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”Controlling” the Shifting Sands: Minority Shareholdings Under EEC Competition Law

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Abstract

Significant shifts have occurred during the past three years in the control thresholds that determine whether an acquisition of a minority shareholding will be subject to one or more EEC competition laws. The scope and effects of these shifts are neither clear nor necessarily consistent. The Commission appears on the one hand to have expanded the Merger Regulation’s concept of decisive influence to reach a variety of minority shareholdings previously falling within the Philip Morris influence standard, while on the other hand to have expanded the Philip Morris influence standard to reach not only transactions previously thought to be passive (i.e. no influence), but perhaps also concentrations that are normally subject to the exclusive jurisdiction of the Merger Regulation, vis-à-vis Articles 85 and 86. Whether these control thresholds will continue to shift is critically important to firms contemplating the legal certainty of their future investments. Eventually, the Commission may conclude that the potential benefits of “flexible” control thresholds are outweighed by the costs, such as reduced legal certainty, higher transaction costs (both public and private) and slower decisionmaking capabilities. Simpler, albeit less flexible, thresholds may ultimately be required to control these shifting sands.

ARTICLES

"CONTROLLING" THE SHIFTING SANDS: MINORITY SHAREHOLDINGS UNDER EEC COMPETITION LAW*

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INTRODUCTION

A common issue under all antitrust regimes is when should a minority shareholding, either alone or combined with other factors, trigger application of merger control and restrictive

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practices legislation?[1] Virtually all jurisdictions, including the European Community, focus on different gradations of "control" as the principal litmus test. The boundaries of each control threshold that triggers application of a particular jurisdiction's antitrust laws are of fundamental importance to companies and their advisors when contemplating a wide variety of investments.[2]

EEC competition law has focused on three relevant control thresholds: "decisive influence," "influence" and "no influence" (i.e. a passive investment). During the past three years, there has been a significant evolution or "shifting" of these control thresholds, occurring primarily on two fronts.

First, the Commission of the European Community ("Commission") has expanded the concepts of sole and, especially, joint control that are deemed to constitute "decisive influence" under the EEC Merger Regulation.[3] These concepts have been expanded to reach progressively smaller minority shareholdings and more modest corporate governance rights. As a result, a substantial number of minority shareholding transactions have been shifted from potential review under Articles 85 and 86 of the EEC Treaty to the jurisdiction of the Merger Regulation or Member State merger control laws.[4]

Second, in its recent *Gillette* decision[5] the Commission expanded the concept of "influence" that triggers application of

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1. Minority shareholdings can take several forms, including joint ventures, "one-way" minority stock acquisitions, and cross-shareholdings. For purposes of this article, we also include non-voting equity interests, financing arrangements, and interlocking directors or management within the general concept.

2. The control thresholds that trigger application of Member State and other national antitrust merger control and restrictive practices legislation are outside the scope of this Article. Several publications provide useful insight into the minority acquisition rules of a variety of jurisdictions. *See, e.g.*, STEPHEN AXINN ET AL., ACQUISITIONS UNDER THE HART-SCOTT-RODINO ANTITRUST IMPROVEMENTS ACT (1993); Barry E. Hawk, *Member State Merger Controls, in* II UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE, Chap. 15, Supp. 1992; J. WILLIAM ROWLEY & DONALD I. BAKER, INTERNATIONAL MERGERS: THE ANTITRUST PROCESS (1991).

3. Council Regulation No. 4064/89 , O.J. L 395/1 (1989), *corrected version in* O.J. L 257/13 (1990) [hereinafter Merger Regulation].

4. *Compare, e.g.*, Mitchell Cotts/Sofiltra, O.J. L 41/31 (1987), [1988] 4 C.M.L.R. 111 (representing early Commission interpretation) *with, e.g.*, Thomas Cook/LTU/West LB, O.J. C 199/12 (1992), Case No. IV/M.229 (Eur. Comm'n July 14, 1992) ¶ 8, *reprinted in* EEC MERGER CONTROL REP. (Oct. 1992) at 815-19 (representing one of many joint control cases decided under Merger Regulation).

5. Warner-Lambert/Gillette and BIC/Gillette, O.J. L 116/21 (1993), *reprinted in* Eur. Community Case (CCH Europe) at 2,039 [hereinafter Gillette].

Articles 85 and 86 to acquisitions of minority shareholdings under *Philip Morris*.[6] This expansion of the *Philip Morris* influence standard occurred in two ways. The concept was expanded to apply Article 86 to very small minority shareholdings and limited rights acquired by a dominant firm in a competitor, which the Court of Justice in the *Philip Morris* judgment indicated were either totally passive investments or, at a minimum, insufficient to enable the acquiring firm to exercise any influence over the commercial policies of the entity in which the minority shareholding was held.[7] The *Gillette* decision also appears to have expanded the *Philip Morris* influence standard by applying Article 85, in effect via the "back door," to prohibit a concentration that results in a so-called "artificial" geographic break-up of a competitor in an oligopolistic industry.[8] The *Gillette* decision raises important questions regarding the future scope of these shifts in control thresholds under EEC competition law.

I. *BEFORE THE SHIFTS BEGIN: EEC CONTROL THRESHOLDS AFTER* PHILIP MORRIS

By the beginning of 1990 three control thresholds were generally acknowledged to determine the jurisdictional scope of EEC competition laws: decisive influence, influence and no influence (passive investment).

Articles 3(1) and 3(3) of the then newly-enacted Merger Regulation provided that a direct or indirect acquisition of sole or joint control over another entity is deemed to be an acquisition of decisive influence — the primary prerequisite for a concentration.[9] A concentration is subject either to the Merger Regulation, if the Community dimension turnover thresholds are satisfied, or Member State competition laws, but not Articles 85 and 86.[10]

6. British Am. Tobacco Co. Ltd. and R.J. Reynolds Indus. Inc. v. Commission of the European Community, Joined Cases 142/84 & 156/84, [1987] E.C.R. 4487, [1988] 4 C.M.L.R. 24 [hereinafter Philip Morris].

7. *Id.* at 4575-84, ¶¶ 32-64, [1988] 4 C.M.L.R. at 58-65.

8. *See Gillette*, O.J. L 116/21, at 23, ¶ 7, *reprinted in* Eur Community Case (CCH Europe) at 2,041, ¶ 7.

9. *See* Merger Regulation, *supra* note 3, art. 3(1) & 3(3), O.J. L 257/13, at 17 (1990). All acquisitions of sole control are concentrations under the Merger Regulation. *Id.* Acquisitions of joint control must satisfy an additional jurisdictional test (i.e. they must be "concentrative" rather than "cooperative"). *Id.*

10. *See id.* art. 22(2) (disapplying Regulation 17's enforcement powers), art. 22(1)

In contrast, an acquisition of a shareholding in a competitor that does not convey decisive influence, but allows the acquiring entity to influence the commercial activities of the acquired entity, was subject to review under Articles 85 and 86, pursuant to the Court of Justice judgment in *Philip Morris*.[11] A purely passive investment, conveying no rights to exercise any influence over the acquired entity's commercial activities, fell outside the scope of EEC competition laws.

When the Merger Regulation was adopted, the Community opted not to employ bright line thresholds to determine at what point a minority shareholding passes from decisive influence to influence to no influence over the commercial activities of the acquired entity. For example, in its 1990 Joint Venture Notice the Commission acknowledged these three thresholds, but focused primarily on describing the differences between sole and joint control (i.e. different gradations of decisive influence), rather than identifying the differences among decisive influence, influence and no influence.[12] Thus, at the advent of the Merger Regulation's implementation, *Philip Morris* was the principal source of guidance to delineate the boundaries of these control thresholds.

A. *The* Philip Morris *Judgment*

In 1981 Philip Morris and Rembrandt Group Limited, which (through its wholly owned subsidiary Rothmans Holdings) controlled Rothmans International, entered into an agreement whereby Philip Morris would acquire 50% and the right to name half of the board members of Rothmans Holdings.[13] Reciprocal rights of first refusal were created, which would be triggered if either party sought to sell all or part of its interest in Rothmans Holdings. Philip Morris also acquired 50% of the convertible Rothmans International bonds held by Rothmans Holdings.

(preempting application of all Member State competition laws to concentrations with a Community dimension). O.J. L 257/13, at 24 (1990); *see also* Commission Notice, O.J. C 203/10, ¶¶ 7-14, 37-45 (1990) [hereinafter 1990 Joint Venture Notice] (reflecting Commission's oft-stated policy that Articles 85 and 86 will not be applied to concentrations).

11. *Philip Morris*, [1987] E.C.R. at 4577, ¶ 37, [1988] 4 C.M.L.R. at 59.

12. *See generally* Commission Notice, *supra* note 10, O.J. C 203/10.

13. *Philip Morris*, [1987] E.C.R. at 4568, ¶ 3, [1988] 4 C.M.L.R. at 52. Philip Morris and Rothmans International were competing tobacco products suppliers in Europe. *Id.* at 4492-505, ¶¶ 1-33, [1988] 4 C.M.L.R. at 52-58.

The parties executed cooperation agreements that contemplated joint Research & Development ("R&D"), manufacturing and distribution of tobacco products in Europe, as well as trademark licenses that gave Philip Morris the right to exploit certain Rothmans' brands in the Americas and South Africa.

After complaints were raised by two competitors (BAT and R.J. Reynolds), the Commission objected that these arrangements violated Articles 85 and 86.[14] The parties eventually restructured the deal to (i) reduce Philip Morris' holding to a direct 24.9% interest in the outstanding voting rights of Rothmans International; (ii) eliminate Philip Morris' representation on the Rothmans' board; (iii) terminate all of the cooperation agreements having any effect in the Community;[15] and (iv) implement various "Chinese Wall" provisions intended to insulate Rothmans from any influence by Philip Morris.[16] The revised agreement did not eliminate either the reciprocal rights of first refusal or Philip Morris' holding of Rothmans International's convertible bonds, although Philip Morris agreed to notify the Commission of any increase in its voting interest beyond the critical 25% threshold.[17] The Commission concluded that this arrangement no longer allowed Philip Morris and Rothmans to coordinate their activities and did not enable Philip Morris to influence Rothmans.[18]

14. *Id.* The Commission perceived that the European tobacco products market was highly concentrated and that Rothmans held a dominant position in the Benelux countries. *Id.*

15. The parties did not amend agreements to cooperate in Indonesia, Malaysia and the Philippines. *Id.*

16. These Chinese Wall provisions included an agreement not to seek or to accept competitively sensitive information about or from Rothmans or to seek or to accept any information that might influence the behavior of any of the companies in the Philip Morris group. *Id.*

17. *Id.* The rights of first refusal were actually expanded to provide that, if either party sold its interest to a third party, and the other party did not exercise its rights to acquire the interest, the selling party could be forced to dispose of its entire shareholding to a single third party or to ten or more third parties. A sale by Rembrandt also required the third party purchaser to offer to acquire all of Philip Morris' interest at the same price.

