéressés que par l'argent qu'ils pouvaient retirer de l'entreprise. Le représentant de la République tchèque explique qu'il s'agissait là des préoccupations de l'Office vis-à-vis des participations minoritaires et de la raison pour laquelle il avait approuvé la fusion sous réserve du désinvestissement des participations minoritaires dans les quatre entreprises. Aujourd'hui, soit cinq ou six ans après la fusion, on observe une intense concurrence entre les trois sociétés indépendantes et l'entité issue de la fusion. Le représentant de la République tchèque ne prétend pas que la seule raison de cette concurrence réside dans les conditions

imposées par l'Office, mais souligne le fait qu'en République tchèque la libéralisation du secteur de l'électricité a été plus réussie que celle du gaz.

Le président s'adresse ensuite à la délégation lituanienne et lui demande d'expliquer son affaire des produits laitiers et du secteur correspondant, affaire qui a donné lieu à l'évaluation d'une participation minoritaire, et en particulier la façon dont a été évaluée l'acquisition aux termes du régime lituanien des fusions.

Le représentant de la Lituanie explique que l'affaire était intéressante parce qu'elle a donné lieu à quatre notifications et à trois retraits. Chaque fois, l'acquéreur, *Rokiškio sūris*, a indiqué un nombre différent d'actions à racheter. Chaque fois, *Rokiškio sūris* a aussi souligné que le principal objet de la concentration consistait à pouvoir exercer une influence sur la société cible, *Panevėžio pienas*, et plus particulièrement sur les décisions commerciales statutaires de *Panevėžio pienas*, et à s'assurer que la valeur de ses actions ne baisserait pas. En conséquence, l'acquisition d'actions devait être considérée comme un placement financier. Lors de l'évaluation de la concentration, on a aussi tenu compte du fait que le principal actionnaire de *Panevėžio pienas* détenait 50.2 % des actions de cette dernière entreprise.

La principale évaluation relative au contrôle qui ait été effectuée dans ce contexte a eu trait à la notification concernant l'intention de *Rokiškio sūris* d'acquérir 33 % du capital de *Panevėžio pienas* tout en affirmant que cette acquisition n'entraînerait pas la prise du contrôle, parce qu'elle ne permettrait pas d'obtenir des droits de veto. Le représentant de la Lituanie explique que le concept de « contrôle et [d'] influence décisive » tel qu'il est défini dans la Loi sur la concurrence recouvre l'acquisition de droits, indépendamment de l'exercice effectif ou non de ces droits par la personne qui acquiert le contrôle, l'important étant l'acquisition et la possibilité d'exercer ces droits de contrôle. En l'occurrence, il a été établi que le contrôle par un actionnaire unique est devenu un contrôle conjoint. La participation minoritaire emportait le droit de bloquer des décisions statutaires concernant la politique commerciale de *Panevėžio pienas*, notamment sur le budget, les investissements importants et le plan d'entreprise. L'évaluation contenait une analyse de la structure de l'actionnariat et il s'agissait de vérifier si la participation minoritaire emportait la possibilité d'exercer un droit de veto lors de l'assemblée générale des actionnaires. Il est apparu qu'il suffisait de détenir 33 % pour obtenir un droit de veto, l'analyse des faits montrant que toutes les personnes physiques actionnaires n'étaient pas présentes lors des assemblées générales et que *Rokiškio sūris* pouvait donc exercer plus d'influence que ne l'indiquait sa participation de 33 %.

Un autre point très important portait sur l'analyse des statuts de la société qui prévoient généralement les droits des actionnaires minoritaires. En l'occurrence, le droit de bloquer des décisions essentielles concernant le budget, les investissements importants et le plan d'entreprise. La composition du conseil d'administration a aussi été étudiée : l'acquéreur avait le droit de désigner trois des sept administrateurs. Compte tenu de la situation sur le marché des produits laitiers, qui était très préoccupante en raison de la présence de trois entreprises seulement détenant chacune un tiers du marché, il était probable qu'elles s'entendraient sur une stratégie commune ou sinon qu'elles coordonneraient leurs initiatives sur le marché, y compris par des accords concernant le paiement du lait acheté, le partage des zones d'achat du lait, les prix d'appel des produits laitiers et les demandes de remises professionnelles. Le Conseil de la concurrence a adopté une décision aux termes de laquelle *Rokiškio sūris* a été autorisé à poursuivre son projet d'acquisition, sous réserve de certaines conditions et obligations : *Rokiškio sūris* devait s'abstenir d'exercer ses droits de vote durant les assemblées générales de *Panevėžio pienas* en ce qui concerne les décisions de répartition des bénéfices, la constitution, la réduction, l'annulation de réserves au titre des bénéfices non distribués, la cession, la mise en gage ou en hypothèque de certains actifs, etc. Le Conseil de la concurrence a aussi imposé à *Rokiškio sūris*, pour que sa participation soit bien reconnue comme un placement financier, de vendre les actions dans un certain délai, ce que *Rokiškio sūris* a fait.

Le président explique que la discussion a jusqu'ici porté sur les participations minoritaires et l'acquisition d'un contrôle. Comme l'a souligné la Commission européenne, cependant, il peut manifestement y avoir des acquisitions de ce type qui ne confèrent pas de pouvoir de contrôle, d'où la question de savoir si les lois relatives au contrôle des fusions doivent voir leur portée élargie à des situations dans lesquelles il n'y a pas changement de contrôle. Certains parlent à cet égard de « participations minoritaires passives » par opposition aux « participations minoritaires actives ». Le Président s'adresse ensuite à la délégation du Royaume-Uni, qui a eu une expérience intéressante dans ce domaine, car les règles britanniques relatives aux fusions permettent d'examiner des prises de participations minoritaires en deçà du seuil de contrôle. Le Président demande au représentant du Royaume-Uni d'expliquer le régime juridique applicable à ces acquisitions et, si possible, de donner quelques exemples de son application.

Le représentant du Royaume-Uni souligne que, lorsque l'on évoque le régime juridique du contrôle des fusions au Royaume-Uni, il convient de tenir compte de deux éléments très importants. Le premier est que le Royaume-Uni est doté de l'un des rares régimes d'examen volontaire des fusions et donc que les affaires relevant de sa compétence ne sont pas soumises à une évaluation obligatoire, avec les coûts correspondants. Le second élément est que le régime britannique des fusions a un champ de compétence très souple qui est plus étendu qu'au niveau européen, ce qui permet aux autorités d'être sélectives quant aux affaires qu'elle examine. Ces deux éléments sont allés de pair depuis 1973, date de l'introduction du contrôle des fusions dans le pays. En ce qui concerne l'ampleur de son champ d'application, ce régime couvre, outre les scénarios d'exercice d'une influence décisive et les participations de contrôle supérieures à 50 %, des scénarios dans lesquelles un investisseur acquiert une « influence significative ».

