

# The controlling shareholder



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### **INM Teaching Note**

#### **Outline of the Case – brief description of the instance and the context in which it is set**

The presence of a controlling stockholder can dramatically alter best corporate administration patterns. How extended these alterations need to be depends on the character of the commanding stockholder and the ability of an independent board ( a board independent non merely of the corporation but besides of the commanding stockholder ) to efficaciously manage its relationship with this really particular stockholder. Institutional investors will place ruddy flags that may bespeak commanding stockholder self-interest and so seek to carry the board to better its corporate administration patterns. Minimally, doing these ruddy flags known to other stockholders and stakeholders will assist set force per unit area on the board to rectify bad patterns and alter the ways of the inappropriately timeserving commanding stockholder, protecting value for all stockholders and other stakeholders.

#### **Maltreatment of power by Anthony O'Reilly – Questions**

##### **Independent lead manager:**

Was there an functionary or unofficial independent lead manager who has the authorization and stature to take Anthony O'Reilly softly aside and objectively express concern about the commanding stockholder ' s strategic programs and operational decisions—and will the commanding stockholder listen? Is at that place one there now for Gavin O'Reilly and Denis O'Brien?

**Executive Compensation:**

If the commanding stockholder has an employment contract with the company, it is of import that the board negotiate the contract through an independent commission with advice from outside advocate and compensation advisers straight engaged by the commission.

**Limits of Authority:**

If the commanding stockholder is the CEO, what are his “ limits of authority” when it comes to board engagement? A reappraisal of commission charters will uncover what issues need to be reviewed independently, e. g. , engaging and expiration of senior officers, manager nominations, major investings, strategic determinations, etc. A reappraisal of commission studies will uncover the board ‘ s ability to retain independent advocate and other professional advisers.

**The Independence of the Board & A ; the Value of an Independent Board**

Denis O’Brien up to this point was publically branded a heretical stockholder by INM and was a adult male who publically stated a blood feud against the so Group CEO of INM -Tony O’Reilly. Denis O’Brien had over a six twelvemonth period taken actions as a stockholder that negatively impacted on the value of INM portions while at the same time doing himself a bulk stockholder. Denis O’Brien made personal onslaughts on the so Group CEO as to his determination devising abilities for running companies non related to INM. To let Denis O’Brien to put up three managers for the board of INM was a major determination for INM as it means there are now two warring cabals on the board of INM. Both of whom are represented by bulk

stockholders of close equal values. It means that the board of INM truly and genuinely can not be considered independent.

A recent article by Professors Lucian Bebchuk and Assaf Hamdani has brought to the fore the thought that good corporate administration patterns at a publically held house 1 will not needfully be good patterns at a publically traded house in which there is a controlling stockholder. 2 This is because board independency, 3 a cardinal construct in structuring appropriate corporate administration patterns, has a different significance when a controlling stockholder is present. Corporate board members of a controlled company, even if run intoing all of the presently mandated independency demands and truly independent of the corporation 's direction, 4 may not be independent of the controlling stockholder. 5 If so, so these managers may be badly missing in the ability to exert “ independence of head, ” the ultimate intent of board independency. 6 Therefore, where a controlling shareholder is present, board independency must intend independency from the controlling shareholder every bit good as the corporation. 7

Board independency is besides critical to corporate administration because it allows a board to decently carry through its responsibilities under the jurisprudence. Corporate jurisprudence requires the house 8 to be led by a board of managers, not the commanding stockholder.

Identifying whether or not a board is genuinely independent is merely the first measure in measuring the quality of corporate administration at a controlled corporation. After all, a commanding stockholder 14 still has the

power to rule an independent board through his direct vote power and by menaces of removal. 15 Therefore, a proper rating requires cognition of those corporate administration patterns that a controlled company uses to supervise and pull off the decision-making influence of the controlling stockholder. Furthermore, to do certain these patterns are optimum, a subjective analysis of merely how the controlling stockholder interacts with the board is required. In addition, the focal point of such a subjective analysis must travel chiefly to an rating of the character of the commanding stockholder and his/her motives since the public assistance of the company.

The personality of the commanding stockholder will besides play a function in finding the most optimum corporate administration patterns ( Bebchuk and Hamandis )

The inquiries this raises for corporate administration at INM such as:

Will the board of INM ever make determinations in the best involvement of the company or will they hold motive to do determinations to hurt the representatives of the adversary ( DOB ) and frailty versa.

Will the representatives of Denis O'Brien and representatives of Anthony O'Reilly supply cheques and balances for each other that create a better determination doing board than what was antecedently the instance where there was merely one bulk stockholder on the board: the Group CEO Antony O'Reilly?

Anthony O'Reilly was a bulk stockholder and Group CEO of INM when the determination was made allow Denis O'Brien representatives on the board of

INM. If INM had an independent board at the clip would they of made the same determination? Or to set it another manner: was this determination made because of the personal force per unit area Anthony O'Reilly was put under by Denis O'Brien?