18. Rothmans Holdings retained a direct interest of 30.8% in Rothmans International's capital, representing 43.6% of the voting rights. *Id.* Philip Morris also held a direct 30.8% capital interest, but only 24.9% of the voting rights. *Id.* The remaining capital and voting rights were widely dispersed among the general public. Given the relevant corporate governance provisions, the Commission, and later the Court of Justice, viewed this as giving Rembrandt, through Rothmans Holdings, sole control over

BAT and R.J. Reynolds objected before the Court of Justice that even this revised arrangement violated Articles 85 and 86. In its judgment the Court announced that Article 85(1) applies to minority shareholdings in a competitor if they may "serve as an instrument for influencing the commercial conduct of the companies in question so as to restrict or distort competition . . . ."[19] The Court stated that this test would be satisfied under one of the following conditions:

(i) the shareholding results in legal (de jure) or de facto control;
(ii) the agreement gives the acquiring firm the possibility of reinforcing its position at a later time and thereby eventually taking effective control of the entity;
(iii) the agreement provides for or creates a structure likely to be used for commercial cooperation between the parties; or
(iv) the minority shareholding requires the firms to take into consideration each other's interests when determining commercial policy.[20]

The Court rejected the Article 85 claim on the facts, concluding, at the Commission's urging, that Philip Morris' 24.9% interest, right of first refusal, and holding of 50% of Rothmans International's convertible bonds did not satisfy any of these conditions, given the remedial measures (Chinese Wall provisions and elimination of post-acquisition cooperation agreements) imposed by the Commission.[21]

The Court summarily rejected the complainants' Article 86 claim. The Court acknowledged that an acquisition of a minority interest in a competitor can constitute an abuse of a dominant position, but only if the shareholding "results in effective

Rothmans International, whereas Philip Morris had "no influence" over Rothmans International's commercial behavior.

19. *Id.* at 4577, ¶ 37, [1988] 4 C.M.L.R. at 59.

20. *Id.* at 4577 & 4579, ¶¶ 37-40 & 48, [1988] 4 C.M.L.R. at 59-60 & 61.

21. *Id.* at 4577-84, ¶¶ 37-64, [1988] 4 C.M.L.R. at 59-65. The Court rejected complainants' argument that the right of first refusal constituted an Article 85(1) restriction because it could be used by Philip Morris to prevent any other entity from acquiring a controlling interest in Rothmans. The Court also rejected complainants' argument that the cooperation agreements covering operations outside the Community would lead to coordination of activities within the Community.

control of the other company or at least in some influence on its commercial policy."[22] The Court merely stated, without further elaboration, that its preceding Article 85 analysis established that neither of these control thresholds was met.[23]

B. *Post*-Philip Morris *Commentaries and Decisions*

The *Philip Morris* judgment elicited a variety of commentaries attempting to predict the scope of the Court's "influence" standard.[24] Most commentators sought primarily to identify the upper limits of the influence standard, with the nearly universal consensus that a variety of reasons weighed heavily against applying the standard so broadly as to allow full mergers, 100% acquisitions, or acquisitions of majority interests conveying sole control (de jure or de facto) over an acquired entity to be subject to prohibition under Article 85.[25] Except for joint bids, the Commission did not apply the *Philip Morris* influence standard to such transactions.[26]

The *Philip Morris* judgment made it clear, however, that a potentially broad array of acquisitions of minority shareholdings in a competitor could trigger the influence standard. During the three years before enactment of the Merger Regulation, the Commission proved to be increasingly willing to apply the *Philip Morris* influence standard to a growing number of minority acquisitions.

In *Mitchell Cotts/Sofiltra*[27] a joint venture agreement provided that Sofiltra would acquire a 25% interest in a competitor (the selling parent retained a 75% interest), the right to name

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22. *Id.* at 4584, ¶ 65, [1988] 4 C.M.L.R. at 65.

23. *Id.*

24. *See, e.g.*, Karen Banks, *Mergers and Partial Mergers Under EEC Law, in* 1987 Ford. Corp. L. Inst. 373, 425-27 (Barry E. Hawk ed. 1988) (discussing "influence" standard of *Philip Morris*); Christopher Bellamy, *Mergers Outside the Scope of the New Merger Regulation — Implications of the Philip Morris Judgment, in* 1988 Ford. Corp. L. Inst. 22-1, 22-19 to 22-22 (Barry E. Hawk ed. 1989) (same); Mario Siragusa, *Current Procedural and Litigation Aspects of Mergers and Takeovers, in* 1989 Ford. Corp. L. Inst. 509, 518-22 (Barry E. Hawk ed. 1990) (same).

25. *See, e.g.*, Banks, *supra* note 24, at 425-27; Bellamy, *supra* note 24, at 22-19 to 22-22; Siragusa, *supra* note 24, at 518-22; *see also Joint Ventures and Mergers Under EEC Law — Panel Discussion, in* 1987 Ford. Corp. L. Inst. 453, 460-61 (Barry E. Hawk ed. 1988) (comments of Cornelis Canenbley).

26. *See, e.g.*, Irish Distillers Group v. GC&C Brands Ltd., [1988] 4 C.M.L.R. 840; Plessey Co. v. General Electric Co., Siemens AG, [1990] E.E.C. 384.

27. Mitchell Cotts/Sofiltra, O.J. L 41/31 (1987), [1988] 4 C.M.L.R. 111.

two of the competitor's five board members, and the right to name half of the members of a newly-created shareholders' committee, which would have the right to determine a variety of commercial and investment activities of the competitor.[28] A separate agreement provided that the competitor would manufacture products using technology licensed from Sofiltra.[29] The Commission concluded that these arrangements allowed Sofiltra to influence the commercial conduct of the competitor and, thus, fell within Article 85(1).[30]

The Commission subsequently relied on *Philip Morris* to review a variety of acquisitions of minority shareholdings. The Commission intervened in a proposed acquisition by the French can manufacturer, Carnaud SA, of a 66.6% interest in Sofreb, a competing French can manufacturer, that would have resulted in a competing German can manufacturer owning the remaining 33.3% interest, because this would have created a risk of cooperation between competitors.[31] In another matter the Commission determined that the proposed acquisition by Danish Fur Sales ("Danish Fur") of a 35% interest in its largest EC competitor, Hudson's Bay and Annings ("HBA"), would enable Danish Fur to influence HBA's commercial activities, thereby triggering application of Article 85(1).[32] In a third transaction the leading Scandinavian producer of semi-manufactured copper and copper alloy products (Outokumpu) acquired a minority interest in the largest Spanish producer of the same products and executed cooperation agreements contemplating rationalization of manufacturing capacity, joint marketing, and Outokumpu's eventual exercise of options to acquire the remainder of the Spanish producer's stock.[33] The Commission intervened to ensure that this option to acquire sole control would be exercised quickly, because the minority interest and cooperation agreements created a clear risk of coordination between independent competitors,

28. *Id.* at 32-33, [1988] 4 C.M.L.R. at 114-15.

29. *Id.* at 33, [1988] 4 C.M.L.R. at 115.

30. *Id.* at 37, [1988] 4 C.M.L.R. at 122.

31. *See* Siragusa, *supra* note 24, at 526-27; COMMISSION NINETEENTH REPORT ON COMPETITION POLICY ¶ 69 (1990). The Commission dropped its objections after Carnaud agreed to purchase the 33.3% interest as well, thereby clearly transforming the transaction into an acquisition of sole control. *See* Siragusa, *supra* note 24, at 526-27; COMMISSION NINETEENTH REPORT ON COMPETITION POLICY ¶ 69 (1990).

32. *See* COMMISSION NINETEENTH REPORT ON COMPETITION POLICY ¶ 42 (1990).

33. *See id.* ¶ 65.

should the exercise of the option be delayed indefinitely. Finally, the Commission opposed KLM's acquisition of a 40% interest in a small, competing Dutch operator of scheduled and charter flights, which included the right to appoint two of the acquired entity's five board members and execution of a non-competition agreement.[34]

Commentators and the Commission focused less attention on the lower limits of the *Philip Morris* influence standard, where a minority acquisition passed from "influence" to "no influence" over a competing entity. Post-*Philip Morris* decisions did not address this issue and earlier cases provided only minimal guidance.[35]

Nonetheless, the *Philip Morris* Court clearly indicated that an acquisition of a minority interest in a competitor, including one holding a dominant position, alone would not satisfy the influence standard necessary for application of Articles 85 and 86.[36] Indeed, the Court's analysis in *Philip Morris* indicated the following "no influence" safe harbor: an acquisition of less than a 25% interest in a competitor, even if it includes rights of first refusal or similar preemption rights over other shareholders' interests *and* a substantial holding of the acquired entity's outstanding debt (i.e. convertible bonds), nonetheless would *not* trigger the *Philip Morris* influence standard if (i) the acquiring firm obtained no special control (e.g., veto) rights over the acquired entity's commercial or competitive activities, beyond those rights provided to minority shareholders under normal

34. *See* COMMISSION TWENTY-FIRST REPORT ON COMPETITION POLICY ¶ 90 (1992). The Commission later dropped its objections after KLM provided "guarantees" that it would deal with the acquired entity at arms length and the Dutch government agreed to open gate access to other competitors. *Id.* ¶ 92.

35. *See, e.g.*, Mecaniver/PPG, O.J. L 35/54 (1985). Mecaniver sold 81% of its 100% interest in Boussois, its French flat glass manufacturing subsidiary, to PPG, a major worldwide producer of flat glass. In addition to the retained 19% voting interest and minority board representation in Boussois, Mecaniver had a 20% interest in a Spanish flat glass producer. *Id.* at 55, ¶¶ 4-7. The Commission granted a negative clearance, finding that the transaction did not fall within Article 85(1) because (i) Mecaniver could not influence the competitive behavior of either Boussois or the Spanish entity given that full and effective (i.e. sole) control was vested in the majority shareholder of each entity; (ii) the majority shareholder in each entity had an option to acquire Mecaniver's minority interests; and (iii) the Commission perceived Mecaniver's minority interests as temporary because Mecaniver had announced its intent to withdraw from the flat glass industry. *Id.* at 56, ¶ 14.

36. [1987] E.C.R. at 4577, ¶ 37, [1988] 4 C.M.L.R. at 59.

corporate governance provisions; (ii) the acquiring firm obtained no right to name any members of the acquired entity's board or management; (iii) the transaction did not involve agreements providing for post-closing cooperation or coordination of the parties' competing activities in the Community;[37] and (iv) the parties implemented Chinese Wall provisions to minimize the risk of information exchanges or other methods to facilitate collusion between the parties.[38]

C. *Summary*

On the eve of implementation of the Merger Regulation, the boundaries of the three control thresholds that determine the application of EEC competition laws appeared to have achieved a modest, albeit imperfect, degree of clarity. "Decisive influence" clearly included full mergers, 100% acquisitions and acquisitions of majority interests conveying sole control over the acquired entity. The boundaries of the *Philip Morris* influence standard, although far from clear, appeared to include a potentially broad array of acquisitions of minority shareholdings. The Commission's increasingly expansive standard for minority acquisitions before implementation of the Merger Regulation suggested that the upper boundary of the influence standard, below which decisive influence did not exist, included many transactions involving substantial minority interests (i.e. in the 25%-40%+ range).[39] The Court's judgment in *Philip Morris* suggested that most acquisitions of more than a 25% interest fell above the lower boundary of the influence standard, given that (i) they often involve shareholders agreements allocating specific control rights to minority shareholders, and (ii) many national laws give minority shareholders with interests above 25% minimal control rights over a limited range of corporate issues.[40] Acquisi-

37. *Id.* at 4577-81, ¶¶ 41-53, [1988] 4 C.M.L.R. at 60-62. Philip Morris and Rothmans were allowed to retain cooperation agreements that related solely to their operations in Indonesia, Malaysia and the Philippines. *Id.* at 4580, ¶ 52, [1988] 4 C.M.L.R. at 62.

