UNIVERSITA' COMMERCIALE "LUIGI BOCCONI"

PhD SCHOOL

PhD program in **Legal Studies**

Cycle: 34°

Disciplinary Field (code): IUS/04

Institutional Investors and the Antitrust Risks of Common Ownership

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Year 2022

"As Julius Caesar would have said, the die is cast.
And the months and years ahead will show the results"

I wish to thank my advisor, Professor Mariateresa Maggiolino, and my co-advisor, Professor Federico Ghezzi, for the support they gave me in carrying out the extensive legal research in the field of competition and financial regulation to identify legal trends and potential gaps in the U.S. and EU competition law analyses of common ownership and to look at possible solutions to minimize the potential antitrust risks that institutional investors are claimed to raise when holding minority shareholding in numerous undertakings active within the same industry.

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ABSTRACT

During the last years, particularly in the United States, there has been a prolific academic debate on the possession by institutional investors and asset management companies of the caliber of BlackRock, State Street, or Vanguard (*i.e.*, the Big Three) of minority shareholdings in a plethora of firms active within the same industries, and allegedly competing in the same relevant markets. This phenomenon has led to the emergence of the novel theory of harm of "*common ownership*". Under an antitrust standpoint, the common ownership theory assumes that institutional shareholders having minority stakes in competing firms have both the incentive and the ability coordinate the commercial strategies of their portfolio companies or induce them to refrain from competing since that would increase the minority shareholders' overall portfolio value. Accordingly, minority shareholders are claimed to distort market dynamics.

The alleged risks of anticompetitive effects increase in case of "cumulative" networks of common shareholders, which materialize in a scenario in which various financial investors hold at the same time minority shareholdings in the same firms that compete within the same relevant markets. Under the common ownership theory, these various financial investors may be in the position to coordinate the commercial decisions of the partially owned firms.

As a consequence, common ownership is causally linked to a distortion of competitive dynamics in the markets where the partially owned firms are active. In particular, it is alleged that common ownership could lead to forms of collusion that could produce a negative impact on prices. However, as I will make clear, the common ownership theory raises a number of questions and it should be looked at with caution in light of the prejudice that an incorrect antitrust assessment may have over the activities of financial institutions.

In this context, this dissertation will start by differentiating common ownership to other corporate governance structures which may create links

among competing firms and be problematic from a competition law angle (*in primis*, interlocking directorates). This exercise aims at identifying the distinctive traits of common ownership and at evaluating the degree of antitrust risk that is effectively attached to common ownership (Chapter I).

On the basis of this preliminary analysis, in the other chapters I will analyze the main features and activities of financial investors to assess whether in the studies carried out so far on common ownership in the U.S. airline, banking, and pharmaceutical industries any gap may be found (Chapter II).

To strengthen my analysis and disentangle the various antitrust criticisms that common ownership is claimed to raise, I will then look at the regulatory frameworks in which financial investors operate and I will evaluate to which extent those rules already reduce the perceived antitrust risks (Chapter III). While in the first part of this dissertation I will start by looking at the U.S. framework, where common ownership has been observed more prominently, I will then also assess the EU context and look at the approach suggested so far by the EU practitioners in connection with minority shareholding and, more recently, with common ownership (Chapter IV). This comparative approach aims at comparing the two legal systems and at identifying potential solutions to the alleged competition law risks that common ownership is claimed to raise, should they ever materialize.

From a methodological standpoint, instead of undertaking a statistical exercise of the alleged anticompetitive effects of common ownership, this dissertation aims at assessing the claimed antitrust concerns raised by the common ownership theory in light of both the traditional competition law principles and of the various regulatory frameworks that discipline institutional investors. This approach will help in paving the way for questioning the existence of real antitrust risks of common ownership and answering some of the questions raised to date on the soundness of the common ownership theory.

The complexities briefly mentioned above explain why this dissertation evaluates the potential competition law risks of common ownership through comparative lens. In this respect, as mentioned, a comparative approach will be adopted both under a corporate law standpoint by differentiating common ownership from other corporate governance structures (for example, interlocking directorates, cross-shareholdings and other mechanisms that create connections among various firms), and under a "social" standpoint by looking at different legal frameworks applied in various geographic areas (*i.e.*, the U.S. as opposed to EU approach).

That comparative analysis is valuable to clarify why, in my opinion, the existing antitrust toolbox is fit for purpose to tackle the alleged (even potential) anticompetitive risks raised by common ownership. As I will note, this approach balances the public interest to the protection of competitive markets and the private interests of the major financial investors in continuing diversifying their investments in various firms, on the assumption that limiting such activity through either new antitrust rules or additional regulatory bans could have a detrimental impact on a plethora of third-party stakeholders and it could hence negatively affect the general economic interest.

CHAPTER I

CONTROL ENHANCING MECHANISMS AND COMMON OWNERSHIP IN MODERN FINANCE

I. INTRODUCTION

Antitrust enforcers have been traditionally interested in identifying which firm exercises the ultimate decision-making power and hence controls a certain market operator. This is enshrined in various set of antitrust rules, from merger control rules which generally apply to transactions leading to change of control over firms,[1] to the notion of single economic entity[2] subject to the application of the competition law bans of anticompetitive agreements and monopolization conducts (or, in Europe, of abuse of dominance conducts). The reason why antitrust rules have

[1] The notion of control in antitrust law is multi-faceted and in case of minority shareholders it implies a certain degree of discretion as to whether these shareholders can effectively influence the commercial strategies of a firm. As I will detail in the following chapters, the notion of antitrust control as applied in merger analyses is slightly different in various jurisdictions. In the U.S. under Section 7 of the Clayton Act (15 United States Code (USC), section 18a), the parties to non-exempt proposed mergers and acquisitions exceeding certain thresholds have to notify these transactions to the Federal Trade Commission and to the Department of Justice before closing the proposed transactions. Generally, mergers subject to notifications result in change of control or acquisition of control over an entity. However, the U.S. antitrust law may apply to acquisitions of minority shareholdings flexibly, since merger rules do not expressly envisage the notion of control to apply. Therefore, in certain cases, acquisitions of corporate voting securities may be notifiable even if they do not confer "control" over the target entity, as long as they exceed the applicable transaction value and party-size thresholds.
The situation is indeed less clear in the European Union, where under the EU Merger Regulation No. 139/2004, merger control rules expressly apply to transactions resulting in change of control over an entity, provided that the applicable turnover thresholds are met. European merger control law does not in principle apply to acquisitions of minority shareholdings save for cases in which minority shareholders are found to enjoy at least *de facto*, or *de iure* antitrust control upon the partially acquired firm, by holding certain veto rights or other relevant decision-making powers over the target which actually give the acquirer the possibility to control the target (see *infra*, chapter IV). However, as I will point out in the following chapters, the picture is particularly articulated, and this analysis precisely aims at declining and looking at the complexities of antitrust control and at its relevance for the common ownership theory of harm as applied to minority institutional investors.

[2] For more details, see Section III.5 *infra*.

traditionally looked at who exercises control over firms is coherent with the founding principle of antitrust regulations of protecting competitive markets: antitrust law wants to understand who are the decision-making centers which determine how firms behave in the markets.

On the above assumption, antitrust enforcers have traditionally looked at firms that exercise controlling powers over a market operator by holding majority shareholdings because they have usually been in the position to control, and hence orient market strategies of the controlled firm. Therefore, provided that specific turnover thresholds are met, antitrust enforcers traditionally scrutinize transactions in which the investor acquires a majority shareholding within a firm that competes with its other controlled portfolio companies, or at least a significant minority shareholding akin to a majority stake in a scenario in which it also enjoys some veto powers upon the adoption of strategic decisions of the acquired entity. In these cases, post-transaction the acquirer will be in the position to control and to orient market strategies of all its controlled portfolio companies and the impact of the merger on market dynamics takes into account the joint market share of these competing portfolio companies. Similarly, a controlling shareholder may potentially be in the position to coordinate the market strategies of all its owned portfolio companies, and certain safeguards are usually put in place to avoid the exchange of confidential market information between these portfolio companies through the common controlling shareholder.

The idea that antitrust law should focus more closely on investors holding minority shareholdings in firms has recently fueled a prolific debate. Industry dynamics have changed over the years and numerous corporate structures have been set up. In this dynamic context, the general assumption that minority shareholders having very low shareholding may hardly exercise antitrust control and orient market strategies of the minority-owned company does not necessarily hold true. However, as I will clarify in detail in this dissertation, the argument that investors holding very low shareholdings in competing firms may distort market dynamics still

implies that that they are in the position to exercise antitrust control over these firms. Under corporate law, investors are usually in the position to control a company by holding the majority of its shares and voting rights in a scenario in which one share grants the shareholder one right (*i.e.*, the *one-share-one-vote* principle). Therefore, antitrust regulations and corporate law do not coincide. This does not mean that antitrust law is indifferent to the case of minorities, but they are valuable to the extent they are effectively in the position to exercise control the commercial strategies of a firm. In addition, alternative corporate structures to majorities, that establish connections among interdependent firms and give one firm influence upon the connected entity are similarly valuable in competition law assessments. In this respect, a multitude of alternative corporate structure have captured the attention of antitrust practitioners as some of them could effectively grant to parties which do not hold a majority stake in a competitor the possibility to have a voice in its decision-making process.

In particular, I refer to the so-called control enhancing mechanisms ("CEMs"), that are corporate governance structures which depart from the traditional *one-share-one-vote* principle of corporate governance, since they do not imply the existence of a direct unilateral link between shareholding *ratio* and corporate control.[3] These structures may confer to minority shareholders the possibility to exercise corporate control over a firm although holding the minority of its shares. This is so as these mechanisms usually apply to corporate structures where shareholders, despite holding minority stakes of a firm may have majority voting rights and hence have a voice in the corporate boards or anyhow be in the position to orient the management of the minority owned company. In other

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[3] For a detailed assessment of CEMs, see SARA SAGGESE, FABRIZIA SARTO & CORRADO CUCCURULLO, Evolution of the Debate on Control Enhancing Mechanisms: A Systematic Review and Bibliometric Analysis, International Journal of Management Reviews, 18, 4, 417-439 (2016); GUR AMINADAV & ELIAS PAPAIOANNOU, Corporate control around the world, NBER Working Paper, National Bureau of Economic Research (2016).

scenarios, these mechanisms link independent companies and entrust one of them the possibility to orient market strategy of the interrelated entity.

In this complex framework, to assess the potential antitrust risks that these alternative structures may eventually raise, the first question to ask is whether control in corporate law necessarily means control as interpreted by antitrust practitioners. In my opinion, the answer should be negative, and a distinction should be traced between those cases in which corporate control implies antitrust control, and those which do not since minority shareholders prove to be incapable of exercising an effective influence upon their partially owned companies and are not able to orient their market strategies. To the extent that minority shareholders have a voice in the adoption of strategic decisions of the participated company, such as veto rights on budget, business plan, appointment of high-representatives of the minority-owned company or on relevant investments' decisions, minority shareholders also have controlling rights that are valuable from an antitrust standpoint. In the absence of shareholders' agreements conferring those veto rights, the likelihood that minority shareholders may be in the position to exercise antitrust control upon the partially owned company together with majority shareholders is indeed lower.

In this chapter I will hence explore the circumstances under which different CEMs, although leading to a separation of control and cash flow rights, may grant minority shareholders not only corporate control over the minority-owned company, but also antitrust control to the extent that minority shareholders are in the position to influence the firm's decision-making process. To carry out this analysis, I will briefly provide an overview of some of the main CEMs that have been implemented so far on a global scale (such as interlocking directorates, dual and multiple class shares, shareholders' agreements or cross-ownership). Some of these mechanisms do not simply challenge the traditional linear relation between control and share capital *ratio*, which is implied by the one-share-one-vote principle, but more interestingly the "single-firm" approach in cases where they set up corporate links between independent firms. As I will point out, some of

these structures allow the representatives of one firm to influence the management of the inter-connected firm. As I will clarify in detail, this may be the case of interlocking directorates, that imply the existence of personal links among independent competitors. In this scenario, the same person enjoys directorship or apical management positions within autonomous firms active in the same relevant market, which according to antitrust principles should autonomously operate on the market. To the extent that one firm has not only the incentive, but the ability to interfere with the decision-making process of competitors, antitrust concerns may materialize. These may result in anticompetitive coordination of the commercial strategies of these independent firms (so-called horizontal coordinated effects), or in unilateral action of the interconnected entities – which substantially present themselves on the market as a single firm – not to compete among them and hence eliminating an important competitive constraint (so-called unilateral non coordinated effects).

In this context, I will discuss how traditional competition law principles have been applied so far to CEMs' structures and evaluate whether the antitrust framework is suitable to deal with the envisaged antitrust concerns they potentially raise, or new rules should be implemented. On this preliminary basis, I will then introduce the new common ownership ("CO") theory as applied to institutional shareholders and lay down the basic principles upon which that theory relies. As I will explain, CO structures seem to qualify as a new type of CEM as they challenge the relation between control and share capital rights by implying the presence of "controlling" minority shareholders within the share capital of potential competitors. However, I will clarify the reasons for which CO does not fit within the existing categories of CEMs and in the following chapters I will evaluate whether the presence of institutional shareholders with minority stakes within the share capital of potential competitors may effectively raise antitrust criticisms and eventually call for the intervention of antitrust authorities.

II. CONTROL-ENHANCING MECHANISMS IN THE LITERATURE

To assess firms' strategies and understand whether a certain corporate structure may raise any degree of antitrust risk, a preliminary analysis of corporate ownership structures (*e.g.*, one-share one-vote model as opposed to various CEMs) is useful. First, it is intuitive that investors may have a higher incentive to align the behaviors of the firms of which they hold shares if they are present in the share capital of the same firms with substantial overlapping share portfolios. If that co-ownership tie is marginal, the incentive of shareholders to "orchestrate" the commercial strategies of competitors is low, and these firms will hence most likely behave independently.[4] Although apparently plain, the practical implementation of that argument to the activities of institutional minority shareholders is not straightforward, since it is not clear whether they effectively control their portfolio companies. Understanding the extent to which they may effectively interfere with the decision-making process of competitors depends on various factors, *in primis* the specific corporate governance structure of the commonly participated firms.

As already mentioned, in a theoretical model of corporate governance, by applying the *one-share-one-vote* principle – that implies that all securities have votes in the board in the same proportion as their claim to income[5] – a linear relation correlates corporate control and rights to share capital.[6] This means that in theory only majority shareholders exercise corporate control upon a firm by holding the highest percentage of its share capital and voting rights. As a result, majority shareholders may

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[4] LUCA ENRIQUES & ALESSANDRO ROMANO, Institutional Investor Voting Behavior: A Network Theory Perspective, Law Working Paper N° 393 (2018).

[5] SANFORD J. GROSSMAN & OLIVER D. HART, One share-one vote and the market for corporate control, J. Financ. Econ., Vol. 20, 175-202 (1988).

[6] LUCIAN AYE BEBCHUK, REINIER KRAAKMAN & GEORGE TRIANTIS, Stock Pyramids, Cross-Ownership and Dual Class Equity: The Mechanisms and Agency Costs of Separating Control from Cash-Flow Rights, HLS Discussion Paper No. 249 (1999); LA PORTA, RAFAEL, FLORENCIO LOPEZ-DE-SILANES & ANDREI SHLEIFER, Corporate Ownership Around the World, JOF 54:471-517 (1999).

be in the position to exercise antitrust control upon various firms and accordingly orient their commercial strategies. This is so as these shareholders bear the economic risks associated to their decision-making power and they are best equipped to decide on the affairs of the controlled firms and on the commercial strategies that they should implement in the relevant markets where they are active.[7] In this context, it is clear why the one-share-one-vote principle has been traditionally key in ensuring the stability of companies by securing voting structures and minimizing potential conflicts of interests between shareholders and management. These conflicts refer to the so-called *agency problems* which, as I will point out later, add a layer of complexity in the assessment of the activities of institutional investors under the CO debate.[8]

However, there may still be cases in which, although the one-share one-vote principle is not applied, because of the implementation of CEMs, a minority shareholder has still an influence upon the market strategies of the partially owned company. In these cases, CEMs may ensure the stability of a company by allowing family shareholders or other shareholders to control that company. In some cases, CEMs create interconnections among competitors, and they could operate as coordination devices among independent firms (for example, cross-shareholdings). On the basis of these general assumptions, in the following sections I will explore the main CEMs implemented both in the U.S. and in Europe with the aim of setting the scene to the CO theory.

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[7] From an antitrust standpoint, as I will make clear, the relevant market definition is essential to define the framework within which competition policy is applied by identifying where competition among firms should be ensured.

[8] Agency problems mainly arise from the delegation of control to the management. The disconnection between ownership and day-to-day management of a firm may lead the management to adopt short-term strategies to the detriment of the firms' long-term financial objectives. However, it cannot be excluded that such delegation is now necessary to manage global players active in the worldwide financial scenario. In a hypothetical world with zero agency costs, this layer of complexity does not arise. However, this extreme scenario is hard to materialize in practice. For a doctrinal analysis see LUCIAN BEBCHUK & SCOTT HIRST, Index funds and the future of corporate governance: theory, evidence, and policy, Colum. L. Rev. 119, 8 (2019).

III. A SNAPSHOT OF THE MAIN "TRADITIONAL" CEMS AND OF SIMILAR CORPORATE STRUCTURES

CEMs bring about a non-linear relation between the distribution of capital shares and control rights by misaligning financial ownership and voting rights. Some CEMs may entrust minority shareholders with corporate control over the partially owned company even though they hold a stake of equity below the 51% share-capital threshold, and that could even amount to a small fraction of the company equity. In other cases, they result in the creation of personal relations between independent companies, entrusting them the possibility to exercise some form of reciprocal corporate control upon the interconnected one in spite of the absence of financial shareholdings (for example, interlockings). Therefore, within the wide category of CEMs, various corporate structures may be identified, such as interlocking directorates, shares that confer multiple voting rights, shareholders' agreements or cross-shareholdings. Their implementation in Europe and in the U.S. has followed different trends in view of the various legal constraints and limits and of the different macro-economic scenarios.

Interestingly, CEMs have recently captured the attention of the antitrust enforcer and, in Europe, a study commissioned by the European Commission (the "CEM Study")[9] reports that, as of 2016, in Member States CEMs were common in listed companies, with multiple voting rights' shares that made up to up 21% of all scrutinized CEMs or shareholders' agreements up to 14%. In general terms, the CEM Study also found that several listed companies, the great majority of which were incorporated in the United States, had dual class shares or granted loyalty votes to shareholders (for example, five or ten votes *per* share if held for four

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[9] External Study Commissioned by the European Commission, Report on the Proportionality Principle in the European Union, Proportionality Between Ownership and Control in EU Listed Companies (2016). This study assessed the corporate governance structure of 464 European companies and found that 44% have implemented one or more CEMs. France, Sweden, Spain, Hungary and Belgium are the countries with the highest proportion of companies featuring at least one CEM.

years). In this context, the paragraphs below will focus on some of the main CEMs in terms of their legal availability both in the U.S. and in Europe, as well as on their effective implementation and on the possible antitrust risks that they could raise.

III.1 Interlocking directorates

Interlocking directorates ("IDs") refer to a situation where the members of the board of a company sit on the board of a direct competitor (horizontal interlocks), or of an entity active in a downstream or upstream market (vertical interlocks). This CEM has attracted the most attention of the antitrust practitioners as the members of board of directors, management or control bodies of a company are usually entrusted with key management or strategic positions within a company and when there is an ID those people also sit on the board of competitors and may channel sensitive commercial information among the two. The exchange of sensitive information due to IDs may create opportunities for competing firms to coordinate their commercial strategies and thus collude to the detriment of consumers. In addition, IDs may induce a firm to refrain from competing aggressively with the inter-locked competitor by minimizing competitive constraints among them.

In this framework, there have been voices who have strongly opposed the implementation of IDs. This approach relies on the underlying premise that, as authoritatively claimed, "*the practice of interlocking directorates is the root of many evils (…). It tends to disloyalty and to violation of the fundamental principle that no man can serve two masters*".[10]

(i) *Interlocking directorates in the United States*

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[10] LEWIS J. PAPER, Brandeis: An Intimate Biography of Supreme Court Justice Louis D. Brandeis, Open Road Media (2014); see also FLORENCE THÉPOT, FLORIAN HUGON & MATHIEU LUINAUD, Interlocking Directorates and Anticompetitive risks: An Enforcement Gap in Europe?, Concurrences No 1/2016.

In light of the antitrust concerns that have been briefly referred to above, a rigorous regulatory approach has been traditionally adopted in the United States in respect to IDs. More precisely, Section 8 of the Clayton Act prohibits IDs.[11] Therefore, the same person cannot simultaneously serve as an officer or director of two competing firms (other than banks, banking associations and trust companies), that are engaged in whole or in part in commerce, unless certain *de minimis* exceptions apply. The concern under Section 8 is that a common officer or a director could exchange sensitive information between competitors and coordinate their business decisions.[12] The elimination of competition caused by an agreement between these firms would constitute a *per se* violation of antitrust law.[13]

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[11] 15 U.S. Code § 19 – Interlocking directorates and officers.

[12] For a recent detailed study, see YARON NILI, Horizontal Directors, Northwestern Univ. L. Rev., Vol. 114, No. 5, 1228 et seq., 2020. According to the author, "*Horizontal directors may facilitate, or unintentionally contribute to, both collaboration and collusion between the companies whose boards they serve on. This phenomenon may be especially prevalent in industries that are more saturated with horizontal directors* […]. *The Justice Department itself has indicated that horizontal directorships may facilitate 'a cozy relationship among competitors' prompting them to coordinate at the expense of consumers. Yet, the same potential 'cozy relationship' that raises antitrust concerns may actually benefit the shareholders of these companies, allowing them to increase profits by having consumers pay more, therefore making horizontal directorships a rational and legitimate corporate governance choice for companies*".

