

# U.S. ANTITRUST ENFORCEMENT INVOLVING MINORITY SHAREHOLDINGS

Michael E. Jacobs

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## I. INTRODUCTION

The U.S. Supreme Court has long held that section 7 of the Clayton Act, which prohibits transactions that may substantially lessen competition, reaches partial acquisitions, and both the U.S. Department of Justice (“DOJ”) and the Federal Trade Commission (“FTC”) have challenged acquisitions involving minority shareholdings. Underscoring the importance of this issue, the 2010 Horizontal Merger Guidelines also includes a section on partial acquisitions and minority shareholdings. Such acquisitions may violate the U.S. antitrust laws when there is more than a mere “ephemeral possibility” of competitive harm, and the transaction creates an “appreciable danger” of anticompetitive effects.<sup>1</sup> This memorandum provides a overview of the treatment of minority shareholdings and partial acquisitions under U.S. antitrust law.

## II. SECTION 7 OF THE CLAYTON ACT

Section 7 of the Clayton Act provides the statutory basis for regulating partial acquisitions and minority shareholdings. The statute provides, in relevant part:

No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or **any part** of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, **the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.**

No person shall acquire, directly or indirectly, the whole or **any part** of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the

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<sup>1</sup> Paul C. Cuomo, *et al*, “Partial Acquisitions: Recent MOFCOM Action Suggests Possible Divergence With U.S. Standards,” CPI ANTITRUST CHRONICLE, January 2012 (1), at 2.

assets of one or more persons engaged in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, **the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.**

**This section shall not apply to persons purchasing such stock solely for investment** and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition.<sup>2</sup>

By its own terms, section 7 explicitly addresses partial acquisitions,<sup>3</sup> and therefore application of the Clayton Act does not depend on a change in control of a company.<sup>4</sup> However, because the statute does not establish any minimum ownership threshold that might trigger competitive concerns, all acquisitions of equity shares are subject to the jurisdiction of the antitrust agencies, whether or not any control or influence over the target company and its business decision making process is obtained.<sup>5</sup>

“[T]here are no bright line rules as to when a partial acquisition does (or does not) violate the U.S. antitrust laws and the analysis of any particular partial acquisitions is highly dependent upon the specific facts of each proposed transaction.”<sup>6</sup> Nevertheless, in a number of older cases, acquisitions involving less than 25 percent of a company’s shares have been found to violate section 7.<sup>7</sup> In

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<sup>2</sup> 15 U.S.C. § 18 (emphasis added).

<sup>3</sup> *Id.* (“[n]o person...shall acquire...the whole or any part” of the stock or assets of another entity where “the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.”).

<sup>4</sup> OECD, “Antitrust Issues Involving Minority Shareholding and Interlocking Directorates,” DAF/COMP(2008)30 (June 23, 2009), at 41.

<sup>5</sup> See, e.g., *Denver & Rio Grande W. RR. Co v. U.S.*, 387 U.S. 485, 501 (1967) (“A company need not acquire control of another company in order to violate [§7]”); *U.S. v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 592 (1957) (“Any acquisition of all or any part of the stock of another corporation, competitor or not, is within the reach of [§7] whenever the reasonable likelihood appears that the acquisition will result in a restraint of commerce or in the creation of a monopoly of any line of commerce.”).

<sup>6</sup> Cuomo, “Partial Acquisitions,” *supra* note 1, at 3.

<sup>7</sup> OECD, “Minority Shareholding,” *supra* note 4, at 41 (citing *E.I. du Pont de Nemours & Co.*, 353 U.S. at 592 (23% stock acquisition); *Rio Grande W. RR. Co v. U.S.*, 387 U.S. at 501 (20%

some more recent matters involving partial acquisitions, the agencies have entered consent decrees limiting ownership to less than 30 percent of the acquired company.<sup>8</sup>

Section 7 is not applicable when stock is purchased “solely for investment.” This exception is seen as serving the “limited function of reassuring investors, particularly institutional investors, that the Clayton Act was not designed to interfere with general investment[.]”<sup>9</sup> While courts have looked at various factors in determining whether a transaction was “solely for investment,” this requirement generally will be satisfied if the acquirer does not gain influence over the actions and business conduct of the target company.<sup>10</sup> In contrast, the exemption has been found not to apply when the acquirer has the ability to influence the actions of the

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stock acquisition); *American Crystal Sugar Co v. Cuban-American Sugar Co.*, 259 F.2d 524,526, 531 (2d Cir. 1958) (23% stock acquisition)).