Le terme « influence significative » n'est pas défini dans la législation, mais le Royaume-Uni dispose d'une pratique décisionnelle de près de 35 ans qui lui permet de donner corps à ce concept. En outre, les indications qui ont été fournies à l'occasion du nouveau régime introduit en 2003 s'appuient sur l'expérience acquise dans le cadre de l'ancien régime. Le concept d'influence significative part d'une démarche centrée sur la participation : les participations supérieures à 25 % sont généralement par définition constitutives d'une influence significative, entre autres parce qu'elles permettent normalement à l'actionnaire de bloquer des résolutions spéciales lors des assemblées générales. Les instructions précisent que le Royaume-Uni examine aussi les participations se situant dans une fourchette de 15 à 25 % voire, à l'occasion, en dessous de 15 % ; il n'y a pas de régime de protection pour les niveaux de participation inférieurs. L'analyse consiste pour une très large part à examiner l'importance cumulée de tous les intérêts des parties et de l'ensemble de leurs liens. En dehors du niveau absolu de participation, l'autorité va examiner les facteurs additionnels les plus manifestes et en tenir compte : les sièges d'administrateurs, sans qu'il y ait nécessairement imbrication des conseils avec l'acquéreur, même si cela peut souvent être le cas, et diverses autres asymétries (par exemple si la participation de l'acquéreur est beaucoup plus importante que les intérêts des autres actionnaires ou si l'acquéreur dispose d'un quelconque droit de veto spécial ou bénéficie d'arrangements commerciaux), ou d'autres faits ou circonstances quelconques. Les critères d'analyse sont très souples et présentent l'avantage manifeste, du point de vue d'une autorité, que l'on peut analyser certains scénarios préoccupants pour la concurrence qu'il ne serait pas possible de prendre en compte en se fondant sur une ligne de démarcation si ce n'est dans le contexte d'un aspect annexe d'une transaction principale correspondant à une prise de contrôle ; le Royaume-Uni tient aussi compte de ces scénarios.

L'exemple le plus significatif de transaction dans laquelle la prise d'une participation minoritaire constitue l'initiative principale, par opposition à un aspect auxiliaire de la transaction, est celui de l'affaire récente *BSkyB/ITV*. Cette affaire a été remarquable pour deux raisons : c'est une affaire d'influence significative d'une participation minoritaire, la première aux termes du régime de l'*Enterprise Act* que le Royaume-Uni applique depuis cinq ans ; c'est aussi une affaire de pluralisme des médias et le régime britannique permet un examen sous cet angle des fusions de médias parallèlement aux aspects touchant à la

concurrence. L'affaire *BskyB/ITV* est une affaire combinée de concurrence et de pluralisme des médias dans laquelle, après la décision de la Competition Commission, la décision finale a été prise par le gouvernement, le Secrétaire d'État aux entreprises se prononçant sur les deux volets. La participation minoritaire concernée dans cette affaire était une participation unique de 17.9 % et, à l'examen des faits, la Competition Commission a estimé qu'elle permettait d'exercer une influence significative sur l'entreprise cible. La Commission a aussi constaté, sur la base des faits, que la situation donnait lieu à un affaiblissement substantiel de la concurrence sur le marché de la télévision.

Le président souligne ensuite que la Loi israélienne sur la concurrence faisait expressément référence aux placements financiers passifs et demande à la délégation israélienne d'expliquer comment l'Autorité israélienne de la concurrence évalue ces investissements en donnant quelques exemples concrets.

Le représentant d'Israël explique que la Loi sur la concurrence définit la notion de fusion en termes très généraux. Une transaction qui implique l'acquisition de droits quelconques au-delà d'un seuil de 25 % constitue une fusion, indépendamment de la question de savoir si l'entreprise acquéreuse ne détient qu'un bloc d'actions minoritaire. À cet égard, la loi ne distingue pas entre droits actifs, comme le droit de vote ou de désigner des administrateurs, et droits passifs, généralement les droits aux dividendes. La formulation de la définition du terme « fusion » commençant par l'expression « y compris, » les lignes directrices sur les fusions publiées par l'Autorité de la concurrence précisent : « dans certaines circonstances, l'acquisition de moins de 25 % peut même constituer une fusion dans le cadre de laquelle l'acquisition aboutit à une influence significative. » En d'autres termes, même si la loi présume de façon irrévocable que les transactions qui franchissent le seuil de 25 % constituent des fusions, il n'y a, comme au Royaume-Uni, aucun régime de protection pour les transactions qui ne franchissent pas ce seuil. À la lumière de cette situation, les sociétés demandent souvent à l'Autorité de la concurrence une « pré-décision » ou consultent des experts du droit de la concurrence en cas de doute. Le résultat dépend généralement d'indicateurs comme la structure, la concentration ou au contraire la dispersion de l'actionnariat, le type de droits attachés aux actions, les pactes d'actionnaires ainsi que d'autres caractéristiques des statuts. Dans une décision récente, la Cour suprême a encouragé les entreprises à engager de telles consultations, d'autant que la loi prévoit des sanctions pénales pour les parties à une fusion illégale.

Au fil des années, l'Autorité de la concurrence est intervenue dans plusieurs affaires concernant des droits passifs. L'un des exemples récents est la transaction entre les deux quotidiens *Globes* et *Yedioth Ahronot* qui concernait l'acquisition de 30 % des droits aux bénéfices et de 12 % des droits de vote. Dans cette affaire, le résultat a consisté à imposer au quotidien acquéreur la cession d'une partie des droits aux bénéfices ainsi que la limitation de sa capacité d'exercer ses droits de vote. Une autre affaire en cours devant le Tribunal de la concurrence concerne le marché des produits transformés à base de tomate. Dans cette affaire, une société a racheté 24.8 % du capital de la société mère de son concurrent qui a été uniquement créée aux fins de cette transaction. L'actionnaire majoritaire de la société mère n'exerce aucun contrôle et a accordé les pleins pouvoirs managériaux à l'actionnaire minoritaire. À la suite de l'intervention et de l'enquête de l'Autorité de la concurrence, le Tribunal de la concurrence a délivré une injonction préliminaire interdisant à la société acquéreuse d'interférer dans la gestion des affaires de la société acquise. La logique économique sous-tendant l'action de l'Autorité de la concurrence concernant les participations minoritaires et les droits passifs a été avalisée par le Tribunal de la concurrence ; l'argumentation est simple : une participation minoritaire d'une société donnée au capital d'une société concurrente vise à réduire l'incitation de cette dernière à s'inscrire dans une concurrence active, l'objectif étant dès lors de maximiser les bénéfices agrégés générés par l'ensemble constitué par les deux entreprises. En outre, l'acquisition d'une participation minoritaire peut être perçue comme un moyen d'envoyer des signaux, en particulier sur un marché oligopolistique. En pareil cas, il est difficile de fermer les yeux sur le risque de fuites d'informations et de collusion. À cet effet, le représentant d'Israël considère que le cadre économique proposé par O'Brian et Salop – également mentionné dans le document de référence du

Secrétariat – à propos des effets sur la concurrence des participations partielles en termes d'intérêt financier et de contrôle des entreprises, est très utile et tout à fait pertinent pour cette Table ronde.

Le représentant d'Israël ajoute que l'Autorité de la concurrence a estimé, dans une affaire traitée il y a quelque temps, que la détention d'une participation minoritaire dans le capital d'un concurrent pourrait constituer aussi un accord de limitation de la concurrence et non pas une simple fusion et qu'à ce titre elle pourrait être interdite par la loi. Toutefois, les tribunaux israéliens n'ont pas encore statué sur la question ; néanmoins, dans une décision anticipée de 2007, l'Autorité de la concurrence a déclaré qu'elle n'autoriserait pas une compagnie d'assurance de premier plan à acquérir une participation de 20 % au capital de la principale société de cartes de crédit du pays, parce que la transaction aurait entraîné le retrait d'un concurrent potentiel du marché des cartes de crédit et restreint la concurrence.