[13] To understand how rigorous the antitrust "*per se*" rule is in the scrutiny of alleged collusive conducts, I will briefly outline below this standard, as opposed to a more lenient "*rule of reason*" rule. It is well-known that in the U.S. alleged violations of antitrust laws are typically analysed either as *per se* illegal or under the *rule of reason* standard. When the *per se* rule is applied, reasonableness of the conduct or arguments about the procompetitive effects of the conduct in question are not taken into account to support the antitrust theory of harm. Accordingly, the U.S. antitrust agencies have traditionally challenged as *per se* illegal the agreements among direct competitors to fix prices or output, or market sharing. This is due to the fact that experience shows that these agreements always or almost always tend to prejudice final consumers, without inquiring into their claimed business purposes or into their overall competitive effects (See the FTC and DOJ *Antitrust Guidelines for Collaborations Among Competitors*, April 2020. See also, U.S. Supreme Court, *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 432-36, 1990).
By contrast, the *rule of reason* standard calls the antitrust enforcer to consider the circumstances surrounding the restraint and to evaluate the potential procompetitive benefits that the alleged antitrust restraint is likely to produce. The U.S. Supreme Court clarified how to apply this standard in *Board of Trade of City of Chicago v. U. S.*, where,

This means that, in case of a breach, the antitrust authority should not prove that the IDs effectively distorted competitive dynamics among the interconnected firms and produced anticompetitive effects. In this circumstance, officers and directors who find themselves in violation of Section 8 have one-year grace period to resign from their positions. If they do not, the two authorities responsible for enforcement of antitrust law – namely, the Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") – may seek injunctive relief, whereas private plaintiffs can sue the infringer for damages.

It is clear that Section 8 aims at *ex ante* "*removing the opportunity or temptation to such* [antitrust] *violations through interlocking directorates*".[14] This holds especially true in case of horizontal IDs, that raise the highest degree of antitrust risk as they connect direct competitors which are active within the same relevant market at the same level of the value chain.

By contrast, vertical interlocks among companies that are active at different levels of the value chain are indeed not as problematic from an antitrust standpoint since, in these cases, there is not a risk of coordination on prices or on other essential market conditions of competing products that are offered by firms active at the same level of the value chain. In case of vertical IDs, antitrust risks may eventually arise to the extent that there is some evidence of foreclosure effects of competitors of the interconnected firms as they cannot have access to customers of the interconnected firms

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in an opinion written by Justice Brandeis, it held that the "*true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition*" (*Board of Trade of City of Chicago v. United States*, 246 U.S. 231, 1918). In that case, the court valued several facts to support its analysis, as "*the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual and probable" along with* "[t]*he history of the restraint, the evil believed to exist, the reason for adopting the particular remedy,* [and] *the purpose or end sought to be attained*". All these factors led the Court to conclude that the conduct under scrutiny complied with antitrust law.

[14] The US District Court for the Southern District of New York, U.S. v. Sears, Roebuck & Co., 111 F. Supp. 614 (S.D.N.Y. 1953).

or to certain input. This factual assessment requires a more in-depth analysis of market dynamics and, in a number of cases, the anticompetitive effects result to be balanced by procompetitive ones due to vertical integration-efficiencies between the connected firms.[15]

In such a context, although valuable to minimize antitrust risks, the ban set forth by Section 8 has also raised a number of issues. First, the use of the term "corporation" has raised the question of whether Section 8 applies to limited liability companies and, in modern finance, the same question may arise in connection with the application of this ban to new corporate structures such as investment funds. As I will detail further (see Chapter III), investment funds do not fit within one model of corporate law and could have a plethora of structures. Even though courts have not directly addressed this question, the DOJ has proposed a wide interpretation of the Section 8 ban since the harm that IDs may cause can be the same independently from the corporate structure that a market player has opted for.[16]

The Section 8 ban does not apply if the inter-locked firms have competitive sales below certain thresholds.[17] The rational is clear: if the shares of the interlocked firms in the market where they compete are not

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[15] This is exactly the same logic that the antitrust authorities have traditionally applied in the scrutiny of vertical agreements, that are usually investigated under the traditional *rule of reason* standard. As repeatedly stated by the U.S. courts, that standard involves a factual inquiry into the restraint's overall competitive effects and it thus entails a more flexible inquiry depending on the nature of the agreement and on market circumstances.

In this respect, see the U.S. Supreme Court, California Dental Ass'n v. FTC, 119 S. Ct. 1604, 1617-18 (1999); FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 459-61 (1986); National Collegiate Athletic Ass'n v. Board of Regents of the Univ. of Okla., 468 U.S. 85, 104-13 (1984).

[16] DOJ's press release, "Principal Deputy Assistant Attorney General Andrew Finch Delivers Keynote Address at Capitol Forum's Fifth Annual Tech, Media & Telecom Competition Conference", U.S. Washington DC, December 14, 2018.

[17] 15 U.S. Code, § 19, clarifies that "*competitive sales' means the gross revenues for all products and services sold by one corporation in competition with the other, determined on the basis of annual gross revenues for such products and services in that corporation's last completed fiscal year*".

high enough, the risk that competitors coordinate their strategies through interlocking is substantially minimized. Regardless of whether IDs effectively result in appreciable distortive *effects* of competitive dynamics, which may not be relevant for the antitrust assessment because of the strict *per se* scrutiny reserved in the U.S. to IDs, if inter-locked firms hold particularly low market shares the *incentive* to enter into an anticompetitive agreement is intuitively reduced. This is so as in fragmented markets characterized by a large number of small firms, competing instead of colluding is the most rational course of action. Coordination among small players could be easily neutralized since consumers may divert their demand to third-party competitors which are not linked by IDs. In these cases, the risk of coordination, and thus of being exposed to high penalties, looks less likely.

Furthermore, Section 8 does not apply to the banking sector that is regulated by a specific legislation. In particular, the Depository Institution Management Interlocks Act prohibits IDs between banks that compete in the same territory in excess of certain thresholds.[18] This rule differs from Section 8 and lists a series of exemptions to the IDs' ban, which take into account the peculiarities of the U.S. banking sector and its essential value for the entire financial system. In addition, IDs may be exceptionally authorized on a *case-by-case* basis by banking authorities if there is no risk that they could substantially soften competition. Hence, the application of the rule against IDs in the banking sector seems to be subject to a more cautious approach. This may depend on the awareness that a strong prohibition of IDs in the U.S. banking industry may destabilize not only that sector (for example, interlocks between corporations in financial distress or serving moderate-income areas), but other industries as well if one considers the role of banks in ensuring the stability of various economic sectors.

[18] 12 U.S.C. 1823(k), 3207.

In light of the above, it is reasonable to conclude that Section 8 and the specific banking discipline on IDs, although primarily focused on good corporate governance, are already valuable and sufficient to protect competitive dynamics between firms active in the same relevant market. These rules were designed to avoid conflicts of interest arising from the pervasive presence of the same representatives in the boards of directors of the major American industrial and financial companies, made up of a small number of administrators with significant influence over firms' strategies, and who could distort credit allocation. Nowadays, the evolution of corporate structures and the enlargement of boards, including independent directors, has reduced the scope of action of the executives and the risk that interlocked directors may influence and impact on market strategies of competing firms seems lower.

However, as the above makes clear, the evaluation from an antitrust standpoint of IDs is generally complex and requires fact-based analyses. Hence, antitrust enforcers should continue monitoring economic sectors to avoid that the pervasive use of this category of CEM leads to collusive outcomes. Even though IDs have not historically represented an antitrust enforcement priority, since in many cases the firms found in violation of the ban have adopted remedies with a voluntary resignation of the inter-locked members,[19] the renewed attention of the DOJ in investigating potential

[19] For example, in 2009, the FTC launched an investigation into Google and Apple in connection with a Section 8 breach. That corporate tie between Google and Apple had been subject to the FTC's scrutiny for some time, even in view of the fact that Google and Apple were (and are) close horizontal competitors in a number of important markets for the modern economy, such as those for smartphones and operating systems. To close the antitrust investigation and avoid the imposition of fines, the companies committed to eliminate IDs and common representatives resigned from the respective boards, including the CEO of Google who resigned from Apple's board. This choice solved the antitrust criticisms, and it was welcomed by the antitrust enforcer, but the FTC still remarked that it would have continued to monitor companies that share board members and take enforcement actions where appropriate (see FTC Press release, *Statement of FTC Chairman Jon Leibowitz Regarding the Announcement that Arthur D. Levinson Has Resigned from Google's Board*, October 12, 2009).

breaches of Section 8 is valuable. In a speech delivered at Capitol Forum's conference on Tech, Media & Telecom Competition, held in Washington on December 2018, the Principal Deputy Assistant Attorney General Andrew Finch remarked that the DOJ had begun scrutinizing IDs – and, as I will point out, CO – more closely.[20]

This renewed attention is particularly justified in concentrated markets where interlocks could effectively increase the risk of coordination. Accordingly, firms that had not reviewed their board of directors' policies in compliance with Section 8 are invited to do so. In this respect, it is worth noting that, in addition of breaching Section 8 of the Shearman Act, any prohibited interlock could give rise to claims under Section 1,[21] that prohibits combinations and conspiracies in restraint of trade.

The importance attached to IDs by antitrust agencies is certainly relevant. In addition to the DOJ, the FTC has also renewed its attention to this structure and an anticompetitive ID could be problematic under Section 5 of the FTC Act, which prohibits unfair or deceptive acts in restraint of commerce. Due to the wider scope of application of Section 5, the FTC has made clear that it may use such rule to prosecute interlocks that may not technically meet the Section 8 ban, but which may "*violate the policy against horizontal interlocks expressed in Section 8*".[22] The decisional

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In the absence of voluntary resignation, the remedy for a Section 8 violation is injunctive relief, *i.e.* elimination of the offending interlock, typically by imposing upon the officer or director the obligation to resign.

[20] DOJ's press release, "Principal Deputy Assistant Attorney General Andrew Finch Delivers Keynote Address at Capitol Forum's Fifth Annual Tech, Media & Telecom Competition Conference", U.S. Washington DC, December 14, 2018. See also, the FTC Bureau of Competition, report on "Interlocking Mindfulness" (Jun 26, 2019); the Speech of the Assistant Attorney General Makan Delrahim at Fordham University School of Law, New York (May 1, 2019); and the FTC Press release, Have a plan to comply with the bar on horizontal interlocks (by Debbie Feinstein, Bureau of Competition, January 23, 2017).

[21] In some cases, IDs have been challenged under Section 1 as enabling a conspiracy through the exchange of confidential information (see Perpetual Fed. Sav. & Loan Association, 90 F.T.C. 608, 657 (1977), withdrawn, 94 F.T.C. 401 (1979).

[22] See the FTC Bureau of Competition, report "Have a plan to comply with the bar on horizontal interlocks" (January 23, 2017).

practice of the FTC confirms this wide interpretation and the antitrust enforcer has so far contested the simultaneous membership in the boards of directors of horizontal competitors as an unfair act.[23] In such a contest, IDs should be on the agenda of the biggest market players, including institutional investors, which should be particularly careful in structuring their governance bodies.

(ii) *Interlocking directorates in Europe and the Italian experience*

Differently from the U.S., in Europe IDs are not subject to an EU-wide specific regulation and a decentralized regulatory approach at the national level is followed. The absence of a level playing field is certainly a gap considering that a plethora of economic players operate in more Member States and globally.

Notwithstanding this regulatory gap, under competition law the European Commission has traditionally looked closely at IDs in the context of mergers and on several occasions merger clearance decisions have been conditioned to commitments aimed at minimizing the risk that IDs vehicled confidential information among competitors.[24] By removing personal links

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[23] In some cases, the FTC alleges a violation of Section 8 together with a violation of Section 5 (see In the Matter of TRW Inc. v. FTC, 981-0081, 1998); In re BorgWarner Corp., 101 F.T.C. 863, 1983 WL 486332, modified, 102 F.T.C. 1164 (1983), revised Borg-Warner Corp. v. FTC, 746 F.2d 108 (2d Cir. 1984)). See also decision, Complaint In the matter of Perpetual Federal Savings & Loan Association, Doket 9083. Complaint, May 13, 1976 - Final order December 6, 1977.

[24] For example, in the context of General Electric's acquisition of Avio's aviation business - one of the main members of the Eurojet consortium formed to design and produce an engine for the Eurofighter military aircraft and thus including several competing aircraft engine manufacturers - the European Commission found that the existence of interlockings could have allowed General Electric to gain access to confidential information within the consortium to the benefit of its own business and to the detriment of the consortium itself. To clear the transaction, General Electric had to implement commitments aimed at preventing it from having access to confidential information discussed within the Eurojet consortium and at limiting the presence of, and the participation of Avio's representatives in the Eurojet consortium (European Commission, *General Electric/Avio*, case COMP/M.6844. July 1, 2013).

In the acquisition by Toshiba of control of two companies of the Westinghouse group - active in safety and operational systems for the supply of nuclear services and nuclear fuel - the European Commission identified competition concerns due to the fact that Toshiba

among direct competitors, the risk that sensitive information was shared among them has been *ex ante* eliminated.

The above is in line with the European Commission's view that "cross-directorships" (*i.e.*, IDs), particularly in concentrated markets, may favour collusion as they could be an instrument to exchange confidential information and make it easier for competitors to reciprocally monitor their commercial activities and thus enter into anticompetitive agreements. Consistently, in the Horizontal Merger Guidelines, the European Commission highlights that "[i]*n some markets where the general conditions may seem to make monitoring of deviations difficult, firms may nevertheless engage in practices which have the effect of easing the monitoring task, even when these practices are not necessarily entered into for such purposes. These practices* […] *may increase transparency or help competitors interpret the choices made. Cross-directorships, participation in joint ventures and similar arrangements may also make monitoring easier*".[25]

If one looks closely at the decisional practice of the EU Commission, in some merger cases IDs have been found to raise significant competitive concerns because of the existence of additional links among competing firms, such as direct or indirect possession of a minority shareholding within the share capital of a competitor. To minimize the potential competitive risks attached to the existence of various interconnections among competing undertakings, the antitrust enforcer has conditioned the clearance decision to the elimination of both IDs and financial links. Commitments mainly consisted in impeding executive managers to assume

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held a minority shareholding with board representation in a competitor of the target, namely a joint venture with General Electric active in the supply of nuclear fuel. To obtain clearance, Toshiba committed to implement measures aimed at limiting the presence of its representatives on the board of the joint venture (European Commission, *Toshiba/Westinghouse*, case COMP/M.4153, September 19, 2006).

[25] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, 2004/C 31/03, § 51.

apical roles in competing firms, and in divesting financial minority shareholding within competitors.[26]

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[26] For example, in 2000 the European Commission cleared the *Generali/INA* merger which involved the acquisition by Generali of control over the INA Group (European Commission, *Generali/INA*, case IV/M.1712, January 12, 2000). In that context, the Commission identified antitrust concerns due to the existence of both personal (IDs) and financial links (minority shareholding) between the parties and competing insurance companies. To obtain the antitrust clearance, Generali had to (i) remove the financial links (*i.e.*, divestment of Generali's minority shareholdings in competing insurance companies and divestment of INA's shareholdings in Banco di Napoli and Bnl Vita); (ii) remove IDs (*i.e.*, Generali had to ensure that no person who held a position or office in another insurance company or was a member of the Executive Committee of companies which directly or indirectly controlled insurance companies was appointed as a member of its Executive Committee; Generali could not appoint to the Board of Directors and to the Executive Committee of INA persons who had a role or corporate and/or operational offices in other insurance companies or were members of the Executive Committee of companies which had direct or indirect control of insurance companies).

In the acquisition by Veba AG of control over Degussa AG, the European Commission noted that through its stake in the joint venture Cabot/Hüls, Veba had an interest in one of the two production plants operated by Degussa's biggest competitor in Europe. Therefore, if Veba took over Degussa, the concentration would have conferred a dominant position on Veba/Degussa on the market where such joint venture was active. Moreover, through the joint venture, there would have been a structural link between Cabot and Veba, which would have significantly weakened the position of Cabot as an independent competitor. This was so because the contractual relations between Veba and Cabot/Hüls would have helped Veba/Degussa with being always informed about the pricing behaviour of Cabot. To authorize the transaction, the Commission ordered Veba to dispose of its stake in the joint venture Cabot/Hüls. This undertaking was supported by a behavioural commitment that there should be no IDs among Veba, Degussa, and the buyer of Veba's stake in the joint venture. (European Commission, *Veba/Degussa*, case IV.M.942, December 3, 1997 §§ 55–59).

In Glencore's acquisition of control of Xstrata – a minerals and metals mining and processing firm – the European Commission identified competition concerns due to Glencore's minority shareholding (7.79%) in the competitor Nyrstar, which may have eased the exchange of sensitive information among the two companies as it is the case for IDs. To remove this competitive concern, Glencore committed to divest its minority shareholding and to end an exclusive zinc off-take agreement with Nystar. According to the European Commission, "[t]*he divestment of Glencore's 7.79% minority stake in Nyrstar contributes to eliminate the serious doubts identified in the commodity grade zinc market, as it allows Nyrstar to be fully independent from the Merged Entity. The divestment of the minority stake removes the structural link between Nyrstar and Glencore, thereby taking away the ability of Glencore to appoint an observer to the board of Nyrstar and removes the potential for Glencore to obtain any access to competitively-sensitive information*" (European Commission, *Glencore/Xstrata*, case COMP/M.6541, November 22, 2012, § 505).

Similar to the general ban set forth by Section 8 of the Clayton Act in the U.S., in Italy a rigorous approach has been reserved to IDs in the banking and insurance sectors, where a specific regulation generally bans IDs. From an historical perspective, it is worth noting that a competition law concern induced the Italian legislator to regulate IDs within the financial industry. Before the introduction of a regulatory ban, IDs were subject to the radar of the Italian Competition Authority ("ICA") for quite a long time. In 2007/2008, the ICA launched a market study to assess the main peculiarities of corporate governance of banks, insurance companies and asset management companies (AMCs). In this context, the ICA closely looked at personal links among competing financial entities and came to the conclusion that the existence of an extensive network of IDs' links between competitors could have weakened the competitive dynamics within the relevant financial markets. The risk of prejudice to market dynamics could have been further aggravated by the crisis that the financial system was experiencing. The reputation of financial intermediaries was indeed key for the proper and efficient functioning of the financial sector, and the inadequacy of the regulatory framework could have jeopardized that objective. On this basis, the ICA recommended to regulate IDs to safeguard competitive dynamics and in November 2011 that warning was welcomed with the introduction of Article 36 of Law Decree No. 201, of 6 December 2011 (the so-called "Save Italy decree"), expressly banning IDs in the credit, insurance and financial markets.[27]

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[27] More precisely, Article 36 of Decree Law No. 201/2011, as converted into Law No. 241, of 22 December 2011, provides the following:

"*1. People who hold management, supervisory and control positions and senior officers of companies or groups active in the credit, insurance and financial markets are prohibited from assuming or exercising similar positions in competing companies or groups of companies.*

2. For the purpose of applying the prohibition referred to in paragraph 1, competitors are those companies or groups of companies between which there are no controlling relationships pursuant to Article 7 of Law No. 287 of 10 October 1990 and which operate in the same product and geographic markets".

Although appreciable to limit the potential risks of anticompetitive coordination among competing financial entities, that ban raised some concerns. For example, its wide scope of application to apical managers (namely, all people who hold management, supervisory positions and senior officers) was perceived to be *prima facie* disproportionate since those who do not directly perform executive and management functions do not necessarily participate in the adoption of commercial strategies of the interlocked competitors. This may be the case of those who have supervisory functions.[28] Accordingly, the risk that they could vehicle confidential information among competing undertakings concerning reciprocal commercial strategies is less clear with respect to those holding management positions. However, it is also true that control bodies do not simply have a right, but a duty to oversee management decisions. Hence, they should be aware of the decisions taken by the management and can request access to commercially sensitive information, with the consequence that, in some circumstances, it cannot be excluded that IDs among the supervisory bodies of competing entities may be a vehicle for the exchange of confidential information.

2-bis. In the hypothesis referred to in paragraph 1, people who hold incompatible offices may opt within ninety days of their appointment. Upon expiration of this term, they shall forfeit both offices and the forfeiture shall be declared by the competent bodies within thirty days from expiration of that term or knowledge of the non-observance of the prohibition. In case of inertia*, the forfeiture is declared by the competent supervisory authority of the sector.*

2-ter. During the first application, the term for exercising the option referred to in paragraph 2-bis, first period, amounts to 120 days, starting from the date of entry into force of the law of conversion into law of this decree [i.e., up to 26 April 2012]".

Then, to clarify the scope of application of this prohibition, on April 2012 the Ministry of Economy and Finance in collaboration with regulatory authorities (*i.e.*, the Bank of Italy, the ICA, the National Commission for Society and the Stock Market and the Insurance Regulatory Authority) published interpretative guidelines on the applicability of the ID's ban, as further updated in June 2012 (see *Criteria to Apply Article 36 of the Save Italy Decree*, 20 April 2012). In June 2012, the prohibition of IDs was further clarified with the adoption of Frequently Asked Questions.

[28] FEDERICO GHEZZI, La nuova disciplina dei legami personali in Italia, in Mercato concorrenza regole, a.XIV, n. 2 (August 2012).

In such a context, regulation through legislation has certainly minimized the perceived anticompetitive risks attached to these corporate interconnections in view of the particularly concentrated structure of the Italian banking system and of the existence of close links among the biggest players. Apart from preventing the risk of coordination among competitors, the introduction of a legislative ban against IDs has also minimized the risk of unilateral effects, due to the loosening of the competitive pressure among the inter-connected firms. In the absence of explicit or even tacit collusion, the existence of IDs among the management bodies of competing firms may induce each of them to refrain from implementing aggressive market conducts which could lead to losses for the interconnected entity. As I have already mentioned, this argument relies on the logic assumption that "no man can serve two masters".

However, it is also true that regulation may not represent a catch-all policy solution and in non-concentrated industries a more flexible approach may be preferable in view of the specificities of each sector. Accordingly, where regulation is not advisable, the application of the traditional antitrust toolbox is still possible. To this extent, when IDs are found to be an instrument for collusion among competing undertakings, the anticompetitive effects of IDs may be addressed by the antitrust prohibition set forth by Article 101 of the Treaty on the Functioning of the European Union (TFEU).[29] In addition, merger control remedies (*i.e.*, commitments)

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[29] In addition, it could be explored whether the non-coordinated unilateral effects may eventually trigger the application of the abuse of dominance prohibition under Article 102 TFEU to the extent that the inter-locked undertakings, which opt for a "quiet life", hold a particularly relevant market position amounting to collective dominance, and make use of that position to refrain from competing and to distort competitive dynamics, mainly to the detriment of third-party competitors. This reasoning may apply to stable, not dynamic industries, where high barriers to entry further reduce the risk that "outsiders" enter the market and interfere with the competitive incentives of the inter-locked major player. However, there are also authors who claim that the above-mentioned competition law rules, such as the prohibition of abuse of dominant position, are costly and have a limited scope of application (in this respect, see VIDIR PETERSEN, Interlocking Directorates in the European Union: An Argument for Their Restriction, Eur. Bus. L. Rev., 2016).