<sup>8</sup> *Id.* (citing *U.S. v. Gillette Co.*, Proposed Final Judgment, Stipulation and Competitive Impact Statement, 55 Fed. Reg. 12,567, 12,569 (1991); *U.S. v. AT&T Corp.*, Proposed Final Judgment, Stipulation and Competitive Impact Statement, 64 Fed. Reg. 2506 (1999); *U.S. v. MCI Comm. Corp.*, Proposed Final Judgment, Stipulation and Competitive Impact Statement, 59 Fed. Reg. 33,009 (1994); *Time Warner Inc.*, Proposed Consent Agreement with Analysis to Aid Public Comment, 62 Fed. Reg. 67,868, 67,871 (1996)).

<sup>9</sup> AREA & HOVENKAMP, ANTITRUST LAW ¶1204(b)

<sup>10</sup> See, e.g., *United States v. Tracinda Inv. Corp.*, 477 F. Supp. 1093, 1098 (C.D. Cal. 1979) (“The ultimate definitive factor the courts have looked to [...] is whether the stock was purchased for the purpose of taking over the active management and control of the acquired company”); *Anaconda Co. v. Crane Co.*, 411 F. Supp. 1210, 1219 (S.D.N.Y. 1975).

Other factors courts have considered include whether there were subsequent agreements that restricted the use of the acquired stock, *Anaconda Co.*, 411 F. Supp. at 1218, the extent to which a defendant maintains a diversified investment portfolio, and the price paid for the stock in comparison to its market value. *Hamilton Watch Co. v. Benrus Watch Co.*, 114 F. Supp. 307, 316 (D. Conn. 1953).

See also OECD, “Minority Shareholding,” *supra* note 4, at 42 n.83 (noting that the “implementing regulations to the HSR Act, which has its own exemption from premerger notification and waiting requirements for ‘acquisitions, solely for the purpose of investment, of voting securities’ resulting in holdings of 10% or less of outstanding voting securities (15 U.S.C. § 18a(c)(9)). Those regulations provide that an acquisition is ‘solely for investment’ if the acquirer has no intention to participate in the formulation, determination, or direction of the basic business decisions of the issuer (16 C.F.R. § 801(1)(i)). The FTC’s related Statement of Basis and Purpose, 43 Fed. Reg. 33450, 33465 (July 31, 1978), identifies six types of conduct which could be considered evidence of an intent inconsistent with the ‘solely for investment’ exemption: (1) nominating a candidate for the board of directors of the issuer; (2) proposing corporate action requiring shareholder approval; (3) soliciting proxies; (4) having a controlling shareholder, director, officer or employee simultaneously serving as an officer or director of the issuer; (5) being a competitor of the issuer; or (6) doing any of the foregoing with respect to any entity directly or indirectly controlling the issuer.”).

target firm.<sup>11</sup> However, if an acquirer can demonstrate that to the satisfaction of the court that its acquisition was “solely for investment,” then the plaintiff must be able to show that the defendant is in fact “using the [stock] by voting or otherwise to bring about or in attempting to bring about, the substantial lessening of competition.”<sup>12</sup> This is a higher burden than under the general clause in section 7, which requires the plaintiff only to show likely effects on competition.

### III. COMPETITIVE ASSESSMENT OF PARTIAL ACQUISITIONS

Both the DOJ and FTC recognize the potential anticompetitive effects that can result when a firm makes a partial acquisition of a horizontal competitor. For a recent OECD roundtable on minority shareholdings and interlocking directorates, the U.S. authorities remarked that partial acquisitions can have effects analogous to, but (usually) quantitatively smaller than, horizontal mergers.<sup>13</sup> Thus, according to the 2010 Horizontal Merger Guidelines, “[w]hen the Agencies determine that a partial acquisition results in effective control of the target firm, or involves substantially all of the relevant assets of the target firm, they analyze the transaction much as they do a merger.”<sup>14</sup> Nevertheless, even when partial acquisitions do not result in effective control, competitive concerns can arise, which “may require a somewhat distinct analysis from that applied to full mergers or to acquisitions involving effective control.”<sup>15</sup>

In undertaking an analysis of the potential competitive impact of a partial acquisition, the DOJ and FTC focus on three principal effects:

- “First, a partial acquisition can lessen competition by giving the acquiring firm the ability to influence the competitive conduct of the target firm.” Such influence, which may come by way of voting interests or governance rights (e.g., the ability to appoint directors), “can lessen competition because the acquiring firm can use its influence to induce the target firm to compete less aggressively or to coordinate its conduct with that of the acquiring firm.”<sup>16</sup>
- “Second, a partial acquisition can lessen competition by reducing the incentive of the acquiring firm to compete.”<sup>17</sup> Whether or not a firm can influence the conduct of a rival in which it holds a minority share, the holder

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<sup>11</sup> See, e.g., *E.I. du Pont de Nemours & Co.*, 353 U.S. at 592-602.

