An Emerging Consensus on Minority Shareholdings?

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Over the summer, the European Commission ("EC") conducted a consultation[1] on the possible extension of the European Union Merger Regulation ("EUMR") to non-controlling minority shareholdings. Its consultation ran parallel to the UK Competition Commission's decision to require Ryanair to decrease its shareholding in Aer Lingus from 29.82 percent to 5 percent. This latest decision by UK competition authorities serves as a reminder that wooden restrictions preventing EU competition authorities from intervening in minority shareholding purchases can seriously stymie the ability of a competition regime to police potentially anticompetitive transactions. Indeed, even in the US where, in many areas, competition challenges are at a nadir when compared to Europe, US authorities would still have the ability to review and challenge a minority shareholding case like *Ryanair/Aer Lingus*. As the EC considers the scope of the EUMR with respect to non-controlling minority shareholdings, the flexibility that the US regime displays in addressing atypical competition problems may provide an instructive comparison.

***Ryanair/Aer Lingus* Chronicle**

Ryanair began its siege of Aer Lingus in 2006 by acquiring a 19.1 percent stake, only days after Aer Lingus' IPO, then quickly making a public offer for the whole of Aer Lingus. The EC reviewed both Ryanair's minority shareholding acquisition and the offer to purchase the entire company, treating the two elements as a "single concentration." The Commission investigated and decided to stop the full acquisition, while stating that it had no power to take action against Ryanair's minority stake in Aer Lingus.[2] Both Ryanair and Aer Lingus appealed – Ryanair asking to overturn the Commission's prohibition, and Aer Lingus challenging the inaction regarding the minority holdings. The General Court rejected both appeals.[3] Key to the General Court's decision on Aer Lingus' appeal was that Ryanair's minority stake in Aer Lingus did not, in isolation from the lapsed bid, confer "control" for EUMR purposes.

Undeterred – if not emboldened – Ryanair continued to amass Aer Lingus shares on the open market such that by July 2008, Ryanair had acquired up to its current ownership stake of 29.82 percent. Ryanair launched two more public offers to acquire Aer Lingus – first in December 2008, abandoned mid-course, and then three and half years later in July 2012, which the EC stopped in February 2013.[4] The minority stake in Aer Lingus remained in place as the platform for the re-bids, undisturbed by the negative review of the new offers.

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[1] European Commission Staff Working Document, "Towards more effective EU merger control," *available at* http://ec.europa.eu/competition/consultations/2013_merger_control/index_en.html.
[2] Case COMP/M. 4439 – Ryanair/Aer Lingus.
[3] Case T-342-/07, *Ryanair Holdings plc v. European Commission* [2010] ECR II-3457 (Ryanair's appeal); Case T-411/07, *Aer Lingus Group PLC v. European Commission* [2010] ECR II-3691 (Aer Lingus' appeal).
[4] *See* Alec Burnside & Christian Lorenz, *Irish air traffic control*, Competition Law Insight (Apr. 16, 2013). Ryanair has again appealed to the General Court (Case T-260/13, pending).

As it turns out, the EC's was not the last word on the matter. Although national antitrust agencies must defer to the results of an EC merger investigation (Article 21(3) EUMR), the General Court noted in its 2007 decision that "where there is no concentration with a Community dimension, the Member States remain free to apply their national competition law to Ryanair's shareholding in Aer Lingus in accordance with the rules in place to that effect."[5] The UK authorities answered that call and commenced an investigation.[6] During its substantive review of the case, UK authorities found that Ryanair's 29.8 percent shareholding empowered Ryanair to block Aer Lingus special resolutions (which Ryanair repeatedly did). Second, the UK authorities determined that – while there were no obvious unilateral or coordinated effects from the transaction – Ryanair's minority shareholding could undermine Aer Lingus' effectiveness as a competitor in a few different ways.

Specifically, Ryanair could: (1) impede Aer Lingus' ability to engage in M&A activity; (2) affect the management of Aer Lingus' slots at London's Heathrow Airport; and (3) utilize the shareholding as a launching point to engage in further disruptive takeover bids. Given Ryanair's incentive and ability to exercise its corporate governance rights to restrict Aer Lingus' competitive options, UK authorities chose to act. The UK Competition Commission[7] required Ryanair to sell down to 5 percent of Aer Lingus, prevented Ryanair from obtaining any representation on Aer Lingus' Board, and prohibited Ryanair from re-acquiring any additional Aer Lingus shares, unless it first obtained an EUMR approval to take full control.

UK and German Perspectives on Minority Shareholdings

This tortuous episode between Ryanair and Aer Lingus is just the latest reminder that minority shareholdings can create significant competition concerns. Some EU states have already for many years afforded their competition agencies the flexibility to review and challenge anticompetitive minority shareholdings.

