Horizontal minority shareholdings in the EU, US, UK and Germany: Applicable Legal Framework

Initial Comparative Brief

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Introduction

The practice of cross-ownership in competing firms by institutional investors has grown significantly in recent years. Such cross ownership is said to result in anticompetitive effects in concentrated industries. One possibility to regulate this activity, thus, is antitrust regulation. This brief presents an initial review of current antitrust/competition regulatory framework in four jurisdictions: the EU, US, UK and Germany.

European Union

The EU Merger Regulation

The Merger Regulation was adopted in 1989 and amended in 2004 (EUMR), strengthening the functioning of merger control at the EU level. The 2004 regulation reform introduced the *significant impediment of effective competition* (SIEC) test: an assessment based on qualitative and quantitative/empirical evidence.[1] When a transaction results in *concentration having a community dimension*, it is subject to the exclusive jurisdiction of the EUMR. The concept of *concentration* in the regulation covers operations bringing about a lasting change in the control of an undertaking concerned; and refers to (sole or joint) control as "rights, contracts or any other means which, either separately or in combination […], confer the possibility of exercising decisive influence on an undertaking".[2]

Partial equity interests will only be subject to the EUMR, therefore, when they result in the ability to exercise *decisive influence* and thus qualify as concentration. Such situations include the possibility of establishing control through qualified minority (when specific rights are attached to the minority shareholding; where a minority shareholder has the right to manage the activities of the company; where collective choice problems result in de-facto control, or - in the case of joint control - through deadlock situations where actions determining the strategic commercial behavior of an undertaking may be blocked by a minority shareholder[3]). Minority shareholding acquisitions (including passive investments) falling short of establishing control would not fall within the jurisdiction of the current EU merger regulation.

The ultimate test for the applicability of merger control emphasizes the existence of *decisive influence* and *control*. In *Aer Lingus v. the Commission* case, the General Court ruled in its judgment of 2010 that:

> "[T]he Commission […] did not have the power to require Ryanair to dispose of its shareholding in Aer Lingus. Only if such a shareholding had enabled Ryanair to control Aer Lingus by exercising *de jure* or *de facto* decisive influence on it, which is not the case here, would the Commission have had such a power under the merger regulation".[4]

At the time, Ryanair held almost 30% of minority shareholding in Aer Lingus. The Court noted that acquisitions of shareholdings which do not, as such, confer control, do not constitute a *concentration* for the purposes of the regulation. It further noted that on that particular point EU law differs from the law of some of its Member States, where the national authorities are in fact authorized under provisions of

[1] White Paper: Towards more effective EU merger control, COM(2014) 449 final, 9 July 2014, p. 5. (*White Paper*)
[2] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, art. 3(2).
[3] Commission Notice on the Notion of a Concentration [1994] OJ C385/5; Gilo and Ezrachi (2006), p. 335.
[4] Case T-411/07 *Aer Lingus Group plc v Commission* [2010] ECR II-03691, para. 78.

national law on the control of concentrations to take action in connection with minority shareholdings in the broader sense.[5]

A White Paper published by the Commission in 2014 (WP), described an existing gap in relation to cases of minority shareholding acquisition. The WP noted that "when the acquisition of a minority shareholding is **unrelated to an acquisition of control**, the Commission cannot investigate or intervene against it. The Commission can only intervene against a pre-existing minority shareholding held by one of the merging parties when control is specifically acquired".[6] Adopting a narrow approach, the Commission concluded it has no competence to deal with possible competition concerns arising from pre-existing minority shareholding acquisition, despite the fact that the competition concerns arising from minority shareholding may be similar to those that arise when control is acquired.[7]

Articles 101 and 102 of the TFEU

Where the case does not involve assuming *control* or *decisive influence* over a competitor - thereby not satisfying the threshold required for the applicability of the merger regulation, minority shareholding acquisition may still fall within the jurisdiction of articles 101 and 102 of the TFEU and thereby be prohibited. Articles 101 and 102 apply, respectively, to situations (1) that would result in anticompetitive agreement or concerted practice, and/or (2) where one party has a dominant position. Jurisprudence in recent years has established a clear legal basis for applying articles 101 and 102 to acquisition of non-controlling minority shareholdings. In the *Philip Morris* case the Court ruled 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 or distort competition on the market on which they carry on businesses".[8]

