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Minority Shareholdings Under Antitrust Law: A Regulatory Gap?

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Paul Lugard[1]

I. AN INTRODUCTION TO THIS CHRONICLE

It is hard to underestimate the importance of minority shareholdings in today's economy. This applies to investments of private, non-financial institutions and institutional investors alike. Minority shareholdings, even between competing companies, are a widespread phenomenon in sectors as diverse as banking, insurance, energy, air travel, high-tech electronics, and automotive. The OECD estimates that in 2009 institutional investors alone managed financial assets in excess of $53 trillion including $22 trillion in equities in the OECD area.[2] The European Private Equity and Venture Capital Association states that in 2007 approximately 5200 European companies received private equity investments.[3]

In many cases the equity stakes that private equity investors receive for funding remain well below the threshold that ordinarily triggers antitrust concerns. In other cases investors have some limited influence to support the company at hand, and in yet other cases investors will seek influence that extends to the determination of the company's strategic market conduct.

It has been firmly established that minority shareholdings that do not involve rights and means to confer the possibility of exercising "decisive influence" on a firm, and might at first glance appear innocuous, may, upon proper inspection and under specific circumstances, give rise to anticompetitive unilateral and coordinated effects. Interestingly, some economic research demonstrates that these concerns may also arise even if a competitor directly or indirectly holds an entirely passive minority interest in a competitor and is not represented in the competing company's board or has access to sensitive information.

Minority participations have long received the attention of antitrust agencies in many jurisdictions. However, these types of business transactions receive different treatment under antitrust and merger control laws in various jurisdictions. Indeed, antitrust agencies in Germany, Austria, and a number of other countries require prior notification for acquisitions of minority shareholdings above 25 percent, irrespective of market circumstances and the rights conferred to the holder of the stake. In the United Kingdom, as well, there is a 25 percent threshold, but applied in a different manner. Although there is a presumption of "material influence" irrespective of the status of the rest of the company's equity, the notification remains voluntary.[4]

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[2] *See* OECD Peer Review, The Role of Institutional Investors in Promoting Good Corporate Governance (2011), *available at* http://www.oecd.org/dataoecd/33/17/49081553.pdf.

[3] *See* http://www.evca.eu/publicandregulatoryaffairs/default.aspx?id=86.

[4] The OFT Guidelines also cite a 15 percent threshold above which such influence can be exercised under certain conditions, and reserves for the OFT rights to investigate "occasionally" under the latter threshold. Acquisitions of shareholdings of less than 10 percent have on rare occasions also been examined by the U.K. regulators, but have not resulted in prohibition decisions. *See* http://www.oft.gov.uk/shared_oft/mergers_ea02/oft527.pdf,

In the United States, Section 7 of the Clayton Act provides for an "investment only" exception that serves, in effect, as a safe harbor for partial equity investors. In other jurisdictions, such as the European Union, prior notification of the acquisition of an equity minority interest or an interlocking directorship is only required if the acquisition leads to decisive influence over the target company.

The antitrust treatment of minority shareholdings has, over the past few years, attracted new attention. In 2008, the OECD organized a roundtable discussion on antitrust issues involving minority shareholdings and interlocking directorates.[5] And more recently in the European Union, in a speech delivered on March 10, 2011 that seems at least in part fuelled by the Commission's inability to require Ryanair to divest itself of a 29.82 percent minority stake in Aer Lingus,[6] the Commissioner for Competition, Joaquín Almunia, expressed his concern about the fact that the European Merger Control Regulation[7] does not apply to minority shareholdings and has announced that the Commission will "see whether it is significant enough for us to try and close this gap in EU merger control."[8]

THE CONTRIBUTIONS TO THIS CHRONICLE

In this issue of the *CPI Antitrust Chronicle* a number of expert authors with a variety of backgrounds offer their views on the antitrust treatment of minority shareholdings.

In many respects, the contribution by Bojana Ignjatovic & Derek Ridyard provides the groundwork. They present an instructive and concise discussion of the various economic mechanisms that may be at play in the case of minority shareholdings and illustrate how perceived incentives to raise price have been looked at by the EC Commission in the *Ryanair/ Aer Lingus* merger and the U.K.'s OFT in its *BSkyB/ITV* investigation. They conclude by observing that economic theory strongly suggests that minority shareholdings are, in general, significantly less likely to give rise to the incentive or ability for unilateral or coordinated effects than would be the case for fully-fledged mergers, and that is doubtful that the concerns associated with minority shareholdings are sufficient to justify increasing the Commission's jurisdiction in this area.