<sup>12</sup> *Tracinda Inv. Corp.*, 477 F. Supp. at 1098 (quoting *Anaconda Co.*, 411 F. Supp. at 1219).

<sup>13</sup> OECD, “Minority Shareholding,” *supra* note 4, at 176.

<sup>14</sup> *Horizontal Merger Guidelines* (2010) ¶13. Available at <<http://www.justice.gov/atr/public/guidelines/hmg-2010.html>>.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

may not be willing to compete as aggressively as it might otherwise when it shares in the losses that such competition would inflict on that rival. The agencies recognize, however, that “compared with the unilateral competitive effect of a full merger, this effect is likely attenuated by the fact that the ownership is only partial.”<sup>18</sup>

- “Third, a partial acquisition can lessen competition by giving the acquiring firm access to non-public, competitively sensitive information from the target firm.”<sup>19</sup> Again, regardless of any ability to influence the rival’s conduct, access to competitively sensitive information could allow the firms more easily to coordinate their behavior, or otherwise make faster and more targeted accommodating responses. “The risk of coordinated effects is greater if the transaction also facilitates the flow of competitively sensitive information from the acquiring firm to the target firm.”<sup>20</sup>

Despite these general criteria, the agencies recognize that, just like with mergers, the potential for partial acquisitions to generate anticompetitive effects varies greatly and that therefore the specific facts of each case need to be considered.<sup>21</sup> Furthermore, while the agencies will consider whether a partial acquisition is likely to produce cognizable efficiencies, they note that such transactions generally do not create many of the same efficiencies as mergers.

#### **IV. EXAMPLES OF ENFORCEMENT ACTIONS INVOLVING PARTIAL ACQUISITIONS**

Because of the fact-intensive nature of the analysis, there appears to be a wide variety of scenarios in which partial acquisitions have raised competitive concerns for the DOJ or FTC. Nevertheless, a recent commentary on the subject concludes that enforcement actions fall into “three general buckets,” which include the following:

- Transactions in which the acquiring firm is a direct competitor of the target itself or of the target firm’s partial ownership interest.<sup>22</sup>

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Cuomo, “Partial Acquisitions,” *supra* note 1, at 4. Transactions that Cuomo *et al* include in this “bucket” are: (1) Clear Channel Communications Inc.’s purchase of AMFM, Inc. which controlled a 28.6 percent interest in a direct competitor of Clear Channel; (2) AT&T’s purchase of TCI, which held a 23.5 percent interest in a direct competitor of AT&T in wireless phone service; (3) U.S. West’s purchase of Continental Cablevision, which held a 20 percent interest in a direct competitor of U.S. West; (4) American Airlines’ purchase of 8.5 percent of its direct competitor, Aerolineas Argentinas; (5) TCI’s purchase of 7.5 percent of

- Transactions in which the acquiring firm has a controlling interest in a direct competitor of the target firm itself or of an investment of the target firm. The *Dairy Farmers of America* and *Kinder Morgan* matters (discussed below) are included in this category.<sup>23</sup>
- Transactions in which the acquiring firm has a non-controlling interest in a direct competitor of the target firm.<sup>24</sup> The *Univision* matter (also discussed below) falls within this category.

The matters discussed in this section illustrate the potential competitive concerns discussed in the 2010 Horizontal Merger Guidelines.

#### A. **United States v. Dairy Farmers of America**

In April 2003, DOJ filed a lawsuit challenging Dairy Farmers of America's (DFA's) partial ownership interests in two rival dairies (Flav-O-Rich and Southern Belle Dairy). DFA is milk marketing organization and the largest dairy farmer cooperative in the U.S., with thousands members.<sup>25</sup> In order to fulfill its mission of securing a steady sale of raw milk for its members at the highest price, DFA began vertically integrating and investing in various dairies.<sup>26</sup> According to the DOJ, DFA preferred not to wholly acquire and manage the dairies itself, but rather to acquire 50 percent ownership interests and then leave the day-to-day operations to its business partners, given their greater experience.<sup>27</sup> Before the transaction at issue here, DFA held a 50 percent equity stake in the company that owned and operated the Flav-O-Rich dairy, and also had financial interests in several other dairies that sold milk to schools in Kentucky and Tennessee.<sup>28</sup>

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its direct competitor, Time Warner's equity, with an option to purchase another 7.5 percent; and (6) Lockheed Martin's purchase of Loral Corp.'s defense-related business, which included a 20 percent interest in Loral Space & Communications, which in turn owned a 33 percent interest in Space Systems/Loral, a direct competitor of Lockheed. *Id.* at 4 n.11.