It clarified that an acquisition may serve as an instrument for influencing the commercial conduct of a competitor, where

> "[B]y 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".[9]

The Court discussed cases of passive investment and noted that the Commission must consider in particular:

> "[W]hether an agreement which at first sight provides only for a passive investment in a competitor is not in fact intended to result in a take-over of that company, perhaps at a

[5] Case T-411/07 *Aer Lingus Group plc v Commission* [2010] ECR II-03691, para. 64.
[6] *White Paper*, para. 25.
[7] *Ibid.*
[8] Cases 142/85 and 156/84 *British American Tobacco Company Limited and RJ Reynolds Industries Inc v. European Commission* [1987] ECR 4487, Para. 37 (*Philip Morris* case)
[9] *Philip Morris* case, para. 38.

> later stage, or to establish cooperation between the companies with a view to sharing the market".[10]

However, either way, the Court stressed that:

> "[I]n order for the Commission to hold that an infringement […] has been committed, it must be able to show that the agreement has the object of effect of influencing the competitive behavior of the companies on the relevant market".[11]

This reference to *agreement* highlights an existing difficulty with applying article 101 to the growing practice of horizontal minority shareholding. The language of Article 101 and its interpretation by European Courts and the Commission make it difficult to apply it to cases that do not give rise to an *agreement* or coordinated effects.[12] In the 2014 WP, the Commission discussed whether articles 101 and 102 could be used to intervene against anti-competitive acquisitions of minority shareholdings.[13] It noted that "it is not clear whether acquiring a minority shareholding would constitute an *agreement* having the *object or effect of restricting competition* in all cases". The commission specifically observed that in cases where minority shares are acquired in a series of acquisitions via the stock exchange, or in cases where articles of association in agreements generally determine the corporate governance of a company and the relationship with its shareholders; it may be difficult to conclude that these agreements meet the criteria of article 101.[14]

Advocating for an expanded EUMR that will bring minority shareholding acquisitions into the scope of jurisdiction of the Commission, the 2014 WP envisions a new notification system. This new envisioned system includes jurisdiction over minority shareholding acquisitions, where the threshold of *competitively significant link* has been met. This legal threshold consists of two cumulative criteria: acquisitions of a minority shareholding in a competitor or vertically-related company (requires the existence of a competitive relationship between the acquirer and the target); and the acquired shareholding is either around 20% or between 5% and (approximately) 20%, but accompanied by additional factors such as rights which give the acquirer a *de-facto* blocking minority, a seat on the board of directors, or access to commercially sensitive information of the target.[15] While expanding the review to cases which currently do not fall within the scope of jurisdiction; Rusu (2015) noted that restricting the framework only to deals between competitively-related parties, implies that investments made by private equity investors or banks whose business is not related to the business of the target company will not be stifled.[16]

While economic theory suggests that horizontal minority shareholdings in companies operating in concentrated markets which involves some influence over the activities of a competitor (albeit not amounting to *decisive influence*, thereby invoking the exclusive applicability of the EUMR), may facilitate or result in coordination between the companies; a narrow reading of article 101 and the *Philip*

[10] *Philip Morris* case, para. 45.
[11] *Ibid*.
[12] Gilo and Ezrachi (2006), p. 340.
[13] *White Paper*, paras. 39-41.
[14] *Ibid*, para. 40 (emphasis mine). With regards to article 102 the Commission noted that the article applied only to situations where the acquirer of the minority shareholding holds a dominant position and the acquisition constitutes an abuse (*Ibid*).
[15] *Ibid*, paras. 46-47.
[16] Rusu (2015), p. 206.

Morris decision, with their emphasis on agreement,[17] would leave cases of unilateral effects outside the scope of application.[18] Today, therefore, there seems to be an enforcement gap (no jurisdiction for review by the Commission) at the EU level in cases where a minority shareholding in a company (1) does not confer *control* or *decisive influence*, (2) is not associated with an *agreement* or concerted practice, and (3) does not involve a dominant company**.**

The US, UK and Germany, however, are examples of jurisdictions where the applicable laws of merger control do apply to acquisitions of minority shareholdings. These cases will be reviewed next.