Le président remercie la délégation israélienne et se tourne vers la délégation des États-Unis en lui demandant d'expliquer comment les autorités américaines abordent la question des participations minoritaires en donnant quelques exemples à cet égard.

Le représentant du Département de la Justice des États-Unis explique qu'un certain nombre de dispositions législatives ou réglementaires peuvent être concernées par les participations minoritaires. L'une des dispositions qui tend à être invoquée le plus fréquemment est l'article 7 du *Clayton Act*, qui est généralement examiné dans un contexte des fusions, mais qui, à première vue, ne concerne pas uniquement les fusions. En fait, cet article dispose que toute acquisition d'actifs ou de titres assortis de droits de vote pouvant aboutir à une limitation substantielle de la concurrence ou tendre à la création d'un monopole est illégale. La Cour suprême des États-Unis a estimé à de multiples occasions que l'article 7 ne concerne pas seulement les fusions, mais touche aussi toute forme de regroupement d'entreprises, toute forme d'acquisition de titres par une société dans une autre que la participation assure une majorité de contrôle à part entière, ou qu'elle soit minoritaire. L'article 7 présente aussi l'avantage de son alinéa (a), à savoir le processus *Hart-Scott-Rodino* (HSR) de notification préalable des fusions qui permet aux autorités d'être informées de ces types d'acquisitions, même si elles ne concernent qu'une participation minoritaire. L'article 7 prévoit certaines exemptions importantes expliquées plus en détail dans la contribution des États-Unis. En particulier, l'acquisition de 10 % au plus du capital d'un autre émetteur « uniquement à des fins d'investissement » est exemptée du processus HSR. Dans ce cas, il s'agit généralement de savoir si les actions ne sont détenues qu'à des fins de placement ou non. Comme la prise de participation est étudiée aux termes de l'article 7, l'analyse est assez semblable à celle d'une fusion : des effets unilatéraux et d'effets de coordination risquent de se produire, en particulier si les sociétés sont des concurrents horizontaux.

En décembre 2007, le Département de la Justice s'est penché sur une affaire impliquant des participations minoritaires et des cumuls de sièges d'administrateurs (qui relèvent de l'article 8 du *Clayton Act*). Il s'agissait de l'acquisition par *CommScope Inc.*, société spécialisée dans les câblages, de la société *Andrew Corporation* (« *Andrew* »), société fabriquant du matériel et des systèmes de communication. Peu avant l'acquisition, les deux sociétés avaient été concurrentes sur le marché des câbles de dérivation (type de câbles utilisés, entre autres, pour connecter des logements à des services de télévision). En outre, il n'existait que quatre sociétés vendant ce produit aux États-Unis. Qui plus est, il s'agissait des deux seules à posséder la technologie particulière protégeant les câbles de la corrosion, ce qui est très important pour les clients. Peu avant l'acquisition, *Andrew* avait vendu son activité de câble à une société appelée *Andes Industries* (« *Andes* ») moyennant une participation de 30 % dans *Andes* assortie du droit de désigner des administrateurs au conseil d'*Andes*. Le Département de la Justice a enquêté sur la transaction comme il l'aurait fait pour une quelconque fusion aux termes de l'article 7 du *Clayton Act* et a décidé que l'acquisition d'*Andrew*, et par l'intermédiaire d'*Andrew* de 30 % du capital de son nouveau concurrent, *Andes*, pouvait poser un problème de concurrence. Le Département a pris une décision simple et les mesures correctrices ont aussi été assez simples : un jugement d'expédient accompagnant la plainte

du Département de la Justice, a ordonné à *Andrew* et aux parties (i) de céder la participation de 30 % dans *Andes* et (ii) de céder les droits de propriété intellectuelle que le montage initial conférait à *Andes*.

Le représentant de la Federal Trade Commission (FTC) des États-Unis ajoute des exemples d'affaires dans ce domaine. Il explique que la question est véritablement de savoir si l'acquisition d'une participation minoritaire peut limiter la concurrence ou, selon les termes des textes « limiter sensiblement la concurrence ». L'enquête de la FTC se concentre donc plus sur le fond que sur la forme. L'existence d'une concentration, ou d'une fusion complète ou encore d'un transfert de contrôle n'est pas nécessaire. Ce type d'affaires pose deux problèmes d'analyse. L'un réside dans le type d'analyse des effets multilatéraux dans laquelle la FTC se demande si l'acquisition d'une participation minoritaire a modifié les incitations de telle façon que la concurrence s'en trouve limitée. Dans l'autre, la FTC vérifie si l'acquisition va aboutir à une forme quelconque d'effets coordonnés. Le fait que l'acquisition ne débouche pas sur une fusion ou sur un transfert de contrôle n'empêche pas la FTC de poursuivre ses investigations. Cela étant, il faut manifestement mettre en évidence une limitation substantielle de la concurrence. La simple existence de liens, ou la simple acquisition d'intérêts actionnariaux, la simple acquisition par une entreprise d'une participation minoritaire ou d'un concurrent, ne signifient pas qu'il y a limitation substantielle de la concurrence.

Pour illustrer ce point, le représentant de la FTC fait référence à l'affaire *Kinder Morgan Inc.* De 2007. Cette affaire présentait des effets à la fois unilatéraux et coordonnés. Le marché portait sur la distribution d'essence aux stations-service ; deux sociétés étaient en concurrence sur ce marché : *Kinder Morgan* et *Magellan Midstream* (« *Magellan* »). L'affaire impliquait deux groupes d'investissement détenant des participations dans les deux entreprises. Elle présentait deux faits notables : premièrement, il ne s'agissait pas simplement d'un investissement direct dans un concurrent (en l'occurrence, les deux groupes d'investissement, *Carlyle* et *Riverstone*, détenaient conjointement une participation de 50 % dans *Magellan* et, au moyen de diverses structures d'investissement, ils possédaient une participation minoritaire dans *Kinder Morgan*) ; deuxièmement, leur participation combinée dans *Kinder Morgan* n'était que de 22 %. La FTC n'a pas constaté de quelconque transfert de contrôle chez *Kinder Morgan*. Les préoccupations concernaient à la fois les effets unilatéraux et les effets coordonnés. La FTC craignait que l'investissement dans *Kinder Morgan* par le groupe d'investissement ne l'incite à faire en sorte que *Magella* retienne ses coups contre son concurrent de différentes façons susceptibles d'avantager *Kinder Morgan*. La FTC éprouvait aussi des craintes quant à la circulation possible d'informations entre les deux concurrents sur le marché. Les mesures correctrices ont consisté à imposer au groupe d'investissement de renoncer à sa représentation au conseil d'administration de l'une des deux entreprises concurrentes, tandis que la FTC exigeait la mise en place d'un pare-feu contre une éventuelle circulation inappropriée d'informations.