<sup>23</sup> *Id.* at 5 n.12. Another transactions in this second "bucket" that Cuomo *et al* identify is AT&T's proposed acquisition of MediaOne, in which both companies maintained partial ownership interests in competitors in the residential broadband market (AT&T with 26 percent of Excite@HomeCorp, and MediaOne with a 34 percent interest in the company that operated RoadRunner).

<sup>24</sup> *Id.* at

<sup>25</sup> *United States v. Dairy Farmers of America*, 426 F.3d 850, 852 (6th Cir. 2005). *See also* Complaint, *United States v. Dairy Farmers of America*, Civ. No. 6:03-206 (E.D. Ky. April 23, 2003).

<sup>26</sup> *See* OECD, "Minority Shareholding," *supra* note 4, at 177-78.

<sup>27</sup> *Id.*

<sup>28</sup> Complaint, *Dairy Farmers of America*, at ¶¶ 7-9.

In February 2002, DFA acquired 50 percent of the voting stock of the Southern Belle, Flav-O-Rich's largest rival in the sale of school milk.<sup>29</sup> Indeed, for many school districts, the two dairies were the only two milk competitors. The DOJ alleged that, as a result of the acquisition, DFA's ownership interests in both dairies gave it an incentive to reduce competition. Moreover, DFA had an incentive to facilitate unilateral price increases regardless of any coordination because, with its ownership interests in both dairies, it would not matter to DFA if customers of either dairy switched to the other dairy in response to a price increase.<sup>30</sup> Finally, DFA acquired the ability to influence the management of both dairies to act in DFA's interest to reduce competition.<sup>31</sup>

After the DOJ filed its lawsuit, DFA changed its governance rights, converting its common voting stock in the companies that operated both dairies into non-voting stock. In a subsequent motion for summary judgment, DFA argued because it could no longer exercise control over management of the dairies, its ownership interests in them could not reduce competition. The trial court granted DFA's motion, and the DOJ appealed, and the U.S. Court of Appeals for the Sixth Circuit reversed the lower court's ruling, holding that the DOJ had presented sufficient evidence to survive summary judgment on its claim that DFA's original investment in Southern Belle violated the antitrust laws.<sup>32</sup> Reflecting the DOJ's theories of competitive harm, the Sixth Circuit wrote:

In summary, DFA already had a fifty percent voting interest in... the Flav-O-Rick milk processing plant, when it entered into the original Southern Belle agreement. Pursuant to that agreement, DFA acquired a fifty percent voting interest in Southern Belle and its milk processing plant. Thus, DFA had a fifty percent interest in the only milk processing plants operating in over forty school district in Kentucky and Tennessee. Furthermore, DFA has the power to help set the salary of those running the Southern Belle plant and to veto certain expenditures. This demonstrates that DFA's acquisition of Southern Belle included a mechanism by which DFA exercised some control over the business

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<sup>29</sup> *Id.* at ¶¶ 11-14.

For more than a decade, in the late 1970s and through the 1980s, the two dairies had engaged in a bid-rigging conspiracy, agreeing not to bid aggressively for each other's school milk customers. That conspiracy resulted in felony guilty pleas in 1992 by the two entities. *Id.* at ¶ 18.

<sup>30</sup> OECD, "Minority Shareholding," *supra* note 4, at 178.

<sup>31</sup> *Id.*

<sup>32</sup> *Dairy Farmers of America*, 426 F.3d at 852.

activities of Southern Belle, and resulted in its controlling an undue percentage of the relevant market as well as a significant increase in the concentration of firms in that market. Here, DFA's control was sufficient to show that the acquisition caused anticompetitive effects.<sup>33</sup>

The Court of Appeals further held that DFA's voluntary relinquishment of its voting rights did not remedy the violation because there still may have existed "a mechanism that causes anticompetitive behavior other than control," such as Southern Belle's reliance on DFA for additional capital (given that DFA held all the debt in the company).<sup>34</sup> Moreover, the parties still had "closely aligned interests to maximize profits via anticompetitive behavior."<sup>35</sup> Following the Sixth Circuit's ruling and before trial on remand, DFA agreed to sell the Southern Belle dairy plant to another firm.<sup>36</sup>