In my opinion, it is true that the prohibition of abuse of dominance may only apply to undertakings which hold a strong market position, but in a concentrated stable market the

may be still valuable to the extent that IDs link the merging firms and third-party firms that post-transaction will be active in the same relevant market and there is a foreseeable risk that IDs could be an instrument for competitors to enter into anticompetitive conducts. A careful approach is particularly welcomed in cases where, in addition to IDs, the parties to the concentration have a financial interest (*e.g.*, a minority shareholding) in a third-party that will be active within the same relevant market. In such a scenario, the ability and incentive of these interconnected firms to share sensitive information and distort market dynamics may be higher.[30]

Moreover, in mergers which result in the creation of full-functional joint ventures which should operate on the market independently from parent companies, an interlocking problem may arise when post-transaction a representative of one parent company will also have a role within the newly established undertaking. To the extent that both the parent company and the joint venture will compete within the same relevant market post-transaction, the ID may be a vehicle for the exchange of confidential information among them (in particular, the risk of coordinated effects).

For these reasons, under European merger control rules, when notifying a concentration, the parties are required to explain the structure of ownership and control of each of the firms involved in the transaction before and post-transaction and the existence of corporate links with firms active within the same relevant market. To minimize the coordinated effects' risk, the antitrust enforcer may condition the authorization of the notified transaction to the elimination of IDs and to the implementation of so-called Chinese walls, which reduce the risk that the parent company of the newly

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interlocked undertakings reasonably hold that position. In its absence, the unilateral risk implied by IDs is clearly diminished. This is so since potential third-party undertakings, to whom consumers may revert their demand, may enter the market and neutralize the anticompetitive strategies implemented by the interlocked entities.

[30] European merger control documents, Form CO, Section 3 – Details of the concentration, ownership and control; Italian merger control notification form, Doc. D, Sections I and II – Financial and Personal relations.

established joint venture, in its quality of common shareholder of both firms, could share confidential information between the two.[31]

The decisional practice of the ICA in connection with mergers expressly confirms the adequacy of the current competition law framework to solve the potential competitive risks attached to IDs. In a couple of decisions that involved mergers among firms that were linked by IDs, the ICA assessed whether the existence of personal connections among competitors would have reduced competitive pressure among them. When antitrust risks were identified, the ICA opted for the adoption of conditional clearance decisions and authorized the notified transactions by imposing commitments upon the parties, *in primis* the obligation to implement Chinese walls.[32]

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[31] In particular, these measures are virtual barriers set up to avoid the exchange of sensitive commercial information between competitors that may ease cooperation among them in violation of Article 101 TFEU. In this respect I note that, since "personal Chinese walls" are not available, when one person sits on the board of competing firms and has an executive role the antitrust risk of making use of commercial information concerning the competitor in the context of discussing or voting the implementation of commercial resolutions may be minimized to the extent that some confidential information are not *ex ante* made aware to that person (for example, those concerning the relevant markets in which the competing companies are active).

In mergers, the same *ratio* underlines the creation of the so-called clean teams, namely groups of people that include either external advisors or internal representatives – to the extent they are not engaged in the design and the implementation of commercial strategies of the merging parties – which have access to information of the merging parties to assess the value and the risks attached to the transaction as they have access to documents included in the parties' data rooms that may contain confidential information. To avoid information leakages, members of these clean teams are required to sign supplementary confidentiality agreements restricting the use of the information included in those data rooms and which may be used only for assessing the suitability of the transaction. In this framework, as I will highlight, the remedies imposed by competition authorities to authorize mergers that raised antitrust concerns because of the existence of personal links among competing firms have proved to be sufficient to minimize these risks.

[32] More precisely, in Unicredito Italiano/Capitalia, the ICA conditionally cleared the notified transaction which resulted in the incorporation of Capitalia into Unicredit by imposing commitments upon UniCredit, which was under the obligation to set up Chinese walls to preclude the members of its board of directors with a role in the governance of Mediobanca and/or Assicurazioni Generali (*i.e.*, two competitors of the merging parties in which Capitalia and Unicredit held minority interests) to participate in the discussion and to vote UniCredit's resolutions concerning the investment banking and insurance markets. Moreover, Unicredit was under obligation to adopt internal organizational measures to

ensure that, in the context of the information provided to the members of its board of directors, they did not receive any confidential information concerning the investment banking and insurance markets. According to the ICA, the commitments in question were sufficient to reduce competitive risks due to the interlocks. Hence, if those measures were implemented so that no sensitive information concerning the investment banking and the insurance sector was provided to the members of the board of directors of Unicredit, with a role in the governance of Mediobanca and Assicurazioni Generali, the risk of distortion of competition in the markets where Mediobanca and Generali were active was reduced (case C8660, decision No. 17283, September 18, 2007).

In the merger control proceeding involving the acquisition by SAI, *i.e.* an Italian insurance company under control of the *holding* entity Premafin, of control of La Fondiaria Assicurazioni, the ICA found that the transaction would have led to a *de facto* joint control by SAI and Mediobanca over Fondiaria by taking into account *inter alia* the close personal ties between the top management of Mediobanca and Premafin. Accordingly, Premafin and Mediobanca were able to jointly influence the action of Fondiaria through the joint exercise of voting rights. Mediobanca could also exercise decisive influence over the management of Generali, the new entity's main competitor. The transaction would have led Mediobanca to acquire a dominant position in the non-life insurance markets. In this context, the transaction was conditionally cleared under commitments, including Mediobanca's obligation to refrain from exercising its voting rights at Generali's ordinary shareholders' meetings for a portion of its shareholding ensuring that it would have not reached a majority at the meeting (case C5422 SAI – Società Assicuratrice Industriale/La Fondiaria Assicurazioni, decision No. 11284, October 10, 2002; and case C5422B, decision No. 11475, December 17, 2002).

In Banca Intesa/San Paolo IMI, the ICA conditionally authorized the merger by incorporation of San Paolo IMI into Banca Intesa by imposing upon Banca Intesa a series of commitments, including the obligation to set forth Chinese walls to reduce the envisaged potential antitrust risks raised by the transaction. In particular, Intesa and the competitor Generali were linked by IDs as leading representatives of the management of the two groups were present in the corporate bodies of both. In addition, Generali was a shareholder of Intesa and would have been a shareholder of the new entity post-transaction. They also had a partnership in the insurance sector where they operated through the Intesa Vita joint venture, whereas San Paolo distributed its life insurance products through the subsidiary Eurizon. In this context, to authorize the transaction the ICA imposed the adoption of measures aimed at ensuring that the members of the board of directors of the new bank expressed by Generali, or in any case having direct or indirect personal links with Generali, did not participate in the discussion or vote on resolutions directly concerning the distribution of life insurance products offered by Eurizon. In addition, the managers of Intesa and Generali could neither be provided with confidential information concerning Eurizon with respect to the insurance sector, nor the members of the board of directors of Intesa and Generali could exchange sensitive information. To this extent, Banca Intesa also committed to adopt an antitrust compliance manual to make its employees aware as to the antitrust risks deriving from the exchange of sensitive information with competing undertakings (case C8027, decision No. 16249, December 20, 2006).

By contrast, as I will clarify in the following chapters, in cases where there are no personal IDs links among competitors, and an undertaking is not a parent company of a competitor and/or does not hold a relevant share capital percentage of a direct competitor, but it simply has a minimal shareholding of firms active in the same industry and eventually competing in the same market, the sole presence of minority shareholding among potential competitors raises (if any) a considerably lower level of antitrust risk.[33]

In this complex framework, to sum up the following should be taken into account when evaluating IDs structures under the competition law toolbox. It is true that if the inter-locked firms are horizontal competitors, sharing experts with managerial and technical skills may be critical under an antitrust standpoint. In particular, when the inter-locked members have executive roles and are involved in the adoption of commercial strategies, the risk that the IDs may favour anticompetitive coordination cannot be overlooked. However, under traditional antitrust rules on concerted actions, the mere risk of sharing confidential information is not sufficient for a

[33] The presence of horizontal directors in firms active within the same industry should be distinct from a scenario where the same person sits on the boards of two companies active within the same relevant market as interpreted by competition law practitioners. It is the latter scenario that may raise antitrust concerns. Under the U.S. antitrust framework, but the same reasoning applies under EU competition law, Yaron Nili notes that "*there are directors who serve on the boards of two competitors … and therefore are in violation of antitrust law … [T]here are directors who serve on boards of companies within the same industry but not within the same SIC/NAICS* [*i.e.*., methodologies to identify companies active in the same business line] *and who do not qualify as competitors*". Moreover, "*there are directors who serve on boards of 'mega' corporations such as Amazon, Apple, Alphabet (Google) and Facebook*" – which, I would add, have currently attracted the most antitrust attention – "*where they do not even operate within the same defined industry, but because of the massive span and reach of these companies, the lines of traditional industries have become blurred*" and a certain degree of risk may still arise (in *Horizontal Directors*, *supra* cit., at 1225 et seq.).
In my opinion, in the absence of a clear competitive relation between firms effectively found to be active in the same relevant market, the application of the traditional rigorous approach deserved to IDs may be excessive, also considering all the benefits that, as also Yaron Nili acknowledges, IDs bring about. Moreover, as I will note in the following sections of this dissertation, the same distinction between firms active in the same industry as opposed to those competing in the same market is essential in the analysis of common ownership. As I will point out, the first ones clearly raise a lower degree of antitrust risk.

finding of an anticompetitive concerted practice, whereas the firm that received confidential information should then operate on the market and there should be a causal link between the exchange of confidential information and the effects (either actual or potential) on competition. If sensitive information is exchanged through an ID among the executive managers that are involved in the adoption of commercial decisions, one may reasonably presume that they would make use of those information to orient the firms' conduct in the markets. By contrast, in cases in which the inter-locked members of the boards of competitors are independent managers or individuals who have not been entrusted executive roles, the antitrust risks attached to IDs are clearly lower.

Against this background, the current antitrust framework seems sufficient to deal with the potential antitrust risks that IDs may raise.
On the one hand, the antitrust enforcer can intervene *ex post* against interlocks which are likely or actually found to have anti-competitive effects by applying the prohibition of concerted actions. On the other, under certain circumstances merger control remedies may be applied *ex ante* to eliminate IDs which may raise a certain degree of antitrust risk, *in primis* commitments that may consist in the imposition upon the interlocked members of the obligation to resign from boards of competing firms.
In all cases, the antitrust enforcer does not intervene because of the existence of the interlock as such, but because of the anticompetitive effects on market dynamics that it is likely to cause.

Therefore, I come to the conclusion that the existence of competition law instruments to tackle the potential distortive effects on market dynamics of IDs makes a rigorous catch-all legislative ban disproportionate if applied to all industries.[34] This is so as a legislative ban has the same

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[34] The choice of the Italian legislator to introduce a specific legislative ban of IDs among financial entities is certainly valuable as it confirms the role of regulation in stepping-in only in cases where potential distortions of market dynamics may not be properly dealt with the antitrust toolbox because of their pervasiveness. In practice, that legislation has also proved to be effective in minimizing the perceived antitrust risk by reducing the presence of interlocked representatives (*i.e.*, top managers or members of

effect of an over-comprehensive prohibition, which runs the risk of banning interlocks that are not necessarily anticompetitive.[35] A general overall prohibition may not take into account the different degree of antitrust risks that IDs imply depending on (i) the functions performed by those sitting on the boards of competing firms (*e.g.*, executives, independent managers or members of supervisory boards), and (ii) the dynamics in the economic sectors in which IDs are set up (concentrated *vs* competitive markets).

Furthermore, as already mentioned, the nature of the IDs (horizontal *vs* vertical IDs) inevitably plays a role in evaluating their effects on competition. An outright ban on vertical interlocks also clashes with the traditional competition law scrutiny of vertical restrictions, that as mentioned are claimed to raise a lower degree of antitrust risk and deserve a more lenient approach, unless the parties to the agreement have market power and one is unable to demonstrate that the vertical agreement has pro-competitive effects. In this complex framework, the choice of opting for case-by-case assessments under competition law rules appears

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the internal control bodies) in competing banks. In this respect, in a recent empirical study on interlocking directorates in Italy aimed at assessing whether the introduction of the interlocking ban effectively led to a reduction in the number of personal ties among competing banks, Prof. Federico Ghezzi and Chiara Picciau found that "[a]*mong the banks and banking groups considered, there is not even a single relevant interlocking directorate. More precisely, using a concept of competition closer to traditional antitrust principles … we can conclude that the anti-interlocking provision was meticulously followed, at least as of 31 December 2018 and by the Italian banking sector's largest players*". The elimination of these IDs links also had beneficial effects on market dynamics as it was associated with a drop in interest banking rates (see "The Curious case of Italian Interlocking Directorates", Bocconi legal studies research paper series, December 2020).

[35] Economic literature has in fact shown that there are situations where IDs are beneficial and positively contribute to the economic well-being of consumers. The presence in the boards of competing firms of the same person may avail each firm of the benefit of his expertise, which may improve the decision-making process. Through IDs a firm may take advantage of the skills of competing firms in cases in which they have better knowledge of the relevant markets. All these factors may help with the adoption of optimal strategies from a commercial standpoint and, in turn, result in the offer of better products and services to consumers. In this respect, see FLORENCE THÉPOT, FLORIAN HUGON & MATHIEU LUINAUD, Interlocking Directorates and Anticompetitive risks: An Enforcement Gap in Europe?, Concurrences No. 1/2016.

reasonable, since a catch-all *ex-ante* regulation may be complex and not be the optimal policy to safeguard competitive markets.

III.2 Dual and Multiple voting rights' shares

Dual and multiple voting rights' shares are another type of CEM which may allow minority shareholders the right to exercise corporate control over a company. In this scenario, the shares issued by a company give different voting rights to various categories of shareholders based on an investment of equal value. For example, one type of stock gives two votes *per* unit of par value, another gives three or more votes. This CEM may also take the form of loyalty shares, where the shareholder is granted more voting rights if it detains the shares for a certain period as a reward for the long-term commitment (usually, two years or more).

In the U.S., the legal framework authorizes the issuance of shares which grant multiple voting rights, but they are not common practice. This CEM is most widely used in Europe, particularly in Sweden and in the Netherlands. However, some restrictions have been found in this respect. For example, in Denmark, Hungary and Sweden this corporate governance mechanism cannot be used to give more than ten votes, while in France it is capped to a maximum of two votes. In other countries, shares that grant multiple voting rights cannot represent more than a certain percentage of the company share capital (*e.g.*, 50% in Hungary). In Italy, the possibility to issue shares with multiple-voting rights is available as of 2014 and companies not yet listed on the stock exchange have been allowed to issue shares providing up to three votes each.[36] However, although this CEM is currently authorized by law, it is not common practice in Italy and none of the companies analyzed in the CEM Study made use of it.

In this framework, experience shows that shares granting multiple voting rights have usually played a stabilizing role in the market for

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[36] Article 2351, par. 4, of the Italian Civil Code as amended by Law Decree No. 91, dated 24 June 2014, converted into Law No. 116, dated 11 August 2014.

corporate control. This is so as long-term investors, such as family owners pursuing long term strategies, are able to retain control upon the company while, at the same time, relying on the economic power and the financial resources of third-party investors. Many tech companies have a dual, or multiple class voting structure.[37] Under a competition law perspective, one would need to assess whether financial minority shareholders holding multiple voting rights in competitors are in the position to influence the commercial activities of these portfolio companies. By having shareholdings which grant multiple votes, minority shareholders may have the majority of voting rights and they could hence control these companies also under an antitrust standpoint.[38] Accordingly, these controlling-minority shareholders are in the position to influence market strategies of the partially owned firms. This is not implied by the CO theory, where common shareholders do not hold the control of voting rights in competing firms, but they are still claimed to be in the position to have an influence over the management of these portfolio companies (see *infra* para. IV).

On these underlying premises, I will assess whether there are circumstances in which CO may entrust minority shareholders antitrust control upon the minority owned companies in the absence of the majority of voting rights and of traditional prerogatives of antitrust control upon a

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[37] For example, in May 2019 in the context of the proxy fight concerning Facebook for the split of the chairman and CEO titles held by Mark Zuckerberg, multiple class shares were essential for Zuckerberg to succeed. In particular, despite the split was supported by the majority of outside shareholders such as institutional investors, whose shares gave them one vote, Zuckerberg succeeded as he had shares which granted him ten votes per share, and he was hence able to retain control of the voting pool.

[38] In that respect, also the biggest institutional investors in some cases have been found to hold a certain percentage of voting right shares. For example, BlackRock, Vanguard and State Street have been found to hold nearly identical amounts of class A (voting) and class C (non-voting) stocks in Google (see LUCA ENRIQUES & ALESSANDRO ROMANO, Rewiring Corporate Law for an Interconnected World, Arizona Law Review, Issue 64:1). In that scenario, the relevant issue is not whether institutional investors behave as active *vs.* passive shareholders, but indeed whether they may hold control upon a firm, which is not however implied by the common ownership theory.

portfolio company (*e.g.*, veto rights upon the business plan or in the adoption of relevant investment decisions).

III.3 Shareholders' agreements

Privately held corporations with multiple shareholders often enter into either formal or informal shareholders' alliances that define the relationship between the shareholders and the company and regulate the position of minorities. These agreements have for example traditionally restricted a shareholder from selling its stock to a third-party, forced the shareholders to agree to sell the stock to a third-party only after the company and the existing (even minority) shareholders received a right of first offer, or imposed non-compete clauses. In the U.S., shareholders' agreements are common, but different States have set forth various rules.[39] In general, they entrust to minority shareholders a certain degree of control upon a company.[40]

In Europe, they are legally available in all the countries assessed in the CEM Study and they have been at the core of contractual freedom. However, as the table below shows, in practice they have been implemented in two-thirds of these European countries. They are most common in Italy and Belgium, but not in Denmark, Germany, Luxembourg, Hungary or Poland.

Table [1]

BE	DK	DE	EE	GR	SP	FR	IE	IT	LU	HU	NL	PL	FI	SW	UK
25%	0%	0%	8%	5%	5%	15%	5%	40%	0%	0%	5%	0%	5%	5%	5%

In some European countries, there are some restrictions to their implementation. For example, shareholders' agreements cannot be contrary to the interest of the company (Belgium, Germany, Greece and

39 For example, in California these agreements usually set limits to protect existing shareholders (*e.g.*, rights of first offer or first refusal in favor of the existing shareholders), or they may restrain the corporation's ability to incur indebtedness.

40 DOUGLAS YOUNG, IBA Guide on Shareholders' Agreements, California USA (2019).

Luxembourg), or they may be void if the shareholder commits to vote in accordance with the instructions of the company (Belgium), or of a third party (the Netherlands), or if the agreement provides for a monetary incentive to vote (Estonia, Greece, France).

From an antitrust standpoint, so-far the doctrinal debate on shareholders' agreements has mainly focused on non-compete clauses, that force shareholders not to set up a business that competes with that of the participated firm. If one applies this rule to modern finance and to the activities of institutional investors, one could wonder to which extent the non-compete principle may limit institutional investors from acquiring minority shares in companies that compete with the investor's existing portfolio companies. For example, the possibility to acquire shares in one company *per* industry has been proposed to deal with CO concerns but, in this dissertation (see para IV *infra*, see also chapters II and III), I will clarify why that rigorous regulatory proposal seems disproportionate.

First, the wide application of the non-compete ban to the activities of institutional investors is not in line with its underlying rationale. It has been traditionally implemented to limit the activities of sellers in M&A transactions to the extent they could have damaged the purchaser post-transaction. The circumstance that the scope of application of non-compete clauses has been tailored on the basis of the specific M&A transaction and not widely applied is testified by the approach of competition enforcers to assess whether they qualify as ancillary to the notified transaction. Hence, the non-compete ban has been usually applied to industrial sellers, which may set up a competing business by leveraging their commercial standing in the market to deprive the assets that have been sold of their economic value. By contrast, financial AMCs and other institutional investors usually classify as financial shareholders that do not purchase shares to carry out market activities, but precisely for financial purposes and the imposition upon them of wide non-compete clauses may unduly limit their scope of action.

Second, even if active involvement by institutional investors is demonstrated, the application of the non-compete clause to limit these investors from acquiring shares in competing firms (for example, not having a market share higher than 1% in a relevant market or having shares of one company *per* relevant market[41]) may be excessive and I believe that a more cautious approach is indeed preferable. The biggest institutional investment companies have a myriad of competing firms within their portfolios, each amounting to a particularly low percentage of the overall investment portfolio. The wide application of the non-compete with the ensuing obligation to sale some competing portfolio companies participated by institutional investors, in the absence of clear damage to competition, may unreasonably block the activities of these investors. In such a scenario, by limiting the possibility for institutional investors to diversify investments in a myriad of companies, the financial *rationale* underpinning the establishment of an institutional investor (*inter alia*, the possibility to diversify investments) may be accordingly prejudiced.

By contrast, the non-compete clause may only prevent an institutional shareholder from acquiring shares in firms that compete with those included within its investment portfolio to the extent that further investments within a sector are likely to cause prejudice to market dynamics. This scenario may eventually materialize when the institutional investor through its participated companies already holds a *significant* presence within an industrial sector, and at the same time it effectively is in the position to influence the commercial strategies of these firms.[42] In

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[41] That rigorous approach has been proposed by ERIC POSNER, FIONA SCOTT MORTON & E. GLEN WEYL, in A proposal to Limit the Anti-competitive Power of Institutional Investors, 81 Antitrust L. J. 669 (2017).

[42] For example, this risk could materialize in a concentrated market where an institutional investor already holds a significant presence (in terms of investments within firms active in that relevant concentrated market) and the additional acquisition of stakes of another competitor, even below the control threshold, may reinforce its (indirect) position within the relevant market and grant it the power of exercising some influence over these "owned" firms. However, the extent to which this influence may translate into

this respect, the additional acquisition may be questionable from an antitrust standpoint if, by increasing the market power of the institutional investor within a relevant market, it risks to significantly impede effective competition therein. The European merger control test of significant impediment to effective competition (SIEC) may be helpful to identify institutional investors' acquisitions which may trigger that risk and should be consequently stopped.[43] In such a scenario, non-compete clauses may be valuable to control the activities of institutional investors which through their minority owned companies do not hold a minimal presence within a relevant market.