Le président explique que le Groupe de travail avait débattu de l'évaluation des participations minoritaires dans le contexte de l'examen des fusions, mais que, ces acquisitions, comme l'ont relevé un certain nombre de contributions, peuvent aussi poser des problèmes et mériter d'être surveillées aux termes des règles de la concurrence sur les accords horizontaux et les abus de position dominante. Le président déclare que cela tend à montrer que les autorités disposent de plusieurs options sur la façon d'examiner des prises de participations minoritaires potentiellement anticoncurrentielles. Pour commencer l'examen de ces questions, le président appelle la délégation du Mexique qui a mis en évidence dans sa contribution une différence, ou une asymétrie, intéressante entre les normes de gouvernement d'entreprise applicables aux sociétés non cotées et aux sociétés cotées à propos des droits et obligations des actionnaires minoritaires. Le président demande au représentant du Mexique d'expliquer ces différences et plus généralement la façon dont les participations minoritaires faciliteraient les échanges d'information et les collusions potentielles.

Le représentant du Mexique explique que la différence de traitement des actionnaires minoritaires dans les sociétés non cotées et cotées tire son origine de deux lois : l'une, relativement récente (2006), la Loi boursière qui régit les sociétés cotées, l'autre qui réglemente les sociétés non cotées depuis 1934. Ces textes sont à l'origine de l'asymétrie. Dans le cas des sociétés cotées, la Loi boursière introduit plus de transparence en ce qui concerne les droits et obligations des administrateurs ainsi qu'une surveillance étendue par des administrateurs indépendants ou d'autres administrateurs. Cette loi relativement récente restreint relativement fortement les possibilités de dissimuler des comportements illégaux puisqu'elle attribue plus de responsabilités au conseil d'administration en cas de comportements de ce type. Selon le représentant du Mexique, le véritable problème vient du fait que la richesse est très concentrée au Mexique ; cela implique que les participations croisées et les imbrications de conseils d'administration par cumul de mandats sont relativement courantes et ouvrent largement la voie à des actions de coordination et des échanges d'informations. Le représentant du Mexique renvoie à la contribution de son pays dans laquelle on trouve quelques exemples de circonstances dans lesquelles la Commission de la concurrence est intervenue pour essayer d'atténuer ce problème dans des affaires de fusion. Il y a deux affaires dans le secteur des télécommunications, qui concernent toutes les deux *Telmex*, principal opérateur de téléphonie fixe. L'une porte sur la fusion entre *SBC* et *AT&T*. La société *SBC* était actionnaire de *Telmex* et *AT&T* était actionnaire d'un petit opérateur de téléphonie fixe. La Commission de la concurrence a décidé d'imposer des « murailles de Chine » pour que la plus petite des deux entreprises survive même si *SBC* et *AT&T* avaient déjà fusionné. La seconde affaire impliquait le premier opérateur de télédiffusion du Mexique, *Televisa*, qui rachetait le deuxième opérateur de télévision par câble. Cette affaire impliquait aussi *Telmex* parce que le Commission de la concurrence voulait séparer le réseau de téléphonie fixe du réseau câblé. La Commission a décidé de mettre fin à l'imbrication des conseils d'administration de *Telmex* et *Televisa*. Ces affaires sont les plus importantes dans le contexte des fusions.

Le président s'adresse à l'Allemagne et souligne que la contribution allemande fait référence à une affaire récente dans laquelle l'Office fédéral des ententes (Bundeskartellamt) a appliqué les règles allemandes de la concurrence ainsi que l'article 81 du Traité de Rome à une participation minoritaire. Le président demande au représentant de l'Allemagne de décrire l'affaire *Xella/Nord-KS*, les problèmes mis en évidence et la façon dont ils ont été réglés.

Le représentant de l'Allemagne explique que l'affaire *Xella/Nord-KS* concernait la participation minoritaire de 17.5 % de *Xella Deutschland GmbH* (« *Xella* ») dans la coentreprise *Nord-KS GmbH* (« *Nord-KS* »). *Xella* est un grand producteur de briques silicocalcaires et de matériaux de maçonnerie. *Nord-KS* travaillait sur le même marché des produits et dans la même zone géographique que *Xella*, à savoir un marché régional du nord de l'Allemagne. Les coûts de transport jouent un rôle sensible dans ce secteur. Aux termes d'un accord conclu par *Xella* et ses partenaires de la coentreprise *Nord-KS*, les grandes décisions d'orientation concernant la coentreprise, comme l'adoption du plan annuel d'investissement et du plan financier, devaient être examinées dans le cadre d'un conseil consultatif. Même si *Xella* avec ses 17.5 % des actions et des droits de vote ne pouvait pas bloquer les décisions de ce conseil, sa présence en son sein lui donnait la possibilité de prendre connaissance des décisions stratégiques de son concurrent *Nord-KS* et d'influer sur lesdites décisions à son propre profit. Le Bundeskartellamt a constaté que le conseil consultatif avait déjà pris des décisions de relèvement des prix et de diminution des remises. Il a supposé que les sociétés parentes de la coentreprise qui continuaient d'être présentes sur le marché coordonnaient leur action sur ce marché. Le Bundeskartellamt en a conclu que la position de *Xella* sur le marché se trouvait renforcée par sa participation minoritaire dans son concurrent *Nord-KS*, que la concurrence s'en trouvait sensiblement faussée, que l'on ne pouvait attendre aucune concurrence dynamique sur les prix de la part de *Nord-KS* vis-à-vis de ses sociétés parentes, la concurrence par le secret ayant été éliminée. Le Bundeskartellamt a alors ordonné à *Xella* de se retirer de la coentreprise dans un délai de un an à compter de sa décision ; à titre de mesures provisoires, *Xella* a reçu l'ordre de ne plus participer aux réunions du conseil consultatif, de ne plus exercer ses droits de vote et de ne plus demander la communication ou l'inspection des procès verbaux des réunions du conseil consultatif. De plus, il a été

ordonné aux autres actionnaires de ne pas transmettre à *Xella* ces procès verbaux. En appel, la Haute cour régionale de Düsseldorf a confirmé la décision relevant de l'article 1 de la Loi allemande sur la concurrence, tout en estimant que l'accord n'était pas de nature à affecter le commerce entre les États membres, de sorte que l'accord ne contrevenait pas à l'article 81 du Traité de Rome. La cour a par ailleurs confirmé les mesures provisoires ordonnées par le Bundeskartellamt, mais a estimé que la décision d'ordonner à *Xella* de se retirer de la coentreprise n'était pas proportionnée ; la cour a en revanche estimé qu'il appartenait à *Xella* de décider comment réagir à la conclusion que l'accord de constitution de la coentreprise contrevenait à l'article 1 de la Loi allemande sur la concurrence.

Le président s'adresse ensuite au Taipei chinois dont la contribution fait référence à l'application des règles de la concurrence aux participations minoritaires sur le marché de la télévision par câble. Il demande au représentant du Taipei chinois de décrire les initiatives prises par la Fair Trade Commission et les résultats de ses investigations.