38. *Id.* at 4579, ¶ 47, [1988] 4 C.M.L.R. at 61.

39. *See supra* notes 27-34 and accompanying text (discussing cases applying *Philip Morris* standard).

40. *See supra* notes 13-23 (discussing 25% boundary). For example, greater than 25% minority shareholders enjoy an automatic "blocking minority" under German corporate law, allowing them to veto such non-management issues as changes to the articles of association, execution of agreements regarding distribution of profits or control

tions of minority interests below 25% appeared to fall within the "no influence" safe harbor if there were no agreements giving the minority shareholder extraordinary corporate governance rights or providing for ongoing commercial cooperation within the Community and if there were Chinese Wall provisions or other protections against the risk of tacit collusion. Commission decisions since the Merger Regulation implementation have significantly altered the boundaries that appeared to exist at the advent of the Merger Regulation's implementation.

II. *THE SANDS BEGIN TO SHIFT: EXPANDING THE CONCEPT OF DECISIVE INFLUENCE UNDER THE MERGER REGULATION*

Even before the Merger Regulation was implemented, certain acquisitions of minority shareholdings undoubtedly could satisfy the Regulation's decisive influence threshold.[41] However, the scope of minority acquisitions that would satisfy the decisive influence standard was uncertain, given that the Commission during the prior several years appeared increasingly willing to apply Article 85, pursuant to the *Philip Morris* influence standard, to a variety of minority acquisitions.[42]

This trend, however, was quickly reversed after the 1990 implementation of the Merger Regulation. Since that time the Commission has adopted an increasingly expansive interpretation of the decisive influence standard to reach a growing array of minority acquisitions, many of which before 1990 would have fallen within the *Philip Morris* influence standard.[43]

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of the entity's operations, and the recall of members of the entity's supervisory board. *See* M. HEIDENHAIN & H. SCHNEIDER, GERMAN ANTITRUST LAW 80-82, ¶¶ 271-76 (4th ed. 1991).

41. *See, e.g.*, Merger Regulation, *supra* note 3, O.J. L 257/13, at 14, ¶ 3; 1990 Joint Venture Notice, *supra* note 10, O.J. C 203/10, at 11, ¶¶ 10-14.

42. *See supra* notes 27-38 and accompanying text (demonstrating Commission willingness to apply Article 85). The Commission's willingness to expand its application of the *Philip Morris* influence standard was probably best explained by the Council's continued refusal to enact a Community merger control law.

43. *Compare* Mitchell Cotts/Sofiltra, O.J. L 41/31 (1987) (representing early Commission interpretation according to *Philip Morris* standard) *with* Thomas Cook/LTV/West LB, *cited in* O.J C 199/12 (1992), Case No. IV/M.229 (Eur. Comm'n July 14, 1992) ¶ 8, *reprinted in* EEC MERGER CONTROL REP. (Oct. 1992) at 815-19 (representing one of many joint control cases decided under Merger Regulation).

A. *Sole Control*

Nearly all transactions involving acquisitions of sole control are full mergers, 100% acquisitions or acquisitions of majority interests. The issue whether an acquisition of a minority shareholding constitutes sole control has arisen only occasionally under the Merger Regulation, primarily because such transactions typically raise joint control, rather than sole control issues. The few decisions, however, reveal that a minority shareholder may exercise sole control in two situations.

First, a minority shareholder may, pursuant to corporate governance provisions, shareholders agreements or otherwise, have the right to determine the strategic, commercial and competitive activities of the entity in which it holds the minority interest, as opposed to the right merely to determine issues that affect only the value of the minority shareholder's investment.[44] If the minority shareholder is the only shareholder that has the right to determine the entity's strategic, commercial and com-

44. *See, e.g.*, PepsiCo/General Mills, *cited in* O.J. C 228/6 (1992), Case No. IV/M.232 (Eur. Comm'n Aug. 5, 1992) ¶ 7 *reprinted in* EEC MERGER CONTROL REP. (Oct. 1992) at 838; Eridania/ISI, *cited in* O.J. C 204/12 (1991), Case No. IV/M.062 (Eur. Comm'n July 20, 1991) ¶¶ 3-5 *reprinted in* EEC MERGER CONTROL REP. (Mar. 1992) at 303-04. The Commission has drawn a distinction between rights to determine the strategic, commercial and competitive activities of an entity (e.g., business and strategic plans, hiring/firing of senior management) versus rights typically created under national laws that enable the minority shareholder merely to protect the value of its investment (e.g., corporate decisions affecting incorporation, changes in legal headquarters, dissolution or winding up, dividends). *See, e.g.*, PepsiCo/General Mills, *cited in* O.J. C 228/6 (1992), Case No. IV/M.232 (Eur. Comm'n Aug. 5, 1992) ¶ 7; Eridania/ISI, *cited in* O.J. C 204/12 (1991), Case No. IV/M.062 (Eur. Comm'n July 20, 1991) ¶¶ 3-5.

The term "strategic, commercial and competitive activities" is used throughout this article to describe the category of issues and activities focused upon by the Commission in its sole and joint control analyses. *See, e.g.*, Ericsson/Hewlett-Packard, *cited in* O.J. C 83/5 (1993), Case No. IV/M.292 (Eur. Comm'n Mar. 12, 1993) ¶ 6; Philips/Thomson/SAGEM, *cited in* O.J. C 22/2 (1993), Case No. IV/M.293 (Eur. Comm'n Jan. 18, 1993) ¶ 11, *reprinted in* EEC MERGER CONTROL REP. (Apr. 1993) at 986; Harrisons & Crosfield/AKZO, *cited in* O.J. C 128/5 (1993), Case No. IV/M.310 (Eur. Comm'n Apr. 29, 1993) ¶ 7. Although the types of issues and activities within this category have remained constant, the Commission (especially in recent cases) has used a variety of different "labels" to describe the category. *See, e.g.*, Ericsson/Hewlett-Packard, *cited in* O.J. C 83/5 (1993), Case No. IV/M.292 (Eur. Comm'n Mar. 12, 1993) ¶ 6 ("fundamental business decisions and . . . commercial and competitive strategy"); Philips/Thomson/SAGEM, *cited in* O.J. C 22/2 (1993), Case No. IV/M.293 (Eur. Comm'n Jan. 18, 1993) ¶ 11 ("major strategic decisions"); Harrisons & Crosfield/AKZO, *cited in* O.J. C 128/5 (1993), Case No. IV/M.310 (Eur. Comm'n Apr. 29, 1993) ¶ 7 ("important policy matters").

petitive activities, it has sole control.[45]

Second, if the minority shareholder does not enjoy such rights, it will be deemed to acquire sole control over the entity only when (i) the remaining shareholder interests are widely dispersed among numerous other shareholders, rather than one or a few other significant shareholders; (ii) a sufficiently small percentage of these other shareholders vote at shareholder meetings, so that the minority shareholder's interest is likely to represent a majority of all votes cast at future meetings; *and* (iii) no other shareholder is deemed to share joint control over the acquired entity.[46]

Arjomari-Prioux/Wiggins Teape Appleton,[47] one of the first decisions under the Merger Regulation, illustrates an early application of these principles. Although Arjomari had no extraordinary control rights, the Commission found that Arjomari's acquisition of a 39% voting stock interest in Wiggins Teape constituted an acquisition of sole control because the remaining 61% was widely dispersed among 107,000 other shareholders, with the next largest shareholder owning slightly less than a 4% interest.[48]

The Commission expanded its analysis a year later in *Mediobanca/Generali*.[49] The Commission considered whether Mediobanca's increase in its voting stock interest in Generali from 5.98% to 12.84% constituted an acquisition of sole control.[50] The parties claimed, and the Commission accepted, that Mediobanca enjoyed no special control rights over Generali (such as

45. *E.g.*, CCIE/GTE, *cited in* O.J. C 258/12 (1992), Case No. IV/M.258 (Eur. Comm'n Sept. 25, 1992) ¶¶ 2-9, *reprinted in* EEC MERGER CONTROL REP. (Jan. 1993) at 113-15, 119-20 (setting forth Commission finding that 19% shareholder exercised sole control, where 81% shareholder, an investment banking firm, had ceded extraordinary control rights to minority shareholder, including veto right over all board and shareholder issues, and had delegated all its management powers to two executive employees of acquired entity).

46. *E.g.*, Mediobanca/Generali, *cited in* O.J. C 334/23 (1991), Case No. IV/M.159 (Eur. Comm'n Dec. 19, 1991) ¶¶ 6-11, *reprinted in* EEC MERGER CONTROL REP. (Oct. 1991) at 23.

47. Arjomari-Prioux/Wiggins Teape Appleton, *cited in* O.J. C 321/16 (1990), Case No. IV/M.025 (Eur. Comm'n Dec. 10, 1990) ¶ 4, *reprinted in* EEC MERGER CONTROL REP. (Oct. 1991) at 23.

48. *Id.*

49. Mediobanca/Generali, *cited in* O.J. C 334/23 (1991), Case No. IV/M.159 (Eur. Comm'n Dec. 19, 1991) ¶¶ 6-11, *reprinted in*, EEC MERGER CONTROL REP. (Apr. 1992) at 610-11.

50. *Id.*

veto rights under supermajority clauses or the right to name directors or management).[51] However, because the 12.84% interest would represent the largest, or one of the largest, individual shareholdings in Generali, the Commission compared the size of this shareholding to the total shareholder interests that normally participated in ordinary shareholders meetings.[52] During the previous five years, between 26.4% and 34.4% of total shareholder interests had voted at ordinary shareholder meetings, a range that the Commission assumed would likely increase by the percentage Mediobanca proposed to acquire (i.e., the range would likely increase to between 33.24% and 41.24%).[53] The Commission concluded that there was no possibility for Mediobanca to exercise sole control because the 12.84% interest could not alone constitute a majority at shareholders meetings where at least 33% of total shareholder interests would be voting.[54]

In mid-1993 the Commission refined its analysis even further in *Société Générale de Belgique/Générale de Banque*.[55] SGB increased its voting stock interest in GDB from 20.94% to 25.96% by acquiring 725,000 shares from GDB's next largest shareholder (AG Group), whose interest declined from 14.69% to below 5%.[56] The Commission first noted that, before the transaction, neither SGB nor any other entity exercised control over GDB within the meaning of Article 3(3) because, at the last three shareholder annual meetings, SGB's 20.94% interest represented only 43.02%, 47.68% and 45.70% of the total shares voted (present or represented) at the meeting. SGB argued in

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51. *Id.* The Commission also found that there were no shareholders agreements providing for block voting or other "pooling" of Mediobanca's minority interest with the interests of other shareholders, which might indicate that Mediobanca and other shareholders exercised joint control over Generali. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* Three other minority shareholders in *Generali* subsequently filed an unsuccessful suit with the Court of First Instance alleging that Mediobanca had failed to reveal a de facto block voting agreement with another shareholder, which allegedly enabled them to exercise joint control. *See* Zunis Holding S.A. v. Commission, Case No. T-83/92 (Ct. First Instance Oct. 28, 1993) (not yet reported).