United States

Sherman Act § 1

Sherman Act § 1 has been the traditional tool of antitrust law for addressing behavior in oligopolistic markets. The Act prohibits coordination between competitors that unreasonably limit competition. It states that:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by […]".[19]

A question arises as to what constitutes the required agreed coordination between competitors, and whether investors need to explicitly communicate their interests in order for the management to act in accordance with the interests of shareholders. This question becomes especially relevant to cases of *conscious parallelism:* under conditions of concentrated markets, the simultaneous increase in prices by a number of competitors who recognize their interdependence may be unavoidable. With nothing more in the evidentiary record except parallel price increases, are courts able to infer the existence of unlawful horizontal agreement in violation of Sherman Act § 1 based only on this circumstantial evidence.[20]

US courts have accordingly developed jurisprudence applying a threshold of *parallelism plus*. According to the legal doctrine of parallelism plus, an agreement to fix prices cannot be inferred solely from parallel pricing in the absence of additional evidence: the *plus factors*. These factors essentially operationalize the legal concept of an agreement:

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[17] *Philip Morris* case, paras. 38-39.

[18] Gilo and Ezrachi (2006) suggest that *influence* was read by the Commission as enabling control of a company in which the investment had been made (or at least some influence over its activities), but not as an independent element relating to what influence the acquisition did have on the unilateral pricing behavior of each of the invested companies. Gilo and Ezrachi (2006), p. 341.

[19] 15 U.S. Code § 1.

[20] Baker (1993) noted two reasons that make such a finding problematic: first, since parallel pricing is often unavoidable (competitors will naturally be led to charge the same prices), an injunction barring conscious parallelism is tricky because the court cannot offer a satisfactory relief: it is not practical to forbid conduct that is unavoidable. Second, finding a violation solely on the basis of parallel pricing blurs the distinction between unilateral and concerted behavior (if conscious parallelism is unavoidable, it is possible that a competitor acting innocently with no intent to agree will be held liable). Baker (1993), pp. 172-173.

1. Evidence proving that the competitors have had the opportunity for direct communication, or that they in fact communicated directly;
2. Evidence of anticompetitive intent behind the parallel conduct;
3. Behavior that would be difficult to imagine arising in the absence of detailed communication, because it appears arbitrary or unusually complex; or,
4. Behavior that would be difficult to rationalize in the absence of an agreement, including the absence of a legitimate justification for the practice.[21]

Consequently, not every parallel pricing constitutes an agreement in violation of the law. An agreement requires a process that the firms engage in, and not merely the outcome that they reach: a process that concludes when the firms convey mutual assurances that the understanding they reached will be carried out.[22] The legal doctrine of parallelism plus, in turn, allows judicial review even in cases of secret agreement among competitors. In case of horizontal minority shareholding, it may be suggested that if investors use their position to facilitate an agreement among competitors, such agreement would give rise to liability under § 1. However, as agreement is the essence of a §1 violation, it is possible that common ownership without more in the sense of the *plus factors*, does not meet the threshold required to constitute a violation of § 1 and create liability, since anticompetitive effects will necessarily be based solely on circumstantial evidence. Absent evidence indicating the plus factors, current antitrust laws provide no remedy, even where horizontal shareholdings create structural incentives for anticompetitive pricing.

Clayton Act § 7

Clayton Act § 7 has traditionally been the tool to apply in the context of mergers. It prohibits the acquisition of stocks where the effect of the acquisition or the effect of the use of the stock may result in substantially lessening competition. It determines that:

> "No person shall acquire, directly or indirectly, the whole or any part of the stock or other share capital […] of one or more persons engaged in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly".[23]

Section 7 essentially bars any merger that creates anticompetitive market structures, without requiring any evidence of post-merger conspiracy or anticompetitive conduct.[24] Additionally, the prohibition applies to acquiring shares, regardless of whether the acquisition is sufficient to attain control or appears to be a step towards control.[25] It is thus suggested that Clayton Act § 7 provides a better legal framework for antitrust

[21] *Ibid*, pp. 176-177.
[22] *Ibid*, p. 179.
[23] 15 U.S.C. § 18.
[24] Elhauge (2016), p. 1302.
[25] Annex to the Commission Staff Working Document: Towards more effective EU merger control (Annex II - Non-controlling minority shareholdings and EU merger control), SWD(2013) 239 final, 25 June 2013, para. 75. (*SWD Annex*).