For example, the United Kingdom's Enterprise Act (2002), replacing older legislation, grants UK competition authorities the ability to scrutinize minority shareholdings where a shareholder would exert "material influence" over a target business. As a result, UK authorities were able to review the leading pay-TV provider BSkyB's acquisition of a 17.9 percent stake in the leading commercial free-to-air broadcaster ITV; and they forced BSkyB to reduce its ownership to 7.5 percent, in view of concerns that BSkyB could use its rights so as to limit ITV's strategic options. Similarly, Germany accords the Bundeskartellamt the ability to review minority shareholding cases at a similarly low level ("competitively significant influence"). Indeed, the Bundeskartellamt has blocked four minority shareholding cases between 2005 and 2012. That represents 12.5 percent of all

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[5] Case T-411/07.
[6] *See* Alec Burnside & Marjolein De Backer, *Tyranny of the minority*, Competition Law Insight (Oct. 15, 2013) (providing further detail regarding the intricacies of the jurisdictional and substantive aspects of OFT's and CC's review of the *Ryanair/Aer Lingus* case).
[7] Competition Commission Report, *Ryanair Holdings plc/Aer Lingus Group plc*, 28 August 2013, *available at* http://www.competition-commission.org.uk/assets/competitioncommission/docs/2012/ryanair-aer-lingus/130828_ryanair_final_report.pdf.

Bundeskartellamt prohibitions, even though minority shareholdings represented only 4.1 percent of notifications.

While certain European competition regimes have demonstrated that the ability to review and challenge anticompetitive minority shareholdings is critical to effective maintenance of competition this view is not limited to Europe. Indeed, had the Ryanair and Aer Lingus saga played out in the US, American antitrust authorities would have had the same ability as the UK authorities to intervene – albeit with different tools and processes – and likely would have taken a similarly dim view of Ryanair's minority stake.

A View From Across the Atlantic on Minority Shareholdings

Like some European member countries, US antitrust authorities possess the flexibility to challenge minority shareholding cases. Where a company seeks to acquire a non-controlling minority stake in its competitor, US antitrust law provides a few layers of protection to ensure the share acquisition does not substantially lessen competition. First, if the minority share acquisition results in a transaction value above a certain dollar amount, the acquirer will have to file under the Hart-Scott-Rodino Act ("HSR").[8] Indeed, the acquirer cannot close the transaction or effectuate the share purchase *until* the relevant US antitrust agency closes its review of the transaction. This protection ensures that, irrespective of the percentage of share ownership, US antitrust authorities have an opportunity to review a potentially harmful minority share acquisition that affects a significant amount of commercial activity.

Should the transaction fall below the relevant filing thresholds, the US antitrust authorities may still review the acquisition on their own initiative: the HSR system imposes a notification duty on a sub-set of transactions, but the underlying substantive law applies regardless of whether the parties are required to file.

Further, under Section 8 of the Clayton Act, the US law prohibits a Board member of one company from serving as a member of a competitor's Board of Directors.[9] The application of this statute does not "exalt form over substance", which means that neither an actual officer or director nor an agent of such an officer or director may sit on the board of a competitor.[10] Not only does Section 8 limit the potential for the exchange of competitively sensitive information between rivals, it ensures one competitor does not have the ability to stymie another competitor's independent competitive decision-making.

This is not just an academic point. US authorities have reviewed and challenged minority shareholding cases in the past. For example, in June 2007, CommScope Inc., a major manufacturer of wire and cable products including drop cable and hardware products used in drop-cable installations, acquired Andrew Corporation. Andrew previously manufactured drop cable but sold the business to Andes Industries, Inc. Andrew owned 30

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[8] *See* 15 USC. § 18a(a)(2).
[9] 15 USC. § 19.
[10] *Square D Company v. Schneider S.A., SQD Acquisition Co.*, 760 F. Supp. 362, 366 (S.D.N.Y. 1991).

percent of Andes' shares, a warrant to purchase additional shares, and some of Andes' debt. Andrew also possessed certain governance rights in Andes including the ability to appoint members to Andes' Board of Directors; and it licensed intellectual property relating to special dry anti-corrosion features of drop cable to Andes.

The DOJ reviewed the transaction and found that CommScope's minority share ownership in Andes (by way of the Andrew's acquisition) substantially lessened competition. In particular, DOJ noted that "[CommScope's] 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 Andrews, and/or to undermine Andes' ability to compete on price and innovation."[11] As a result, DOJ filed a complaint and entered a consent decree ordering CommScope to divest its entire ownership interest in Andes including all related debt and derivative equity instruments, while also ordering CommScope to terminate the IP license. CommScope also had to renounce its contractual governance rights to Andes' Board.[12]

Lessons for the Review of Minority Shareholdings in the EU

Just as there are many roads to compete in a market, there are also many forms of anticompetitive conduct. If these episodes in minority shareholdings teach us nothing else, it is that competition authorities require great flexibility in policing potential competition abuses. As the EC considers whether and how to extend its competition rules to non-controlling minority shareholding cases, the EC will doubtless take heed of the experience of other competition regimes – that even minority ownership stakes can leave an outsized effect on competitors and competition.

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[11] Competitive Impact Statement, *United States v. CommScope, Inc.*, at 7, *available at* http://www.usdoj.gov/atr/cases/f228300/228364.htm.
[12] *United States v. CommScope, Inc.*, 2008 WL 3978124 (D.D.C. June 20, 2008).