55. Société Générale de Belgique/Générale de Banque, Case No. IV/M.343 (Aug. 3, 1993) ¶¶ 5-14.

56. AG Group also divested 1.14 million shares in GDB to other shareholders, none of which apparently held more than 5% of GDB after the transactions were completed.

its Form CO notification that, after the transaction, its 25.96% interest would represent 56.62% of the total shares voted at the shareholders meetings, even assuming (1) all GDB shares retained by AG Group or sold to other shareholders would be voted, and (2) all other shareholders would vote the same percentage of their interests as at the last shareholders meeting. The Commission, while neither accepting nor rejecting these assumptions, agreed that SGB would likely be able to exercise more than 50% of the voting rights actually cast at future shareholders meetings, even under the more stringent assumption that all shareholders holding more than a 0.06% interest in GDB would vote their entire interest at the shareholders meeting.[57] The Commission concluded that SGB would therefore be able to exercise sole control over GDB, given that a majority vote by shareholders determined the composition of GDB's Management Board, which in turn determined such strategic issues as the business plan and budget.[58]

B. *Joint Control*

The Commission has been paricularly expansive in its application of the joint control concept of Article 3 to progressively smaller minority shareholdings and related control rights. As a result, minority shareholdings in the 10%-25% range, and in some cases even lower, have been found to constitute joint control. In these situations the Commission has relied on two joint control tests, which for descriptive convenience we have labelled the "unilateral rights" and "shifting alliances" joint control tests.

Under the "unilateral rights" test, a minority shareholder may exercise joint control if, through corporate governance provisions, shareholders agreements or otherwise, it has either positive control or, at a minimum, negative control, such as a veto or approval right, over the strategic, commercial and competitive

57. Indeed, the Commission noted that a total of 900,000 votes would have to be cast by shareholders holding individual interests *below* 0.06% in order for SDB's interest to fall below 50% of votes cast at future shareholders meetings, which was extremely unlikely given that such shareholders, as a group, had never cast more than 200,000 votes at prior meetings. The group collectively held 54.12% of GDB's outstanding shares.

58. Control was not defeated by the fact that Belgian banking laws required that GDB's board membership be approved by a government commission because the board retained the power to determine GDB's strategic, commercial and competitive policies.

activities of the entity in which it holds the minority interest.[59] If at least one other shareholder is deemed to exercise positive or negative control over the entity's strategic, commercial and competitive activities, the entity is jointly controlled.[60]

Under the "shifting alliances" test, joint control may exist if, through a holding company, block voting agreements or other "pooling" arrangements, (i) the minority shareholder "groups" its interest with the interests of one or more other shareholders, (ii) there is no possibility of "shifting alliances" between these "grouped" interests, and (iii) in the aggregate the grouped interests have the right to exercise either positive or negative control over the strategic, commercial and competitive activities of the entity in which the interests are held.

A typical application of the "unilateral rights" test is presented in *Thomas Cook/LTV/West LB*,[61] where a travel agency acquired 90% of another travel agency and a bank acquired the remaining 10%. The bank was deemed to share joint control because the shareholders agreement gave it extraordinary unilateral control rights over the acquired entity.[62] The same principles were applied to find joint control in *Northern Telecom/Matra Telecommunication*,[63] a two-parent joint venture involving 80% and 20% interests.[64]

59. *See, e.g.*, Thomas Cook/LTU/West LB, *cited in* O.J. C 199/12 (1992), Case No. IV/M.229 (Eur. Comm'n July 14, 1992) ¶ 8, *reprinted in* EEC MERGER CONTROL REP. (Oct. 1992) at 815-19. Negative control rights, such as veto or prior approval rights, may be contrasted with positive control rights, such as the right to appoint key management or to define commercial policy. Joint control often exists when one shareholder, typically the majority shareholder, has positive control that is subject to a potential exercise of the minority shareholder's negative (veto) control rights.

60. *Id.*

61. *Id.*

62. The bank had (i) the right to name five of the entity's ten directors, the 90% shareholder had the right to name only two directors and the remaining three directors were to be jointly named; and (ii) a further right to name the chairman of the board, who would have a casting vote. *Id.* The consent of both shareholders was required for strategic, commercial, and competitive decisions, such as approval of the acquired entity's annual and five-year business plans, material changes in the entity's business, major financial and acquisition/divestiture proposals and hiring/firing of senior employees. The bank also loaned most of the funds to allow the other parent to acquire its 90% interest.

63. Northern Telecom/Matra Telecommunication, *cited in* O.J. C 240/15 (1992), Case No. IV/M.249 (Eur. Comm'n Aug. 10, 1992) ¶¶ 6-7, *reprinted in* EEC MERGER CONTROL REP. (Apr. 2, 1993) at 851-52.

64. Northern Telecom's initial 20% investment in Matra's existing telecom subsidiary included (i) an option to increase the interest by at least another 20% by the end of

Variations of the "shifting alliances" test have been applied in several cases. In some situations minority shareholdings are literally pooled into a holding company to enable the aggregated interest to exercise control over the acquired entity.[65] In other cases the minority shareholders execute agreements that require the shareholders either to vote together as a block or to require unanimous votes, which ensure that all parents must agree on the acquired entity's strategic, commercial and competitive activities.[66]

Commission commentators have indicated that at least one of these joint control tests must be satisfied in order for joint control to be found.[67] Indeed, in a few cases where two or more shareholders did not each have either positive or negative control rights over the acquired entity's strategic, commercial and competitive activities and there was a risk of "shifting alliances,"

1997; and (ii) a shareholders agreement provision that all fundamental business decisions, business plans and budgets, and appointment of the venture's chairman required unanimous parental approval. *Id.*

65. *See, e.g.*, UAP/Transatlantic/Sun Life, *cited in* O.J. C 296/12 (1991), Case No. IV/M.141 (Eur. Comm'n Nov. 11, 1991) ¶¶ 6-10, *reprinted in* EEC MERGER CONTROL REP. (Apr. 1992) at 485-86 (parents contribute separate 27.7% interests in Sun Life to newly formed holding company that is 50-50% owned and jointly controlled by parents); ABC/Generale des Eaux/Canal/W.H. Smith TV, *cited in* O.J. C 244/5 (1991), Case No. IV/M.110 (Eur. Comm'n Sept. 10, 1991) ¶¶ 5-7 & 9, *reprinted in* EEC MERGER CONTROL REP. (Mar. 1992) at 361-63 (ESPN, GdI and Canal+ acquire W.H. Smith's television sports programming business by forming CV1, which is 50-50% owned by ESPN and CV2, a separate holding company that is 50-50% owned by GdI and Canal+; Commission finds CV1 to be jointly controlled by ESPN, GdI and Canal+ because CV2 is jointly controlled by GdI and Canal+).

66. *See* Sunrise, *cited in* O.J. C 18/15 (1992), Case No. IV/M.176 (Eur. Comm'n Jan. 13, 1992) ¶¶ 11-13 & 15, *reprinted in* EEC MERGER CONTROL REP. (Apr. 1992) at 622-23 (unanimity required among five parents each holding between 15% and 25% interests); Kelt/American Express, *cited in* O.J. C 223/38 (1991), Case No. IV/M.116 (Eur. Comm'n Aug. 20, 1991) ¶ 5, *reprinted in* EEC MERGER CONTROL REP. (Mar. 1992) at 341-42 (unanimity required among eight parents holding unstated minority interests); Dräger/IBM/HMP, *cited in* O.J. C 236/6 (1991), Case No. IV/M.101 (Eur. Comm'n June 28, 1991) ¶ 4, *reprinted in* EEC MERGER CONTROL REP. (Dec. 1991) at 233 (unanimity required among three parents each holding 33.3% interest); *see also* JC-SAT/SAJAC, Case No. IV/M.346 (Eur. Comm'n June 30, 1993) ¶¶ 4-5 (joint control found to be shared by four largest shareholders, holding 27%, 23%, 22% and 22% interests, where each minority shareholder had right to name two of venture's ten board members, but the unanimous consent of all four shareholders was required for (i) naming remaining two board members, and (ii) such matters as determination of venture's medium and long term management plans and all important issues relating to management of venture).

67. *See* Christopher Jones & F. Enrique González-Diáz, THE EEC MERGER REGULATION § 1.2.2 (Colin Overbury ed., 1992).

the Commission has indicated that joint control is absent.[68] Nonetheless, several more recent cases suggest that the Commission may be applying these tests more flexibly, thereby further expanding the range of minority shareholdings that constitute joint control under the Merger Regulation.

For example, the Commission has found that a minority shareholder exercises joint control, despite the fact that neither the "unilateral rights" nor "shifting alliances" test was met.[69] *Avesta/British Steel/NCC/AGA/Axel Johnson* involved a newly formed joint venture in which the ownership structure was 40%, 25.1%, 7.54%, 7.23% and the remainder was widely dispersed to the public.[70] The Commission found that the four largest shareholders, including the two 7%-8% shareholders, exercised joint control, even though the shareholders agreement provided that approval of each of the two largest shareholders and only one of the two 7%-8% shareholders was required for strategic, commercial and competitive issues, such as approval of the joint venture's annual operating budget and business plan, appointment or dismissal of the venture's Managing Director and acquisitions or sales exceeding a certain value.[71] Similarly, in *Philips/Thomson/SAGEM*[72] the Commission found joint control to be shared among an 80% and two 10% shareholders, even though the

68. *See* Eureko, *cited in* O.J. C 113/12 (1992), Case No. IV/M.207 (Eur. Comm'n Apr. 27, 1992) ¶¶ 6-12, *reprinted in* EEC MERGER CONTROL REP. (Aug. 1992) at 748-49 (Commission indicates that joint control is probably absent where four insurance companies form joint venture in which they will hold approximately equivalent minority interests and none will have extraordinary veto or other control rights; Commission emphasizes that virtually all fundamental decisions of board and at shareholders meetings are subject to simple majority votes, thereby creating risk of "changing alliances"); Koipe-Tabacalera/Elosua, *cited in* O.J. C 227/10 (1992), Case No. IV/M.117 (Eur. Comm'n July 28, 1992) ¶¶ 6-9, *reprinted in* EEC MERGER CONTROL REP. (Jan. 1993) at 828-24 (Commission indicates that joint control is not present where Spanish state and private company will each acquire 40% of Elosua, with Elosua's workers council holding remaining 20%, where there are no corporate governance rights giving any shareholder positive or negative control rights over Elosua's strategic, commercial, and competitive activities and there is clear risk of shifting alliances because such activities are to be decided by simple majority votes).

69. Avesta/British Steel/NCC/AGA/Axel Johnson, *cited in* O.J. C 258/9 (1992), Case No. IV/M.239 (Eur. Comm'n Sept. 4, 1992) ¶¶ 7-12, *reprinted in* EEC MERGER CONTROL REP. (Jan. 1993) at 874-75.

70. *Id.*

71. *Id.* Thus, neither 7%-8% shareholder had a negative veto right and there was a risk of shifting alliances, since the consent of only one of these shareholders was sufficient to implement any action proposed by the two largest shareholders.