enforcers to bring a case against horizontal minority shares acquisitions in cases where the structural effect of such acquisitions is anticompetitive.[26]

Absent the need to establish agreement of conspiracy, US agencies assess the competitive effect of shares acquisitions based on whether there is a reasonable probability of a substantial lessening of competition (i.e. same threshold that applies to full mergers).[27] Since US courts have not set a standard for how large a percentage of share capital must be acquired in order to raise concerns about the impact on competition; a notification requirement is triggered for any acquisition of voting securities or assets that meets the transaction-size threshold (adjusted periodically under the Act), even if the acquired amount represents a very small percentage.[28] The Hart-Scott-Rodino ("HSR") Act, however, provides a possible exemption from notification for acquisitions of 10% or less which are "solely for the purpose of investment".[29]

The passive investment exemption provides that the prohibition in Clayton Act § 7 does "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 substantial lessening of competition".[30] Relevant case law has interpreted this exception to consist of two elements: that the stock acquisition is **solely for investment**, and the acquired stock **is not actually being used to lessen competition substantially or to attempt to do so**. In the *Tracinda* case the Court stated that:

> "The statute […] do[es] support a 2-pronged test: (1) a factual determination of whether the acquisition was made solely for investment; and (2) a factual determination of whether the stock is being used by voting or otherwise to bring about or attempt to bring about a substantial lessening of competition."[31]

As for the first element, the standard that has been developed in case law for reviewing whether a stock acquisition falls within the *solely for investment* scope focuses on whether the acquisition was part of an effort to obtain influence and control in the company in which the investor acquired ownership:

> "Courts have looked at such factors as subsequent agreements restricting the use of the newly acquired stock […] and the extent to which the defendant already maintains a diversified investment portfolio as well as the price paid for the stock in comparison to the market value of the stock […]. The ultimate definitive factor the courts have looked to, however, is whether the stock was purchased for the purpose of taking over the active management and control of the acquired company. [...]. [I]n the context of a Section 7 action, this control-investment distinction is not only a valid dichotomy, but is a most useful judicial tool in tackling the investment exemption issue".[32]

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[26] Additionally, it seems that any person financially injured by a stock acquisition that creates anticompetitive horizontal shareholdings has standing to bring a claim under Clayton Act Section 7 to recover damages and to get injunctive relief ending the horizontal shareholdings. See Elhauge (2016), p. 1304.
[27] *SWD Annex* , para. 79.
[28] *Ibid*, paras. 76-77.
[29] 15 U.S.C. § 18a, subsection c9.
[30] 15 U.S. Code § 18.
[31] *United States v. Tracinda Inv. Corp.*, 477 F. Supp. 1093 (C.D. Cal. 1979).
[32] *United States v. Tracinda Inv. Corp.*, 477 F. Supp. 1093 (C.D. Cal. 1979).

Applying the standard to the merits of the *Tracinda* case, the Court found that:

> "[T]here has been absolutely no showing that the stock acquisition herein in question was made for the purpose or even with the slightest intent of controlling Columbia. […] Central to this finding is the […] contract between the defendants and Columbia, placing in concrete written form the assurances Kerkorian and Tracinda had previously orally given to the Columbia directors and management".[33]

The scope of solely for investment, therefore, depends on of whether the investor intends to exercise influence over the decisions and competitive conduct of the issuer through its investment. Gilo (2008) suggests that passivity is typically presumed (in the absence of contrary evidence) where the acquirer is required to be a passive investor with no direct influence over the operations of the issuer by statute, regulation, a consent decree, or a shareholder's agreement.[34]

As for the second element, it appears that even if the acquisition was made solely for investment, the exemption would still not apply if the stock is *de facto* being used to lessen competition substantially or is intended to lessen competition substantially. This element therefore requires the plaintiff to show evidence that the use of the stock has resulted in actual lessening of competition. In the *Tracinda* case the Court determined there was no such evidence, and ruled that:

> "[...] The Government failed to produce a single scintilla of evidence to show that Kerkorian has used, is using, or is threatening to use, the stock by voting or otherwise, to bring about or in attempting to bring about, the substantial lessening of competition. On the contrary, all the witnesses testified that there has been no actual or threatened lessening of competition since the acquisition. Accordingly, it is the determination of this Court that this acquisition of Columbia stock comes squarely within the investment exemption and thus no violation of Section 7 of the Clayton Act can be shown. And in fact none has been shown."[35]

The precise scope of "investment only" is nevertheless open to debate in relation to horizontal minority shareholdings. Elhauge (2016) suggests that this formulation of the threshold for passive investment implies that passivity only raises the standard of proof for establishing liability; and thus it is not so much an exemption as it is a different threshold. He argues that whereas active investments can be condemned under Clayton Act § 7 if they *may* substantially lessen competition, a passive investment can be condemned only if it *actually* does so or was intended to do so.[36]

Ultimately, if the exemption applies, common ownership would be exempt from §7 as long as the investor continues to play such a passive role (in accordance with the two elements). If the exemption does not apply, establishing a violation of §7 would still require evidentiary support to prove the use - or intended use - of such shareholding substantially lessens competition. This, however, may be more

[33] *United States v. Tracinda Inv. Corp*., 477 F. Supp. 1093 (C.D. Cal. 1979).
[34] Gilo (2008), p. 1648; *United States v. Tracinda Inv. Corp*., 477 F. Supp. 1093 (C.D. Cal. 1979).
[35] *United States v. Tracinda Inv. Corp*., 477 F. Supp. 1093 (C.D. Cal. 1979).
[36] Elhague 2016, p. 1308. See also Gilo (2008), p. 1648: "under U.S. case law, passive stock acquisitions are exempt from scrutiny under the incipiency test, which examines whether a transaction might (in a probabilistic sense) substantially lessen competition. Instead, the passive stock acquisition is examined under the more lenient (from the defendant's perspective) test requiring a showing that the investor is bringing about or is attempting to bring about an anticompetitive effect."

difficult to prove than it appears.[37] Since the anticompetitive effects of passive investment are usually probabilistic and hard to prove; the requirement that an acquisition made solely for investment be shown to have actual (present or future) anticompetitive effects, means - as Gilo (2008) pointed out - that in practical terms such a requirement is tantamount to a *de facto* exemption for all passive stock acquisitions.[38]

On April 2016 the White House Council of Economic Advisers issued a brief which – among other things – discussed potential areas for consideration for additional regulation. Common ownership of stocks by large institutional investors was mentioned as one such area.[39] On March 9, William Baer, Assistant Attorney General for the Antitrust Division of the DOJ, confirmed that the DOJ is investigating potential antitrust issues arising from cross-ownership in competing firms in concentrated industries. Baer however stressed that it is still unclear whether cross-ownership alone violates the existing antitrust laws.[40]

United Kingdom

The relevant statute for merger control in the UK, including for minority shareholdings, is the Enterprise Act (2002). The UK Office of Fair Trading (OFT) examines whether a merger *substantially lessens competition* (the SLC test) over time.[41] The OFT has jurisdiction to examine acquisitions of non-controlling minority shareholdings that allow an acquirer to *materially influence* the policy of a target firm (thus a lower threshold than *decisive influence* which confers control under the Merger Regulation).[42] The assessment of *material influence* is based not only on percentage shareholding (at least 15% or more) but on a portfolio of factors “focusing on the overall relationship between the acquirer and the target and on the acquirer’s ability materially to influence policy relevant to the behavior of the target entity in the marketplace”.[43]

UK merger control rules create three distinctive levels for addressing the acquisition of minority shareholdings:

1. Shareholding of 25% or more creates a presumption of material influence (such a percentage of shareholding generally enables the holder to block special resolutions).