Le représentant du Taipei chinois explique qu'en ce qui concerne la question des actionnaires minoritaires et de l'imbrication des conseils d'administration, la loi du Taipei chinois est assez semblable à celle des autres juridictions présentes à la Table ronde. L'acquisition d'actions d'une autre société peut faire l'objet d'un examen aux termes du contrôle des fusions et peut contrevenir aux règles relatives aux ententes et collusions. Le représentant du Taipei chinois souligne que lorsque les autorités déterminent si une opération constitue une fusion ou un accord illégal, le volume des actions acquises est l'un des facteurs pris en considération, sans pour autant être décisif. Généralement, les faits sont vérifiés pour voir si l'acquisition des actions habilite l'acquéreur à exercer un contrôle de fait de l'autre société. Dans plusieurs cas, la Fair Trade Commission (FTC) a constaté que des sociétés avaient utilisé des salariés, amis, collègues, parents, voire beaux-parents pour siéger en tant qu'administrateurs actionnaires dans l'autre société et qu'elles la contrôlaient effectivement. Sur les deux affaires décrites dans la contribution, l'une concerne une fusion entre deux sociétés de télévision par câble, chacune d'entre elles ayant désigné des salariés ou parents à l'autre société pour siéger en tant qu'administrateurs actionnaires. Si la FTC a considéré qu'il s'agissait là d'une fusion en dépit du fait que la participation acquise représentait moins de 5 %, c'est qu'elle a trouvé des preuves directes démontrant que les deux sociétés étaient de fait placées sous un contrôle unique. Par exemple, l'une des sociétés de télévision par câble faisait appel aux avocats de la société concurrente pour négocier les programmes avec le fournisseur de programmes en amont et signait même le contrat pour l'opérateur du système en aval. De l'avis de la FTC, cela montrait très clairement que les deux sociétés se trouvaient sous une forme de contrôle unique. Un autre facteur pertinent aura été que la FTC a constaté que les deux sociétés utilisaient le même formulaire uniforme de présentation de leurs états financiers et utilisaient même le même formulaire de rappel du personnel de maintenance détaché ; elles n'avaient pas de documents distincts pour ce faire. Sur la base de ces deux constats, la FTC a estimé que les deux sociétés ne faisaient qu'une et que l'acquisition d'actions était constitutive d'une fusion aux termes de la loi du Taipei chinois.

La seconde affaire portait sur un cas de collusion, également dans le secteur de la télévision par câble. L'affaire a commencé par le dépôt d'une plainte par des clients qui se voyaient refuser un service de télévision par câble lorsqu'ils déménageaient dans un immeuble neuf. L'explication avancée par la société de télévision par câble était que l'installation d'un réseau serait très onéreuse pour elle. Pour les plaignants cependant, la principale raison était que la société de télévision par câble avait conclu une forme d'accord de répartition du marché avec son concurrent, ce qui les a amenés à déposer plainte auprès de la FTC. À l'issue de son enquête, la FTC a trouvé des éléments de preuve directs et indirects permettant de conclure à l'existence d'une collusion. En ce qui concerne les éléments directs, la FTC a trouvé des documents internes portant la mention « nous devons respecter les intérêts de notre concurrent et nous ne devons pas envahir la zone desservie par l'autre société ». En ce qui concerne les éléments indirects, la FTC a constaté que les frais d'abonnement facturés par les deux sociétés pendant les deux ans précédant le dépôt de la plainte n'avaient cessé d'augmenter et qu'en fin de compte, les deux sociétés facturaient les mêmes frais

d'abonnement. Le représentant du Taipei chinois explique que la FTC a vu là une indication claire que les deux sociétés avaient conclu une forme d'accord ou étaient parvenues à un quelconque arrangement conscient entre elles pour fixer les frais d'abonnement. La FTC a par ailleurs observé que la qualité des services dans les années précédant la plainte ne s'était pas sensiblement améliorée ou qu'elle n'était à tout le moins pas proportionnée aux augmentations des frais d'abonnement. Le marché de la télévision par câble du Taipei chinois est oligopolistique ; généralement chaque zone est desservie au plus par deux sociétés, ce qui facilite les échanges d'informations entre rivaux. Sur la base de toutes ces constatations, la FTC a conclu que les sociétés se livraient à une collusion. Le représentant du Taipei chinois explique qu'au cours de l'enquête, la FTC s'est appuyée sur le document rédigé par les Professeurs Reynolds et Snapp, également mentionné dans la note du Secrétariat, qui a été très utile lorsque la FTC a dû dresser son argumentaire contre le comportement des sociétés. Le représentant du Taipei chinois précise en outre que l'affaire est encore en appel.

Le représentant du Taipei chinois conclut son exposé en expliquant le problème auquel est confronté le Taipei chinois face aux participations minoritaires et imbrications des conseils d'administration, à savoir que le contrôle *ex post* du respect de ses décisions. Dans chaque affaire, la FTC impose aux administrateurs de conseils imbriqués de démissionner ou demande la vente des actions, mais elle ne dispose pas de suffisamment de ressources pour procéder au contrôle *ex post*. Le représentant du Taipei chinois indique qu'il a appris de certaines délégations représentées à la Table ronde que leurs autorités ont mis en place une forme de groupe de surveillance en leur sein et il précise que la FTC envisage un dispositif analogue pour l'avenir.

Le président se tourne vers la délégation de la Roumanie dont la contribution évoque une affaire dans laquelle des liens structurels entre soumissionnaires concurrents ont facilité une collusion lors d'une adjudication.

Le représentant de la Roumanie confirme l'existence de cette affaire qui a nécessité l'intervention du Conseil roumain de la concurrence (CRC) aux termes des règles de la concurrence sur les accords restrictifs entre concurrents. Il indique que l'affaire concerne la privatisation d'une entreprise publique au moyen d'une procédure d'enchères ascendantes organisée par le Fonds des participations de l'État pour la cession des parts qu'il détenait dans cette entreprise. Trois sociétés ont participé aux enchères ; la société qui l'a emporté a proposé le prix le plus élevé et a signé le contrat de privatisation. Toutefois, elle n'a pas payé les actions dans le délai prévu par le contrat ; une deuxième procédure d'enchères ascendantes a dû être organisée. Les participants à cette deuxième adjudication étaient les sociétés A et B, toutes deux se présentant comme des soumissionnaires indépendants. Une fois que les enchères ont commencé, les sociétés se sont abstenues de soumissionner au prix d'ouverture et ont contraint la procédure à se transformer en enchères descendantes. La situation a été aggravée par le fait qu'au cours de cette deuxième procédure, la société A s'est montrée passive et n'a pas du tout enchéri, de sorte qu'il était facile pour la société B d'emporter les enchères à un prix bien inférieur au prix de départ.

Dans ce contexte, la CRC a trouvé au cours de l'enquête des éléments montrant l'existence de liens structurels entre les sociétés A et B de nature à restreindre la concurrence, voire à faciliter les collusions entre les soumissionnaires. Ces éléments montraient que la société B et son actionnaire unique étaient actionnaires minoritaires de la société A, même s'ils n'y détenaient pas de participation de contrôle. La CRC a constaté qu'il existait des liens familiaux entre la direction exécutive de la société A et l'actionnaire unique de la société B et que les deux sociétés avaient une longue histoire de coopération, aussi bien formelle qu'informelle. De plus, l'actionnaire unique de la société B était également l'actionnaire unique de la société qui avait emporté les toutes premières enchères et n'avait pas pu payer les actions à temps. Outre ces éléments, la CRC a relevé que la société A avait facilité la participation de la société B aux enchères en apportant des actifs immobiliers en garantie d'une lettre de crédit bancaire en faveur de la société B. Cet élément a constitué une preuve décisive de l'existence d'un accord anticoncurrentiel.

