



MINORITY SHAREHOLDINGS AND THE EUMR

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DON'T MIND THE GAP, PLEASE

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WHERE IS THE GAP?

STEP 1 : MINORITY SHAREHOLDINGS UNDER THE EUMR

- Notion of “control”: mere possibility of exercising **decisive influence** over the strategic commercial behaviour
- Minority shareholding providing joint control → veto rights over:
 - **Business plan**
 - Plan must be detailed and precise; not general declarations of intent regarding commercial strategy – *Royal Bank of Scotland/Bank of Ireland*
 - Must include strategic decisions (quantitative/qualitative objectives, pricing policy, investment activities, financial plans) – *Saab Ericsson Space*

WHERE IS THE GAP?

STEP 1 : MINORITY SHAREHOLDINGS UNDER THE EUMR

- ❑ **Budget approval**
 - Must be a quantitative detailed expression of a plan of action summarizing the objectives of each department – *Conagra/Idea*
- ❑ **Appointment of senior management**
 - Must have executive powers – *Raytheon/Thales/JV*
- ❑ **Decisions on investments**
 - Level of investments is important: approval of high level investments viewed as normal protection of interests – *Bertelsmann/KKR/JV*
 - Investments an essential feature of the market concerned?

WHERE IS THE GAP?

STEP 1 : MINORITY SHAREHOLDINGS UNDER THE EUMR

IN SHORT

- A fact-sensitive and flexible test (no need to influence pricing behaviour of the target)
- Presumably low threshold already
- N.B.: Section 4.2 of Form CO

WHERE IS THE GAP?

STEP 2 : OTHER INSTRUMENTS AVAILABLE UNDER EU COMPETITION LAW?

- Minority shareholdings as part of a wider cooperation
 - Acquisition of minority stake in a competitor is often part of a wider scheme – *GM/Peugeot*
 - Potential review of the minority stake under the Guidelines for horizontal cooperation agreements and the Guidelines on vertical restraints
 - Self-assessment

WHERE IS THE GAP?

STEP 2 : OTHER INSTRUMENTS AVAILABLE UNDER EU COMPETITION LAW?

- Minority shareholdings as conduit to access or share business sensitive information (e.g. to facilitate collusive outcome)
 - Case-by-case assessment – is the risk material?
 - What are the corporate governance and compliance rules?
 - What kind of information does the management pass on to the BoD and shareholders?
 - What are the directors' fiduciary duties (exposure to conflicts of interest)?

HERE IT IS :

EUMR

Decisive influence

Self-assessment:
cooperation and
information sharing

**SOFTENING OF MINORITY
INVESTOR'S INCENTIVES
TO COMPETE**

→ **GAP**

OTHER WAYS TO LOOK AT THE GAP

- Some national merger control regimes – Austria, Germany, the UK – cover minority shareholdings not captured by the EUMR
 - Is this a problem?

- Art. 8(4) EUMR: “Residual” minority shareholding following a prohibited/abandoned concentration
 - *Aer Lingus/Ryanair*

WORDS OF CAUTION

- Take account of existing framework
- Need for a balanced/proportional approach: do not use a sledgehammer to crack a nut
 - Resources within DG Comp? Additional costs on business community?
- Potential spill-overs : use of “control” and “decisive influence” in other fields of law (e.g. cartels, export control) and accounting
 - Legal certainty?
 - Will the way deals are made be affected?