Given the acrimonious competition that was shared between the present board members of INM would it be in the best involvements of the company to make an independent board of managers free from the influence of bulk stockholders?

### **Issues in relation to Majority Shareholders and Agency Theory**

Before retirement Anthony O'Reilly was the Group CEO of INM with a interest of over 28 % , with purchase over more than 29.5 % with household and other affiliated parties. Because of this state of affairs the board of INM could non be considered “ independent” in the idiom of Corporate Governance Best Practice. Anthony O'Reilly ' s big portion in the concern and his competitory personality would propose that he was a bulk stockholder who reduced “ agency costs” for INM by seeking wealth maximization for the company. However if you consider some of the benefits Anthony O'Reilly enjoyed as a consequence of his place there may be a suggestion of personal indulgence on his portion. For illustration Denis O'Brien believed that Anthony O'Reilly used his power in INM to guarantee that O'Brien was given negative intelligence coverage in respect to the awarding of a telecoms license and the subsequent Moriarty Tribunal that followed. Another illustration in this vena is while he is a individual in a alone place to pass on with the Group CEO, Anthony ' s assignment of his boy Gavin as Chief Operating Officer could be construed as nepotism by critics.

In a publically held company where there are a big and diverse figure of stockholders, a authoritative bureau job is created because of the separation of ownership and control—will the directors work for the stockholders or progress their ain involvements? 18 Inserting the presence of a controlling stockholder into the mix may assist cut down these bureau costs, if he uses his clout to supervise the activities of direction, 19 either by going the Chief Executive Officer ( CEO ) , actively take parting as a board member or holding one more of his agents stand foring his involvements on the board.

However, the presence of a controlling stockholder can besides make bureau jobs between the commanding and noncontrolling stockholders 20 and other stakeholders as a commanding stockholder can besides make bureau jobs between the commanding and noncontrolling stockholders 20 and other stakeholders in the house. This job arises if the commanding stockholder attempts to utilize his authorization to reassign corporate resources to himself for personal ingestion or addition in which the non- commanding stockholders do non proportionately profit, 21 and/or consequences in injury to the corporation.

There are two types of private benefits of control: monetary and non-pecuniary. 22 Monetary benefits include “ tunneling minutess, ” corporate fringe benefits and larceny. 23 Non-pecuniary benefits include “ forms of psychic and other benefits that, without more, involve no transportation of existent

company resources and do non disproportionately thin the value of the company ‘ s stock to a diversified investor.” 24 For illustration, nonpecuniary

benefits may deduce from holding control of a major national newspaper through which the commanding stockholder may hold the chance to act upon national sentiment. 25 Or, one can have the non-pecuniary benefits of putting household members in executive places whether or non they are qualified.

While the ability of a commanding stockholder to take advantage of non-pecuniary benefits

may look less baneful, the consequence can be merely as financially harmful to non-controlling stockholders and other stakeholders since the commanding stockholder who takes advantage of either type of benefit, monetary or non- monetary, may be efficaciously “ maximizing the commanding stockholder ‘ s public-service corporation, ” but non needfully “ maximizing the value of the corporation.”

Questions that arise in respect to the bureau job and INM ‘ s bulk stakeholder state of affairs are:

- Did Anthony O’Reilly abuse his place as Group CEO for his ain benefit?
- Was it in the best involvements of INM to name Gavin O’Reilly as COO?
- Is at that place a struggle of involvement in being involved in high profile public stamps and besides in control of the most fecund media group in Ireland?
- Is the instance that Denis O’Brien ‘ s bulk shareholding is making new jobs for INM?



## **The Impact of a Controlling Shareholder on Corporate Governance Practices**

Denis O'Brien may hold had some believable grounds for knocking INM ' s Corporate Governance in footings of “ Best Practice” .

There are legion corporate administration patterns that are presumed to be optimum in a publically traded corporation ; these include holdingan independent bulk of the board, bulk vote, one-year election of managers, leting the board to run into in executive session without the presence of executive direction and necessitating stockholder blessing to amend bylaws. In add-on, corporate administration is usually enhanced when there is an absence of the followers: a toxicant pill, charter commissariats that allow managers to be removed merely for cause and ace bulk vote demands for stockholders.

What we usually see best patterns are non so when a controlling stockholder is present. The presence of a commanding stockholder moves the focal point of bureau costs from executive direction to the commanding stockholder. We are now most disquieted about commanding the possible bad behaviour of the commanding stockholder, non the executive direction squad.