Compte tenu des éléments de l'affaire, des comportements et des entreprises concernés, la CRC a conclu que les sociétés A et B étaient parties prenantes à un accord horizontal anticoncurrentiel et leur a infligé une amende pour collusion. La seconde procédure d'enchères et la privatisation ont été annulées. Le représentant de la Roumanie souligne que de l'avis de la CRC, cela démontre qu'il peut y avoir des circonstances particulières dans lesquelles, une prise de participation minoritaire, même si elle ne confère pas des droits de contrôle sur une société, peut tout de même avoir un impact sur la concurrence et que de telles participations doivent faire l'objet d'une surveillance constante partout dans le monde.

Le président remercie la délégation roumaine et s'adresse aux Pays-Bas. Il explique que la contribution des Pays-Bas fait référence aux risques que les participations minoritaires et les imbrications de conseils d'administration par cumul de mandats font courir à la concurrence sous l'angle des collusions horizontales potentielles et il souligne qu'il peut être difficile de prouver comment ces liens structurels peuvent affecter négativement les différentes incitations à la concurrence. Le président demande aux Pays-Bas d'expliquer plus avant leur expérience, en particulier dans l'affaire *ACS*.

Avant d'entrer dans le détail de l'affaire *ACS*, le représentant des Pays-Bas veut souligner que l'Autorité néerlandaise de la concurrence (NMa) éprouve des difficultés lorsqu'elle doit se pencher sur des liens structurels, si ces liens ne débouchent pas sur une fusion. Certes, la NMa peut examiner d'autres possibilités prévues par sa loi nationale, comme l'interdiction des ententes et des pratiques concertées empêchant ou limitant la concurrence. En droit néerlandais, les liens structurels ne sont pas interdits *per se* ; la NMa doit apporter des éléments factuels montrant que le lien structurel concerné, par exemple une participation minoritaire, restreint la concurrence. Pour l'essentiel, la NMa doit répondre à la question de savoir si une décision d'une société ayant un lien structurel avec une société concurrente aurait été organisée différemment si elle n'avait pas eu ce lien structurel avec cette autre société. Il faut répondre à cette question à l'aide d'éléments factuels ; la NMa ne peut pas répondre de façon théorique, ce qui lui impose une lourde charge de la preuve. Lorsqu'un lien structurel est plus important, s'il y a la possibilité qu'une participation minoritaire bloque certaines décisions ou confère des droits de vote prioritaires, il est plus probable que l'autorité puisse s'en servir comme élément ; dans les autres cas, il s'avérera très difficile de prouver l'infraction aux règles de la concurrence.

L'affaire *ACS* est partie d'une demande d'exemption de l'application des règles de concurrence déposée avant la modernisation du droit communautaire, lorsque les exemptions demeuraient possibles. En l'occurrence, la NMa, pour établir que l'accord sur la participation minoritaire tombait sous le coup de l'interdiction des accords anticoncurrentiels, a dû démontrer que cette participation minoritaire était de nature à restreindre dans la pratique la concurrence et que les informations obtenues du fait de la participation minoritaire avait servi à restreindre la concurrence. De par la façon dont la participation minoritaire et la constitution de la société ont été conçues, il était très difficile pour les parties concernées d'utiliser les informations dans leurs propres prises de décision ; en conséquence, la NMa était dans l'impossibilité de prouver que les informations serviraient à des fins anticoncurrentielles.

Le président remercie la délégation néerlandaise pour son intervention. La discussion a jusqu'ici surtout porté sur la façon de traiter les problèmes de participations minoritaires et d'imbrication des conseils d'administration dans le cadre des règles relatives au contrôle des fusions, puis des règles relatives aux accords horizontaux et à l'abus de position dominante. Le président explique que la contribution irlandaise évoque le fait que les règles traditionnelles ne sont parfois pas très adaptées au traitement des dispositifs de participation minoritaire. Pour cette raison, l'Irish Competition Authority (ICA) a demandé d'apporter des modifications au *Competition Act* pour régler ces problèmes. Le président demande à la délégation irlandaise de décrire les raisons pour lesquelles elle envisageait ces corrections de la législation et, plus précisément, les solutions qu'elle propose.

Le représentant de l'Irlande commence par quelques commentaires généraux, notant que les préjudices que peuvent porter des effets unilatéraux et coordonnés ne sont guère contestés. Selon lui, le contrôle des fusions présente deux aspects : l'un réside dans le mécanisme de notification, l'autre dans l'application du droit positif des fusions. Certains régimes se servent de la notification comme d'un seuil à surveiller pour appliquer le critère de fusion en droit positif et pour déterminer s'il y a une limitation substantielle de la concurrence. C'est le régime appliqué en Irlande, qui se conforme au modèle de la Commission européenne. Si une fusion n'atteint pas le seuil de notification, l'autorité n'est pas habilitée à examiner cette fusion. Aux États-Unis, en revanche, une compétence distincte est prévue pour étudier les fusions, à savoir dans l'article 7 du *Clayton Act*. Il y a aussi le *Hart-Scott-Rodino Act* ; une société peut devoir notifier ou non une fusion, mais elle peut tout de même être soumise à l'article 7 du *Clayton Act*. Le système de notification des fusions vise en fait à ne pas imposer une charge trop lourde aux entreprises. C'est la raison pour laquelle, de façon générale, le système de notification est souvent assorti de seuils très élevés. Dans les régimes européens, s'il n'y a pas de contrôle, l'autorité n'est pas habilitée à examiner le dossier. Cela peut poser un problème, car il peut y avoir des préjudices découlant d'effets unilatéraux ou coordonnés. Généralement, on passe beaucoup de temps à débattre du caractère actif ou passif d'une participation ; ces débats sont tous destinés à traiter en fait la question du type de système de notification que nous souhaitons et du régime positif des fusions que nous voulons.

Le représentant de l'Irlande en vient ensuite aux articles 81 et 82 du Traité de Rome. En ce qui concerne l'article 81, il n'y a eu que quelques rares affaires dans lesquelles les circonstances étaient telles que l'on pouvait constater l'existence d'un accord. De toute évidence, si l'acquéreur vend des actions en autocontrôle à l'acquéreur, c'est qu'il y a un accord. Un exemple de tentative d'établir l'existence d'un accord pour justifier l'application de l'article 81 (ou l'article 4 du *Competition Act*) consiste à s'en remettre à l'article 25 de l'*Irish Companies Act* de 1963 qui prévoit que les documents constitutifs d'une société sont réputés avoir été signés par chaque membre (chaque actionnaire). On s'est demandé si toute personne achetant une action devient signataire de ces documents constitutifs et si l'on se trouve donc en présence d'un accord au sens de l'article 81 du Traité de Rome. Si l'on parvient à contester cet accord aux termes de l'article 82, le résultat revient alors normalement à considérer que l'accord est nul. Cela signifie qu'il n'y existe aucun accord. Cela aurait des effets catastrophiques au regard du droit des sociétés. On passe beaucoup de temps à déployer une grande ingéniosité pour établir l'existence d'un accord, mais tout cela veut dire que l'on cherche à contourner le véritable problème, qui est celui de la participation minoritaire.