## **B. Kinder Morgan, Inc./Carlyle Group/Riverstone Holdings LLC**

In January 2007, the FTC challenged the acquisition of interests in Kinder Morgan, Inc. ("KMI"), an energy transportation, storage and distribution firm, by private equity funds managed by The Carlyle Group ("Carlyle") and Riverstone Holdings LLC ("Riverstone"). The acquisitions were part of a US\$22 billion transaction in which the company would be taken private by KMI management and a group of investment firms that included the Carlyle and Riverstone funds. As a result of the proposed deal, Carlyle and Riverstone would have acquired a combined interest of 22.6 percent in KMI.<sup>37</sup>

At the time of the proposed transaction, a private equity fund controlled and managed by Carlyle and Riverstone held a 50 percent interest in the general partner that controlled Magellan Midstream, a competitor of KMI in the terminaling of gasoline and other light petroleum products in the southeastern United States. According to the FTC, the proposed transaction would violate section 7 of the Clayton Act and section 5 of the FTC Act<sup>38</sup> by reducing competition in terminaling in

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<sup>33</sup> *Id.* at 862.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> OECD, "Minority Shareholding," *supra* note 4, at 179.

<sup>37</sup> See also Analysis of Proposed Agreement Containing Consent Orders to Aid Public Comment, *In the Matter of TC Group L.L.C., Riverstone Holdings LLC, Carlyle/Riverstone Global Energy and Power Fund II, L.P., and Carlyle/Riverstone Global Energy and Power Fund III, L.P.*, FTC No. 061-0197 (January 25, 2007), available at <<http://www.ftc.gov/os/caselist/0610197/analysis.pdf>>. See also OECD, "Minority Shareholding," *supra* note 4, at 177.

<sup>38</sup> Section 5 of the FTC Act proscribes, *inter alia*, "[u]nfair methods of competition in or affecting commerce," and authorizes the FTC to prohibit such practices. 15 U.S.C. § 45.



eleven metropolitan areas in the United States that were either moderately or highly concentrated prior to the acquisition and where a combination of KMI and Magellan “through partial common ownership or control would significantly increase those levels of concentration.”<sup>39</sup> In addition, the FTC alleged that the deal would reduce competition because Carlyle and Riverstone would have board representation on both competing firms, could exercise veto power over actions by Magellan, and access to non-public and competitively sensitive information about KMI and Magellan that could be directly or indirectly exchanged between the companies.<sup>40</sup>

The FTC expressed concerns over possible unilateral and coordinated effects of the transaction. The agency stated, for instance, that the partial acquisition would facilitate the exercise of unilateral market power because many of KMI’s and Magellan’s terminals were customers’ first or second choices, and other terminals would be either unable or unwilling to replace the competition that would be lost through the transaction.<sup>41</sup> Moreover, by combining through common partial ownership two of the primary independent participants in eleven geographic areas, the proposed deal increased the likelihood of coordinated interaction between competitors in those markets.<sup>42</sup>

The FTC reached a consent agreement with the parties pursuant to which Carlyle and Riverstone were required, *inter alia*, to (1) remove all of their representatives from any Magellan boards of directors, (2) cede control of Magellan to its other principal investor, (3) not influence or attempt to influence the management or operation of Magellan, and (4) establish safeguards against the sharing of competitively sensitive information between KMI and Magellan.<sup>43</sup>

### **C. Univision Communications Inc./Hispanic Broadcasting Corp.**

In March 2003, the DOJ reached an agreement with Univision Communications Inc. (“Univision”) regarding its proposed acquisition of Hispanic Broadcasting Corporation (“HBC”). Univision was the largest broadcaster of Spanish-language television programming in the United States with two broadcast networks, Univision and Telefutera, and one cable channel. HBC was a media company that owned or operated more than 60 radio stations in 18 geographic regions in the United States, most of which broadcast in Spanish. At the time of the transaction, Univision also had a minority interest in another Spanish-language media company, Entravision Communications Corporation (“Entravision”), which included ownership of 30 percent of Entravision’s stock, and significant governance

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<sup>39</sup> *Id.* at 4.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 6.

rights, including the right to place two members on Entravision’s board and the right to veto certain of Entravision’s business decisions. Entravision was HBC’s principal competitor in Spanish-language radio in many markets.<sup>44</sup>