72. Philips/Thomson/SAGEM, *cited in* O.J. C 22/2 (1993), Case No. IV/M.293

shareholders agreement required merely a supermajority vote just above 80% on strategic joint venture decisions.[73]

Other decisions suggest that the Commission may be willing to find the "unilateral rights" test to be satisfied even if the minority shareholder has a veto or other control right over only one, or a very few, of the issues that have been identified by the Commission as determining an acquired entity's strategic, commercial and competitive activities. In *Ericsson/Hewlett-Packard*[74] the majority (60%) shareholder had the right to name four of the acquired entity's seven board members. All board and shareholder votes were by simple majority, except for a limited number of issues requiring unanimity.[75] Although all but one of the unanimity issues listed in the decision are types that the Commission in previous cases has identified as merely protecting the value of a minority shareholder's investment (i.e. *not* affecting the entity's strategic, commercial or competitive activities), the Commission nonetheless found the minority shareholder to enjoy joint control because the one remaining unanimity issue was approval of the acquired entity's business plan or budget — an issue that the Commission has consistently described as affecting strategic, commercial and competitive activities.[76]

(Eur. Comm'n Jan. 18, 1993) ¶¶ 8-11, *reprinted in* EEC MERGER CONTROL REP. (Apr. 1993) at 986.

73. Thus, the majority shareholder needed only the consensus of one of the two 10% shareholders, creating a clear risk of shifting alliances. *Id.*

74. Ericsson/Hewlett-Packard, *cited in* O.J. C 83/5 (1993), Case No. IV/M.292 (Eur. Comm'n Mar. 12, 1993) ¶ 6 *reprinted in* EEC MERGER CONTROL REP. (May 1993) at 1007.

75. *Id.*

76. *Id.* Indeed, the Commission has indicated in other decisions that a veto or approval right over the business plans of an entity is perhaps the most significant power affecting the entity's strategic, commercial and competitive activities. *See* Ingersoll Rand/Dresser, *cited in* O.J. C 86/15 (1992), Case No. IV/M.121 (Eur. Comm'n Dec. 18, 1991) ¶ 8, *reprinted in* EEC MERGER CONTROL REP. (Eur. Comm'n Apr. 1992) at 538; Saab Ericsson Space, *cited in* O.J. C 17/10 (1992), Case No. IV/M.178 (Eur. Comm'n Jan. 13, 1992) ¶¶ 4-6, *reprinted in* EEC MERGER CONTROL REP. (Apr. 1992) at 627-28.

It should be noted that the minority shareholdings in all three cases were relatively high (40%, 40% and 49%, respectively). Ericsson/Hewlett-Packard, *cited in* O.J. C 83/5 (1992), Case No. IV/M.292 (Eur. Comm'n Mar. 12, 1993) ¶ 6; Ingersoll Rand/Dresser, *cited in* O.J. C 86/15 (1992), Case No. IV/M.121 (Eur. Comm'n Dec. 18, 1991) ¶ 8, *reprinted in* EEC MERGER CONTROL REP. (Eur. Comm'n Apr. 1992) at 538; Saab Ericsson Space, *cited in* O.J. C 17/10 (1992), Case No. IV/M.178 (Eur. Comm'n Jan. 13, 1992) ¶¶ 4-6, *reprinted in* EEC MERGER CONTROL REP. (Apr. 1992) at 627-28. This might suggest an inverse relationship between the size of the minority shareholding and the mag-

Fletcher Challenge/Methanex[77] also suggests that the Commission is increasingly willing to find joint control even in situations where it is uncertain whether at least two shareholders satisfy one of the Commission's joint control tests.[78] Metallgesellschaft AG ("MG") owned 32% of Methanex, with the remaining interests widely dispersed among the public.[79] Fletcher Challenge ("Fletcher") and Methanex agreed that Fletcher would contribute its worldwide methanol business to Methanex in exchange for a stock issue that would give Fletcher a 44% interest in Methanex and dilute MG's interest to 10%.[80] Fletcher and MG executed a separate shareholders agreement providing that Fletcher would nominate five Methanex directors, MG would nominate three directors and they would jointly nominate the three remaining directors.[81] All board issues, however, were subject to simple majority votes.[82] Nonetheless, the shareholders agreement also provided that (i) Fletcher and MG would jointly name the Chairman and Deputy Chairman of the board;[83] (ii) Fletcher and MG would vote together at shareholders meetings in favor of all simple, non-extraordinary proposals made by the board that were subject to shareholder approval; and (iii) Fletcher and MG had mutual rights of first offer and refusal, as well as take along rights, regarding transfers of the other's interest.[84] These minimal control rights were deemed sufficient to enable MG, with its mere 10% interest, to exercise joint control over Methanex.[85]

The occasional case also suggests that the Commission may be willing in certain circumstances to find the "unilateral rights" test satisfied even when the minority shareholder has no formal veto or approval right over the acquired entity's strategic, com-

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nitude or number of strategic, commercial, and competitive issues over which the minority shareholder must have a veto right in order to satisfy the first joint control test.

77. Fletcher Challenge/Methanex, *cited in* O.J. C 98/12 (1993), Case No. IV/M.331 (Eur. Comm'n Mar. 31, 1993).

78. *Id.*

79. *Id.* ¶ 6.

80. *Id.* ¶ 7.

81. *Id.* ¶ 8.

82. *Id.* ¶ 8(iii).

83. *Id.* ¶ 8. For the first two years the Chairman would be a MG nominee and the Deputy Chairman would be a Fletcher nominee. Thereafter, Fletcher would name the Chairman and MG the Deputy Chairman. *Id.* ¶ 10.

84. *Id.* ¶ 8.

85. *Id.* ¶ 11.

mercial and competitive activities. In *Sanofi/Sterling Drug*[86] the Commission found that the minority shareholder in a 70%-30% venture shared joint control even though (i) all board and shareholder votes were by simple majority, (ii) the minority shareholder could name only three of the venture's eight board members, and (iii) the board, before making any decisions to close plants, to make acquisitions or divestitures, or to adopt its business plans, was required merely to *consult* the minority shareholder, who, in other words, had no veto right.[87] The absence of other decisions relying on only a prior consultation, as opposed to prior approval right, to find joint control suggests, however, that the future scope of this "exception" is extremely limited.[88]

In other situations the Commission has suggested that an extremely small or even non-existent shareholding may nonetheless trigger the joint control threshold if special corporate governance provisions or shareholders agreements give the minority shareholder extraordinary control rights. Although the Commission has not expressly found a minority shareholding below

86. *See* Sanofi/Sterling Drug, *cited in* O.J. C 156/10 (1991), Case No. IV/M.072 (Eur. Comm'n June 10, 1991) ¶ 7, *reprinted in* EEC MERGER CONTROL REP. (Jan. 1992) at 191 (stating minority shareholding is joint control).

87. *Compare id.* ¶ 7 *with* Ericsson/Hewlett-Packard, *cited in* O.J. C 83/5 (1992), Case No. IV/M.292 (Eur. Comm'n Mar. 12, 1993) ¶ 6, *reprinted in* EEC MERGER CONTROL REP. (Apr. 1993) at 985 (minority shareholder was given right to be consulted about identity of General Manager to be appointed by majority shareholder; Commission cites this as one of several factors establishing joint control).

88. *Compare* Sanofi/Sterling Drug, *cited in* O.J. C 156/10 (1991), Case No. IV/M.072 (Eur. Comm'n June 10, 1991) ¶ 7, *with* DASA/Fokker, *cited in* O.J. C 136/4 (1993), Case No. IV/M.237 (Eur. Comm'n May 10, 1993) ¶¶ 4-5 & 8 (setting forth Commission finding that Daimler-Benz/DASA acquired *sole* control of Fokker when it acquired 51% interest and Dutch Government retained 49% interest). The Commission found that the Government did not retain joint control over Fokker, even though a supermajority of supervisory board votes was required for such decisions as changes in Fokker's role as lead company for certain aircraft projects or terminations of its existing programs for producing jet aircraft. DASA/Fokker, *cited in* O.J. C 136/4 (1993), Case No. IV/M.237 (Eur. Comm'n May 10, 1993) ¶¶ 4-5 & 8. Joint control was absent because (i) Daimler-Benz/DASA could achieve this supermajority with either the votes of the two independent board members appointed by Fokker's labor unions or one independent board member and the member appointed by the Government (i.e. potential for shifting alliances); and (ii) the Government had agreed not to oppose decisions relating to termination of existing aircraft programs if such programs were uneconomical. *Id.* Thus, the Commission concluded that the Government did not retain any right to veto Fokker's business decisions on its own. *Id.* Clearly, however, the Government had at least the equivalent of the prior consultation right in *Sanofi/Sterling Drug.* Sanofi/Sterling Drug, *cited in* O.J. C 156/10 (1991), Case No. IV/M.072 (Eur. Comm'n June 10, 1992) ¶ 7, *reprinted in* EEC MERGER CONTROL REP. (Jan. 1992) at 191.

5% to enjoy joint control, at least one decision indicates that such shareholdings can meet the joint control test if they are accompanied by a sufficiently large number of veto rights or other means to determine the acquired entity's strategic, commercial and competitive activities.[89]

C. *Summary*

A comparison of these and other Merger Regulation decisions[90] with pre-Merger Regulation decisions applying *Philip Morris* indicates that the Commission has become increasingly willing to find that minority shareholdings constitute an acquisition of decisive influence, even though many of the same minority shareholdings, before implementation of the Merger Regulation, would have been found to satisfy the lower *Philip Morris* influence standard.[91] This substantial and ongoing shift is not surprising.

Before implementation of the Merger Regulation, the Commission had a strong incentive to find that an acquisition of a minority shareholding conveyed only influence because a finding of either decisive influence or no influence would have greatly restricted the Commission's jurisdictional options to review the transaction.[92] In contrast, after implementation of the

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89. *See* Volkswagen AG/V.A.G. (UK) Ltd., *cited in* O.J. C 38/12 (1993), Case No. IV/M.304 (Eur. Comm'n Feb. 24, 1993) ¶ 4, *reprinted in* EEC MERGER CONTROL REP. (Apr. 1993) at 995 (where VW proposed to acquire 100% of voting stock of VAG from Lonrho, Commission noted that acquisition would involve a change from joint control to sole control over VAG; Commission found that VW already exercised joint control over VAG, despite owning none of its stock, because VW was represented on "Coordination Committee which takes joint decisions on major issues of [VAG's] commercial policy.").

90. *See, e.g.*, Lyonnaise des Eaux Dumez/Brochier, *cited in* O.J. C 188/20 (1991), Case No. IV/M.076 (Eur. Comm'n July 11, 1991) ¶¶ 4-5, *reprinted in* EEC MERGER CONTROL REP. (Mar. 1992) at 247-48 (25.1% minority interest found to share joint control); CONAGRA/IDEA, *cited in* O.J. C 175/18 (1991), Case No. IV/M.010 (Eur. Comm'n May 30, 1991) ¶¶ 5-6, *reprinted in* EEC MERGER CONTROL REP. (Jan. 1992) at 167-68 (26% interest found to share joint control); Apollinaris/Schweppes, *cited in* O.J. C 203/14 (1991), Case No. IV/M.093 (Eur. Comm'n June 24, 1991) ¶ 6, *reprinted in* EEC MERGER CONTROL REP. (Jan. 1992) at 220 (28% interest found to share joint control).

91. *See supra* notes 13-34 and accompanying text (discussing *Philip Morris* and pre-Merger Regulation cases applying "influence" standard).

92. There was no Merger Regulation and, pursuant to the Court of Justice judgment in *Continental Can*, Article 86 could be applied only if one of the parties already held a dominant position. *See* Europemballage & Continental Can Co. v. Commission, Case 6/72, 1973 E.C.R. 215, [1973] C.M.L.R. 199. For most transactions this left Article 85, which the *Philip Morris* Court had indicated did not apply if no influence was ac-

Merger Regulation there has been an equally strong incentive to find that transactions involving minority shareholdings create decisive influence, given the well-recognized procedural, substantive and remedial advantages of the Merger Regulation vis-à-vis Articles 85 and 86.[93] The result has been a significant and welcome expansion of the decisive influence standard to reach a growing number of minority acquisitions and a corresponding contraction of the universe of minority shareholdings that satisfy the *Philip Morris* influence standard.