In their contribution, Samuel Miller, Marc Raven, & David Went contrast the lack of competence to review partial ownership acquisitions that do not confer control on the purchaser under European rules with the broader jurisdiction U.S. agencies have under Section 7 of the Clayton Act.[9] One of the many interesting elements in their paper is the discussion of the potential for expanding the scope of the EUMR to acquisitions of minority shareholdings. While expanding the scope of the EUMR would subject a large number of previously immune transactions to review under the EUMR, their article shows how recent changes to the HSR reporting requirement provides the U.S antitrust agencies with relevant information regarding

[5] OECD Policy Roundtables- Minority Shareholdings (2008), DAF/COMP(2008)30, *available at* www.oecd.org/dataoecd/40/38/41774055.pdf).

[6] Case t-411/07, Aer Lingus v. Commission, 6 July 2010.

[7] Council Regulation (EC) No 139/2004 of 20 January 2004 on the Control of Concentrations between Undertakings ("EUMR"), *available at* http://ec.europa.eu/competition/mergers/legislation/regulations.html#merger_reg

[8] Press Release, March 10, 2011, *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/11/166&format=HTML&aged=0&language=EN&guiLanguage=en

[9] Samuel R. Miller, Marc Raven, & David Went, *Antitrust Concerns From Partial Ownership Interest Acquisitions: New Developments in the European Union and United States*, 1(1) CPI ANTITRUST CHRON., January, 2012.

entities that are under common investment or operational management with, but are not "controlled" by, an acquiring person.

In their insightful paper, Paul Cuomo, Changrong Xu, & Charles Malaise dissect the policy of the U.S. antitrust agencies by categorizing the agencies' enforcement actions into three distinct categories: cases where the acquiring firm competes directly with the target company and cases where the acquiring firm has either a controlling or non-controlling interest in another firm that competes with the target firm.[10] However, their article is not confined to the U.S. practice, but extends to recent enforcement practice in China, a jurisdiction of prime importance for international business. They provide an overview of the relevant Chinese provisions and discuss two cases in which MOFCOM has recently challenged minority shareholding deals, the 2009 *Sanyo-Panasonic* transaction and the proposed acquisition of Savio by Alpha Private Equity Fund V (*Alpha V*) of 2011. With some concern, they note the low evidentiary standard that MOFCOM seems to have applied in those cases and conclude that MOFCOM might be less tolerant of partial acquisitions than U.S. courts and agencies.

Returning to Europe, Enrique González-Díaz discusses the possible effects of minority participations may have on competition and provides an overview of the Commission's decisional practice under the EUMR, as well as articles 101 and 102 TFEU.[11] His contribution contains many interesting observations, including reflections on the acquisition of minority stakes in the context of creeping acquisitions of control that the EC Commission may not be able to compel an acquiring firm to divest, as well as the importance of competition and corporate law as a constraint on the anticompetitive effects arising out of the minority shareholdings in a competitor (as expressed in *BT/MCI)*.[12] Incidentally, that acknowledgment contrasts with other authors who take the position that the improved protection of minority shareholders *vis a vis* majority shareholders, and the management of companies under corporate law of recent years, may actually favor anticompetitive effects. In this respect, Russo has noted a *vacuum legis* and suggests that any minority participation in a competing firm requires antitrust scrutiny.[13]

In his paper, Sean Ennis, Executive Director of the Competition Commission of Mauritius, also discusses the intersection between corporate governance and competition law.[14] In addition to describing how concentrated ownership in many smaller countries may affect competition in general terms, he focuses on situations in which procurement competition may be distorted and, as a consequence, result in higher prices. He observes that competition law may apply to decisions of companies to procure from related parties and raises the interesting question whether competition law is an appropriate instrument for protecting the interests of minority shareholders that are harmed by companies' decisions to procure goods and services at above-market prices.