La question des participations minoritaires passives ou actives est très complexe parce qu'un investissement passif peut parfois être actif. Une autorité ne voudra pas se lancer dans l'imposition de conditions, en permettant, par exemple, à une société de prendre une participation de 25 %, mais de ne pas exercer des droits de vote, parce que cela suppose de consentir d'énormes efforts pour surveiller l'application d'une telle décision. Le *Competition Act* de 2002 fait l'objet d'un réexamen tous les cinq ans et le Minister for the Department of Enterprise, Trade and Employment a lancé un appel à contributions publiques. L'ICA a remis une contribution et l'une des questions qu'elle évoque porte sur les participations minoritaires. L'ICA s'est demandé si un régime fondé sur une norme d'influence significative, comme celui du Royaume-Uni, pouvait convenir à l'Irlande. Toutefois, il n'y a pas d'obligation de notification au Royaume-Uni, ce qui offre une énorme souplesse. La question est de savoir comment concilier ce système avec un régime qui prévoit une notification obligatoire si les seuils sont atteints. Les contributions de l'Autriche et de l'Allemagne indiquent que leur seuil d'intervention est fixé à 25 % ; même la contribution britannique indique que le seuil de 25 % peut être significatif. Peut-être l'ICA devrait se rallier à ce seuil, plutôt que d'avoir un seuil irlandais différent de ceux de l'Allemagne et l'Autriche.

Le président passe la parole au représentant du BIAC qui admet que les participations minoritaires entre concurrents, les participations minoritaires dans un concurrent par des tiers ou les imbrications de conseils d'administration par cumul de mandats entre concurrents peuvent avoir des effets anticoncurrentiels dans certaines circonstances. Toutefois, de l'avis du BIAC, ces liens structurels ne

doivent être réglementés que lorsqu'ils risquent de produire des effets anticoncurrentiels : soit dans des situations dans lesquelles ils ouvrent la voie à une coordination, notamment en facilitant l'échange d'informations sensibles, soit en présence d'effets unilatéraux incitant les parties à limiter la concurrence. Le BIAC souligne que les États-Unis suivent une politique assez claire concernant l'application de l'article 7 du *Clayton Act* en appliquant un régime de protection aux situations de pur investissement au moyen de seuils *de minimis* (que le BIAC estime au passage trop bas) et semblent se concentrer surtout sur la recherche d'imbrications de conseils d'administration par cumul de mandats. En revanche, la politique suivie en Europe est assez incohérente : premièrement, au niveau européen, la doctrine Philip Morris fait intervenir, comme on l'a expliqué précédemment, trois instruments différents : la réglementation des fusions, l'article 81 du Traité de Rome et l'article 82 du même traité. Ces instruments ont des objectifs différents et ne couvrent pas toutes les situations (c'est la faille évoquée précédemment par le représentant de la Commission européenne). De la même façon, il semble qu'au niveau national, on applique différents principes, depuis les régimes qui prévoient la notification obligatoire au-delà de certains seuils de participation, comme l'Allemagne ou l'Autriche, jusqu'aux régimes dans lesquels l'autorité n'a pas de tradition de contrôle des participations minoritaires.

Pour favoriser la certitude juridique, le BIAC préconise une clarification de la politique à appliquer, probablement au moyen d'orientations, plutôt que de règlements, par exemple sous forme de complément à la Communication consolidée sur la compétence de la Commission européenne. Les orientations ne doivent pas être uniquement fondées sur le niveau absolu de la participation, mais doivent aider à déterminer si la participation réduit l'incitation à la concurrence, ou induit la possibilité d'exercer une influence, ou encore facilite une forme quelconque de coordination, principalement par l'échange d'informations sensibles. Le BIAC recommande d'élaborer des critères d'analyse devant permettre de traiter avant tout de la situation du marché, parce qu'on s'accorde généralement à considérer que les effets anticoncurrentiels des participations minoritaires se manifestent principalement sur des marchés oligopolistiques, et des instruments à utiliser pour exercer une influence (conseils d'administration, droits de veto ou droits analogues et l'accès à l'information). De l'avis du BIAC, il doit y avoir aussi des conseils sur les mesures correctrices acceptables comme le retrait des conseils d'administration ou des droits de veto et la promotion des pare-feux, tout en admettant qu'il peut y avoir des problèmes touchant au suivi de l'application de ces mesures. Le BIAC est conscient de la difficulté qu'il y a à formuler des orientations claires et admet aussi que cela peut ne pas être prioritaire pour des autorités plus préoccupées par d'autres problèmes comme les ententes injustifiables.

Le président explique qu'il aimerait que l'on aborde la question distincte, mais connexe des imbrications de conseils d'administration par cumul des mandats. Il demande à la délégation turque d'expliquer comment s'appliquent les règles traditionnelles de la concurrence aux imbrications de conseils d'administration.

Le représentant de la Turquie évoque une affaire datant de 2005 dans le secteur des transports maritimes. Bien que la Turquie n'ait pas de disposition spécifique concernant l'imbrication des conseils d'administration par cumul des mandats, l'article 4 de la Loi turque sur la concurrence (qui est semblable à l'article 81 du traité de Rome) contient une liste non exhaustive des situations susceptibles d'être couvertes par cet article. La question de l'imbrication des conseils d'administration par cumul des mandats pourrait être examinée aux termes de l'article 4. Dans l'affaire de 2005, on se trouvait en présence de deux sociétés rivales travaillant dans le secteur des transports maritimes. Elles avaient conclu un protocole pour ne pas modifier leurs tarifs et leurs conditions de paiement sans le consentement de l'autre partie. Ce protocole était explicitement destiné à coordonner les prix et a été considéré comme anticoncurrentiel aux termes de la Loi turque sur la concurrence. En outre, en raison de la structure actionnariale des deux sociétés, certains administrateurs siégeaient dans les deux conseils d'administration. C'est la raison pour laquelle la question de l'imbrication des conseils d'administration a été amplement débattue dans cette affaire. Le Conseil de la concurrence a conclu que l'existence de ces administrateurs communs allait inévitablement aboutir à une

coopération entre les deux sociétés. Le fait que cette imbrication intervienne dans un secteur très concentré non seulement facilitait, mais encore renforçait la coopération et la coordination entre les deux sociétés rivales. En conséquence, le Conseil a estimé qu'aucune des deux sociétés ne pouvait fixer des prix sans l'accord de l'autre, bien qu'elles aient veillé à ne pas fixer des prix identiques ou à annoncer des augmentations au même moment. Le Conseil a ordonné la suppression de l'imbrication des conseils d'administration, ce qui revient à interdire cette pratique. Le Conseil a considéré que cette mesure correctrice était suffisante et aucun désinvestissement n'a été demandé.

Le président explique que la Loi antimonopole du Japon ne comporte pas de disposition spécifique traitant de la question de l'imbrication des conseils d'administration et demande à la délégation japonaise de décrire brièvement ses dispositions législatives et réglementaires et la façon dont elles sont mises en œuvre par la Fair Trade Commission du Japon (« JFTC »).