Indeed, given the Commission's increasing proclivity to find decisive influence in a variety of transactions involving minority shareholdings in the 10%-25% range, one might wonder whether the Merger Regulation's decisive influence standard has largely overlapped the *Philip Morris* influence standard, leaving little more than two control thresholds, decisive influence and no influence/passive investment. Rumors of the demise of the *Philip Morris* influence standard would be premature, however, in light of the new life that has been breathed into that standard by the Commission's recent *Gillette* decision.

III. *SHAVING TOO CLOSELY IN A SANDSTORM? — GILLETTE'S EXPANSION OF THE* PHILIP MORRIS *INFLUENCE STANDARD*

In 1989 Gillette, the world leader in wet shaving products, faced an opportunity to acquire a major competitor, the Wilkinson Sword wet shaving products business, from Stora Kopparbergs Bergslags AB.[94] Although the Merger Regulation was not yet enacted, Gillette apparently realized that an attempt to acquire Wilkinson's EC operations would likely elicit EC and

quired. Virtual universal opposition had developed against its potential application to acquisitions of decisive influence such as full mergers and acquisitions. *See supra* notes 26-28 and accompanying test (discussing *Philip Morris* decision and Article 85).

93. *See supra* notes 41-89 and accompanying text. The procedural, substantive and remedial differences between the Merger Regulation and Articles 85 and 86, as well as the Commission's recent attempts to reduce those differences, are outside the scope of this article, but are the partial subject of the authors' recent article in the Common Market Law Review. *See* Hawk & Huser, *A Bright Line Shareholding Test to End the Nightmare Under the EEC Merger Regulation*, [1993] 30 C.M.L.R. 1155 (1993); *see also* Barry E. Hawk, *Mergers, Acquisitions and Concentrative Joint Ventures*, *in* COMPARATIVE GUIDE, *supra* note 2, ch. 13.

94. *See Gillette*, O.J. L 116/21, at 23, ¶ 8 and accompanying table, *reprinted in* Eur. Community Cases (CCH Europe) at 2,041, ¶ 8 and accompanying table.

Member State opposition, given the substantial Community market shares held by Gillette and Wilkinson in this highly oligopolistic industry.[95]

The parties initially structured their transaction so that Gillette would acquire Wilkinson's operations in North America and the rest-of-the-world outside the EC, while a management-led investor group, eventually called Eemland Holdings NV, would acquire the EC operations. After objections by the U.S. Department of Justice, Wilkinson's operations in the United States were included among the operations to be sold to Eemland and certain terms of Gillette's participation in Eemland's leveraged buy-out were modified pursuant to a Justice Department consent decree.[96]

After complaints were filed in early 1990 by competitors, BIC SA and Warner Lambert's Schick subsidiary, the EC Commission opened an investigation of the transaction. Three years later, the Commission concluded that Gillette's participation in the Eemland buy-out violated Article 86 (but not Article 85) and, separately, that Gillette's 100% acquisition of the Wilkinson operations in European countries outside the EC violated Article 85 (but not Article 86). In so doing, the Commission appears to have significantly expanded the lower and, possibly, the upper boundaries of the Court's *Philip Morris* influence standard.

A. *Shifting the Lower Boundary of the* Philip Morris *Influence Standard: "Some" Influence Under Article 86*

There is little doubt that Gillette carefully structured the scope of its participation in Eemland's buy-out to fall below the influence threshold, and thus within the no influence or passive investment "safe harbor," outlined by the Court of Justice in *Philip Morris*. By structuring the transaction in this manner, Gillette sought to avoid triggering the *Philip Morris* influence threshold, below which the Court had indicated neither Article

95. *Id.* Whether measured by value or volume of sales, Gillette's EC-wide and Member State market shares for wet shaving products, with rare exceptions, ranged between 50% and 90%. *Id.* Wilkinson's shares were significant in nearly every Member State, especially Germany, the United Kingdom, and Ireland. *Id.* On an EC-wide basis, Gillette and Wilkinson were the two largest suppliers, measured by value. *Id.*

96. *See* United States v. Gillette Co., 1990-2 Trade Cases (CCH) ¶ 69,142 (D.D.C. July 25, 1990).

85 nor Article 86 applied.[97]

Gillette acquired no voting stock or other voting interest in Eemland, no board or management representation, and no access to any internal, non-public Eemland information. Instead, Gillette (i) acquired a 22% non-voting "loan stock" equity interest that was convertible to voting stock only under limited conditions;[98] (ii) loaned about 13.6% of Eemland's total debt financing at what appeared to be favorable non-market terms;[99] (iii) acquired certain preemption rights that gave Gillette an option to acquire (or force to be sold to a selected third party) any voting stock in Eemland that a shareholder eventually might seek to sell; (iv) entered into a two-year supply agreement, whereby it purchased Wilkinson products manufactured by Eemland for resale by Gillette outside the EC and North America; and (v) entered into a "non-Community sale agreement" and an intellectual property agreement, pursuant to which the "rest-of-the-world" Wilkinson operations and trademarks were assigned to Gillette.[100] Each party agreed not to sell products under the Wilkinson trademark outside its respective territories, and the parties agreed to cooperate to resolve any problems that might arise from multinational customers seeking to purchase their requirements for both territories from one or the other supplier.

In its consent decree with the U.S. Justice Department, Gillette also accepted a variety of Chinese Wall and standstill provisions.[101] Gillette agreed, for as long as it held any interest in Eemland, not to exchange information regarding prices and other terms of sale in the United States, not to exercise any influence over Eemland and not to do anything to cause Eemland to become insolvent.[102] Gillette further agreed, for a period of ten years, not to acquire any additional interest in any "securities" of

97. *See supra* notes 13-23 and accompanying text (discussing *Philip Morris*).

98. *Gillette*, O.J. L 116/21, at 25, ¶ 13, *reprinted in* Eur. Community Cases (CCH Europe) at 2,043, ¶ 13. These conditions were a winding up of Eemland, a public listing of its shares or a sale of the company to a third party. *Id.* at 25, ¶ 14.

99. *Id.* at 25, ¶ 15, *reprinted in* Eur. Community Cases (CCH Europe) at 2,045, ¶ 15. Interest was capitalized until the principal became due under a balloon payment. *Id.*

100. *Id.* at 25-27, ¶¶ 12-20, *reprinted in* Eur. Community Cases (CCH Europe) at 2,043-2.046, ¶ 12-20.

101. United States v. Gillette Co., 1990-2 Trade Cases (CCH) ¶ 69,142 (D.D.C. July 25, 1990).

102. *Id.* ¶ 64,273.

Eemland,[103] other than via its limited preemption rights, without the Justice Department's prior written consent.[104] Should it exercise those preemption rights, Gillette agreed to give an automatic proxy to Eemland to cast Gillette's votes in the same proportion as the votes cast by the other shareholders, thereby effectively negating any ability by Gillette to use these voting powers to affect Eemland's activities.[105] The Justice Department, therefore, concluded that these provisions, together with the fact that Gillette had no voting interest or board or management representation in Eemland, eliminated the Department's original concerns that the transaction violated section 7 of the Clayton Act and section 1 of the Sherman Act.[106]

A comparison of Gillette's minority interest and control rights in Eemland with those held by Philip Morris strongly suggests that Gillette did not satisfy the influence standard prescribed by the *Philip Morris* Court for application of Articles 85 and 86. The Court of Justice found that Philip Morris could not influence the commercial activities of Rothmans, despite having a 24.9% *voting* interest, substantial preemption rights over the sale of Rembrandt's controlling interest in Rothmans, *and* holding 50% of Rothmans' convertible bonds, because (i) Philip Morris had no board representation, (ii) it agreed to implement various Chinese Wall protections to insulate Rothmans from any influence, and (iii) the only post-closing cooperation agreements between Philip Morris and Rothmans affected only their non-EC operations.[107] In reaching this conclusion, the Court expressly rejected the complainants' theories that (i) the preemption rights restricted competition by enabling Philip Morris to prevent any other entity from acquiring a controlling interest in Rothmans, and (ii) the cooperation agreements covering operations located outside the Community would lead to the coordi-

103. The term "securities" was broadly defined to include both voting and nonvoting equity interests, as well as any forms of indebtedness. *Id.* ¶ 64,272.

104. *Id.* ¶ 64,273.

105. *See id.* ¶ 64,273-76; *see also Gillette*, O.J. L 116/21, at 27, ¶ 21, *reprinted in* Eur. Community Cases (CCH Europe) at 2,046, ¶ 21.

106. *See Gillette Co.*, 1990-2 Trade Cases (CCH) ¶ 69,142.

107. *Philip Morris*, [1987] E.C.R. at 4575-4579, ¶ 33, [1988] 4 C.M.L.R. at 58 (noting that they kept agreements to cooperate in Indonesia, Malaysia, and Philippines) *compare with id.*, ¶ 47, [1988] 4 C.M.L.R. at 61 (concluding that "1984 agreements do not contain any provisions regarding commercial cooperation").

nation of activities within the Community.[108]

Like Philip Morris, Gillette had no board representation, held preemption rights over other shareholder interests, which were no greater than, and quite possibly more limited than those held by Philip Morris, and agreed to implement Chinese Wall provisions.[109] Unlike Philip Morris, Gillette held no voting interest and its nonvoting equity interest was only 22%, compared to Philip Morris' 24.9% voting and 30.8% nonvoting equity interests.[110] Gillette held a significant percentage (13.6%) of Eemland's total debt, although Philip Morris held 50% of Rothmans International's outstanding convertible bonds, which represented an unstated percentage of Rothmans' total debt.[111] The only influence "plus factor" in *Gillette* vis-à-vis *Philip Morris* was the existence of (non-EC) cooperation agreements between Gillette and Eemland, which appeared to involve more extensive commercial activities and were more likely to have effects within the Community than those in *Philip Morris*.[112] On balance, these facts represented a weak basis for application of either Article 85 or Article 86 under the Court's *Philip Morris* influence standard.

Despite this apparent dilemma, the Commission concluded that the nonvoting minority interest and other limited links with Eemland would enable Gillette to exercise "some influence" over Eemland's commercial activities, in violation of Article 86, but not Article 85.[113] In support, the Commission cited, without elaboration, to Paragraph 65 of the Court's *Philip Morris* judgment, where the Court had used the term "some influence" in its brief (four-sentence) Article 86 analysis, rather than the word "influence" alone, which had been used in its Article 85 analysis.[114]

108. *See supra* notes 13-23 and accompanying text (discussing *Philip Morris*).

109. *Gillette*, O.J. L 116/21, at 25-27, ¶¶ 12-20, *reprinted in* Eur. Community Cases (CCH Europe) at 2,043-46, ¶¶ 12-20.

110. *Id.*

111. *Id.*

112. *Id.* The *Philip Morris* cooperation agreements covered only operations in Indonesia, Malaysia and the Philippines. *Philip Morris*, [1987] E.C.R. at 4577, ¶¶ 37-40, [1988] 4 C.M.L.R. at 59-60.