[37] For example, if the investor can show that the exercise of market power in those companies will harm other investments in their portfolios; if the anticompetitive effects take the form of discouraging firms from entering the market to begin with (therefore there is no head-to-head competition); or, if there is no evidentiary support which is sufficient to conclude that the effects of overlapping ownership in one industry (such as the airline industry) will have the same outcome in other industries. See: Baker (2016), pp. 223-231.
[38] Gilo (2008), p. 1648.
[39] The report considered that “further study of the anti-competitive effects of common ownership is warranted given that many U.S. industries are oligopolies and that the role of institutional investors has grown over the last 30 years”. Council of Economic Advisers, *Benefits of Competition and Indicators of Market Power*, April 2016, pp. 13-14. See: https://www.whitehouse.gov/sites/default/files/page/files/20160414_cea_competition_issue_brief.pdf.
[40] Oversight of the Enforcement of the Antitrust Laws: Hearing Before the Subcommittee on Antitrust, Competition Policy and Consumer Rights, 114th Cong. (March 9, 2016), video available at: http://www.judiciary.senate.gov/meetings/oversight-of-the-enforcement-of-the-antitrust-laws-2016.
[41] For a detailed review of the SLC test, see *Merger Assessment Guidelines*, joint publication of the Competition Commission and the Office of Fair Trading, OFT1254 (Sep 2010) (’Part 4: A substantial lessening of competition’) . See: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284449/OFT1254.pdf (*Merger Assessment Guidelines)*.
[42] *SWD Annex*, paras. 69-70.
[43] The policy of the target includes the strategic direction of a company and its ability to define and achieve its commercial objectives. See: *Merger Assessment Guidelines*, para. 3.2.8.

2. Shareholding of 15%-25% is not presumed to infer material influence, but may be examined to see whether the holder *might be able* materially to influence the company's policy.
3. Material influence may exceptionally extend to shareholdings of less than 15%, but in practice such acquisitions are likely to be examined only where they concern one business taking a stake in a direct competitor.[44]

The *material influence* threshold mainly rests on two pillars: voting rights and board representation. This standard requires the authorities to consider not only the ownership of the shareholding, but other factors such as the distribution and holders of the remaining shares; patterns of attendance and voting at shareholders' meetings; the existence of special voting or veto rights attached to the shareholding; the status and expertise of the acquirer and its corresponding influence with other shareholders; special provisions in the constitution of the company conferring an ability materially to influence policy, and/or other kinds of agreements between the acquirer and the company.[45] Additionally, under certain circumstances, board representation alone is considered sufficient to confer material influence.[46]

In the *Ryanair/Aer Lingus* case, following the General Court's confirmation that EU Commission lack jurisdiction under the EUMR to order the divestiture of a non-controlling minority shareholding; the OFT referred the matter to the (national) Competition Commission (CC) in June 2012. On 28 August 2013 the CC published its report finding that Ryanair's minority shareholding had given rise to, or could in future give rise to, a substantial lessening of competition, and ordered Ryanair to sell down its shareholding from 29.8% to 5%.[47] While the Court found that the case has given rise (or could in the future give rise) to a substantial lessening of competition; Levy (2013) nevertheless argues that the report of the CC demonstrates that there are still significant legal, evidentiary and practical difficulties associated with identifying and substantiating credible theories of harm.[48]

Germany

Under the German merger regime codified in the Act against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen, "GWB"), the Bundeskartellamt can assess the acquisition of both controlling and non-controlling minority shareholdings which qualify as a *concentration* within the meaning of GWB §37. These *Concentrations* are subject to an obligation to notify under GWB §39.

[44] *Mergers: Jurisdictional and procedural guidance*, Office of Fair Trading (June 2009), paras. 3.19-3.20. See: http://webarchive.nationalarchives.gov.uk/20140402142426/http:/www.oft.gov.uk/shared_oft/mergers_ea02/oft527.pdf
[45] *Merger Assessment Guidelines*, paras. 3.2.10, 3.2.12.
[46] *Ibid,* para. 3.2.11.
[47] Ryanair Holdings plc and Aer Lingus Group plc: A report on the completed acquisition by Ryanair Holdings plc of a minority shareholding in Aer Lingus Group plc, Competition Commission (28 August 2013), see: http://webarchive.nationalarchives.gov.uk/20140402141250/http://www.competition-commission.org.uk/assets/competitioncommission/docs/2012/ryanair-aer-lingus/130828_ryanair_final_report.pdf
Ryanair's legal challenge to the report of the CC was later dismissed (on Feb 2015) by the Court of Appeals. *Ryanair Holdings Plc v The Competition And Markets Authority & Anor* [2015] EWCA Civ 83 (12 February 2015)
URL: http://www.bailii.org/ew/cases/EWCA/Civ/2015/83.html
[48] Levy points out that "the principal theory of harm relied upon by the CC was that Ryanair's minority shareholding might frustrate a merger between Aer Lingus and another unidentified EU airline that might in turn be expected to increase competition on routes between Great Britain and Ireland. However, the circumstances in which an antitrust agency will be in a position to conclude at the time the minority shareholding is acquired that, absent the acquisition of that minority shareholding, the target firm would merge with, be acquired by or acquire another company, and that such a transaction would materially enhance competition, are extremely rare. See: Levy (2013), pp. 740-741.