The DOJ expressed concerns that Univision’s stake in Entravision, including its exercise control over significant Entravision decisions, would reduce the incentives of both companies to compete aggressively against each other in the sale of Spanish-language radio advertising time.<sup>45</sup> The agency asserted that Univision’s ability to appoint directors and veto certain strategic business decisions (including the issuance of equity or debt, or acquisitions over \$25 million) would impair Entravision’s ability and incentive to compete with Univision/HBC.<sup>46</sup> Moreover, the DOJ believed that, because Univision was a substantial owner of Entravision stock and the company therefore would benefit even if a customer chooses Entravision rather than HBC, that Univision/HBC would have reduced incentives to compete against Entravision for advertisers seeking a Spanish-language radio audience. This, according to the agency, would result in an increase in prices for a significant number of advertisers.<sup>47</sup>

To alleviate the DOJ’s competitive concerns, Univision agreed, as part of a consent decree (i) to divest a significant portion of its equity stake in Entravision; (ii) to relinquish its right to two seats on Entravision’s Board of Directors; and (iii) to give up the right to veto certain Entravision business decisions. The decree required Univision to reduce its Entravision holdings to no more than 15 percent within three years and no more than 10 percent within six years. In addition, Univision was required to exchange its Entravision stock for a nonvoting equity interests with limited rights. These provisions were aimed at preventing Univision from participating in Entravision governance, or influencing Entravision’s radio business.

## **V. PREMERGER NOTIFICATION OF PARTIAL ACQUISITIONS**

As part of the Hart-Scott-Rodino (“HSR”) pre-merger notification regime in the U.S., acquisitions of voting securities (or assets) that satisfy the “size of transaction” threshold (and the “size of person” threshold, if applicable) must be reported to the FTC and DOJ—and a 30-day waiting period observed—prior to the transaction being consummated.<sup>48</sup> Partial acquisitions that meet these thresholds are subject to the notification and waiting period requirements unless they fall

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<sup>44</sup> Competitive Impact Statement, *United States v. Univision Communications, Inc.*, Civil No. 1:03CV00758 (D.D.C., May 7, 2003), available at <<http://www.justice.gov/atr/cases/f201000/201006.htm>>.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> 15 U.S.C. § 18a(a).

within one of the exemptions established by the HSR Act and the implementing rules, which are provided for transactions that are viewed as being unlikely to raise antitrust issues.<sup>49</sup>

One of the available exemptions involves acquisitions of 10 percent or less of an issuer's voting securities if the acquisition is made "solely for the purpose of investment."<sup>50</sup> According to section 801.1 of the HSR implementing rules, voting securities are acquired "solely for the purpose of investment" when "the person holding or acquiring such voting securities has no intention of participating in the formulation, determination, or direction of the basic business decisions of the issuer."<sup>51</sup> The rules provide the following example to illustrate this point:

If a person holds stock "solely for the purpose of investment" and thereafter decides to influence or participate in management of the issuer of that stock, the stock is no longer held "solely for the purpose of investment."<sup>52</sup>

Acquisitions that result in holdings of more than 10 percent of an issuer's outstanding voting securities must be reported in all instances unless the acquirer is an "institutional investor."<sup>53</sup> In that case, the 10 percent exemption is effectively raised to 15 percent when: (i) the acquisition is made in the ordinary course of business of the institutional investor; (ii) the acquisition is made "solely for the purpose of investment"; (iii) the issuer is not a competitor of the "institutional investor"; and (iv) the acquiring person does not include any entity that is not an "institutional investor" and that holds voting securities of the target issuer.

These exemptions are narrowly construed and, consistent with the purpose underlying the HSR Act, "the FTC's Premerger Notification Office applies a rebuttable presumption against its use where the issuer whose stock is being acquired is a competitor of the acquirer."<sup>54</sup>

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<sup>49</sup> In addition to the exemptions contained in the HSR Act itself, the U.S. antitrust agencies are authorized to provide exemptions for classes of transactions that "are not likely to violate the antitrust laws." 15 U.S.C. § 18a(d)(2)(B).

<sup>50</sup> 15 U.S.C. § 18a(c)(9).

<sup>51</sup> 16 C.F.R. § 801.1(i)(1).

<sup>52</sup> *Id.*

<sup>53</sup> 16 C.F.R. § 802.64.

<sup>54</sup> See Samuel R. Miller *et al*, "Antitrust Concerns From Partial Ownership Interest Acquisitions: New Developments in the European Union and United States," CPI ANTITRUST CHRONICLE, January 2012 (1).