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[10] Paul Cuomo, Changrong Xu, & Charles Malaise, *Partial Acquisitions: Recent MOFCOM Action Suggests Possible Divergence with U.S. Standards*, 1(1) CPI ANTITRUST CHRON., January, 2012.

[11] Francisco Enrique González-Díaz, *Minority Shareholdings and Interlocking Directorships: The European Union Approach*, 1(1) CPI ANTITRUST CHRON., January, 2012. *See also* F. E. González-Díaz, *Minority shareholdings and creeping acquisitions*, Fordham Competition Law Institute 2011, Ch. 17.

[12] Case No. IV/34.857 BT/MCI, 27July 27, 1994,

[13] Francesco Russo, *Abuse of Protected Position? Minority Shareholdings and Restriction of Markets' Competitiveness in the European Union*, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=935325

[14] Sean Ennis, *Competition and Governance: Minority Shareholdings in Small Countries*, 1(1) CPI ANTITRUST CHRON., January, 2012.

Finally, the paper by Christian Riis-Madsen, Sophia Stephanou, & Killian Kehoe brings us back full circle to the *Ryanair* case, and the possible reforms of the EU Merger Regulation.[15] They provide a valuable perspective of the *Ryanair/ Aer Lingus* saga, discuss the European Union, United Kingdom, and German regulatory approaches in the area of minority shareholdings and reflect on four possible policy reforms in Europe that the Commission may consider to remedy any perceived "enforcement gap" under EU merger control law: (i) extending the scope of the EUMR to minority acquisitions conferring "competitively significant influence," (ii) voluntary notification coupled with the possibility of *ex officio* post-acquisition control, (iii) ex-post control on the basis of articles 101 and 102 TFEU, and (iv) granting the Commission the power to order divestment of certain minority shareholdings.

The following, which builds on the economic insights of minority shareholdings as presented in Ignjatovic & Ridyard's contribution, provides additional context.

III. ANTICOMPETITIVE EFFECTS

Economic research shows that minority shareholdings and interlocking directorates between competing firms can produce anticompetitive effects by reducing the incentives for companies to compete. There are two main ways in which this may occur: (i) by eliminating important competitive constraints on the investing company or the investee on incentives to compete (unilateral effects), and (ii) by changing the nature of competition in such a way that the firms are significantly more likely to coordinate and raise prices or otherwise harm competition by facilitating express or tacit collusion.

A. Unilateral Effects

The acquisition of a minority shareholding—even of an entirely passive nature—may first negatively affect competition by reducing the acquiring firm's incentives to compete with the target firm, as the financial losses incurred by the latter will affect the value of the investment by the investing firm. Gilo illustrates this effect on the basis of a theoretical two-firm industry. Firm A may, in the absence of any structural links with the only other competitor on the market, cut prices and increase its market share, thereby generating a profit of 1$ and inflict losses on Firm B of 4 $. If, however, A owns 26 percent of B's stock, A will incur 26 percent of B's losses, *i.e.* 1.04 $, as a result of which it would refrain from cutting price. Gilo observes that in many cases it would not be rational for A to forego its own profits by refraining from cutting price, but also makes the point that in a more complex and realistic scenario A's minority participation in B might serve as a commitment device for A not to cut price itself, which would, in turn, discourage B from cutting prices first.[16]

In their contribution to this *Chronicle*, Ignjatovic & Ridyard observe that the competitive effects critically depend on the diversion ratio between the parties—the proportion of sales lost by one firm following a price increase that is diverted away to the other party–and the degree to which the participation effectively "dilutes" the diversion ratio. They illustrate this point by questioning whether the remaining 29 percent equity stake Ryanair holds in Aer Lingus may result in higher Ryanair fares on overlap routes.

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[15] Christian Riis-Madsen, Sophia Stephanou, & Killian Kehoe, *Reform of the EU Merger Regulation: Looking Out for the Minority*, 1(1) CPI ANTITRUST CHRON., January, 2012

[16] David Gilo, *The Anticompetitive Effect of Passive Investment*, 99 MICH. L. REV.1.*See* also Robert Reynolds & Bruce Snapp, *The Competitive Effects of Partial Equity Interests and Joint Ventures*, 4 INT'L J. INDUST. ORG. 141.