Whereas GWB §37(1) No 2 addresses the acquisition of control, the scrutiny of minority shareholdings below the level of control is possible on the basis of two provisions:

1. The acquisition consists of 25%-50% (minority) shares (GWB § 37(1) no 3), and
2. The qualitative criterion: the acquisition provides the acquirer with a *competitively significant influence* on the target (GWB § 37(1) no 4).[49]

German case law however shows that even where shareholdings are below 25%, there can still be additional factors that place the acquirer of the minority shareholding in a similar position to that of a 25% shareholder.[50] In the *A-Tec Industries/Norddeutsche Affinerie* case (2012), the Bundeskartellamt prohibited the acquisition of a13.75% participation by A-Tec Industries AG in Norddeutsche Affinerie. It considered that given the continuously low presence in Norddeutsche Affinierie's shareholders meetings, A-Tec's 13.75% share would have granted it a *de facto* blocking minority under corporate law comparable with the legal position granted by an acquisition of a 25% stake. The Bundeskartellamt considered that the transaction would have led to the creation of a dominant position on the market for oxygen-free copper billets.[51]

Conclusions

As far as the jurisdictions reviewed in this brief, it seems that the applicable law to the activities of passive investors depends on the extent to which they are able to exercise influence and control over the policies of their portfolio companies. Generally speaking, horizontal minority shareholding acquisitions could potentially be reviewed if the acquisition provides the investor with control over the competing companies; if the acquisition lessens competition by affording competitors access to competitively sensitive information; or, in cases falling short of control, if the shareholding - by some form of agreement, rights or other effects – provides the investor nonetheless with the ability to exert (a certain level of) influence over the companies which results in actual lessening of competition.

In practical terms, however, the current regulatory environment seems to create a presumption of excludability for passive investors holding a relatively low percentage of shares. When the percentage of shares is relatively low (25% or less, and especially under 10%), it is presumed that investors do not have the ability to exert influence or control. However, this presumption is rebuttable if contrary evidence is found (the additional factors required to rebut the presumption may be different in different jurisdictions). The burden of proof rests with the enforcement agencies, the plaintiffs, to provide sufficient evidentiary support that proves the activities (individually or collectively) of minority shareholders amounts to an ability to exert influence or control (defined differently in each jurisdiction).

Yet, this is just the first hurdle. In order to find a violation, the enforcers must show that the activities of minority shareholders bring about anticompetitive effects (the specific requirements to satisfy this

[49] *SWD Annex*, pp. 10-11.
[50] See for example: B6- 27/04 – M. DuMont Schauberg/Bonner Zeitungsdruckerei; B8-27/04 –Mainova AG / Aschaffenburger Versorgungs AG. Also see: Levy (2013), p. 724.
[51] A-Tec and Norddeutsche Affinierie were the largest competitors in the manufacture and distribution of oxygen-free copper billets in the EEA with a combined market share of well over 85%, and post-merger the Bundeskartellamt expected they would co-ordinate their behavior in the market, and customers would be left with no real alternatives to switch to another supplier. SWD Annex (2013), pp. 11-12 (referring to case B5- 198/07 - A-Tec Industries AG / Norddeutsche Affinerie AG).

threshold may differ in different jurisdictions). While various theories of harm may be relevant to horizontal shareholding, the ability to establish the causal link is more complex. More than anything, this brief highlights the need for further research on passive investments. The agenda should include research on the activities of passive investors *vis-a-vis* individual companies (to unravel additional ways of exerting *de facto* control), and specific research aiming to refine the causal link between horizontal minority shareholding and anticompetitive effects. Such research is a prerequisite to any future action or attempt to regulate and possibly reform current legal frameworks.

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