In light of the above, one could reasonably conclude that the application to institutional investors of some corrective measures that have been already implemented in connection with shareholders' agreements – such as the discipline on non-compete clauses – may be valuable to control their investment strategies whenever there is a tangible risk that they may have a detrimental impact on competitive dynamics. However, these measures should be re-shaped in light of the principles set out above to avoid an excessive and disproportionate interference with institutional investors' scope of action.

III.4 Cross-shareholding

The case of cross-shareholding refers to a situation in which a company holds a stake in another company which, in turn, holds a reciprocal stake in the former and eventually in a third-one (for example, circular holdings). M&As' practitioners have positively looked at cross-shareholding as it has been traditionally viewed as "*a means to reduce the amount of equity that a shareholders' group has to invest in order to*

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a distortion of market dynamics will be scrutinized further in the following chapter of this paper (see *infra*, chapter II).

[43] Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), 20 January 2004, Article 2.

acquire, maintain and defend (in case of a hostile bid) the control of a corporation".[44] However, antitrust practitioners have been sometimes skeptical since cross-shareholding, although not necessarily giving one firm the power to exercise antitrust control upon the connected firm, may be still functional to vehicle confidential information among the two and this conduct could raise antitrust concerns to the extent that these firms are active within the same relevant market.

In the U.S. and EU different paths have been followed. In the U.S. cross-shareholdings have been rarely implemented because of the ban set forth by Section 8 of the Clayton Act. As discussed above, that rule prohibits IDs, but it has been commonly referred to as a wide limitation to the creation of interconnections among competing firms, including cross shareholdings.[45] This ban has been rigorously disciplined in the media industry.[46] In Europe, cross-shareholding is legally available in all the countries analyzed in the CEM Study, but implemented only in some of them (31%). In Italy, only 5% of the companies included in the CEM study

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[44] MARCO PAGANO, FAUSTO PANUNZI & LUIGI ZINGALES, Osservazioni sulla Riforma della Disciplina dell'OPA, degli Obblighi di Comunicazione del Possesso Azionario e dei Limiti agli Incroci Azionari, Rivista delle Società, 168 (1998); see also the OECD study on Corporate Ownership and Control, Law Reform and the Contestability of Corporate Control, by Prof. GUIDO FERRARINI, Centre for Law and Finance, University of Genoa (2000).

[45] See the OECD study on Lack of proportionality between ownership and control cit. above, 19.

[46] In 1975, to ensure media pluralism in the U.S., a legislative ban prohibited cross-ownership by a single entity of a daily newspaper and television or radio broadcast station operating in the same local market. In 1996, the Telecommunications Act imposed upon the Federal Communications Commission ("FCC") the duty of conducting a biennial review of its media ownership rules to determine whether it was necessary in the public interest. If not, the Commission had to repeal or modify it. Then, in September 2002, the FCC issued a Notice of Proposed Rulemaking stating that the Commission would re-evaluate its media ownership rules pursuant to the obligation specified in the Telecommunications Act of 1996. In June 2003, the FCC repealed the newspaper/broadcast cross-ownership ban, since it was considered no longer necessary in the public interest to maintain competition. Subsequently, in 2007 the FCC revised it and ruled that it would have determined case-by-case the cases in which cross-ownership may affect the public interest. Then, in 2017 the FCC further released the application of the ban.

were linked by cross-shareholding,[47] with the highest presence in France (20%) and Sweden (25%).

Furthermore, some European jurisdictions have set limits to cross-shareholding. For example in Italy cross-shareholdings have traditionally raised criticisms in the banking sector as an additional CEM to interlocking.[48] As a consequence, voting rights of cross-shareholders in excess of certain thresholds are suspended.[49] This is so as the existence of

[47] Likewise the U.S., a specific discipline of ownership structures of broadcasters and media companies has been also adopted in Italy. More precisely, Law No. 112 of 3 May 2004 has reformed the sector by introducing narrow limits to ownership structure of media companies to ensure the pluralism in the provision of audiovisual services. In particular, it prohibits companies, whose revenue in the electronic communications sector, including that secured through controlled or affiliated companies, is greater than 40% of the total revenues generated in that sector, from earning, within the integrated communications system (the SIC), revenue exceeding 10% of the total revenues generated in that system in Italy. The law has been highly debated because of its political impact as it prevented the French media company Vivendi SA – which already held a significant position in the Italian electronic communications sector by reason of the control that it exerted over Telecom Italia S.p.A. – from acquiring 28% of the capital in Mediaset Italia S.p.a. In 2017, the Italian Communications Regulatory Authority declared that Vivendi had infringed that law by acquiring the shares in Mediaset. Vivendi brought an action for the annulment of that decision before the administrative judge, who referred the case to the EU Court of Justice. On September 3, 2020, in Case C-719/18 the EU Court finally held that the Italian law did not comply with European principles, and the thresholds it set forth neither were proportional to safeguard media pluralism, nor made it possible to determine whether an undertaking could actually influence media content.

[48] The underlying reason for the creation of a multitude of reciprocal holdings in the Italian banking system lies in the overall reorganization of this financial system starting from the '90s. In that period the banking system underwent profound changes at normative and institutional levels, which "opened up" the share capital of financial institutions with a view of liberalizing the sector and redefining ownership structures. The reform of the Italian banking system resulted in the creation of a multitude of cross-ownership links among the major banking groups in the country.

[49] Under Article 121(1) of the Code of Finance, if a listed company holds three per cent or more of another listed company's voting shares, the latter may not exercise the voting rights attached to shares in the former exceeding three per cent of the voting shares and must sell such shares within twelve months. Moreover, Article 121(3) provides that if a person or entity holds more than three per cent of the shares in a listed company, the latter or the person controlling it may not hold more than three per cent of the shares in listed companies it controls. If one company is listed and the other is not, when the listed company holds ten per cent or more of the other company's share capital, the latter may not hold more than three per cent of the voting shares in the former. When the non-listed

cross-shareholding that links competing firms may facilitate the exchange of competitive information among firms that are active in the same relevant markets, which raises competitive concerns since it could lead to coordinated conducts in the markets.[50] In this context, the ICA has looked at cross-shareholding in the context of mergers among banking institutions in a number of merger proceedings, such as that involving Capitalia and Unicredit (see above § III.1).[51]

However, in spite of the existence of close links among competing firms, the ICA finally cleared the notified transactions under commitments aimed at neutralizing the risk that these links facilitated the exchange of confidential information between the merged entity and its competitors.[52] In such a context, in line with the approach mandated by authoritative doctrine to assess cases where an antitrust risk cannot be excluded,[53] the ICA evaluated the competitive effects of a cross-shareholding structure by

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company has a three per cent holding or more in the listed company, the latter may not hold more than ten per cent of the shares in the former.

[50] In this respect, in the Italian Competition Law Dictionary, that provides a snapshot of the main competition law concepts and theories, cross-shareholding is listed among those instruments which may ease the exchange of confidential information among competing firms and favour the conclusion of anticompetitive agreements (see LORENZO F. PACE, *Dizionario Sistematico del Diritto della Concorrenza*, Jovene Ed., 2013). More precisely, instruments such as "*cross-shareholdings, overlapping of the members of the decision-making bodies (so-called interlocking directorates) of several competing companies, and common shareholding*" are identified among those potential "*facilitating practices*", that may ease the conclusion of a collusive outcome by channeling the exchange of confidential information (*sub* p. 78). Under the same reasoning, an authoritative Italian legal practitioner observes that cross-ownership, likewise interlocking directorates, can favour the exchange of confidential information that may help with coordinating the commercial strategies of competing firms (see, Ginevra Bruzzone, *Assetti proprietari, governo delle banche e tutela della concorrenza* (1999), in: MASCIANDARO, D., RIOLO, F. (Eds.), Il governo delle banche in Italia, Edibank, Milano, 111–125, 1999).

[51] In particular, both Capitalia and Unicredit held minority shareholding in the competing banks Mediobanca and Assicurazioni Generali, Unicredit also held IDs with both Mediobanca and Assicurazioni Generali. Moreover, Mediobanca was the main shareholder of Assicurazioni Generali.

[52] See footnote No. 32 above.

[53] STEVEN C. SALOP & DANIEL P. O'BRIEN, Competitive Effects of Partial Ownership: Financial Interest and Corporate Control, 67 Antitrust L.J. 559-614 (2000).

applying an *ad hoc* approach and looking at the competitive dynamics in the markets where the interconnected firms competed. For the same reason, in Unicredit/Capitalia the ICA did not focus on cross-shareholding *per se*, whereas it qualified cross-shareholding as a circumstantial element that increased the antitrust risk that post-transaction the merging firm may have found more likely to collude with the closest competitors Mediobanca and Generali, in a context where competitive pressure was already relaxed by the presence of IDs.[54]

As the above makes clear, the current antitrust rules are suitable to deal with the potential competition law risks that cross-shareholding raises by creating some connections among independent firms, which should independently operate on the market. Precisely for this reason, cross-shareholding requires an *ad hoc* scrutiny under antitrust rules. All the more so if one considers that, on the one hand, the existence of cross-shareholding arrangements between financial institutions and corporations may result in efficiency gains. Efficiency could depend on the possibility for shareholders to monitor more effectively the managers of the interconnected companies and pressure them not to follow short-term commercial strategies. On the other, evidence of negative effects on market dynamics of cross-shareholding is not easy to be proved, whereas it critically depends on the specific corporate governance structure of the interconnected companies and on the dynamics within the relevant markets where they operate. In such a context, it is key to assess to which extent shareholders enjoy some forms of control upon the interconnected companies, and how this control is likely to translate into the decision-making process of the latter and eventually raise antitrust concerns.

III.5 Business groups and Stock pyramids

[54] As clear, cross-shareholdings raise a lower antitrust risk as they do not involve the existence of personal links like in case of IDs, but of corporate and financial interconnections among independent companies, that in the absence of antitrust control do not necessarily entrust the management of competitors to be aware of the reciprocal commercial strategies.

A peculiar corporate structure that mixes elements of majority and minority control relations among various firms is represented by stock pyramids and business groups. In this scenario, the holding company of the group may either have a majority controlling stake within the various firms included in the corporate chain, or minority shareholdings. In this second scenario, like in other CEMs' structures, there is a formal separation between corporate control and cash flow rights. However, the holding company by having a controlling shareholding in a second-tier company is still in the position to indirectly have an influence upon the not-directly controlled operating firm included in the chain, in turn under control of the second-tier company. This process can be repeated a number of times and the higher the number of firms involved in the pyramid, the higher the degree of deviation from the linear relation between capital share ownership and control rights.

These structures are particularly relevant in modern economies where the use of articulated chains of control may allow the holding shareholder to indirectly exercise a certain influence upon a number of companies situated at the bottom of the pyramidal structure, without investing in each a financial equity proportionate to its "control rights".[55]

However, in various jurisdictions different paths have been followed. In particular, in the United States pyramid structures have not been common due to the fact that, under fiscal rules, they could be subject to double taxation of inter-corporate dividends.[56] These corporate structures are indeed popular in Asia and particularly in Japan.[57] In Europe, this CEM

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[55] FEDERICO CENZI VENEZZE, The Costs of Control-enhancing Mechanisms: How Regulatory Dualism Can Create Value in the Privatisation of State-owned Firms in Europe, European Business Organization Law Review, 10 (2014).

[56] Organisation for Economic Co-operation and Development (OECD), Corporate Affairs Division, Directorate for Financial and Enterprise Affairs, Report on "Lack of proportionality between ownership and control: overview and issues for discussion", 19 (December 2007).

[57] For example, the Li Ka-shing group is a well-known pyramid, that long operated through the Cheung Kong public company by holding a 35% stake. In turn, Cheung Kong had a 44% stake in its main operating company, Hutchison Wampoa. Only in 2015 Cheung

is legally available, and it has been implemented in several countries. In some European jurisdictions it has been the most used mechanism for granting to minority shareholders a certain degree of corporate influence over a third company. The only countries that do not use it despite its formal availability are Denmark, Ireland, Finland (and, in a pre-Brexit scenario, the United Kingdom).

For a clearer picture, the CEM Study reports the frequency of occurrence of pyramids in various European countries. As the table above shows, pyramids are widely used in Italy and they are reported to be used as a means to control many of the largest Italian listed companies. However, the use of these structures has decreased over the last two decades due to the radical reform of the Italian corporate law framework in 2003, which strengthened minority investors' protection and reduced the need for implementing corporate structures aimed at granting rights to minorities to allow them to exercise some influence upon a company in the absence of control of capital share.[58]

Table [2]

BE	DK	DE	EE	GR	SP	FR	IE	IT	LU	HU	NL	PL	FI	SW	UK
40%	0%	15%	8%	15%	20%	25%	0%	45%	26%	35%	11%	10%	0%	65%	0%

From an antitrust perspective, one could evaluate whether a potential concern of sharing confidential information within the pyramid may *ex ante* materialize. In a scenario in which one company has a controlling participation within a group entity, which in turn has a minority shareholding with board representation within another active in the same relevant market, there could be a risk of flow of confidential information

Kong and Hutchison Wampoa merged in a new company, the CK Hutchison Holdings Limited, which is among the largest companies listed on The Hong Kong Stock Exchange.

58 FEDERICO CENZI VENEZZE, The Costs of Control-enhancing Mechanisms cit. above; see also LUCA ENRIQUES, Corporate Governance Reforms in Italy: What Has Been Done and What Is Left To Do, 10 EBOR (2009); MARCELLO BIANCHI, MAGDA BIANCO & LUCA ENRIQUES, Pyramidal Groups and the Separation Between Ownership and Control in Italy, in FABRIZIO BARCA & MARCO BECHT, eds., The Control of Corporate Europe, OUP (2001).

between these companies through the second-tier undertaking. However, in such a scenario, for a competition law risk to arise the minority-owned company should not be within the perimeter of the business group and it should not be (indirectly) controlled by the holding company. In other words, to apply the coordinated-effects theory to pyramids, one should assume that the companies between which confidential information are shared are not within the same business group and are not a single corporation from an antitrust standpoint (under European competition law, a *single undertaking*), namely one single entity engaged in the offer of goods or services on a given market.

If companies within stock pyramids are indeed all part of the same business group and they are not simply under an indirect influence of the final holding company, the group-companies represent one firm (or undertaking) for competition law purposes and the antitrust prohibition of concerted actions cannot apply. In fact, both in the U.S. and in Europe there is a ban against coordinated conducts implemented by at least two independent competing firms, which are not part of the same business group. The fact that a business group may qualify as a single economic entity (*i.e.*, one firm) for the purposes of applying antitrust rules is confirmed, *inter alia*, by the structure of antitrust compliance programs, that have been usually designed to catch business groups as a whole. To this extent, the concept of "compliance pyramid" has been developed on the assumption that the hierarchical implementation of a set of rules and mechanisms designed to ensure compliance with competition law is essential to make antitrust compliance programs effective within large groups.[59]

Business groups may indeed raise another type of antitrust risk to the extent that the group enjoys a strong market power. In this respect, business groups could make use of that power to engage in exclusionary

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[59] The OECD Competition Committee, Policy Roundtable on "Promoting Compliance with Competition Law", § 2 (2011). See also, the ICA, Guidelines on Antitrust Compliance, § VIII, Resolution No. 27356 of 25 September 2018.

conducts to the prejudice of competitors. For example, they may leverage their strong financial position to engage in predatory pricing by charging low prices that an as efficient competitor may not sustain, or they may rely on vertical relations within the group to foreclose non-integrated undertakings which are active at one level of the value chain.

In this context, whether the rules of corporate governance play a role and complement competition law to tackle the potential distortions of market dynamics that these groups may eventually raise should be scrutinized. In this respect, a point of attention could be whether regulation should be introduced to shape the corporate structures of the biggest business groups to minimize the competitive risks posed by their relevant market power whenever found to exist, like it is happening with respect to the activities of the "Big tech". It is undeniable that the rules of corporate governance may be helpful when competition law gaps exist, and they may play a "disciplinary effect" by orienting the actions of corporate executive managers. This holds certainly true in cases where business groups are active in industries where experience shows that there is not a widespread culture of antitrust compliance. In other cases, the current competition law rules may prove sufficient to discipline the activities of business groups.[60]

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[60] In this respect, the so-called *parental liability* doctrine may be precisely applied to business groups. It is a well-established principle of the EU competition law that parent companies within business groups can be fined for the antitrust infringements imputable to their fully owned subsidiaries on the assumption that the former exercises *decisive* influence over the commercial strategies of their subsidiaries. By making parent companies liable for antitrust infringements that are imputable to their affiliates, parental liability widens the spectrum of the companies whose turnover is taken into account by the antitrust enforcer to set fines.

For the European case law application of this doctrine see *ex multis* the Court of Justice of the European Union in Akzo Nobel v. Commission, case C-516/15 P, 27 April 2017. More precisely, in 2009 the European Commission imposed a fine on Akzo Nobel NV and several of its subsidiaries for infringements on the heat stabilisers market. The Commission attributed liability also to the ultimate parent company Akzo Nobel NV because two of its subsidiaries had participated directly in the infringement. On appeal before the General Court, Akzo Nobel challenged the attribution of liability to its parent company on the assumption that parent liability cannot be purely derivative of that of its subsidiary in the absence of other factors which individually reflect the conduct for which the parent company is held liable. However, both the General Court and the EU Court of Justice

disagreed, stating that the parent company had carried out the anticompetitive activities itself since it formed an economic unit with its subsidiaries. In the words of the EU Court, the presumption of parental liability implies that "*the parent company to which the unlawful conduct of its subsidiary is attributed is held individually liable for an infringement of the EU competition rules which it is itself deemed to have infringed, because of the decisive influence which it exercised over the subsidiary and by which it was able to determine the subsidiary's conduct on the market*". This relies "*on the principle of the personal responsibility of the economic unit which has committed the infringement. Thus, if the parent company is part of that economic unit, it is regarded as personally jointly and severally liable with the other legal persons making up that unit for the infringement committed*" (§§ 56-57).

The *ratio* of this doctrine is clear in cases in which the controlling entity is an industrial player with controlling stakes in another industrial player active in the same sector, since there is an underlying interest of having a view on reciprocal market strategies. The scenario may be less clear with respect to shareholdings by financial institutional and investment funds, where the underlying reason of having (even majority) stakes in various companies may be purely financial. In this second scenario, the application of the parental liability doctrine implies that a financial investor could be liable for the commercial conducts carried out by several companies in which it holds a (still majority) shareholding, since there can be a presumption that it influenced the commercial strategies of the participated companies.

However, it is interesting to note that the parental liability doctrine has been recently applied to financial investors to make them liable for the anticompetitive actions implemented by the companies in which they held a *majority* shareholding. In particular, see the well-known *Power Cable* cartel case. More precisely, in 2014 the European Commission imposed a fine of approximately € 104.6 million on Prysmian. Goldman Sachs held 91.1/84.4% of the equity in Prysmian during the relevant period and 100% of the voting rights. Since Goldman Sachs was not a 100% shareholder, the Commission based its decision on the fact that it controlled 100% of the voting rights and it was deemed to be "*in a similar situation to that of a sole owner as regards its power to exercise a decisive influence over the conduct of its subsidiary*". Accordingly, that investor should not have taken into account the interests of minority shareholders when adopting strategic decisions or in the day-to-day business of the subsidiary and it was jointly and severally liable for the infringement imputable to Prysmian. On appeal before the General Court, the financial investor argued that it could not be held liable as a parent since it was a pure financial investor who held shares to make a profit, and it had accordingly refrained from any involvement in Prysmian's management and in exercising control. However, the General Court agreed with the Commission on the assumption that Goldman Sachs had corporate control over Prysmian (*i.e.*, it could appoint members of the board, call shareholder meetings, propose the removal of directors and its representatives on the board of directors had management power). Thus, Goldman Sachs was not a pure financial investor but a typical industrial owner of Prysmian. The General Court's judgment was finally upheld by the CJEU, which definitively rejected Goldman Sachs' appeal in January 2021. In this respect, the CJEU confirmed that when a parent company can exercise all the voting rights and it has a very high majority stake in the share capital of a subsidiary, it can be presumed that the parent company determines the economic and commercial strategy of that subsidiary, although it does not hold all or virtually all of the subsidiary's shares

Against this background, I think that the rigorous enforcement of antitrust rules could lead to false positives whenever applied to financial business groups in the absence of evidence of distortive effects on competitive dynamics. This is so as financial shareholders may not qualify neither as industrial players nor as family owners with an interest in the commercial prospect of their portfolio companies, but as mere financial investors. Even in cases in which they hold relevant shareholdings in third-party companies, they may simply aim at increasing the share value of their portfolios rather than being interested in their day-by-day commercial strategies. In this context, the risk of being liable for the commercial conducts of their portfolio companies may induce these investors to refrain from investing and thus diversifying their portfolios to the prejudice of final consumers (*i.e.*, savers).

However, the less rigorous application of antitrust law may be complemented by a severe enforcement of corporate governance rules, *in primis* those on liability of managers and employees. By making corporate law complementary to antitrust, the risk that the application of antitrust prohibitions may detrimentally impact on important economic players like financial institutions is minimized. To conclude, also in case of business groups and pyramids that do not perfectly qualify as a traditional CEM structure, the potential antitrust criticisms – which, as mentioned, may materialize in limited circumstances – may be perfectly dealt with under the existing antitrust toolbox and there is no need to introduce new competition bans.

IV. THE NEW COMMON OWNERSHIP THEORY

(CJEU, case C-595/18PC, *The Goldman Sachs Group Inc. v. EU Commission*, January 27, 2021).

The parental liability rule is admissible under the U.S. antitrust framework as well. In this respect, see CARSTEN KOENIG, Comparing Parent Company Liability in EU and US Competition Law, World Competition 41, No. 1, 69-100 (2018).

The paragraphs above have detailed the most common CEMs and similar structures which can create links among independent players, their main features and the extent to which they may trigger an antitrust risk to the extent that they connect independent firms which should autonomously operate in the market. As clarified, IDs are the most critical CEM under competition law because they lead to convergence within the same persons of directorship or management positions in competing firms, whereas cross-shareholding raises a more limited risk unless implemented in an industrial sector where market players are already connected by IDs. As clarified above, the competitive value of cross-shareholding mainly depends on the percentage value of the reciprocal shareholding, on the corporate rights that are granted to reciprocal shareholders and on the competitive dynamics within the relevant market where the cross-held companies are active. In any event, on several occasions competition law authorities have deemed the implementation of traditional antitrust safeguards (*in primis* Chinese walls) sufficient to deal with the competitive risks raised by the above-scrutinized CEMs.