113. *Gillette*, O.J. L 116/21, at 25-27, ¶¶ 12-20, *reprinted in* Eur. Community Cases (CCH Europe) at 2,043-46, ¶¶ 12-20.

114. *See Gillette*, O.J. L 116/21, at 27-28, ¶ 24, *reprinted in* Eur. Community Cases (CCH Europe) at 2,047, ¶¶ 24.

This raises the question whether the Court's use of the term "some influence" was inadvertent or, as the *Gillette* decision suggests, was intended to create a lower control threshold for purposes of applying Article 86 to acquisitions of minority shareholdings. Until *Gillette* it seemed virtually certain that the Court in *Philip Morris* intended to apply under Article 86 the identical "influence" control threshold that it had applied and described in detail in its preceding Article 85 analysis. This conclusion is supported by the fact that BAT and R.J. Reynolds had argued unsuccessfully to the Court of Justice that Philip Morris' minority investment violated Article 86, even if Philip Morris was unable to influence Rothmans International.[115] Thus, despite the Commission's attempt to cloak its *Gillette* decision under the mantle of the Court's judgment in *Philip Morris*, it appears that the Commission expanded the *Philip Morris* influence standard to create a new, *lower* control threshold for application of Article 86 to acquisitions of minority interests.

Portions of the *Gillette* decision suggest that the Commission recognized it was applying a new, lower control threshold to minority acquisitions by firms holding a dominant position. The Commission acknowledged that Gillette's non-voting equity interest in Eemland was insufficient to trigger application of Article 85 under the *Philip Morris* influence standard.[116] Nonetheless, the Commission emphasized that entities enjoying a dominant position have a "special responsibility not to allow [their] conduct to impair genuine undistorted competition . . . . ", thereby drawing a clear distinction between Article 85 and Article 86.[117] The Commission proceeded to describe various means by which Gillette could exercise "some influence" over Eemland, even though some of the same rationales had been considered, yet rejected by the Court of Justice as insufficient to satisfy the "influence" standard for application of either Article 85 or Arti-

115. *See Philip Morris*, [1987] E.C.R. at 4560-61, [1988] 4 C.M.L.R. at 47 (opinion of Advocate General Mancini) (comparing complainants' argument that, for purposes of establishing abuse under Article 86, "the extent of the control exercisable by an undertaking does not count" with Commission's counterargument that there can be no abuse under Article 86 "if the investing company is not in a position to influence the undertaking in which it has a holding").

116. *Gillette*, O.J. L 116/21, at 29, ¶ 34, *reprinted in* Eur. Community Cases (CCH Europe) at 2,049, ¶ 34.

117. *Id.* at 27, ¶ 23, *reprinted in* Eur. Community Cases (CCH Europe) at 2,046-47, ¶ 23.

cle 86 in *Philip Morris*.[118] It appears, therefore, that the Commission understood that it was creating a new "some influence" control threshold for application of Article 86 that is satisfied by a significantly lower quantum of control rights than the "influence" standard utilized by the Court of Justice for application of both Articles 85 and 86 in *Philip Morris*.[119]

Although it appears unlikely that the Court of Justice in *Philip Morris* intended a lower "some influence" control threshold to be applied to acquisitions of minority interests by dominant firms, such a rule could facilitate realization of several important antitrust policy objectives. While minority interests and other links between non-dominant competitors can raise antitrust concerns, such as spillover collusion, these risks are presumptively greater, all else equal, if one of the entities enjoys a dominant position. Given that minority acquisitions may also create efficiencies or other procompetitive benefits, there appears to be a sound policy basis for requiring that a "higher" control threshold, such as the *Philip Morris* influence test, be satisfied before minority acquisitions involving no dominant firm are subjected to antitrust prohibition. When dominant firms are involved, however, the potential harms to competition are pre-

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118. *Compare Gillette*, O.J. L 116/21, at 28, ¶¶ 26-27, *reprinted in* Eur. Community Cases (CCH Europe) at 2,047-48, ¶¶ 26-27 (setting forth Commission finding that Gillette's preemption and conversion rights allow Gillette to exercise "some influence" over Eemland because Gillette can prevent third parties from acquiring and possibly invigorating the competitive viability of Eemland) *with Philip Morris*, [1987] E.C.R. at 4577-82, ¶¶ 32-74, [1988] 4 C.M.L.R. at 58-66 (setting forth Court of Justice's contrary finding that similar preemption rights allowed Philip Morris to "influence" Rothmans because such rights enabled Philip Morris to prevent any third party from acquiring Rothmans International and thereby strengthening its competitive viability).

119. *See Gillette*, O.J. L 116/21, at 28, ¶¶ 26-27, *reprinted in* Eur. Community Cases (CCH Europe) at 2,047-48, ¶¶ 26-27; *Philip Morris*, [1987] E.C.R. at 4577-82, ¶¶ 32-74, [1988] 4 C.M.L.R. at 58-66. An alternative explanation of the *Gillette* decision — that the Commission applied the same control threshold as the Court in *Philip Morris*, but merely found different facts in *Gillette* that satisfied this control test — seems less plausible. The Commission made only passing attempts to identify facts that would distinguish *Gillette* from *Philip Morris*. The Commission merely noted that (i) the dominant firm in *Philip Morris* was the entity in which the minority interest was acquired, whereas the acquiring firm in *Gillette* held the dominant position; and (ii) the acquired entity in *Gillette* was highly leveraged and weakened by its debt burden, which was held in part by the acquiring firm — financial conditions that were absent in *Philip Morris*. *See Gillette*, O.J. L 116/21, at 28, ¶¶ 24 & 29. If the Commission actually believed that these facts were sufficient to enable the *Gillette* transaction to satisfy the *Philip Morris* influence standard, presumably it would have stated so explicitly *and* found that Gillette's participation in the Eemland buy-out violated *both* Article 85 and Article 86.

sumptively greater, thereby justifying regulatory intervention at a lower control/influence threshold.

Gillette represents the clearest signal that the Commission is likely to rely on a significantly lower control threshold for purposes of applying Article 86 to minority shareholdings between competitors. Other Commission decisions, under the Merger Regulation, also suggest that the Commission will carefully scrutinize acquisitions of even very small minority interests among competitors, if at least one firm enjoys a dominant position.

In *Alcatel/Telettra*[120] the Spanish state-owned telecommunications operator, Telefonica, held minority interests in the two telecom equipment suppliers whose combination was the subject of the proposed concentration.[121] Because Telefonica was likely to remain a monopsonistic, or near-monopsonistic, buyer of most telecom equipment in Spain and would not be subject to the provisions of the EC's public procurement transparency directive for several years, the Commission obtained Alcatel's (Phase I) undertaking to acquire these minority interests from Telefonica to sever the vertical links that the Commission feared would give the combined Alcatel/Telettra a purchasing preference vis-à-vis competing telecom suppliers.

In *STET, Italtel, AT&T and AT&T-NSI*[122] two suppliers of telecommunications equipment, who operated in different Member States, acquired 20% cross-shareholdings in each other and entered into a variety of agreements providing for technological cooperation (exchanges and licensing of technical information and patents, technical assistance and joint product development) and commercial cooperation (cross distribution and purchasing agreements, as well as establishment of joint marketing subsidiaries in countries where neither operated). One supplier, Italtel, was part of the vertically integrated Italian telecom group, STET, which also controlled the national telephone mo-

120. Alcatel/Telettra, *cited in* O.J. L 122/48 (1991), Case No. IV/M.042 (Eur. Comm'n Apr. 12, 1991) ¶¶ 20-22, *reprinted in* EEC MERGER CONTROL REP. (Jan. 1992) at 117.

121. *Id.* Alcatel proposed to acquire sole control of the Italian company, Telettra. Telefonica owned a 5.4% interest in Telettra, a 10% interest in Telettra's Spanish subsidiary and a 21.14% interest in Alcatel's Spanish subsidiary. *Id.*

122. Commission Notice, O.J. C 333/3 (1992). The transaction was notified to the Commission (seeking an Article 85(3) exemption or comfort letter) in July 1989, before implementation of the Merger Regulation. *Id.*

nopoly.[123] Despite the parent's dominant position in providing voice telephone services in Italy, the Commission nonetheless concluded that the transaction qualified for exemption under Article 85(3) after the parties gave undertakings designed to address the Commission's vertical foreclosure and discrimination concerns. The Commission appears to have based this exemption, in part, on the parties' showing that neither of the two telecom equipment suppliers enjoyed a dominant position in the supply of telecom equipment in Italy or elsewhere in the Community.[124]

A critical question now facing firms and their legal advisors is when will minority interests and other so-called structural links between competitors trigger application of Article 86? *Gillette* suggests that the degree of structural links necessary to trigger Article 86 may be very low, at least when the acquiring entity already holds a dominant position, although clear guidance is absent from the Commission's decision.[125] Confusion in this area may be compounded by the *Italian Flat Glass* case, where the Court of First Instance held that competitors (none of which individually holds a single-firm dominant position) may abuse a joint or collective dominant position under Article 86 if they create sufficient structural or economic links between themselves in a highly oligopolistic industry.[126] Do the same or different "structural links" trigger *Gillette*'s "some influence" standard and the *Italian Flat Glass* "joint dominance" standard? Commission guidance would be welcomed in this increasingly murky area.

B. *Shifting the Upper Boundary of the* Philip Morris *Influence Standard? — "Back Door" Application of Article 85 to Concentrations*

The *Gillette* decision may also have introduced a novel interpretation of the *Philip Morris* influence standard to allow Article

123. *Id.* The other supplier, AT&T-NSI (including its ultimate parent, AT&T) did not have a dominant position in any part of the Community. *Id.*

124. *See id.* ¶ 26.

125. *Id.* For example, was the financing provided by Gillette, which resulted in Eemland being highly leveraged, the key factor that led the Commission to conclude that Gillette had abused its dominant position, or was it the other links that may or may not have allowed Gillette to exercise any influence over Eemland?

126. *See* Societa Italiano Vetro SpA, Fabbrica Pisana SpA and PPG Vernante Pennitalia SpA v. Commission, Joined Cases T-68 & 77-78/89, at 171 & 174, (Eur. Comm'n Mar. 10, 1992) ¶¶ 350 & 358 (1992).

85 to be applied, in effect via the "back door," to prohibit 100% acquisitions and other clear-cut concentrations. The Commission held that Eemland's agreement to transfer the non-EC (and non-North American) operations, including intellectual property rights, to Gillette, together with the related product supply and noncompete agreements, resulted in an "artificial" geographic separation of the Wilkinson Sword business and, thus, an unavoidable, ongoing commercial cooperation between competitors in neighboring markets (i.e. the EC and non-EC European countries), in violation of Article 85(1).[127] Gillette was ordered to divest back to Eemland all of the Wilkinson Sword operations and assets in the EFTA[128] countries, Eastern Europe and Turkey.[129]

Gillette's "artificial" geographic break-up theory raises several interesting questions. Is this application of Article 85 to prohibit a concentration perhaps a new variation of the "separability" concept, pursuant to which a concentration accompanied by "inseparable," yet nonetheless "non-ancillary" agreements requiring post-closing performance requires the entire transaction to be cast outside the jurisdiction of the Merger Regulation and subjected instead to Article 85 review?[130] Should this application of Article 85 to a concentration be viewed as a unique exception that is unlikely to be invoked again by the Commission (e.g., because the Gillette/Eemland transaction preceded the effective date of the Merger Regulation) *or* are we facing the dawn of a potentially significant jurisdictional expansion of Article 85 to reach, for example, any "artificial" concentration that "inevitably" leads to post-closing coordination between the relevant parties (and, if so, by what criteria are these concepts to be defined and applied)? Several reasons indicate that *Gillette* should (and probably will) be strictly construed and, ultimately, limited to the unique facts presented in that case.