Ignjatovic & Ridyard point to yet another scenario that may give rise to anticompetitive unilateral effects: If a minority shareholding does enable the acquirer to influence the decisions of the target firm, the minority shareholder may have the ability to force the target company to raise prices and thereby degrade the target company's offering. Regardless of the magnitude of the participation, the acquiring firm would benefit from the full diversion of sales from the target company. This scenario critically hinges on A's ability to force the target company to increase prices in spite of A's unwilling management and other shareholders.[17]

B. Coordinated Effects

A separate question is whether minority shareholdings can facilitate express or tacit collusion.

Explicit collusion is dependent on a number of necessary conditions, in particular regarding the structure of the market, the degree of transparency, and the consequences of deviations from the common strategy.[18] It is disputed whether (reciprocal) minority shareholdings in one or more competitors may facilitate collusion by increasing transparency due to the fact that minority shareholders may have access to information that independent competitors would not have.

The OECD is of the view that the potential for such an information exchange is significant but, in my opinion, it remains to be seen whether this is true.[19] Ignjatovic & Ridyard take a critical view. Indeed, they note that "unless structural links are widespread throughout the industry to aid coordination with any firms other than the parties to the transaction, or the target is a maverick firm that has prevented effective coordination among the remaining competitors, enhancing the ability to reach a coordinated agreement between only two firms in the market is rarely likely to lead to effective coordination across the market as a whole."

Similarly, it appears that the potential for tacit collusion, while not yet fully researched, is limited and is, in any case, dependent on a number of subtle necessary conditions; for instance, maverick firms that commit themselves to becoming less aggressive competitors by investing in less vigorous competitors.[20]

It is important to realize that, while economic research indicates that minority shareholdings—even of a purely passive nature—may produce anticompetitive effects, the models underpinning these findings are premised on specific assumptions and may not hold under other, more realistic, market circumstances. For instance, unilateral effects as predicted by Reynolds & Snapp are dependent on the existence of high entry barriers and the absence of competitors' reactions and are premised on an oligopolistic market in which identical firms produce homogenous products at constant marginal costs.[21] In markets that do not display these characteristics, the outcome could be materially different.

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[17] Contrary to the previous example, this scenario involves some specific measure of control of A to effectuate B's price increase.

[18] *See* EC Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, ¶¶ 39-60 , *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52004XC0205(02):EN:NOT

[19] *See* OECD, *supra* note 5 at 30.

[20] *See* Gilo, *supra* note 16.

[21] *See* Reynolds & Snapp, *supra* note 16 and OECD, *supra* note 5 at 25.

In addition, the effects will depend on a combination of various factors, such as the size and nature of the minority participation, the market share of the target company, the diversion ratio between the competitors' products and the like.[22] Moreover, it appears that the great majority of research is of a theoretical nature; obviously, empirical research would be helpful to further instruct legislators and antitrust agencies in this field.

IV. EFFICIENCIES

It is undisputed that efficiency claims need to be considered in the overall assessment of the effects of minority shareholdings, either in the context of a concentration, or under articles 101 and 102 TFEU or equivalent provisions of non-European law. It is therefore striking that a discussion of potential efficiencies associated with minority shareholdings is largely missing in the debate on the antitrust treatment of minority shareholdings.

In many cases minority participations, especially by providers of private equity, are primarily motivated by the prospect of adequate financial return on investments and the need to diversify investments, perhaps coupled with a preference for sectors that investors know well.[23] However, over and above those considerations, there may be perfectly valid efficiency reasons for acquiring a minority participation, even in a competitor, such as the desire to give equity support to a legitimate cooperation agreement.

In its 2010 report on minority interests in competitors, the OFT takes a relatively negative stance with regard to efficiencies. This is because efficiencies associated with full control, such as economies of scale, rationalization, and avoiding cost duplication do not exist in the case of minority shareholdings.[24] Nonetheless, the OFT report notes that minority shareholdings allow companies to diversify risks which may translate into lower cost and increased competition. Minority shareholdings may also be useful in aligning the incentives of firms involved in alliances or joint ventures involving *ex ante* relationship specific investments.