However, is the list of CEMs and of similar structures detailed so far exhaustive, or could other areas of possible divergence between corporate governance mechanisms and competition law be identified? As I will make clear, a potential clash between corporate law and antitrust precisely lies in the new CO doctrine. The present dissertation aims at further exploring this doctrine to discuss whether there is a gap in the existing antitrust theory of harm and propose possible solutions should any of the claimed antitrust risk appear to be tangible. This theory will be discussed extensively in the following chapters of this dissertation, but for now I simply point out its value for the competition law debate.

I have already explained that a CO structure generally implies the possession by financial investors of partial ownership within firms active in the same industry, in the absence of the majority of voting rights upon these portfolio companies or other formal mechanisms which may grant minority shareholders corporate and antitrust control upon the commonly

owned companies (as it is indeed the case of shares with multiple voting rights), or at least a degree of control relevant for merger control purposes under antitrust rules. For example, this may be possible *de jure* through veto rights on business plan, budget or relevant investments, or *de facto* in case of proof – on the basis of the analysis of attendance at shareholders' meetings – of the ability of the minority shareholder to control the firm because of the highly dispersed shareholders basis, which effectively allow the minorities to impose their voice in the boards and prevail in the adoption of commercial decisions of the minority owned company.

In such a complex context, in my opinion, at first look the likelihood that minority financial investors may impose their views on the management of their innumerable portfolio companies to influence their business strategies is low. But what if the *status* of common minority shareholders is held by the biggest institutional investors on a global scale? Should a different competition law assessment be pursued? If potential antitrust risk were effectively found to materialize, are the traditional antitrust principles and the regulatory obligations applicable to institutional financial investors suitable and sufficient to deal with the potential concerns that the CO theory eventually raise? All these questions are fueling the existing doctrinal and case-law debate on CO and they will be scrutinized in detail in the following chapters of this dissertations.

In this section I only note that, as it seems clear, CO may be reasonably qualified as a new form of CEM since it assumes that minority shareholders enjoy a certain degree of control over the partially owned companies, but it undoubtedly does not fit within any of the CEMs' categories presented above. To begin with, the observed divergence between corporate and antitrust control is relevant in this respect and it will be helpful to test the CO theory: CO may eventually lead to distortions of market dynamics to the extent that one assumes and proves that minority shareholders are in the position to exercise antitrust control upon the participated firm, and in turn to influence the management of each of the commonly owned companies and then to coordinate their commercial

conducts. However, is the "passive *vs* active shareholders theory" helpful in this respect? In other words, could we assume for example that the biggest funds, irrespective of their formal qualification as passive investors, have effectively the ability to influence the market strategies of each of their portfolio companies?

Clearly, if no influence or an oversight akin to control can be exercised, no antitrust risk can be *ex ante* identified. If minority investors have no ability and hence no incentive to influence the market strategies of competing firms, they can neither facilitate a collusive outcome, nor induce independent firms to refrain from competing. As it will be clarified, part of the antitrust doctrine alleges that the lack of corporate control by common minority shareholders over their participated companies is a false problem since the biggest investors, irrespective of the fact that they hold a minimal share capital of each of their portfolio companies, can still have an influence on the management of these companies and exercise antitrust control upon them.

However, even if the above was true, CO may not be considered a *hard-core* restriction of competition law and antitrust authorities should even prove that the claimed influence exercised by these institutional investors upon the commonly owned companies results in the distortion of competitive dynamics. The essence of that concern lies in the boundaries of the notion of *causality*. In particular, competition authorities should first prove that the simultaneous presence of institutional investors with minority shareholdings in competing firms allow them either to coordinate the commercial strategies of these firms, or induce them to refrain from competing, and then that these coordinated or unilateral conducts cause anticompetitive effects. If this probative standard is not met, the claimed distortive effects observed in some industries (for example, an increase in prices) could be due to exogenous factors other than the widespread presence of common shareholders in competing firms (see in this respect the detailed analysis presented in Chapter II *infra*).

In any event and above all, I will make clear that even if institutional investors were in the position to influence the market behavior of competing portfolio companies and caused distortions of market dynamics, the question is then not to ban CO altogether, but whether antitrust rules (coupled with the existing regulatory disciplines) are sufficient to deal with these criticisms. As I will point out, in my opinion the answer to this question should be positive.

CHAPTER II

THE COMMON OWNERSHIP THEORY UNDER THE LENS OF ANTITRUST PRACTITIONERS: ANY GAP SO FAR?

I. INTRODUCTION

The CO theory of harm has been quickly introduced in the previous chapter and compared to other corporate structural links. In this chapter I will detail the competitive rationale underlying this doctrine to evaluate to which extent any gap may be found in the analyses carried out so far in this field, and whether any alternative factors help with explaining the distortions of competition observed in the industries where common shareholders allegedly hold a significant presence.

As already mentioned, there has been a prolific academic debate on CO during the last years, particularly in the United States. In Europe, competition law practitioners have so far reserved little attention to the claimed increasing power of institutional investors and of AMCs of the caliber of BlackRock, State Street, or Vanguard. The different approaches taken in the U.S. and in the European Union to CO are consistent with the heterogeneous economic dynamics that characterize these jurisdictions. While the dispersed and particularly fragmented ownership structures of many U.S. companies may lead to the higher presence of minority financial shareholders, especially when it comes to listed companies, in Europe family owned and centralized companies are more prominent. In Italy, for example, family owners have traditionally retained the ultimate decisional power upon important economic players by setting up family holding companies to oversee the whole activities of the group (among many, Ferrero as the first Italian company in the global ranking).[61]

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[61] The fact that the Italian economy has been more resilient to open the share capital of the biggest companies to non-family owners does not imply that institutional investors, in the *status* of minority shareholders, do not play a role in the Italian economy as well. On the basis of the recent Annual Report of the Bank of Italy, the total amount of funds invested in Italy by institutional investors at the end of 2018 amounted to 16 billion euros (Annual Report of 31 May 2019, 182). In any event, traditional institutional investors such

In this context, after a brief reference to the role that institutional investors play in modern finance and of their benefits resulting from their activities, the present chapter will describe the CO theory by critically analyzing the main articles on this topic, starting from the studies of the eminent U.S. Harvard Law school Professor Einer Elhauge, the father of the CO theory. This preliminary analysis will help us to understand why the presumption that CO distorts market dynamics has been recently proposed, and thus whether competition law enforcers should look at the activities of the main institutional investors on a global scale. On that basis, the theory will be tested by assessing the economic context where it has been observed to question whether the alleged distortions of competition have been caused by CO or rather by other factors.

II. INSTITUTIONAL INVESTORS IN MODERN FINANCE

The professionalization of the investment function, which requires skilled managers to collect financial resources from innumerable savers and invest them in a plethora of portfolio companies, has set the stage for institutional investors to grow and play a prominent role in the world of modern finance. Their steady rise begun in the late 1980s in the U.S. and it was mainly fed by a socio-economic phenomenon. In particular, because of the increased longevity of population on the one hand, coupled with higher household savings on the other, several non-qualified investors began looking at investment opportunities in a diversified set of financial securities. Institutional investors opened the doors of modern financial markets to non-qualified savers by assisting them in identifying the most advantageous opportunities suitable to each risk profile. In this context, institutional investors became key in collecting and managing savings of small-scale investors to give them access to relevant investment opportunities.

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as banks play a pivotal role in our economy and, as I have explained in the previous chapter, they have not escaped the antitrust scrutiny because of IDs.

The dynamics of the U.S. economy undoubtedly favoured the rapid growth of institutional investors, which currently manage significant assets and financial wealth on a global scale. This rise also relies on institutional investors' ability to leverage their market expertise in innumerable industries, and thus to rapidly expand their reach. As a result, institutional investors have begun collecting savings and composing portfolios of innumerable clients, helping them to diversify investments in various sectors of the economy to balance the risks and the expected returns of each chosen security. Finding the optimal trade-off between risks and return has always been – and still is – their imperative. They help clients with lowering transaction costs by having access to huge volumes of financial resources and generating economies of scale.[62] In this context, it is clear why over time financial intermediaries have specialized and gradually acquired a pivotal role in financial markets.

As a consequence, as I will make clear in the following chapter, the category of institutional investors is now particularly wide and includes several economic operators (*e.g.*, banks, insurance companies, pension funds and the diversified world of index funds and AMCs), subject to different regulations. In such a multi-faceted background, I will assess the extent to which the financial strength held by institutional investors reflects their alleged market power in the industries where their commonly owned portfolio companies are active.

Against this background, one of the preliminary questions that I will try to address in this chapter concerns whether the studies carried out so far on CO are effectively sound under an antitrust standpoint. In this respect, one should preliminarily consider whether common investors are effectively in the position to control their portfolio companies and in turn distort market dynamics in the sectors where they are active. Even

[62] ESTELLE JAMES, GARY FERRIER, JAMES H. SMALHOUT, DIMITRI VITTAS, Mutual Funds and Institutional Investments: What Is the Most Efficient Way to Set Up Individual Accounts in a Social Security System?, Vol. Administrative Aspects of Investment-Based Social Security Reform, UCP (2000).

admitting that these investors were in such a position, it would be still unclear whether that power effectively favours coordination among competing portfolio companies or in any event distorts competition in "downstream" markets (*i.e.*, in those markets where the minority owned companies are active). Could we identify alternative causes to CO which might explain the observed increases in prices in the markets where that theory has been applied to? To this extent, in the following sections I will detail the arguments upon which the CO theory is based and analyse the studies carried out so far to propose an alternative interpretation that questions some of its underlying assumptions.

On this basis, as I will point out, in contrast with the position of eminent academics, the U.S. antitrust enforcers have been rather silent as regards the CO theory and they have so far applied the traditional antitrust tools in reviewing transactions that involved the existence of interconnections among competing firms. The antitrust enforcers have neither called for the introduction of new regulatory tools, nor made CO an antitrust enforcement priority. Then, I will dive deeper by looking at sectoral dynamics in which CO has raised potential antitrust concerns, and I will evaluate whether industry dynamics have played any role in connection with the pricing increases or other distortive effects observed in various U.S. sectors over the last years.

III. THE ACADEMIC ORIGINS OF THE *COMMON OWNERSHIP* THEORY

As briefly mentioned, the CO theory relies on the premise that the biggest financial investors, in their *status* of minority shareholders in a plethora of competing firms, may distort competitive dynamics in the markets in which these firms are active by leveraging their collective economic power on a global scale. The academic dispute has been led by

the eminent Harvard Law School professor Einer Elhauge,[63] who takes the side with those claiming that CO may prejudice competition in the relevant markets where the minority-owned portfolio companies compete. Therefore, under the CO theory, because of their economic strength in the financial industry, institutional investors are assumed to have a significant influence akin to control on the management of each of their portfolio companies, and this notwithstanding the fact that these investors have minority shareholding. Then, due to their presence in the share capital of competing firms, the CO theory assumes that institutional investors may coordinate the market decisions of competitors or induce each of them to refrain from competing. These strategies aim at increasing the overall value of institutional investors' common shares, but risk undermining "intra-portfolio" fair competition. In light of these assumptions, the CO theory does not fit within the classic "single firm" profit maximization model, which should indeed characterize competitive markets.

As the analysis above makes clear, the CO theory is particularly complex and it preliminarily implies that the firms in which institutional investors hold minority shareholding are either horizontal competitors or vertically related firms which, because of the presence of common investors in their share capital, opt to coordinate their commercial strategies, to refrain from competing (in case of horizontal links) or to favor firms operating along the value chain (in case of vertical links). This is due to the fact that aggressive competition among them would harm institutional shareholders, who precisely hold shares in a multitude of competing or vertically interrelated firms.

In practice, under the CO theory, in case of portfolio companies in a horizontal competitive situation, the existence of financial links between them because of common shareholders may either be an instrument to exchange confidential information among competing firms concerning the

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[63] EINER ELHAUGE, How Horizontal Shareholding Harms Our Economy – And Why Antitrust Law Can Fix It, Harvard Bus. Law. Rev. Vol. 10, 2 (2020); see also EINER ELHAUGE, The Causal Mechanisms of Horizontal Shareholding, working paper (August 2019).

relevant markets where they are active, or anyhow facilitate the emergence of a collusive equilibrium (horizontal *coordinated* effects). In addition, this theory assumes that common shareholders may influence the decision-making power of the minority-owned companies, inducing them to opt for a "quiet life" and to refrain from reciprocally competing (horizontal *unilateral* effects). In case of CO in vertically related companies, the CO theory implies that institutional investors may induce portfolio firms to act as if they were structurally integrated with the aim of foreclosing third parties, which compete at one level of the value chain.[64]

In such a complex framework, to deal with the claimed anticompetitive effects of CO, Professor Elhauge calls for the adoption of a severe antitrust scrutiny by applying U.S. merger control rules. In this respect, he proposes to tackle CO under Section 7 of the Clayton Act.[65] That regulation is the main federal substantive law governing mergers, acquisitions and joint ventures, and it expressly prohibits the acquisitions of stock or assets whose *effect "may be substantially to lessen competition, or to tend to create a monopoly"*.[66] According to Professor Elhauge, whenever CO has anticompetitive effects, it violates the Section 7 ban. This rule may thus serve as the key legal device to deem illegal under antitrust law the *presence* of institutional shareholders in competing firms to the extent they distort competitive dynamics. Under this line of reasoning, the scope of Section 7 is broadened to encompass the activities of institutional

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[64] The CO theory of antitrust harm has mainly emerged in connection with horizontal shareholding because the risks of distortion of market dynamics is higher where the commonly owned companies are active at the same level of the distribution chain within the same relevant market. Vertical relations are indeed generally less problematic than horizontal ones from an antitrust perspective. Therefore, this dissertation will mainly focus on the claimed distortions of competition that CO in horizontal competitors may lead to.

[65] 15 U.S.C. § 18.

[66] The original version of Section 7, enacted in 1914, only prohibited the acquisitions of stock of one corporation by another and, by its explicit term, it was not applicable to asset acquisitions. To avoid its elusion, the U.S. Congress amended it by passing the Celler-Kefauver Antimerger Act so to include tangible and intangible assets within its scope of application.

investors, even though they are ordinarily exempt from merger control rules if they invest in companies for *sole financial* purposes.

In addition, as common shareholders are claimed to favor collusion among competing firms, Section 1 of the Sherman Act that generally prohibits contracts, agreements, or any form of conspiracy in restraint of trade may also apply. Hence, under the CO theory, antitrust authorities should step-in notwithstanding the fact that doubts exist as to the likelihood that common minority-investors manage their portfolio companies by exercising antitrust control upon their management and, in turn, cause a distortion of competition in the markets where these firms compete. To dismiss these criticisms, Professor Elhauge claims that clear evidence of the existence of a *causal link* between CO and anticompetitive effects in the industries where the commonly owned companies operate has been empirically found (for example, in the airline and banking industries, where CO has been claimed to have caused adverse price effects).

Other eminent scholars – Posner, Scott Morton and Weyl – have likewise claimed that, in concentrated industries, mutual funds and other institutional investors soften competition among their commonly-owned companies to the extent that they compete within the same markets.[67] To avoid distortions of the competitive dynamics, these scholars call antitrust enforcers to step-in by leveraging their public enforcement powers under merger control rules. To limit institutional investors from indirectly gaining relevant power in the affected markets, they propose to cap their influence to 1% of the total size of an industry, or to allow them to acquire shares exclusively in one portfolio company *per* industry.

On the opposite, there are authors that even recently contested the assumptions underlying the CO theory and which, on the basis of statistical studies, empirically proved that "*greater common ownership is, all else equal, not robustly related to industry outcomes in a manner consistent*

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[67] ERIC POSNER, FIONA SCOTT MORTON & E. GLEN WEYL, A proposal to Limit the Anti-competitive Power of Institutional Investors, 81 Antitrust L. J. 669 (2017).

with reduced competition". As regards the existence of a causal link between common ownership and competition, they claim that "*it is too weak to be identified*" and "*the magnitudes of the* [anticompetitive] *effect may be too small to detect in an average effect estimated across all industries*". This finding also relies on the fact that institutional investors are not unaware of potential antitrust exposure when they hold positions in multiple firms. Hence, should it be proved that in some markets they could have at least the ability to influence the management of their commonly owned companies to refrain from competing or coordinating their commercial strategies, they may lack an incentive in that respect. Precisely for this reason "*to the best of* [these authors] *knowledge no common institutional block-holder of U.S. firms has been party to a case filed by the U.S. Department of Justice due to violations of antitrust laws*".[68]

In light of these contrasting views, in the following sections I will critically analyse the studies carried out so far on CO in the airline, banking and pharmaceutical industries, to assess whether CO has effectively been the *cause* of the observed adverse pricing effects in those sectors, or whether any alternative factor may have played a role in explaining the high market prices, as confirmed by the cautious approach of the U.S. antitrust enforcers so far. They have neither made CO an antitrust enforcement priority, nor advocated for the introduction of new measures in the few cases where institutional investors have been found to raise some antitrust risks. In this context, I will also investigate whether any gap in the enforcement of antitrust rules may have facilitated concentration of these industries (in particular, the airline and banking sectors), which in turn may have (co)determined the observed pricing increases.

IV. COMMON OWNERSHIP AND ANTICOMPETITIVE EFFECTS IN THE U.S. AIRLINE, BANKING AND PHARMACEUTICAL INDUSTRIES

[68] ANDREW KOCH, MARIOS PANAYIDES & SHAWN THOMAS, Common ownership and competition in product markets, J. Fin. Econ., 139, 109-137 (2021).

IV.1. Common ownership in the airline industry

IV.1.1. "The Airline Study"

The idea that CO caused adverse pricing effects in the U.S. airline industry is based on a study carried out by the distinguished scholars Azar, Schmalz and Tecu. They claim to have empirically proved with a 99% statistical confidence level that in the U.S. airline industry high levels of horizontal ownership resulted into an increase of market concentration, causing in turn a rise in airfares.[69] In particular, this study focuses on the airline industry because of the easiness of finding high-quality and sufficiently granular data on airfares in the public domain. In this sector, the biggest AMCs are claimed to have extremely large market power by having minority shares in most U.S. publicly traded airlines.

As a consequence, the study primarily focuses on the "economic power" held by common shareholders within that sector, which allegedly explains the increase in airfares during the investigated period. This is possible since, under the CO theory, common shareholders are claimed to influence the executive managers to align commercial strategies of competing airlines. To this end, common investors may use various methods to induce managers to pursue industry performance rather than the performance of the individual firm, *in primis* incentive schemes that link compensation of managers to industry goals, with the consequence that managers are paid less for their own firm's performance and more in case of an increase in the overall industry performance.[70]

The above notwithstanding the fact that it has also been recently acknowledged that "*skepticism that common ownership affects product market outcomes may be warranted given the lack of a clear mechanism*

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[69] JOSÉ AZAR, MARTIN C. SCHMALZ & ISABEL TECU, Anticompetitive Effects of Common Ownership, J. Finance, vol. 73, issue 4, 1513-1565 (2018).

[70] MIGUEL ANTON, FLORIAN EDERER, MIREIA GINE & MARTIN C. SCHMALZ, Common ownership, competition, and top management incentives, Ross School of Business, working paper 1328 (2016).

that recognizes these agency problems [between investors and managers] *and informational constraints. Thus far, no paper has established a mechanism through which common ownership affects product market outcomes. This has fueled a vigorous debate about whether existing evidence on common ownership has a plausible causal interpretation and, if it does, how to effectively address the resulting regulatory, legal, antitrust, and corporate governance challenges*".[71]

Nonetheless this general skepticism, the CO theory comes to the conclusion that "*commonly-owned firms compete less aggressively in markets in which they face other commonly-owned firms than in markets in which they face maverick firms*". This finding also relies on the assumption that common shareholders are usually "*passive*" and "*more willing to tolerate managerial slack and the resulting productive inefficiency at their portfolio firms because doing so also leads to less intense competition for the other firms in which they hold shares*".

Even if common shareholders were "more active", under the CO theory they would make use of voting rights to induce managers of their portfolio companies to pursue a certain course of action. In this respect, common investors are claimed to influence top managers as they have a voice in the election of candidates to directorship roles. Since high-level managers are interested in retaining positions within governing boards, they are induced to adopt commercial strategies that would benefit common investors. As a result, in the Airline Study common shareholders are claimed not only to have the ability, but also the incentive to induce the executive managers of the minority-owned companies either to coordinate their strategies, or to refrain from engaging in aggressive competition among each other.

By proceeding a step further, the Airline Study then focuses on CO concentration within the airline industry and looks at the ownership

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[71] MIGUEL ANTON, FLORIAN EDERER, MIREIA GINE & MARTIN C. SCHMALZ, Common Ownership, Competition, and Top Management Incentives, Working Papers, Ross School of Business (2021).

composition of airline companies to assess the extent to which the most representative investors in the various airline companies had also shares of competing airlines. As such, the Study broadens the economic model that O'Brien and Salop developed more than a decade earlier to assess the competitive effects of horizontal joint ventures that post-transaction would have been active in the same relevant markets of the parents. That model still helps antitrust enforcers to evaluate the competitive risks in terms of potential coordination that may arise if a company holds the stocks of a direct competitor, as it is precisely the case of parent companies that will be active in the same relevant market of their controlled joint venture.[72]

The model assumes that, in oligopolistic markets, where the few competitors are interested in maximizing a weighted sum of the overall profits accruing to their common shareholders, a shareholder's influence in a firm's strategic plan is proportional to the share capital it holds in that firm as well as in commonly owned companies. The same logic is applied to CO involving institutional investors, where partially owned companies are allegedly disincentivized from competing with each other since the increase in the value of one company's shares leads, in turn, to a decrease in the value of shares of competitors to the prejudice of the value of common investors' portfolios. Therefore, under the CO theory, the higher the market concentration index, the higher the intrinsic anti-competitive incentives created by CO.

Under the above assumptions, the Airline Study concludes that in the U.S. airline industry, over the period considered in the analysis, the market concentration index was considerably higher than the HHI threshold that the U.S. antitrust enforcers deem likely to enhance market power.[73] In a

[72] DANIEL P. O' BRIEN & STEVEN C. SALOP, Competitive effects of partial ownership: Financial interest and corporate control, Antitrust L. J. 67, 559-614 (2000).