First, the Commission can easily (albeit formalistically) distinguish future cases from *Gillette*. The Gillette/Eemland trans-

127. *See Gillette*, O.J. L 116/21, at 29 & 31, ¶¶ 34 & 43, *reprinted in* Eur. Community Cases (CCH Europe) at 2,047-48, ¶¶ 26-27.

128. The seven members of the European Free Trade Association ("EFTA") are Austria, Finland, Iceland, Norway, Sweden, Switzerland and Liechtenstein.

129. *Id.*

130. *See* 1990 Joint Venture Notice, *supra* note 10, O.J. C 203/10, at 10, ¶ 1 (discussing application of Article 85 and 86).

action was completed before implementation of the Merger Regulation, a factor that will not be present in future concentrations. The Commission can therefore avoid future applications of Article 85 to concentrations involving purported "artificial break-ups" by merely citing to the Merger Regulation's exclusive jurisdiction over concentrations.

Second, there is no policy justification for an application of Article 85 to concentrations beyond the unique fact scenario presented in *Gillette.* The "one-stop shopping," reduced transaction costs and legal certainty benefits created by the Merger Regulation's exclusive jurisdiction strongly support no application of Article 85's automatic nullity provisions to concentrations, except in the most extraordinary circumstances. Numerous transactions involve a sale of part of a business and/or a variety of related agreements requiring post-closing performance between the buyer and seller of the business, such as product supply agreements, intellectual property licenses, and joint R&D. If *Gillette* is not strictly limited to its facts, what should the standards be to determine whether a sale of part of a business is sufficiently "artificial" and involves a sufficient risk of post-closing coordination to trigger prohibition (and later divestiture) under Article 85? There is no need to open a jurisdictional Pandora's box by applying Article 85 to concentrations, especially given that concentrations which do not satisfy the Merger Regulation's Community dimension thresholds remain subject to Member State enforcement. Both the number of and enforcement activities under Member State merger control laws have increased significantly over the past several years. This weighs against creating an exception to the general rule that Article 85 does not apply to concentrations.[131]

Third, a recent case involving very similar facts, but reviewed by the Commission after implementation of the Merger Regulation, suggests that the Commission is likely to strictly con-

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131. Admittedly, this factor appears to have played little if any role in the Commission's *Gillette* analysis, given that several Member State authorities were known to be investigating the transaction at the behest of the same complainants. Remedies were eventually imposed in Germany, which reportedly prohibited the transaction, France, and the United Kingdom. *See, e.g.*, MERGERS & ACQUISITIONS INT'L, Jan. 1993, at 10 (Fr.); *EC Commission Imposes Conditions to Clear Ventures for Sanitary Protection Products*, 63 Antitrust & Trade Reg. Rep. (BNA) 152 (July 30, 1992) (Ger.); *Competition Act 1980*, [1992] 3 E.C.L.R. R-80 (U.K.).

strue *Gillette*. *CCIEL/GTE*[132] involved a geographic break-up of GTE's worldwide indoor lamps and lighting fixtures business. Siemens, apparently realizing it would likely face antitrust obstacles in Europe, arranged through various agreements that it would acquire the North American portion of this business, while the non-North American portion would be acquired in a buy-out by a management and investor group ("EDIL") led by a Citibank entity, CCIEL.

Siemens acquired no voting or non-voting equity interest in EDIL and had no board representation or access to EDIL's confidential business information.[133] Siemens provided short-term bridge financing for the buy-out, which was equivalent to more than half the purchase price owed by EDIL.[134] This financing, however, involved limited creditor rights, for example, Siemens had no right to accelerate repayment or to place EDIL into bankruptcy for failure to make interest or principal payments and EDIL could prepay at any time. Moreover, the financing involved no conversion or preemption rights affecting EDIL's equity, although Siemens could obtain 5% of the value of EDIL on its sale or listing if EDIL failed to repay the principal within two years of it becoming due.[135]

The parties did execute several related agreements requiring post-closing transfers of R&D, products and intellectual property rights.[136] The North American operations acquired by Siemens will provide to EDIL, pursuant to agreements lasting up to ten years, intellectual property (patents and technical information) on a royalty-free basis, engineering support services, manufacturing apparatus and input components at cost on a non-exclusive, arms length basis. A separate agreement provided that Siemens' North American operations will supply EDIL with finished products, also at cost, for a period of four years.

The Commission reviewed and cleared this transaction under the Merger Regulation, not Article 85.[137] Because EDIL's

132. CCIE/GTE, *cited in* O.J. C 258/10 (1992), Case No. IV/M.258 (Eur. Comm'n Sept. 25, 1992) ¶¶ 1-12, 29-33, *reprinted in* EEC MERGER CONTROL REP. (Jan. 1993) at 113-15, 119-20.

133. *Id.*

134. Three-quarters of the loan balance was due in three years, with the remainder due on the fourth anniversary. *Id.*

135. *See id.*

136. *Id.*

137. *Id.*

buy-out of the non-North American operations resulted in no changes in market shares or other industry characteristics within the Community, the Commission focused on whether the links between Siemens and EDIL created by the loan financing and various post-closing agreements would adversely affect conditions of competition within the Community, given the industry's high concentration ratio, barriers to entry and other oligopolistic characteristics.[138]

The Commission concluded that the arrangements did not give Siemens *decisive influence* over EDIL.[139] The Commission emphasized that the debt financing provided by Siemens was of limited duration, involved no shareholder rights or extraordinary creditor rights, did not worsen the debt-to-equity ratio of the non-North American operations acquired by EDIL, gave EDIL a three-year grace period on principal payments, and included a graduated interest rate provision that created an incentive for EDIL to refinance the loan, with third parties, as soon as possible. Regarding the post-closing R&D, intellectual property and supply agreements, the Commission adopted a similar analysis, noting that they were of limited duration, involved only a "one-way" flow of information and created incentives for EDIL to develop alternative sources as soon as possible. Although the Commission suggested that these arrangements might give Siemens "*some limited influence*" over EDIL (emphasis added), the Commission did not engage in any Article 85 (or Article 86) analysis, but instead cleared all the arrangements under the Merger Regulation as ancillary restrictions to the underlying concentration.[140]

There are extensive similarities and only modest differences between the factual circumstances presented in *Gillette* and *CCIEL/GTE*. For example, both cases involved highly concentrated markets with substantial barriers to entry, although Gillette's leading firm market share in the EC was significantly higher than Siemens' market share, which appears to have been well below the 50% range (i.e. no single firm dominance in *CCIEL/GTE*).[141] Both cases involved a geographic break-up of a

138. *See id.* at 896-97, ¶¶ 23-29.

139. *Id.*

140. *See id.* at 894 & 897-98, ¶¶ 12 & 30-33.

141. *Compare Gillette*, O.J. L 116/21, at 23, ¶ 8, *reprinted in* Eur. Community Cases

worldwide business, although *Gillette* involved a separation of European operations (EC versus EFTA), whereas *CCIEL/GTE* arguably involved a less "artificial" division whereby all European operations were kept together. Both cases involved a competitor providing substantial financing for the buy-out, although the competitor in *Gillette* obtained conversion and preemption rights that potentially affected the buy-out entity's voting share capital and the buy-out entity appears to have been more highly leveraged in *Gillette*.[142] Both cases involved several commercial agreements requiring post-closing transfers of products and technology. Indeed, the magnitude of these agreements was arguably greater in *CCIEL/GTE*. The Commission, however, claimed that the "flow" of such transfers would be one-way in *CCIEL/GTE* and, perhaps more importantly, *Gillette* included an agreement expressly contemplating allocating customers on a geographic basis, enforcing the geographic separation of the Wilkinson business. Perhaps the most significant differences between the two cases were that (i) *Gillette* preceded whereas *CCIEL/GTE* followed implementation of the Merger Regulation, and (ii) the parties in *Gillette* apparently tried to structure their deal to avoid antitrust review, thereby perhaps inviting more aggressive antitrust scrutiny by the Commission, whereas the parties in *CCIEL/GTE* appear to have had no desire (or perhaps opportunity) to attempt to avoid EC review.

CCIEL/GTE indicates that the Commission should have little, if any, incentive to apply *Gillette* in future cases. Given the Commission's remedial powers under the Merger Regulation, which are equivalent to those under Regulation 17, and the Commission's increasing willingness to condition clearances on the parties agreeing to modify the terms of their transactions, including agreements requiring post-closing performance, the Commission has the means to require parties in future "geo-

(CCH Europe) at 2,041, ¶ 8, *with* CCEL/GTE, *cited in* O.J. C 258/10 (1992), Case No. IV/M.258 (Eur. Comm'n Sept. 25, 1992) ¶ 23.

142. CCIE/GTE, *cited in* O.J. C 258/10 (1992), Case No. IV/M.258 (Eur. Comm'n Sept. 25, 1992) ¶ 23, *reprinted in* EEC MERGER CONTROL REP. (Jan. 1993). The 22% "equity" (i.e. loan stock) interest in *Gillette* is not a significant distinguishing factor from *CCIEL/GTE*, given that this "equity" interest included no voting rights, board or management representation, control rights or access to internal business information. *Id.* at 28, ¶ 25. In other words, *Gillette's* non-voting "equity" was functionally equivalent to debt financing for purposes of assessing whether the holder can exercise any degree of influence over the entity's commercial activities.

graphic break-up" transactions to "reduce" their links sufficiently to prevent competitors from influencing one another.[143] The Merger Regulation perhaps offers an additional benefit of mandatory notification — i.e. geographic break-up transactions, if characterized as concentrations, are subject to mandatory notification (if not under the Merger Regulation, then at the Member State level). In contrast, characterizing such transactions as satisfying the *Philip Morris* influence standard under Article 85 might allow transactions that are less well-known than the Gillette/Eemland deal (or that do not involve competitor complaints) to escape regulatory review.

CONCLUSION

Significant shifts have occurred during the past three years in the control thresholds that determine whether an acquisition of a minority shareholding will be subject to one or more EEC competition laws. The scope and effects of these shifts are neither clear nor necessarily consistent. The Commission appears on the one hand to have expanded the Merger Regulation's concept of decisive influence to reach a variety of minority shareholdings previously falling within the *Philip Morris* influence standard, while on the other hand to have expanded the *Philip Morris* influence standard to reach not only transactions previously thought to be passive (i.e. no influence), but perhaps also concentrations that are normally subject to the exclusive jurisdiction of the Merger Regulation, vis-à-vis Articles 85 and 86.

Whether these control thresholds will continue to shift is critically important to firms contemplating the legal certainty of their future investments. Eventually, the Commission may conclude that the potential benefits of "flexible" control thresholds are outweighed by the costs, such as reduced legal certainty, higher transaction costs (both public and private) and slower decisionmaking capabilities. Simpler, albeit less flexible, thresholds may ultimately be required to control these shifting sands.

143. Indeed, such modifications may have occurred in *CCIEL/GTE* (e.g., during pre-notification meetings with Commission), especially given that the Commission's then-pending investigation of the Gillette/Eemland transaction was well known at the time.