This alteration in focal point means the following in respect to outdo patterns:

- Board member independency now has to be evaluated in footings of the commanding stockholder every bit good the corporation.
- The one-year election of managers and the absence of charter commissariats which allow managers to be removed merely for cause smoothes the manner for a controlling stockholder to coerce the

expiration of disobedient managers and puts force per unit area on single board members to obey the controlling stockholder or be ousted. Alternatively, it would better to hold staggered boards in combination with charter amendments protecting managers from dismissal prior to the termination of their term except for cause. 40

- The company should necessitate the Chairman of the Board to be independent of both the controlling stockholder and CEO.
- It should not let the commanding stockholder to be on the board putting up a commission.
- It should not let household members of the commanding stockholder to function on the executive direction squad
- A figure of presumed best patterns become inconsequential such as bulk vote, meeting in executive session ( commanding stockholder on board, but not portion of executive direction ) , stockholder blessing of bylaws, stockholder nomination of managers and the absence of a toxicant pill.
- Supermajority vote demand for stockholders becomes a necessity in order to give some voice to minority stockholders.

Such patterns not merely assist maintain the commanding stockholder from prosecuting in timeserving behaviour, but besides supports the board ' s function as an independent decision-making organic structure within the corporation.

## Questions

### Understanding the Controlling Shareholder

Anthony O'Reilly is a adult male with a competitory nature, a adult male who knows how to win. The inquiry is did he utilize INM to foster his aim

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involvements in other concern state of affairss or utilize INM to rock public temper to aline with his involvements. The Independent Newspaper is the widest read day-to-day in Ireland with a circulation in surplus of 500, 000. It is the instance that Anthony O'Reilly published biased content on the front page of The Independent that debatably swayed public sentiment in favor of Fianna Fail and the Progressive Democrats in the 1997 general election. This many property to action to root from a difference between Sir Anthony and the former Taoiseach John Bruton over one of his concern involvements.

Anthony O'Reilly and Denis O'Brien both competed for the Esat mobile telecom license and O'Brien won. The Independent ' s subsequent coverage of the Moriarty Tribunal so can objectively be viewed as history reiterating with O'Reilly utilizing his influence at INM to paint a negative image of O'Breien ' s function in that competition. Even if this is non the instance O'Reilly has left himself unfastened to accusals for moving unethically in reagard to intelligence coverage in the past – i. e. by seting opinionate narratives on the front page of the largest newspaper in Ireland at a critical clip in an general election.

Denis O'Brien is an highly successful concern adult male who knows how to acquire things done. However he has a public blood feud against the O'Reilly household and their attached board members and has acted in a manner that hurt the involvements of other stockholders in the past and possibly will make so once more in the hereafter to foster his ain aspirations.

In the worst instance scenario, where the commanding stockholder utilizations every chance to mistreat his place and steal value or chances

from the corporation, enforce his caprice and will on the corporation, and steamroll his managers into entry and timid conformity,

implementing the above list of best patterns and more must be considered a necessity.

The practical world is that most commanding stockholders, who can be assumed to be driven

and powerful people, autumn someplace in between these two extremes

[ .. ]. 43 If so, the board will be working with a strong-minded individual, who has a sense of ownership, high degree of designation with the company and is driven to win no affair what. Such a commanding stockholder will desire to convert the board that his thoughts are best for the company instead than merely stating them what to make. 44 He will recognize that “ buy in” will ease execution whereas telling conformity strains bitterness. This dynamic will coerce the commanding stockholder to believe through his thoughts, prevent major catch determinations, and open the chance for bring forth more and better options. 45 In other words, the managers will more than probably have an chance to supply advocate, act upon the commanding stockholder ‘ s thought and travel frontward in existent alliance.

Furthermore, although it is true that the commanding stockholder has ultimate control over who sits on the board, put uping his ain campaigners from the floor if necessary, it can non be assumed that every commanding stockholder will merely desire to environ themselves with toadies. For illustration, the commanding stockholder may hold the desire to piece a high quality board because it both benefits him and “ his” company and ( on a

less complementary issue ) because star power on the board strokes his self-importance. 46 In add-on, many powerful people are smart plenty to environ themselves with people whom they believe are smarter than they. As a consequence, the commanding stockholder may seek the best he can to retain his independent managers and view the menace of surrender by a cardinal independent manager as a cause for grave concern. Finally, surrenders “ en masse” may be a believable menace to the commanding stockholder as it could make damage to his cyberspace worth by directing a negative signal to the stock market, while besides staining his image as a leader. 47

It is besides of import to maintain in head that the passion, thrust and inventiveness of a controlling stockholder may be the secret to superior company public presentation, accruing to the benefit of all stockholders and other stakeholders. Therefore, the benefits derived from the presence of a “ benevolent dictator” may intend that the corporation is better off by earnestly sing whether to implement all of the best patterns described above. At the same clip, the commanding stockholder ( particularly coming from full ownership ) may ne’er lose his attitude of “ l’entreprise c’est moi, ” i. e. , ne’er accepting that he is no longer the “ owner” of the corporation, and as a consequence, non adequately esteeming the involvements of other stakeholders, particularly other stockholders.

### **Questions**

Have Anthony O'Reilly 's high profile concern traffics outside of INM made INM a mark for defeated challengers who have been angered by intelligence coverage?

Can Denis O'Brien of all time be trusted to stand for the involvements of other stockholders given his path record with the company?