[73] Under U.S. antitrust rules, the Herfindahl–Hirschman Index (HHI) is a commonly accepted measure of market concentration. The HHI is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers. The antitrust enforcers generally consider markets in which the HHI is between 1,500 and 2,500 points to be moderately concentrated, whereas those in which the HHI is in excess

situation in which common shareholders were present in various airline carriers active within an already concentrated sector, CO allegedly had a negative impact on airfares.

Furthermore, to empirically strengthen the existence of a causal link between CO and the observed adverse effects on prices of airline tickets, the Airline Study evaluated whether the assumed anticompetitive incentives of common shareholders translated into *measurable effects* on product market competition (*i.e.*, on competition on airfares in the relevant market where the commonly owned airline companies were active). In that respect, the study assessed to what extent a variation in CO concentration in a given route over time caused changes in airfares in that route.

The authors conclude that competition in airline routes decreased when the shareholders of incumbent airlines acquired *significant* ownership (and control rights) in an independent airline serving the same route, contributing to further concentration of the industry. Evidence of this negative effect is claimed to have been significant, in the order of a 3-11% increase of the average U.S. airfare within routes, as compared to a counterfactual scenario of separate ownership.

The study finally looked at BlackRock's acquisition of Barclays Global Investors in 2009 as a possible alternative factor explaining the observed increase in airfares. However, it concludes that the merger played no role in respect to pricing as airline stocks amounted for a limited fraction of the merging parties' portfolios, and at most that merger caused a slight increase of 0.6% on average airfares across routes.

The Airline Study is certainly interesting as it tries to find one possible explanation to the observed pricing increase within a concentrated sector and it links it to the rise in CO. However, I firstly note that, as the same authors make clear, the findings of that study are consistent with standard notions of corporate governance: only CO by the biggest shareholders

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of 2,500 points to be highly concentrated. Transactions that increase the HHI by more than 200 points in highly concentrated markets are presumed to likely enhance market power.

(usually those ranked first and second) within competitors may have a positive and statistically significant effect on airfares. CO by investors with considerably lower shareholding (as it is usually the case of the Big Three) may have small and less statistically significant effect on prices. This is certainly relevant since this dissertation focuses on the biggest AMCs and on other institutional investors, which typically operate as financial shareholders by holding minimal share percentages (below 10%) in their portfolio companies. Accordingly, under traditional rules of corporate governance, it is questionable that they can effectively influence the managers of their portfolio companies by holding minimal percentages of their share capital.

I anyhow doubt that it was the presence of common investors in airline companies to have certainly caused the observed increase in prices of airline tickets. To take a step further in the analysis, I will contextualize the Airline Study and assess the CO theory in light of the dynamics and events that characterized the U.S. airline industry in the period under investigation. In the following sections I will hence investigate whether other events that occurred in that industry may have played a role in connection with the observed rise in airline ticket prices and may thus act as alternative (or even the only explanatory) variables that led those prices to increase.

IV.1.2 The "Airline Study": any gap in the CO theory of harm?

The Airline study represents an important empirical application of the CO theory of harm in the U.S. airline industry as it explores possible causes of the observed pricing increase within a concentrated market. I do not want to contest the fact that an objective increase of airfares occurred, but question whether such event was causally linked to CO or whether it was instead the natural effect of the concentrated market structure of that industry. Was the CO the cause of that price increase or was that increase the effect of sector dynamics?

In that context, a further question arises as to whether the antitrust enforcer may have intervened *ex ante* to prevent further concentration of the industry when reviewing concentrations among airlines which triggered the application of merger control rules. Could the antitrust enforcer have taken CO into account in the context of merger reviews as a contextual element in the competitive assessment? In the following sections, I will focus on these issues and try to provide a clearer picture.

(i) *The U.S. airline industry as a tight oligopoly*

In a relatively short period of time, the U.S. airline industry underwent a major wave of consolidation as a result of various mergers, that were reviewed by the antitrust authority (the DOJ, *i.e.*, the Antitrust Division of the U.S. Department of Justice). Could the DOJ have been more active and vetoed some transactions on the assumption that parallel conduct leading to higher prices may have been easier in an oligopolistic structure? Could a more rigorous antitrust scrutiny have been justified on the assumption that the already concentrated structure of the sector, coupled with the existence of various corporate links among airlines, recommended a more interventionist approach to safeguard undistorted competition in the industry? In the following sections I will try to address these issues.

To answer the above questions, in this section I will firstly undertake a preliminary analysis of the trend towards consolidation of the U.S. airline industry, experienced during the last two decades. In particular, in 2008, the DOJ let Delta Air Lines to merge with Northwest Airlines. Delta was the third largest airline in the U.S. and Northwest was the fifth.[74] The merger gave rise to what was then the largest commercial airline in the world, with almost eight-hundred aircrafts. Despite the substantial market power that

[74] In particular, Delta carried more than seventy-million passengers *per annum* and with regional affiliates serving more than three-hundred destinations in almost sixty countries, whereas Northwest carried at the time more than fifty-million passengers and serving almost two hundred and fifty destinations in twenty countries in North America, Asia and Europe.

the merged airline would have enjoyed in the U.S. airline industry, after a six-month investigation the DOJ concluded that the merger would have produced substantial and credible efficiencies to the benefit of U.S. consumers.[75]

Two years later, in 2010, the DOJ cleared United Airlines' acquisition of Continental Airlines, after the companies divested some airport slots to Southwest Airlines.[76] The DOJ doubted as to whether that transaction may have been prejudicial to competition.[77] To solve the anticompetitive concerns identified by the antitrust enforcer, United Airlines and Continental Airlines agreed to transfer takeoff and landing rights' slots and other assets at Newark Liberty Airport to a third-party, *i.e.* Southwest Airlines. The transfer of slots and other assets at Newark to a LCC, with only limited service in the New York metropolitan area and no Newark service, was considered sufficient by the antitrust authority to solve the

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[75] Statement of the DOJ on Its Decision to Close Its Investigation of the Merger of Delta Air Lines Inc. and Northwest Airlines Corporation, 08-963, October 29, 2008.

The clearance decision valued the fact that the two airlines competed with a number of other legacy and low-cost carriers (LCCs) in the offer of scheduled air passenger services on the vast majority of non-stop and connecting routes. In addition, the merger would have produced efficiencies in terms of cost savings for airport operations, information technology, supply chain economics and fleet optimization. Furthermore, the combination under single ownership of the complementary aspects of the airlines' networks increased the quality of airport services.

[76] United Airlines and Continental Airlines Transfer Assets to Southwest Airlines in Response to Department of Justice's Antitrust Concerns – DOJ Closes Investigation, Transfer of Newark, N.J., Assets Resolves Competition Concerns, 10-974, August 27, 2010. In particular, United Airlines was the third largest carrier in the U.S. by revenue. At the time, it served approximately eighty million passengers and offered service to more than two hundred destinations in the United States and thirty other countries throughout the world. Continental Airlines was the fourth largest carrier in the United States by revenue, carrying almost seventy million passengers and offering service to more than two hundred fifty destinations in the United States and over fifty other countries throughout the world.

[77] In particular, the merger combined the airlines' complementary networks, but also resulted in overlaps on a number of routes where United and Continental offered competing non-stop services. At Newark airport, Continental held a high share of slots, making entry by other airlines particularly difficult.

envisaged distortion of market dynamics that the transaction was likely to cause.

The next year, the DOJ cleared Southwest's acquisition of AirTran Airways.[78] After a thorough investigation, the antitrust authority concluded that the merger was not likely to substantially lessen competition. Although the merger led to overlaps on certain non-stop routes, post-transaction consumers would have benefitted from new services.[79] Moreover, the airports affected by the overlaps were not subject to restrictions on slots or gate availability and this may have favored entry of other airlines.

Then, in November 2013, the DOJ allowed U.S. Airways to merge with American Airlines' parent company (AMR) under commitment to divest a certain number of airport slots.[80] To authorize the transaction, the DOJ required the two carriers to divest slots and gates at key airports across the country to LCCs to enhance wide competition in the airline industry. As a result, there would have been more choices, and the merger would have provided consumers with more competitive airfares. In this respect, the merging parties entered into a settlement which would have incentivized LCCs to invest in new capacity at key U.S. airports and to compete nationwide on non-stop and connecting routes. As a result, airline travelers

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[78] Statement of the DOJ on Its Decision to Close Its Investigation of Southwest's Acquisition of AirTran, 11-523, April 26, 2011. Southwest Airlines was based in Dallas and, at the time, it carried approximately ninety million passengers, serving seventy cities in the U.S., while AirTran was based in Orlando and carried approximately twenty-five million passengers in seventy cities in the U.S., Mexico and the Caribbean.

[79] In particular, the merged entity would have been able to offer new services on routes that were not served at the time, including a new connecting service through Atlanta's Hartfield Jackson International Airport to cities served by AirTran. Moreover, being Southwest and AirTran LCCs, their presence may have lowered fares on routes that were previously served only by incumbent legacy carriers.

[80] Justice Department Requires US Airways and American Airlines to Divest Facilities at Seven Key Airports to Enhance System-wide Competition and Settle Merger Challenge, 13-1202, November 12, 2013. More precisely, AMR was a Delaware corporation which, at the time, carried more than eighty million passengers to more than two-hundred fifty destinations worldwide, but it had undergone a period of financial distress, and in November 2011 filed for bankruptcy. US Airways was also a Delaware corporation, carrying more than fifty million passengers to more than two hundred destinations worldwide.

may have been benefitted in terms of more competitive prices and enhanced travel options. The settlement, which was approved by the District of Columbia in 2014,[81] solved the lawsuit that had been launched by the DOJ and then joined by six State general attorneys (Arizona, Florida, Pennsylvania, Michigan, Tennessee and Virginia) on the ground that the acquisition would have substantially lessened competition for commercial air travel in local markets throughout the U.S.

The analysis of merger deals carried out so far highlights the complexity of market dynamics within the U.S. airline sector. That industry was scrutinized by the antitrust enforcer on several occasions and the risk of potential anticompetitive effects due to the wave of concentrations has been key in the context of merger reviews. As the above excursus of the trend of consolidations in the airline sector makes clear, the DOJ did not refer to cross and common ownership as a cause for potential distortion of competitive dynamics within that sector. This is so even though the DOJ's clearance decisions of the notified mergers were adopted in the period covered by the Airline Study. In fact, that study covered some airline carriers that, at the same time, were subject to the DOJ's antitrust scrutiny (such as American Airlines, Southwest Airlines, Delta Air Airlines and Continental). Despite this clear overlap, the Airline Study claims that CO in airline carriers caused the observed rise in airfares, whereas the DOJ cleared the notified transactions which involved these flight carriers also on the basis of efficiency arguments to the benefit of passengers. Among these benefits, the DOJ referred to more competitive airfares.

Hence, a disconnection seems to emerge between the findings of the Airline Study and the specific assessment carried out by the DOJ in connection with airline mergers, that involved some of the airline carriers included in the Airline Study as portfolio companies of common shareholders. In other words, it is reasonable to assume that the antitrust

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[81] The U.S. District Court for the District of Columbia, United States of America et al. v. US Airways Group, Inc. and AMR Corporation, Case No. 1:13-cv-01236 (CKK), April 25, 2014.

enforcer would have at least mentioned CO when assessing the ownership structures of the merging airline carriers had CO raised criticisms under antitrust law on the basis that it would have likely caused a rise in airfares.

The above seems even more reasonable if one considers that, in addition to the aforementioned merger reviews, in 2015 the DOJ opened an investigation to assess whether the increase in average airfares was the result of a collusive strategy among airline companies to keep airfares high. Some of the investigated companies appeared as both portfolio companies of institutional investors and as parties to the transactions notified to the antitrust authority under merger control rules (like Delta Air Lines, Southwest Airlines, American Airlines and United Airlines).

The antitrust investigation was probably triggered by a concern expressed by the U.S. Senate for an observed increase in airfares to the prejudice of final consumers. In a letter sent in June 2015 to William Baer, at the time Assistant Attorney General, the U.S. senator Richard Blumenthal called the DOJ to investigate the "*apparent anti-competitive conduct potentially reflecting a misuse of market power, and excessive consolidation in the airline industry*", a process within which the "*DOJ itself played a part … by approving several mergers and now consumers are paying sky-high fares as airlines engage in market conduct designed to keep capacity artificially low*". *Indicia* of a potential conspiracy among airlines were identified in a trade association annual meeting during which, on the basis of press news, the representatives of the biggest airline companies "*publicly discussed their strategies to remain "disciplined" in their decisions to manage capacity across their flight routes*", since "*most airlines have traditionally viewed capacity reductions as a highly valuable way to artificially raise fares and boost profit margins*".[82]

In this context, the DOJ decided to launch an investigation to assess the existence of coordinated effects among the airlines in breach of Section

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[82] RICHARD BLUMENTHAL, State of Connecticut, U.S. Senate, letter to at the time DOJ's Assistant Attorney General Mr. William Baer (June 2015).

1 of the Shearman Act. To this end, it sent to the major U.S. carriers (American Airlines, Southwest Airlines and United Airlines) a letter to request copies of all communications they had exchanged and clarifications about their plans in terms of passenger-carrying capacity. Interestingly, what emerges from the few public available information is a classic conspiracy theory, that could have been achieved through an exchange of confidential information during trade association meetings. Nothing new for antitrust practitioners. However, the DOJ did not find any proof of conspiracy underlying the observed increase in average airfares and, as such, an enforcement action did not consequently follow.

As the above makes clear, the oligopolistic structure of the industry (not common shareholders) may have been particularly relevant in explaining the reasons why U.S. airfare prices increased. As mentioned, due to the wave of consolidations, the U.S. airline industry became a tight oligopoly, and a supra-competitive pricing equilibrium could have been sustained and monitored more easily therein. In such a context, because of the higher market transparency, the increase in prices may have also been caused by legitimate parallel behavior. In any event, as noted, the fact that the airline industry was on the radar of the antitrust enforcer on several occasions during the same period covered by the Airline Study raises at least a flag on whether it was indeed CO to cause the claimed increase in airfares.

In that scenario, to assume that minority common shareholders caused the price increase, it should have been proved that (i) minority shareholders were effectively in the position to control, or at least exercise a decision influence on various airline companies in which they held particularly low percentages of shares, and (ii) they succeed in influencing and coordinating the commercial strategies of these companies and hence caused a supra-competitive market equilibrium (*i.e.*, a causal link).

The above explains why, in my opinion, although the CO theory implies that common minority shareholders are in the position to influence the management and to orient the commercial conducts of their portfolio

companies, that "presumption" does not appear to have been solidly supported by evidence. Since institutional common shareholders cannot be presumed to exercise antitrust control upon their minority-owned companies and orient their commercial strategies, it is also doubtful that CO may result into anticompetitive concertation or cause unilateral effects. As I will point out, that assumption also raises doubts under a regulatory standpoint (see also *infra*, chapter III).

In particular, with respect to the possibility of coordinating the strategies of the commonly owned competitors, it is certainly true that it is easier to sustain anticompetitive coordination in an oligopoly because of easier monitoring than in a highly fragmented market, that makes the deviation from the agreed collusive equilibrium more detectable (see *infra*). However, in the absence of clear evidence of institutional investors' ability to influence their portfolio companies and, in turn, of *coordinated effects*, the CO theory turns up to be unconvincing and this was made clear by the DOJ's investigation in the airline sector.[83] The *unilateral effects* theory is even trickier to hold (*i.e.*, each portfolio company is induced to refrain from competing). This is so as both in a scenario in which the increase in prices is due to legitimate parallel conducts and in a scenario in which that increase depends on common shareholders, which induces the commonly owned companies to unilaterally refrain from competing, the effect is the same: a rise in prices that has been implemented by each portfolio company. However, under the CO theory, competition rules are breached only if that effect is caused by a (even tacit) coordinated action among portfolio companies promoted by common shareholders.[84]

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[83] In this respect, the U.S. courts expressly clarified that for an anticompetitive conspiracy to be proved, circumstantial evidence should "*exclude the possibility that the alleged conspirators acted independently*" (U.S. Court of Appeals for the Seventh Circuit, Toys "R" Us, Inc.,v. Federal Trade Commission, Appellee No. 98.4107, 221 F.3d 928, August 1, 2000).

[84] In other words, also the unilateral effects theory of harm is problematic under antitrust law to the extent that a form of coordination among competitors is proved. Therefore, under the horizontal coordinated effects theory there should be evidence of coordination among portfolio companies orchestrated by common shareholders, which in

Otherwise stated, in both of the above scenarios the antitrust enforcers may intervene if they find any proofs of anticompetitive coordination among competing portfolio companies due to common shareholders. In the absence of evidence in that respect, a mere increase in prices in an oligopolistic market may be legitimate and it may be due to causes other than CO.[85] Nor the antitrust enforcer should infer by the parallel conduct of the various portfolio companies the existence of an anticompetitive concerted action among them on the assumption that the likelihood for common shareholders to vehicle sensitive information reduced the intrinsic risks of competition.

It is clear that the dividing line between legitimate parallel conducts and concerted *vs* unilateral actions is very thin. In this framework, because of the uncertainties as to whether legitimate parallel behavior or other factors (such as CO) may cause price increases, could antitrust enforcers step-in even though there is no evidence of detectable acts of collusion among common shareholders? At first look, the answer should be negative. That answer may find support in a brief overview of the main theories on the application of antitrust principles to oligopolies.

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turn take part to the anticompetitive conspiracy (on the point, see also chapter IV, § II, Hub & spoke theory). Under the unilateral effect theory, institutional investors apparently play no role since portfolio companies unilaterally implement a certain market conduct whose effects are not optimal for consumers (for example, higher prices). However, also in this second scenario, the CO theory assumes that portfolio companies are (although tacitly) jointly induced by common shareholders to align to conducts of competitors and refrain from competing, since that course of action can improve the value of the portfolios of common shareholders.

[85] In particular, one can think of a scenario in which each firm looks at the commercial conducts implemented by the few competitors and it unilaterally decides to implement similar actions in the absence of any anticompetitive conducts by common shareholders. That unilateral action – even if aligned to that of competitors – is not concerted and hence legitimate, apart from being commercially rational to the extent that (i) it may reasonably result in an increase of profits, exceeding those that the firm would obtain if aggressively competing, and (ii) neither the few competing companies would find convenient to adopt more aggressive strategies and move from that situation of supra-competitive equilibrium, nor third parties would enter the market and interfere with that equilibrium. In such a context, the CO may not have caused the claimed distortion of market dynamics, although a similar effect is observed: a price increase.

(ii) *Antitrust and oligopolies: "conscious parallelism" vs. "interdependent pricing"*

As the above makes clear, the application of competition law principles to oligopolies is particularly complex and involves a certain degree of uncertainty. In concentrated markets, the crux of the debate for antitrust practitioners lies in the assessment of whether a price increase or another prejudice to competitive dynamics is caused by a conspiracy among the few competitors, or by the natural (and legitimate) effect of the specific market structure, that should not trigger the intervention of the antitrust authority.

In this regard, on the one hand, the *theory of conscious parallelism* assumes that in an oligopoly conscious parallel conduct is nothing more than a form of tacit collusion, that should be prosecuted under competition law like explicit collusion.[86] On the other hand, according to the *theory of interdependence*, in oligopolies parallel conduct deserves to be prosecuted under antitrust law only if accompanied by detectable acts of collusion which are not the result of legitimate interdependency among the few oligopolists.[87] Therefore, even a supra-competitive market equilibrium in

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[86] See RICHARD A. POSNER, Oligopoly and the Antitrust Laws: A Suggested Approach, 21 S.L.R. 1562 (1969). According to this author, conscious parallelism tacitly aims at altering unilateral actions of independent market players. As a consequence, the application of Section 1 of the Shearman Act against that tacit collusion "*would do no violence to the statutory language or purpose*" of the antitrust ban set forth therein "*and while difficult problems of proof and of remedy would be involved,* [it is questionable] *that they would be insuperable*".

By applying this theory to the airline sector, if an airline announces a pricing strategy or makes public statements concerning either future airfares or other commercial confidential information, and consequently other airlines implement a similar policy in the absence of any proof of contacts among them (even channeled by common shareholders), that public signaling may be evidence of the attempt to reach an anticompetitive equilibrium.

[87] See DONALD TURNER, The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals To Deal, 75 Har. L. Rev. 655 (1962). To solve any criticisms, when antitrust law may not be applied because of the absence of a probative support as to the existence of a concerted conduct, new regulatory remedies should be framed to deal with the observed distortions of market dynamics whenever oligopolistic markets could not self-discipline.

oligopolies is not necessarily due to collusion, but may depend on the interdependency among the few competitors, that could easily monitor each other and find convenient to mimic each other strategy and converge to that equilibrium.[88]

If we apply that argument to the CO debate, could the pricing increase observed in the airline sector be due to the independent conduct of the various airlines and not to an anticompetitive concerted action? Do antitrust rules aim at remedying industry structures or should they only address anticompetitive conducts of market players? The second option seems to be more in line with traditional antitrust principles.[89]

In my opinion, the application of the interdependency theory to the U.S. airline industry may help with explaining the observed fluctuations of prices in that sector. This argument finds support in a recent empirical study that observed distortions of competition on quality of airline services. By applying the interdependency theory, the study finds that "*in the US Airline industry … strategic non-price interactions between firms conform to expected oligopoly behavior*". [90] In this context, market transparency

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[88] This course of action exemplifies the legitimate behavior of a "*rational oligopolist*", who according to Professor Turner behaves "*in exactly the same way* [of] *the rational seller in a competitively structured industry*".

[89] In Europe, a similar trend may be observed. In this respect, in the leading Woodpulp II *case*, the EU Court of Justice clarified "*that parallel conduct cannot be regarded as furnishing proof of concertation unless concertation constitutes the only plausible explanation for such conduct*". This is so because the ban of anticompetitive agreements catches "*any form of collusion which distorts competition, it does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors*". The principle expressed by the EU Court of Justice relies on the economic finding that, in oligopolies, conscious parallelism may arise in the absence of a collusive equilibrium (even tacit) among the few competing undertakings.
For more details, see ALLAN ROSAS, EGILS LEVITS & YVES BOT, The Court of Justice and The Construction of Europe, Analyses and Perspectives on Sixty Years of Case-law, Asser press 417 (2013).