Le représentant de Japon explique que l'article 13.1 de la Loi antimonopole dispose qu'aucun mandataire social ou salarié d'une société ne doit exercer des fonctions de mandataire social d'une autre société lorsque les effets de ce cumul peuvent limiter sensiblement la concurrence dans un domaine quelconque du commerce. La JFTC a publié des Lignes directrices sur les regroupements d'entreprise et a défini les cas d'imbrications de conseils d'administration par cumul de mandats soumis à la procédure d'examen. Il n'y a que peu d'affaires dans lesquelles la JFTC a pris des décisions dans ce domaine. Un exemple est celui de l'affaire de *Hiroshima Electric Railway Co., Ltd.* (« HER ») et de ses dirigeants. HER exploitait des trains, tramways, bus et exerçait d'autres activités à Hiroshima et autour de cette ville et les personnes A, B, C et D. Il s'agissait de dirigeants et d'un salarié de la société. *Hiroshima Buses* exploitait pour sa part des bus et exerçait d'autres activités dans la même zone. À l'époque, le transport de passagers par tramway ou bus à Hiroshima était en grande partie assuré par HER (trains, tramways et lignes d'autobus) et *Hiroshima Buses* (lignes d'autobus) et les deux entreprises étaient concurrentes dans les principales zones. HER a racheté 85 % des actions de *Hiroshima Buses*. En outre, A, B, C et D sont devenus, pour l'un, commissaire aux comptes et, pour les autres, administrateurs de *Hiroshima Buses*, tout en conservant leurs postes de dirigeants ou de salarié de HER. *Hiroshima Buses* comptait en tout cinq administrateurs et un commissaire aux comptes. Sur la base de ces faits, la JFTC a conclu que la prise de participation par de HER et l'imbrication des conseils d'administration par l'intermédiaire des personnes A, B, C et D étaient de nature à limiter sensiblement la concurrence dans le secteur du transport de passagers par tramway et bus dans les principales zones d'Hiroshima.

Le président en vient au dernier thème, à savoir la question des mesures correctrices. Il explique qu'un accord semble se dégager sur l'idée que le meilleur moyen de traiter les liens structurels en termes de participations minoritaires ou d'imbrication des conseils d'administration par cumul des mandats consiste à recourir à des mesures correctrices structurelles. Il note qu'il semble y avoir eu des cas dans lesquels des mesures correctrices comportementales comme les accords de confidentialité ou les pare-feux ont été utilisées par certaines autorités. Le président s'adresse à la délégation canadienne et lui demande de parler de la démarche du Bureau de la concurrence dans ce domaine et des types de mesures correctrices qu'il a envisagées dans deux affaires de fusion évoquées dans la contribution canadienne et qui impliquaient des participations minoritaires et des imbrications de conseils d'administration par cumul de mandats.

Le représentant du Canada explique que la loi canadienne ne comporte pas de disposition spécifique relative à l'examen des intérêts minoritaires et des imbrications de conseils d'administration sauf en ce qui concerne la question ultime et déterminante de savoir si ces liens ont pour effet de limiter significativement la concurrence ou de l'empêcher. En ce qui concerne la compétence du Bureau de la concurrence, la possibilité d'analyser des liens structurels dépend simplement de la question de savoir s'il y a fusion. Une fusion peut être soit la conséquence de l'acquisition d'une position de contrôle, soit de l'acquisition d'intérêts significatifs. Comme au Royaume-Uni, le terme « intérêts significatifs » n'est pas défini par la

loi canadienne, mais il est expliqué dans les lignes directrices et il a fait l'objet d'un certain nombre de décisions au fil des ans. Cette notion renvoie en fait à la capacité d'influencer de façon relativement importante le comportement économique de l'autre entité. Ces liens pourraient être examinés par le Bureau de la concurrence dans deux situations : il peut s'agir d'une fusion proprement dite au sens où l'acquisition d'intérêts minoritaires peut revenir à l'acquisition de la capacité d'influencer de façon relativement importante l'autre entité ; ou il peut s'agir simplement – comme c'est souvent le cas – d'un facteur auxiliaire ou contextuel d'une fusion par ailleurs constituée. Le Bureau va examiner cette caractéristique particulière de la fusion et la façon dont elle pourrait intervenir en dernière analyse sur la question de ses effets probables sur la concurrence. Lorsqu'il évalue la capacité d'influencer de façon relativement importante l'autre entité, en particulier sous l'angle des droits de vote, le Bureau étudie d'autres aspects qui permettent de déterminer ce que les actionnaires peuvent faire – par exemple si, en tant qu'administrateurs, ils peuvent exercer une influence relativement importante sur une résolution spéciale ou ordinaire ou s'ils peuvent la bloquer. Les lignes directrices prévoient une sorte de régime de protection, la détention de 10 % des droits de vote en l'absence d'autres facteurs ne devant pas poser de problème.

Le représentant du Canada note ensuite que le Bureau de la concurrence cherche à corriger le phénomène structurel des intérêts minoritaires et de l'imbrication des conseils d'administration par cumul des mandats au moyen de mesures structurelles. En effet, comme la plupart des autorités, le Bureau a quelques doutes quant à l'efficacité des mesures correctrices comportementales pour remédier à des problèmes structurels. En ce qui concerne plus particulièrement l'imbrication des conseils d'administration par cumul des mandats, le Bureau insiste sur la difficulté de suivre les mesures d'application des décisions ; en effet, compte tenu du caractère privé des réunions d'un conseil d'administration, il lui est très difficile de savoir ce qui s'y passe. De façon générale, les mesures correctrices comportementales ne sont pas nécessairement exclues, mais, toujours de façon générale et tout à fait en dehors de ce contexte, le Bureau ne considérera pas qu'une mesure comportementale constitue la seule réponse, sauf à être certain qu'elle éliminera la limitation substantielle de la concurrence.

Le représentant du Canada évoque ensuite brièvement les deux affaires mentionnées dans la contribution écrite. La première concerne l'acquisition de *Sogides Ltée* (« Sogides ») par *Quebecor Media Inc.*, (« Quebecor »). En l'espèce, les deux parties travaillaient dans la publication et la diffusion de livres en langue française. Le président de *Sogides* siégeait au conseil d'administration de l'un des deux librairies en aval distribuant ces publications et l'autre libraire appartenait à *Quebecor*. Le Bureau de la concurrence craignait que les échanges d'informations entre les deux éditeurs et libraires se fassent au détriment des rares autres éditeurs et libraires concurrents au niveau des modalités de fourniture aux librairies en aval. Dans cette affaire, le Bureau n'a pas poussé très loin ses investigations car les parties ont proposé que le président de *Sogides* démissionne du conseil d'administration du libraire en aval et qu'il soit remplacé par un administrateur indépendant. La seconde affaire concernait des liens structurels entre des chaînes de cinémas au Canada. Lorsqu'il s'est penché sur la restructuration de l'une de ces chaînes, le Bureau s'est aperçu que la deuxième et la troisième plus grosses chaînes entretenaient des liens structurels contractuellement organisés et que ces liens suffisaient pour établir l'existence d'une fusion. Il y avait non seulement des intérêts actionnaires, qui n'étaient que de l'ordre de 6 %, mais aussi une représentation importante au conseil d'administration ainsi que d'importants liens contractuels. Dans cette affaire, les deux chaînes sont convenues, après discussions, de mettre fin à ces dispositions.

Le président remercie la délégation canadienne et clôt la Table ronde. Il estime que la Table ronde a permis de traiter des problèmes importants auxquels de nombreuses autorités se heurtent régulièrement dans le monde. Il remercie tous les participants pour leurs interventions.