This point is also made by Gilo, who also states that minority shareholdings may still involve efficiencies due to superior information regarding the firm at hand, its products, and its prospects.[25] In this respect, Gilo adds one particular scenario whereby (passive) investments in a competitor assists to overcome the difficulties the licensors of technology face in appropriating the return on their technological innovations. Also, depending on the specifics of the case, passive investments may involve efficiencies in the allocation of production among firms. Finally, in specific circumstances, (continuation of) a minority share may also serve to guarantee the development of the company into a viable competitor.[26]

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[22] Some authors have also suggested that the analysis of the effects of minority shareholdings fails to take account of "real-world" factors, such as the inability to capture the financial benefits of the shareholding. *See* Francisco Enrique González-Díaz, *supra* note 11, and OECD, *supra* note 5 at 36.

[23] Companies may also retain a minority shareholding in a transferred business as part of a progressive divestiture scheme, or may acquire minority shareholdings in a company when acquiring a business.

[24] Minority interests in competitors, a research report prepared by DotEcon Ltd, March 2010, OFT 1218, pp 55-57, *available at* http://www.oft.gov.uk/shared_oft/economic_research/oft1218.pdf.

[25] *See* Gilo, *supra* note 16. Superior information does not necessarily involve competitively sensitive information.

[26] Case COMP/98/663/EC- Blokker/Toys"R"Us, 26 June 1997.

V. REGULATORY APPROACHES

Legislators and antitrust agencies have taken different approaches regarding the treatment of minority participations. This applies to non-European and European jurisdictions alike. In Europe, it is clear and justifiable that minority stakes that confer control are considered concentrations under the EUMR, but the situation is less satisfactory when the minority stake does not confer control. While the *Philip Morris* doctrine provides the legal basis for the Commission's possible application of Articles 101 TFEU and 102 TFEU to the acquisition of minority shareholdings in competing undertakings,[27] the boundaries of the scope of application of those provisions, and the way they interact, are unclear.[28] Case law shows that minority shareholdings have been analyzed under a variety of regulations, including the EUMR (*Tetra Laval/ Sidel*[29], *Eurostar*[30], *Toshiba/ Westinghouse*[31]), article 101 TFEU (*BT/MCI*[32], *Olivetti/Digital*[33], *Hudson's Bay/ Finnish Fur Sales*[34]), and article 102 TFEU (*Warner-Lambert/ Gillette*[35]).

Many jurisdictions, including The Netherlands, Belgium, France, Spain, Brazil, the Czech Republic, and Rumania are substantially similar to the European merger control regime and treat the acquisition of minority shareholdings as notifiable transactions only when the minority shareholding confers control.

However, different approaches can be found in the enforcement practice of a number of other national authorities. Germany and Austria impose a notification obligation for acquisition of minority interests above 25 percent, while also stating that the acquisition of a "competitively significant influence" qualifies as a concentration.[36] In Lithuania and the United Kingdom a threshold of 25 percent also applies.[37] In Taiwan acquisitions exceeding one third of the total voting shares or capital stock are subject to a prior notification requirement, while in Korea and Japan minority share acquisitions exceeding 20 percent (and in Korea 15 percent in case of listed companies) and in Israel of 25 percent must be notified. And in some countries antitrust agencies may intervene on the basis of national provisions of merger control (Norway, United Kingdom), or restrictive conduct rules (South Africa, Turkey) against the acquisition of minority shareholdings, even where acquisitions of minority shareholdings do not confer control and are not in and of themselves notifiable. Specific rules on interlocking directorates apply, for instance, in the United States, Japan, Korea, and Indonesia.

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[27] Cases 142/85 and 156/4, British American Tobacco Company Limited and R. J. Reynolds Industries Inc., v. European Commission, 17 November 1987.

[28] For a detailed overview and discussion, *see* F. E. González-Díaz, *Minority shareholdings and creeping acquisitions*, Fordham Competition Law Institute 2011, Ch. 17, forthcoming.

[29] Case COMP/M.2416 Tetra Laval/Sidel, 30 October 2001.

[30] Case No.IV/M. 1305 Eurostar, 9 December 1998.

[31] Case COMP/M.4153 Toshiba/Westinghouse, 19 September 2006.

[32] Case No. IV/34.857 BT/MCI, *supra* note 12.

[33] Case No. IV/34.410 Olivetti/ Digital, 11 November 1994.