[90] SAJID NOOR, Non-price competition in the U.S. airline industry: a VAR model, Journal of Economic Studies (2017). In particular, despite not referring to pricing but to another competitive variable, *i.e.* product quality, this study assesses the interactions among the major domestic airlines in the U.S. when taking decisions on product quality to make their services more attractive to travelers. It observes that in oligopolistic industries, where

and interdependency among airlines may be pivotal in shaping the reciprocal commercial strategies as each carrier observes the conducts of competing airlines and modifies its behaviour accordingly. However, nothing new or problematic under antitrust law emerges in such a context.

Economic theory on oligopolies supports hence the view that in concentrated markets each player could easily observe the strategies (including those concerning prices and product quality) of competitors and may rationally take them into account when unilaterally designing its market conduct. In light of these principles, absent any evidence of flow of sensitive information through common shareholders of competing airline carriers to coordinate the commercial strategies of the participated airlines or to induce them to refrain from competing in the relevant product markets, a CO-driven conspiracy to justify the observed price increases risks misapplying competition law principles. The observed increase in prices may be due to a structural problem of the industry, namely its oligopolistic nature. In this respect, the use of competition law to solve a structural problem of an industry may not be in line with the ultimate objective protected by antitrust law, *i.e.* the consumer welfare, whereas a regulatory solution may be eventually more suitable.[91]

In addition to the above, as I have already noted, mergers among airlines in the U.S. did not escape the antitrust scrutiny. The fact that in many occasions the industry went on the radar of the antitrust authority, that let the market to become a tighter oligopoly, may suggest that the observed increase in airfares was not caused by an underlying conspiracy

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competition is highly influenced by the strategic interaction between a few competing firms, product quality is a relevant aspect of competition which could be easily observed. As a result, airlines are incentivized to improve the quality of readily observable airline services to retain market shares.

[91] A slightly different approach is followed in the UK, where the Competition and Market Authority (CMA) has a particularly wide enforcement mandate. In fact, in the context of merger proceedings, it can open market investigations when features of the market justify an intervention because of broader public interest considerations and not simply because a merger may cause a substantial lessening of competition.

between common shareholders of competing airlines of which the antitrust enforcer did not find any evidence, but rather by legitimate interdependency among the few airline carriers. Had a direct link between CO and pricing strategies of these firms existed, the DOJ should have reasonably found it considering the substantial investigative powers it enjoys in the context of enforcing antitrust rules.

Even in the civil lawsuit filed before the U.S. Court for the District of Columbia against US Airways and American Airlines to try blocking the merger between the two flight carriers,[92] the oligopolistic structure of the market – and *not* common minority shareholders as alleged "owners" of competing airlines – was investigated to assess whether it could have favored the emergence of a supra-competitive airfare price equilibrium.[93] Although the transaction raised some antitrust concerns, the DOJ never referred to CO as a contextual element which may have favoured anticompetitive collusion (for example, in the form of higher airfares and lower quality services to the detriment of passengers).[94] Finally, the merger

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[92] The District Court for the District of Columbia, United States of America et al. v. US Airways Group Inc. et al., civil action No. 13-cv-1236 (CKK), memorandum opinion April 25, 2014.

[93] In particular, in August 2013 the DOJ, six state general attorneys and the District of Columbia filed an antitrust lawsuit alleging that US Airway's $11 billion acquisition of American Airlines would have substantially lessened competition for commercial air travel in local markets throughout the United States. The merger would have eliminated two independent competing airlines, ending head-to-head competition between the two on numerous non-stop and connecting routes, leaving the market with only three similar legacy airlines – *i.e.*, Delta, United, and the merged airline. The reduction in the number of airlines from four to three would have shifted the industry towards a tighter oligopoly. In addition, four of the busiest airports in the country – *i.e.*, Reagan National, LaGuardia, John F. Kennedy International, and Newark Liberty International – were subject to slot limitations governed by the Federal Aviation Administration ("FAA"). Slots at these airports were concentrated in the hands of legacy airlines that had little incentive to sell or lease them to more aggressive carriers. Competition would not have been likely neither by non-legacy carriers, nor by new entrants because of the high barriers to entry due to the lack of slots' availability.

[94] More precisely, if one looks at the District Court's decision, the only reference to the ownership structure of the merging parties can be found in one of the settlement conditions. In particular, the merged company was obliged not to reacquire an ownership interest in the divested slots or gates during the term of the settlement. This obligation

was cleared and the District Court required the merging parties to divest many slots, gates, and additional ground facilities at key airports around the country to incentivize LCCs to invest in new capacity and enter the market. Nothing more than a traditional assessment of a four-to-three merger emerges from the District Court's decision, where structural remedies were sufficient to solve the potential antitrust criticisms raised by the transaction.

In this context, the economic theory that underpins the Airline Study – *i.e.*, the existence of a causal link between the increase in CO in U.S. airline companies and the rise in airfares from 2001 to 2013 – seems to lack empirical support and not to meet the antitrust burden of proof, whereas alternative variables may explain the observed increase in prices. As clarified, it was exactly the shift towards a tight oligopoly that made the market more transparent. In that scenario, competing airlines could have found easier to monitor their actions to implement parallel commercial strategies in the absence of coordination among them, with the consequence that CO may have played no role in respect to the observed increase in prices.

(iii) *CO is the cause, not the "effect" of oligopolistic prices: any (missed) chance for the U.S. antitrust enforcer to intervene?*

On a different note, it has been claimed that CO may not be the cause of supra-competitive prices, but its effect. When an industry becomes more concentrated, the biggest institutional investors and AMCs step-in to acquire shares of companies active in that industry. This relies on the assumption that in an oligopoly companies can charge higher prices and increase their profitability. As a result, shares become more "valuable" and institutional shareholders increase the value of their share portfolios by

was merely ancillary to the effective implementation of the divestiture order since the re-acquisition of an interest in the divested slots would have deprived the order of its effects. Clearly, it had nothing to do with the CO theory as a new potential vehicle to influence commercial strategies of competing companies and accordingly distort market dynamics.

acquiring shares of these companies. There is also a higher chance that these companies are included in financial indexes like the S&P500 – *i.e.*, those referred to in the studies on CO carried out so far and including companies on the radar of the biggest institutional investors. In this context, it is oligopolistic pricing that may contribute to CO, not the other way around.[95]

The above distinction (CO cause *vs* effect of monopoly pricing) is relevant to apply merger control rules and it raises doubts in connection with the solutions proposed so far to solve the alleged anticompetitive effects of CO, such as the wide application of Section 7 of the Clayton Act. That rule only prohibits mergers and acquisitions that have the effect of lessening competition or creating a monopoly. Thus, acquisitions of minority shareholdings that trigger the application of merger control rules, if not carried out for mere financial purposes, may already be blocked if they have the effect of loosening competitive dynamics in a meaningful way, but not simply because they might result in consolidation of an industry which in turn "causes" CO.[96]

The application of Section 7 of the Clayton Act to acquisitions of minority shareholding – although not necessarily by financial investors – has been already scrutinized by U.S. courts and antitrust enforcers.

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95 BENJAMIN R. DRYDEN, 'Horizontal Shareholding': Is Oligopoly Pricing a Symptom or the Disease?, ABA Newsletter of the Mergers & Acquisitions Committee (March 2017).

96 For the sake of completeness, as I will clarify in chapter IV, a similar "by effect" analysis should be carried out under European merger control law. In particular, the European merger regulation prohibits concentrations which would likely have the effect of "*significatively imped*[ing] *effective competition*" in the relevant markets (see, Council Regulation No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 024 of 29 January 2004, 1 - 22, Art. 2, §§ 2-3).
As I will point out, the European merger control framework is to a certain extent more stringent than the U.S. one, since minority shareholding acquisitions by financial asset managers and other institutional investors are usually exempted from the merger scrutiny unless, *on jurisdiction*, these transactions grant minority shareholders with at least *de facto control* on the target companies. Should that be the case, the merger is subject to the European Commission's scrutiny which is called to assess, *on the merits*, whether the transaction is likely to cause prejudicial effects on competitive dynamics.

However, only in the few cases where these transactions raised appreciable competitive concerns because of the perceived negative effects on market dynamics, the antitrust enforcers challenged them.[97] In particular, these transactions have been clustered in three main categories[98] – namely transactions in which (i) the acquiring firm is a direct competitor of the target itself;[99] (ii) the acquiring firm has a controlling interest in a direct competitor of the target;[100] (iii) the acquiring firm has in a direct competitor

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[97] MICHAEL E. JACOBS, U.S. Antitrust enforcement involving minority shareholdings (2013), available at < https://www.fne.gob.cl/wp-content/uploads/2013/11/Minority-Shareholding-in-the-US.pdf>.

[98] PAUL C. CUOMO CHARLES MALAISE & CHANGRONG XU, Partial Acquisitions: Recent MOFCOM Action Suggests Possible Divergence with U.S. Standards, CPI Antitrust chronicle (January 2012).

[99] DOJ, American Airlines cleared to acquire stock in Argentine Airline, 98-320, July 8, 1998. In particular, the transaction involved the acquisition by American Airlines of 8.5% in its direct competitor, Aerolineas Argentinas and raised antitrust concerns as initially structured. Under the original proposal, American would have had a representative on the Aerolineas board of directors, as well as permanent rights to veto certain large investment decisions by Aerolineas. To solve the antitrust concerns, the parties restructured the transaction and American Airlines would have had no director on the Aerolineas board and limited shareholder rights until the Spanish interests were sold to third parties, at which time it would have become a passive investor. As a result, on July 1998 the DOJ cleared that acquisition, but the clearance did not preclude potential future interventions of the DOJ, which reserved the right to challenge the transaction in the future if American would have acquired the ability to influence Aerolineas' competitive decisions affecting U.S. markets or engaged in anticompetitive coordination.

[100] United States v. Dairy Farmers of America (DFA's), 426 F.3d 850, 852 (6th Cir. 2005). In April 2003, the DOJ filed a lawsuit challenging DFA's partial ownership interests in two rival dairies (Flav-O-Rich and Southern Belle Dairy). The DOJ alleged that, as a result of the two subsequent acquisitions (the first in Southern Belle Diary in 2002, and then in Flav-O-Rich), DFA's ownership interests in both dairies gave it an incentive to reduce competition and facilitate unilateral price increases regardless of any coordination because it would not matter if customers of either dairy switched to the other dairy in response to a price increase. DFA changed its governance rights, converting its common voting stock in the companies that operated both dairies into non-voting stock, with the consequence that it then obtained a motion for summary judgment as it was not anymore in the position to exercise control over the management of the dairies. However, on appeal by the DOJ, 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 prove that DFA's acquisitions violated antitrust laws. Nor the voluntary relinquishment of voting rights remedied the violation because DFA may have still imposed its voice upon the firm (for example, the firm relied on DFA for additional capital). As a result, DFA decided to sell the Southern Belle dairy plant to another firm.

of the target a non-controlling interest, which in some instances could raise concerns under an antitrust standpoint.[101]

By contrast, the Section 7 ban should not be applied if the alleged anticompetitive effects depend on the structure of the industry, which in turn causes (and it is not the effect of) horizontal shareholding. In a scenario in which CO may not be the cause of oligopoly pricing but rather its outcome, it should be indeed explored whether the implementation of *ex-ante* regulatory solutions is needed and may be preferable to the wide application of merger control rules to limit the activities of financial investors on a global scale.[102] In this respect, the potential negative effects that the introduction of additional regulations to those already applied to

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[101] Competitive Impact Statement, United States v. Univision Communications, Inc., Civil No. 1:03CV00758 (D.D.C., May 7, 2003). The transaction concerned the acquisition by Univision (*i.e.*, the largest broadcaster of Spanish language television programming in the United States) of a partial ownership in the media company HBC, that owned and 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) and significant governance 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. In this context, the DOJ expressed concerns that the acquisition would reduce the incentives of both partially owned companies to compete aggressively against each other in the sale of Spanish language radio advertising time and it would have led to an increase in prices for a significant number of advertisers. To solve the antitrust concerns and avoid enforcement actions, the DOJ and Univision entered into a settlement by which Univision was prevented from participating in Entravision governance or influencing its radio business. In particular, Univision agreed to divest a significant portion of its equity stake in Entravision, relinquish its right to two seats on Entravision's Board of Directors and give up the right to veto certain Entravision business decisions, in addition to reduce its ownership in Entravision to no more than 10%.

[102] This may be even more true if one considers that in general in the U.S. neither State laws nor federal law make charging high prices which may cause prejudice to final consumers (and not addressed to exclude competitors) unlawful, since even monopoly prices may serve to stimulate entry and further innovation (US Supreme Court, *Verizon Communications Inc., v. Law offices of Curtis V. Trinko, LLP*, No. 2-682 January 13, 2004). In this context, antitrust officials have reminded that "*simply condemning a high price… is not antitrust. It is a regulatory action meant to reengineer market outcomes to reflect enforcers' preferences*" (the former FTC Commissioner, Mr. Maureen K. Ohlhausen, What Are We Talking About When We Talk About Antitrust? Remarks at the Concurrences Review Dinner, September 22, 2016).

the financial sector (see chapter III *infra*) should be also considered, *in primis* the risk of restraining their ability to diversify investments in a plethora of industries to reduce the economic risks to which final consumers are exposed when investing.

In any event, the fact that CO due to industry consolidation may eventually escape the antitrust scrutiny under merger control rules does not mean that it is exempted from the application of other antitrust rules. To the extent that there is evidence of an anticompetitive coordination among competing portfolio companies imputable to institutional investors in their quality of common minority shareholders of these firms, that conduct may be prosecuted *ex post* as a form of restraint of trade or as an unfair commercial practice, respectively in breach of Section I of the Shearman Act and of Section V of the FTC Act.[103] By contrast, if there is no evidence of a conduct likely to alter market dynamics due to CO in the form of explicit or tacit collusion, the antitrust toolbox should not be applied.

In view of what I have detailed above in connection with the U.S. airline industry, there seems to be no evidence that common shareholders of competing U.S. airlines coordinated the commercial strategies of these airlines and, accordingly, led to an increase in airfares. The alleged existence of a causal link between common shareholders and the observed increase in prices in the sector was based on the circumstance that the

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[103] At least in Europe, such conduct by the biggest institutional investors may be also caught by the abuse of dominance prohibition to the extent that the antitrust enforcer succeeds in proving that these investors presented on the market as one collective entity, which abused the single collective dominant position it held to charge supra-competitive prices to exclude competitors of their portfolio companies. The prohibition of abuse of dominance is general and it could also address acquisitions of minority shareholding by institutional investors which are likely to prejudice competitive dynamics in the relevant market. However, I note that abuses of collective dominance are difficult to prove for competition authorities and are quite rarely brought. This is so as to bring a credible abuse of collective dominance case, the authority needs to observe a stable behavioural pattern where the various undertakings, that collectively hold a significant aggregate market market share, repeatedly act jointly to implement a series of commercial strategies which are likely to prejudice market dynamics (see EU Court of Justice, Europemballage Corporation and Continental Can Company Inc. v. European Commission, case 6-72, February 21, 1973).

biggest AMCs were horizontal shareholders in the main U.S. airline carriers and the airline industry was particularly concentrated. These elements relate to the structure of the industry, but do not say much on the behaviors that common shareholders actually implemented within their portfolio companies. Nor the antitrust enforcer may discharge its burden of proving an anticompetitive conspiracy by referring to the peculiar structure of an industry, in the absence of evidence of anticompetitive agreements, of exchanges of sensitive information or of signaling practices suggesting a tacit collusion to increase prices.

As I have made clear, in assessing a number of mergers that involved airlines, the U.S. antitrust authority widely looked at sector dynamics but ultimately it did not veto these transactions, even though it may have avoided the further concentration of the industry, which could have minimized the claimed risk that the few common shareholders of competing airlines coordinated their activities. These mergers were indeed cleared on the basis that they did not have the effect of distorting competition. In fact, they were deemed to be beneficial to passengers.[104]

In this context, the question is not whether CO in the U.S. airline industry had anticompetitive effects, but whether in assessing a certain number of sequential mergers the U.S. antitrust enforcer should have scrutinized them more in-depth and to what extent the wave of industry consolidation caused (and was not caused by) CO and favoured the alleged coordination on prices. Did the authority adopt a too lenient approach in clearing these transactions, allowing airlines to be shielded from the application of the antitrust ban and to coordinate on prices or flight

[104] For example, the US Airways/American Airlines merger improved network connectivity, increased flier loyalty programs, and optimized the use of aircrafts. Duplicative activities were also dismissed due to asset combination, inefficient or redundant hubs, or route closure. Furthermore, this merger also led to operational efficiencies through integration of the merged airlines operating systems. The US Airways/American Airlines merger led to a loss of a competitor on non-stop routes, but it still created an effective competitor in several airport-pairs, to the benefit of millions of passengers.

schedules?[105] In this respect, various studies on airline M&As claim that prices within that industry increased after a merger was completed,[106] and the increase in airline dominance within an airport due to a merger resulted in higher barriers to entry and higher fare *premia*.[107]

The airline mergers discussed above were scrutinized by the antitrust authority and cleared. Whether the enforcer was too lenient in clearing these transactions, or indeed right in assessing their pro-competitive effects rests upon the discretion of the antitrust authority, which may be eventually questioned. In addition, some of the U.S. airline mergers were approved by court orders and thus marked with a judicial seal. Again, the application of traditional antitrust principles was not questioned.

In such a context, one could reasonably conclude that when an increase in prices observed within a concentrated market gets attributed to ownership structures of market players, but no evidence of anticompetitive conducts is found, the intervention of antitrust authorities to fill in potential regulatory gaps may not represent the preferable policy solution.

IV.2. Common ownership in the banking industry

IV.2.1. The "Banking Study"

The CO theory has also been applied to the U.S. banking sector where horizontal and cross shareholding allegedly caused a significant adverse effect on bank fees and rates.[108] The main study reports that over the last decade an increase in fees for banking deposit services has been registered

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105 In this respect, see WILLIAM GILLESPIE & OLIVER RICHARD, Antitrust Immunity and International Airline Alliances, Economic Analysis Group of the DOJ's Antitrust Division (2011).

106 Testimony of GERALD L. DILLINGHAM, Airline Industry Consolidation: Hearing Before the Subcommittee on Aviation (2013); ex multis SEVERIN BORENSTEIN, Airline Mergers, Airport Dominance, and Market Power, 80 American Economic Review (1990).

107 *Ibid.*. SEVERIN BORENSTEIN, Hubs and High Fares: Dominance and Market Power in the U.S. Airline Industry, 20 RAND Journal of Economics, 344-365 (1989).

108 MARTIN C. SCHMALZ, JOSE AZAR & RAINA SAHIL, Ultimate Ownership and Bank Competition, CEPR working paper (2016).

in the U.S. and it has been caused by the high presence of common shareholders in competing banks (the "Banking Study").[109] More precisely, that study claims that during the period subject to investigation institutional investors were among the top five shareholders of the nation's five largest banks. In addition to CO, cross-ownership links among competing banks strengthened the interconnections among them. Interestingly, as ownership structures across geographical markets diverged, the price variation was not homogeneous, with higher prices of banking services observed in California, New York and New Jersey.

By applying the principles discussed so far on CO, the price increase has been causally linked to the existence of a collusive equilibrium among the common investors, who allegedly made use of various corporate governance mechanisms to explicitly coordinate the commercial strategies of the banks in which they held minority shares (*e.g.*, informal meetings with managers of portfolio banks or adoption of strategies aimed at disincentivizing the management of these participated entities from engaging in head-to-head competition with competing banks). In such a context, to deal with the observed prejudice to competitive dynamics, the Banking Study calls for the intervention of the antitrust enforcement.

IV.2.2 <u>The antitrust assessment of the "Banking Study": any *lacuna*?</u>

The arguments set forth in the Banking Study rest on the assumption that CO allegedly distorted market dynamics since the biggest institutional investors were in the position to leverage their valuable presence in the banks, within which they held common shares, to induce their management to collude on the increase of prices of banking services. CO by institutional investors was perceived to be critical under competition law and the antitrust enforcer had to step-in, notwithstanding the pivotal role of banks

[109] The assessment relies on the assumption that bank concentration is generally prejudicial to market dynamics as it may impact on monetary policies, slow down the adoption of new technologies, as well as adversely affect consumers, which may receive lower rates on their savings despite paying more for loans.

in the economy such as helping clients with diversifying investments and reducing financial risks. According to the Banking Study, such benefits in terms of diversification and good governance came at the expense of consumers and society because of the implied deadweight loss due to CO.

However, I believe that the acknowledgment of the benefits due to the activities of institutional investors is certainly valuable as it confirms the relevance of these market players. The results of this analysis clearly demonstrate that, instead of necessarily resulting in a (not still proved) distortion of competition, common ownership can bring about several positive effects on market dynamics. Some of these effects do not concern competition as such but the real economy at large. In the financial sector, at a macro level, CO helps achieve the stability of the financial system, for example, during a liquidity crisis. As said, another valuable pro-competitive effect is at micro level, in terms of benefits to individuals who invest in passive index funds and benefit from the lower transaction costs charged by experienced specialised asset managers and the diversification effects that the passive index funds achieve.[110]

In the above framework, even if anticompetitive effects occurred as a result of CO (which should still be proved), the trade-off between detrimental effects and benefits to final consumers would call for a balanced equilibrium between the two. In any case, I will clarify why the application of the CO theory to the banking industry raises doubts under a competition law standpoint, especially in light of the characteristics of that sector.