[34] 19th Report on Competition Policy Part 2 1989.

[35] Case No. IV/ 93/252/EEC Warner-Lambert/ Gillette and Others, 10 November 1992.

[36] In their contribution to this *CPI Antitrust Chronicle*, Riis-Madsen, Stephanou, & Kehoe note that in Germany ten percent of notifications fall into the minority shareholding category, and only one percent falls into the "competitively significant" category (i.e. shareholdings granting rights equivalent to those of a holder of 25 percent percent of the voting rights).

[37] *See* note 4, *supra*.

Of the 21 OECD countries that participated in the 2008 OECD Roundtable, 8 jurisdictions apply a regime that seems comparable to the EC regime, while in 13 other countries specific legislation applies that seems more tailored to the *ex ante* assessment of minority stakes that do not (necessarily) confer control. The majority of the 8 "European-style" countries indicate that harmful effects associated with minority shareholdings are or may be dealt with under the rules on restrictive agreements or (collective) dominance.[38]

VI. REGULATING MINORITY SHAREHOLDINGS?

Minority shareholdings, either reciprocal or not, in horizontally or vertically related companies are a common and frequent feature in many sectors of today's economy, as are situations in which a third party (e.g. an investment fund) owns minority shareholdings in (potentially) competing companies or vertically related companies. Economic literature shows that, in exceptional circumstances, minority shareholdings, even when they do not confer control over the target company, can have anticompetitive effects. While a limited number of jurisdictions subject minority shareholdings to (*ex ante*) merger control review, that type of review does not seem to have unveiled a disproportionate number of problematic cases that could not have been addressed otherwise. In a number of cases antitrust agencies have successfully intervened against potentially harmful minority shareholdings on the basis of national non-merger control provisions.

As Ignjatovic & Ridyard point out in this *Chronicle*, when considering whether to regulate minority shareholdings—for instance by subjecting those transactions to a system of prior approval under merger control regimes—the potential concerns associated with minority shareholdings should be weighed against the costs of investigating minority shareholdings. While business may benefit from a clarification of policy with respect to the permissibility of minority (cross-) ownership and agency enforcement intentions, perhaps coupled with a larger degree of uniformity across jurisdictions—which would benefit investment, increase innovation, and enhance competitiveness of firms and thereby consumer welfare—the costs of compliance and the risk of over-regulation are real.

Obviously, the key factor for deciding on legislative measures to close an enforcement gap is an informed view of the nature and magnitude of that gap. In Europe, Commissioner Almunia has commissioned a study on the economic importance of minority shareholdings in today's EU economy with a view to establishing whether legislative measures would be appropriate.[39] The study is to provide quantitative information on shareholdings relating to companies within the same sectors, the size of those companies, the level of influence associated with the shareholding, information on the prevailing competitive conditions, specifics on the competitive relationships between the firms, and other relevant factors that will assist DG COMP in making a preliminary assessment of whether a minority shareholding should warrant a further examination.

The study will undoubtedly be useful and interesting. However, it remains to be seen whether the results will be robust enough as to serve as a basis for significant policy reforms. Despite the difficulties involved in identifying the actual levels of control (as opposed to mere ownership), the study is likely to provide some quantitative information on the expected number

[38] *See OECD, supra* note 5. Two of the eight countries (Ireland and Italy) suggest that in some cases intervention against minority shareholding may be difficult.

[39] *See* http://ec.europa.eu/competition/calls/2011_016_tender_specifications_en.pdf.

of notifiable direct and indirect acquisitions of minority stakes under the various assumptions (e.g. notification of all minority participations exceeding 20 percent but not conferring control with a Community dimension).[40]

However, it is a legitimate question whether a solid, but nonetheless generic, study is able to generate reliable indications regarding significant anticompetitive effects, including their nature and frequency. This is particularly true because the researchers are not being asked to address any efficiencies, nor look into the more general reasons underlying the widely diverging structure of ownership in the European Member States and various industrial sectors.[41] In any event, an evaluation of competitive effects generally requires a detailed analysis, often on the basis of information that is not publicly available. And is it fair to assume that the effects associated with minority stakes, as Ignjatovic & Ridyard state, are often more subtle and therefore even more difficult to identify?

To have a full picture of the possible enforcement gap under the EUMR, one also needs to know whether the identified problematic cases are indeed currently not covered by the EUMR (as part of related or successive transactions) and would, in addition, not be adequately addressed by national (merger control) law, or articles 101 and 102 TFEU. And in how many instances can none of these provisions be applied because there is indeed no "change in control," no "agreement between undertakings" (or, more broadly, no coordinated effects), and no dominant position? However, these issues seem to be outside the scope of the study.

In short, it indeed remains to be seen whether we are faced with an enforcement gap under the EUMR that is sufficiently disquieting to recall the decision taken in 1999 not to extend the EUMR to minority shareholdings and to take drastic measures in the shape of extending the scope of the EUMR to those transactions.

VII. BUT WHAT IF REGULATION IN EUROPE IS DEEMED NECESSARY?

A number of contributors to this *Chronicle* are skeptical about the need for further regulation to bring the acquisition of minority shareholdings within the scope of the European merger control regime. Gonzalez-Diaz notes that "the limited frequency and the potentially limited impact of the possible anticompetitive effects of these transactions in the real world warrants a cautious approach if further regulation, if any, were to be adopted in this field," while Ignjatovic & Ridyard doubt "whether these potential concerns, when weighed against the very real costs of investigating minority shareholdings, are sufficient to justify increasing the Commission's jurisdiction in this area." Miller, Raven, & Went note that an expansion of the scope of the EUMR "may be difficult to justify given that most acquisitions of minority shareholdings do not raise competition concern."

I share those views. In particular, there do not seem to be any new facts based on which the Commission's own decision ten years ago not to bring minority shareholding within the scope of the EUMR should be overturned, while doing so might easily result in costly, inefficient over-regulation. In addition, it is yet to be established that *ex-post* enforcement action on the basis of

[40] Note that identifying whether transactions involving minority participations can be considered as having a Community dimension can be complicated.

[41] For an illustration, *see* Luca Enriques & Paolo Volpin, *Corporate Governance Reforms in Continental Europe*, 21(1) J. ECON. PERSPECTIVES, 117-149 (Winter 2007) and OECD, *supra* note 2.

articles 101 and 102 TFEU and national law is intrinsically inadequate to remedy the perceived problems.

Obviously, if, based on the study and perhaps further research—for instance into the practice of jurisdictions where minority shareholdings are subject to *ex ante* control—the likelihood and magnitude of efficiencies and a more complete understanding of the ways in which minority stakes may produce competitive harm (and the necessary conditions therefor) additional regulation is deemed necessary, the question arises how the Commission could best close the identified enforcement gap.

In their contribution Riis-Madsen, Syephanou, & Kehoe offer several valuable observations on a number of policy options that the Commission might consider: (i) extending the scope of the EUMR to minority acquisitions conferring "competitively significant influence" along the lines of the German system, (ii) voluntary notification coupled with the possibility of *ex officio* post-acquisition control, (iii) *ex post* control on the basis of articles 101 and 102 TFEU, and (iv) granting the Commission the power to order divestment of certain minority shareholdings.

Each of these policy directions raises many intricate issues. And if legislative reform is deemed necessary at all, there is also something to be said for a gradual approach which could start with guidelines for *ex post* enforcement of article 101 (and 102) TFEU and which would culminate in a review after a few years. In any event, it seems that any future legislative action should (i) not go beyond what is necessary to remedy the problem, and (ii) provide sufficient guidance for business to assess their investment options. This would entail defining the category of potentially problematic cases and circumstances in which negative effects are most likely to occur. One could, for instance, imagine that a future regime would be confined to cross-shareholdings between actual competitors exceeding 25 percent and some non- *de-minimis* degree of "competitively significant influence" and involving highly concentrated markets as well as at least one firm with significant market power. In addition, any future policy would have to be centered on well-defined safe harbors and clearly articulated theories of harm, as well as a discussion of plausible efficiencies.

Given the complexities of the subject, and the possibly deep ramifications of any policy, it is hoped that the Commission will not give in too light-heartedly to an inclination to develop new policy in the area of minority shareholdings, and will only decide on next steps after careful consideration. We hope that this collection contributes significantly to that dialogue.