(i) *The value of "intra-industry" diversification in the banking sector*

At a micro-economic level, AMCs and other institutional investors are beneficial to final consumers to the extent they help clients with diversifying their investments and reducing financial risks. The fact that institutional investors have in their portfolio financial institutions amplifies the positive

[110] In this respect, Study of the ECON committee, European Parliament, Barriers to Competition through Common Ownership by Institutional Investors, page 53 *et seq* (2020).

effects of investment diversification at a wider macro-economic level. Diversification does not only occur between different financial industries where the portfolio firms held by the AMCs are active (*e.g.*, banking, insurance), but also between different financial products offered by the institutions held by common shareholders. As a consequence, the implementation of measures that would make diversification more difficult could induce financial entities to refrain from making investment decisions, with a negative impact on various economic sectors. This is particularly true in case of important financial entities, whose failure or even a substantial prejudice to their lines of business may have a *domino* effect on other sectors of the economy. In this framework, it is evident that aggressive competition may prejudice the stability of the system. This thin equilibrium between sustainable competition and financial stability risks being jeopardized in case of rigorous enforcement of antitrust rules against CO. There are recent studies that empirically document that "*the increase in common ownership … suggests a positive effect on the resilience of the individual banks and the stability of the entire financial system. Common, as compared to non-common, owners may be more willing to help an individual bank suffering a negative shock, if the bank's financial problems have a knock-on negative effect on other banks*".[111]

The arguments above do not imply a more lenient application of competition law to the banking sector, whereas I only call for a case-by-case assessment in view of the specificities of the banking sector before enforcing competition law therein. This analysis should take into account the connections between perfect competition and financial stability: the trade-off between the two is essential and there are situations in which relaxing competitive dynamics and increasing industry concentration may promote financial stability. If that is the case, from a consumer-welfare

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[111] ALBERT BANAL-ESTAÑOL, NURIA BOOT & JO SELDESLACHTS Common ownership patterns in the European banking sector—The impact of the financial crisis, JCL&E (2021). See also, Study requested by the ECON Committee, European Parliament, Barriers to Competition through Joint Ownership by Institutional Investors (2020).

perspective, under certain circumstances concentration may be preferable to fierce competition.[112]

From a policy perspective, the arguments above supports the value of sector-specific assessments of the risks implied by the CO theory, which seem to have been overlooked in the Banking Study. The proposal to cap institutional investors' scope of activities, such as the prohibition of holding more than 1% of (any) industry or investing in more than one firm *per* industry, should be carefully assessed before being applied to the banking sector. Even though horizontal shareholders in banking institutions led to more loose competitive dynamics – which, in any event, is controversial (see below, *sub* § IV.2.2(ii)) – CO may have contributed to financial stability of the industry. Therefore, while in the airline sector one may eventually question the positive effects of CO, which were still present and antitrust enforcers cleared airline mergers precisely on the basis of efficiency arguments, these positive effects are more prominent in the banking industry.

Furthermore, as I have already clarified in chapter I, in the few cases in which competition law enforcers have addressed the possible risks to competitive dynamics due to the existence of connections among competing banks, a red flag has not been raised against horizontal shareholders. Other potential interconnections due to personal ties and IDs have been indeed under the spotlight of the antitrust enforcers. Even with respect to IDs, that raise a higher degree of antitrust risk, the perceived competition law concerns raised by personal interconnections among competitors have been addressed so far using the traditional antitrust toolkit or opting for *ad hoc* regulatory solutions (see the Italian example), and not calling for the adoption of rigorous over-comprehensive measures

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[112] FRANKLIN ALLEN & DOUGLAS GALE, Competition and Financial stability, in Journal of Money, Credit and Banking, Vol. 36, No. 3, Part 2 (2004).

likely those that have been proposed so far by eminent practitioners to solve the claimed competitive risks raised by CO.

(ii) *Again, any role for the oligopolistic structure of the industry on pricing effects?*

Like the airline industry, the U.S. banking sector has experienced a wave of consolidations during the last two decades. Such trend begun in the late '80s and continued thereafter, allowing banks to acquire a significant position within the relevant local markets.[113] In such a framework, was the observed price variation of banking services caused by horizontal shareholding or rather the result of a parallel pricing behaviour in a concentrated sector in the absence of conspiracy?

As discussed, in concentrated markets *supra*-competitive prices are not necessarily due to tacit collusion, which can be detected and fined by antitrust watchdogs. In the absence of any evidence of information exchange or of any action by common shareholders to orient the management of their portfolio companies to the adoption of a given commercial strategy, it would be wrong to assume that the price increase is necessarily the effect of CO. Similar to the airline industry, also the banking sector has been for years on the radar of antitrust enforcers. Still, corporate governance of banking institutions has raised antitrust concerns only in limited circumstances, which mainly had to do with the presence of personal links (*i.e.*, interlocking) among competing banks, not CO.

Antitrust enforcers have nonetheless refrained so far from enforcing competition law in the absence of clear evidence of anticompetitive conducts. For example, in the U.S. the DOJ has for years looked at conducts in the derivatives markets, and fined individual traders and financial institutions for manipulation of the London interbank offered rate

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[113] DAVID C. WHEELOCK, Banking Industry Consolidation and Market Structure: Impact of the Financial Crisis and Recession, Federal Reserve Bank of St. Louis Review, 93(6), 419-38 (2011). See also, F.M. SCHERER, Financial Mergers and Their Consequences, Harvard Kennedy School, M-RCBG Faculty Working Paper Series (2013).

("LIBOR").[114] On the basis of the little information available in the public domain, no reference to corporate structures of the banking institutions involved in those cartels seems to have been under the spotlight of the antitrust enforcer.[115]

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[114] Interest rate derivatives (*e.g.*, forward rate agreements, swaps, futures, options) are financial products traded worldwide which are used by banks or companies for managing the risk of interest rate fluctuations. They derive their value from the level of a benchmark interest rate, such as the LIBOR – which is used for various currencies including the Japanese yen (JPY) – or the Euro Interbank Offered Rate (EURIBOR), for the euro. These benchmarks reflect an average of the quotes submitted daily by a number of banks who are members of a panel (panel banks). They are meant to reflect the cost of interbank lending in a given currency and serve as a basis for various financial derivatives. Investment banks compete with each other in trading these derivatives.
For more details, see the DOJ's press release on Deutsche Bank's LIBOR settlement, available here: <https://www.justice.gov/opa/pr/deutsche-banks-london-subsidiary-agrees-plead-guilty-connection-long-running-manipulation>.

[115] A similar investigation has been carried out in Europe for a while. More precisely, in 2013 the European Commission fined international financial institutions for participating in illegal cartels in the markets for financial derivatives (see the EU Commission, case AT.39914 – *Euro Interest Rate Derivatives*, 4 December 2013). According to the antitrust enforcer, between 2005 and 2008 some of the biggest banking entities (*i.e.*, Barclays, Deutsche Bank, The Royal Bank of Scotland, Société Générale, Crédit Agricole, HSBC and JPMorgan) reached an anticompetitive agreement in connection with interest rate derivatives denominated in the euro currency ("EIRD"), whereas some of them were part of one or more bilateral cartels relating to interest rate derivatives in Japanese yen ("YIRD") in the period from 2007 to 2010. The EIRD cartel was implemented through information exchange among traders of different banks, who discussed their bank's submissions for the calculation of the EURIBOR (*i.e.*, the Euro Interbank Offered Rate), as well as their trading and pricing strategies with the aim of distorting the normal course of pricing components for these derivatives. The YIRD cartels were indeed implemented by traders of the participating banks on certain JPY LIBOR submissions through exchange of commercially sensitive information. The information exchanges enabled traders to make informed market decisions on whether the currencies they had in their portfolios could be either sold or purchased. The conspiracy was led by traders, who did not hold shares within competing financial institutions, but traded currencies on their behalf. Interestingly, if one looks at the corporate structures of some of the undertakings involved in the European EIRD and YIRD cartels in the period when the contested infringement of competition was committed, will note that horizontal ownership or at least connections with the biggest AMCs already existed. However, as mentioned, no reference to any role that they may have played in connection with conducts carried out by their owned financial institutions emerge from the antitrust investigations.
In particular, considering that in 2009 BlackRock acquired Barclays' global asset management branch (*i.e.*, Barclays Global Investors, "BGI"), it is reasonable to assume that, before 2009 and thus at least in part of the period covered by the EIRD cartel, Blackrock might still have connections with Barclays, involved in that cartel (see EU Commission, case COMP/M.5580 – *Blackrock / Barclays Global Investors UK Holdings*, 22

In light of the above, considering that financial institutions cause important financial benefits at a macro and micro levels and can contribute to the stability of entire sectors of the economy, should competition authorities intervene simply because of the presence of common shareholders within the share capital of competing banks? Or should they refrain unless there is evidence of anticompetitive strategies, implemented by AMCs and by other institutional investors through their (competing) portfolio companies? As already recommended in relation to the airline industry, a rigorous antitrust intervention is not desirable. This recommendation is all the more appropriate with respect to the banking

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September 2009). If this held true, instead of reaching a collusive equilibrium with other AMCs like Vanguard, SSGA or Fidelity to coordinate the conducts of the participated or connected financial institutions, Blackrock opted to purchase BGI, Barclays' branch which directly competed with the biggest AMCs. The presence in the market of companies like Vanguard or SSGA was indeed valued by the European Commission as a pro-competitive element, that minimized the risk of distortion of competitive dynamics as a result of the merger in the only possible segment where the parties would have held more than 15% combined market share, *i.e.* the passive asset management segment.

Interestingly, Crédit Agricole and Société Générale also had relevant connections which led the two institutions to conclude a merger in 2009. They were both involved in the EIRD cartel together with Barclays, whose asset management branch was acquired by BlackRock. Nevertheless, Crédit Agricole decided to acquire sole control of the asset management branch of Société Générale, which offered several active asset management services, such as the creation and management of mutual funds and the offer of portfolio management services in direct competition with the biggest AMCs, including BlackRock (see European Commission, case COMP/M.5728 – *Crédit Agricole / Société Générale Asset Management*, 22 December 2009). In authorizing this merger, the European Commission acknowledged that the concentration of these entities was unlikely to significantly impede effective competition in the European markets for the offer of active asset management services (*e.g.*, other important asset managers remained on the market; institutional investors retained considerable bargaining power since they could have negotiated better management fees or investment conditions with other AMCs had the merged entity increased fees or lowered performance standards; retail customers were not damaged as low barriers to expansion existed in the retail segment for asset management services). The antitrust authority also recognized that independent funds remained in the market and competed on investment returns.

In the merger assessment, as in the U.S., neither corporate governance of the relevant banks nor the structure of the banking industry seems to have played any role. Whereas the acknowledgment that third-party investment funds continued to exercise a competitive constraint is a valuable indication of the fact that the European market for asset management services is rather competitive, and evidence of collusion among the biggest AMCs (for example through their portfolio companies) has not emerged so far.

sector, which for the reasons set out above should be treated more cautiously. As such, the mere application of the CO theory therein may not represent the best course of action from a competition policy standpoint. The antitrust intervention is indeed justified only in case of evidence of anticompetitive conduct or of corporate governance links that will more likely favor an anticompetitive strategy (*e.g.*, interlocks).[116]

Finally, as I will further clarify in the next chapter, the idea that the biggest global asset managers may be responsible for price increases registered in the markets in which their portfolio companies are active (for example, by engaging in corporate activism, meeting face-to-face with company officers and persuading them to adopt anticompetitive strategies) is not in line with the scope of action of institutional investors. AMCs usually hold low share capital percentages of their portfolio companies and the rights that are attached to their shareholding may simply protect their position of minority investors. Because of these dynamics and in light of what I have noted above in respect to the peculiarities of the banking sector, CO should have been carefully scrutinized before being qualified as the cause – rather than a contextual element – of the observed increase in prices of banking services in the U.S..

IV.3 Common ownership in the pharmaceutical industry

IV.3.1. The "Pharma Study"

[116] This argument is further supported by the findings of a market study carried out by the UK Financial Conduct Authority ("FCA") to identify competitive concerns within the asset management sector and eventually launch enforcement actions. In its concluding report, the FCA did not identify any concern in connection with minority shareholdings held by the biggest AMCs in competing undertakings (Final report of the FCA on "Asset Management Market Study", June 28, 2017). The FCA only referred to the importance of strengthening the requirements for asset managers to act in the best interests of investors and to offer high quality services in a transparent way, on the assumption that this would have increased efficiency of the UK asset management industry to make it more attractive for investors, an issue clearly different from the antitrust theory of harm underlying the CO doctrine.

The CO theory of harm has so far also been applied to sectors where not just pricing, but innovation is a relevant competitive variable, including the pharmaceutical industry. The main study in this field claims that CO between brand and generic-drug manufacturers in the U.S. over the sample period 2003/2016 delayed the entry of generics into pharma markets, which in turn had an adverse effect on prices of pharmaceutical products (the "Pharma Study").[117] In particular, the study looked at patent infringement lawsuits launched by originators against generics over that reference period and found that, in almost 22% of the launched lawsuits, there were common shareholders between generics and brand-name manufacturers. On this basis, the Pharma Study asserts that the probability that two drug-companies entered into a settlement agreement by which the brand manufacturer compensated the generic manufacturer to stay out of the market (*i.e.*, pay-for-delay agreement) increased when generics' shareholders held, at the same time, stakes in the brand-name firm. To support these findings, the study reports that only a small percentage of disputes (16%) led to a trial, whereas the mean settlement rate was found to be at 43.6% and varied across federal district courts, with a dismissal rate of 33%.

The Pharma Study also looks at BlackRock's acquisition of BGI as a potential explanatory variable of the observed increase in prices of pharmaceutical products. However, since stocks of drugs only represented a small percentage of the merging parties' portfolios, that transaction had a minor role on the behavior of the merging parties and no impact on the observed pricing increase of pharmaceutical products.

In this context, the Pharma Study comes to the conclusion that CO among brand and generic drug manufacturers resulted in an increase of patent settlements. This phenomenon in turn had the effect of artificially extending the brand's monopoly *status* beyond the expected date of

[117] JOSEPH GERAKOSY & JIN XIEZ, Institutional horizontal shareholdings and generic entry in the pharmaceutical industry, Tuck School of Business Working Paper (2019).

generics' entry into the relevant markets. This reasoning relies on the premise that generic manufacturers with high ownership stakes in brand companies were induced to settle disputes over validity of the brand-drug manufacturers' patents since settlements would have maximized the overall profits of common shareholders. As a result, final consumers were prejudiced as they had to pay drugs more than what they would have paid had the generics entered the market.

In the following paragraphs I will analyze the findings of the Pharma Study and focus on competition on innovation to assess the soundness of its underlying assumptions. As I will clarify, the Pharma Study seems to have overlooked the value of competition on innovation, despite it being a key competitive parameter in the pharmaceutical industry. In addition to pricing effects, generic companies exercise competitive pressure on brand-drug manufactures by incentivizing them to engage in research and development ("R&D") with the aim of enhancing or producing new drugs which would obtain additional patent protection and shield their market power from generics' entry into the market.

On this basis, I will analyze the interconnections between patent settlements and innovation to investigate whether the former may have any positive effect on the incentive of brand-drug manufacturers to engage in R&D. The results presented in the paragraphs below are even more valuable if one considers that investors holding shares in their competitors have been more generally found to engage in R&Ds campaigns and to innovate because common investors are in the position to internalize a portion of the positive externalities associated with innovation.[118]

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[118] LUCA ENRIQUES & ALESSANDRO ROMANO, Rewiring Corporate Law for an Interconnected World European Corporate Governance Institute, *supra* cit, p. 20 and footnote 92 citing a number of studies that support those arguments, including ÁNGEL L. LÓPEZ & XAVIER VIVES, Overlapping Ownership, R&D Spillovers, and Antitrust Policy, 127 J. POL. ECON. 2394 (2019); MIGUEL ANTON ET AL., Innovation: The Bright Side of Common Ownership? (2018), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3099578; and PAUL BOROCHIN, JIE YANG & RONGRONG ZHANG, Common Ownership Types and Their Effects on

IV.3.2. Common ownership in the pharma industry and IP rights

The Pharma Study touches upon one of the most debated topics by competition law practitioners, namely the relationship between dynamic competition and intellectual property ("IP") in a context where IP rights are essential to reward companies for investing in R&D.

In the pharmaceutical industry, this relationship calls for a balancing exercise between the right of generic companies to launch their drugs on the market upon patent expiration of the IP rights held by the brand-drug manufacturers, and the incentives of the patent holder to avoid entry in the relevant market of generic versions of its branded product before expiration of its patent or when its validity is contested in court.

In this section, without attempting to exhaustively discuss such complex trade-off, I will focus on some arguments that cast doubts on the application of the CO theory of harm to pay-for-delay agreements in the pharmaceutical sector. In particular, I will point out that the relationship between pay for delay, patent protection and innovation is particularly complex as there may be situations in which patent settlements could have a positive impact on the incentives of brand-manufacturers to innovate when they delay market entry of infringing drugs. Moreover, a pay for delay strategy offsets costs that the parties would have incurred should they had gone to trial, with patent validity being upheld at the end of the dispute. In this complex framework, the following sections will discuss whether the starting position that antitrust enforcers should take, when assessing pay for delay in cases where common investors are present within the share capital of brand and generic-drug manufacturers, should be one of skepticism, or whether the benefit of doubt should be indeed given in light of the possible positive effects on innovation that patent settlements may have – contrasting with the findings of the Pharma Study.

Innovation and Competition 4 (2020), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3204767.

(i) *Pay for delay and innovation*

As briefly mentioned, the Pharma Study almost overlooked the impact of pay for delay on innovation, to focus instead on pricing effects, although innovation is an important dimension over which companies compete in industries characterized by substantial R&D investments, such as the pharmaceutical sector. In case of multinational pharmaceutical companies, which in the pharma industry represent the main target of institutional investors, R&D is particularly relevant as pharma manufacturers rely more on continuous innovation than on short term financial profits. The reason is simple: research may lead to the development of new drugs; the related patent protection covering new drugs shields the brand-name manufacturer from the competitive pressure of generic companies, which in turn has a positive impact on the long-term financial profitability of that pharma company. As such, the relation between innovation and competition is key, although challenging in the context of a pay-for-delay settlement.

Against this background, there is the concern that patent settlements block generic entry and thus limit competition between the originator and the generic companies. This delay has a prejudicial effect on competition on prices since consumers may not benefit from low-cost generic drugs. However, it is also true that pay for delay safeguards patent protection in case of "strong" patents, whose validity may be still proved in court. In that scenario, pay for delay strengthens the originators' incentives to innovate. In the absence of pay for delay, these incentives may be lower due to the risk for brand-name manufacturers of not recovering the R&D expense to produce a new drug and earn a fair rate of return as a result of the market entry of generic companies, which may challenge the validity of the original patent before its expiration. In the long term, patent protection through pay for delay could be beneficial to consumer welfare in terms of availability of innovative drugs.

It is clear why antitrust law and IP come into conflict. Patent settlements represent an effective mechanism to protect a holder of IP rights before the validity of its patents is confirmed by the competent authority. However, settlements might be problematic under a competition law standpoint to the extent that they prevent market entry of low-cost drugs. When this reasoning is applied to a scenario in which the originator and the generic companies have common shareholders, I think that it is key to assess the strength of patent validity to strike the right balance between IP protection and fair competition. In other words, patent settlements may be valuable when the entry costs for generics are at an intermediate level and patent validity is likely, whereas in a scenario in which entry costs are too high, settlements are preferable regardless of CO. This holds even more true when the outcome of a patent dispute indicates that the original patent is valid and settlements protect the IP rights of the originator, safeguard its incentives to innovate and avoid litigation costs. If entry costs are indeed too low and patent validity is unlikely, regardless of CO the settlement will indeed exert less influence upon the decision to refrain from entering the market as it is more likely that the generic companies would find preferable to enter the market.[119]

The above relies on the fact that when the originators and the generics have common owners, in order to decide whether to settle or engage in a long and expensive litigation, whose outcome is *ex ante* uncertain, common shareholders may have an incentive to assess the costs for generics to enter the market as opposed to those of the originators to innovate. This exercise is certainly complex and subject to a degree of discretion. This is further complicated by the fact that the approach of competition authorities in scrutinizing patent settlements in the pharmaceutical industry evolves over the years. In the U.S., only in recent years the authorities have opted for the application of the 'rule of reason'

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[119] Y. DING & X. ZHAO, Pay-for-delay patent settlement, generic entry and welfare, International Journal of Industrial Organization 67 (2019).

standard and, as such, for a flexible, *case-by-case* assessments of patent settlements and pay for delay.[120] In Europe, the approach of the

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[120] In 1984 the Hatch-Waxman Act, that amended the 1938 Federal Food, Drug and Cosmetic Act (FFDCA), legislated market approval for low-cost generic pharmaceuticals by ruling that, at the expiration of the originator's patent or after having successfully challenged the validity of that patent, the first generic manufacturer filing an abbreviated new drug application was entitled to an exclusive 180-day right to market a new version of the brand medicine. Generic companies had thus an incentive to challenge brand patents because the first could enjoy the benefits of the exclusivity window, but reverse payment settlements have been used as an alternative to patent litigation. These patent settlements have thus called the attention of antitrust enforcers on the basis that they could buy off potential competitors and deprive consumers of the benefits of generics' low-cost medical products. In this context, the U.S. antitrust enforcers have initially shown a quite rigorous attitude in the assessment of those agreements, but they have recently favoured a more cautious approach.

In 2003, rejecting the strict *per se* approach upheld by the Sixth Circuit of the Court of Appeal *In Re Cardizem*, the Eleventh Circuit in *Valley Drug Co.* focused on the *scope of patent test* (*Valley Drug Co. v. Geneva Pharm*., Inc., 344 F.3d 1294, 1311, 11th Cir. 2003). In particular, the case concerned a payment made by Abbott to generic companies to delay their entry into the market for drugs containing terazosin hydrochloride, that was used for hypertension diseases. In that case, the Court of Appeal held that patent settlements are valid as long as they remain within the scope of the patent, on the basis that "*exposing settling parties to antitrust liability for the exclusionary effects of a settlement reasonably within the scope of the patent merely because the patent is subsequently declared invalid would undermine the patent incentives*". This approach was then followed by other Appellate Courts, that upheld the legitimacy of reverse payment agreements as long as the patent litigation did not amount to a sham or baseless litigation.

The approach of the FTC was indeed stricter. In the 2010 Staff Study on Pay for Delay agreements, by recalling a Court of Appeal's decision ruling on the invalidity of such agreements under the *per se* category, the FTC highlighted how a strict approach had a deterrent effect on those practices in the period from 1999-2004. In the words of the FTC, since 2005 the less rigorous approach of some Courts of Appeal resulted in the increase of such settlements. Therefore, it should not be welcomed as these practices posed risks to competition.

Then, in 2012, the scope of the patent test was also judicially rejected in the *Re K-Dur Antitrust Litigation*. In that case the Third Circuit expressed a distaste for the presumption of validity of reverse payment settlements when the agreement did not go beyond the patent scope. The Court adopted a "*quick look*" standard, which had to be applied in light of "*the economic realities of the reverse payment settlement rather than the labels applied by the settling parties*". More precisely, a reverse payment settlement agreement that aim at delaying generics entry into the market amounts to a "prima facie *evidence of an unreasonable restraint of trade*", that could be rebutted by showing that the payment has not been concluded to delay entry (*In re K-Dur Antitrust Litigation*, 686 F.3d 197, 3d Cir. 2012).

The inconsistencies between different Circuits of Court of Appeal were finally composed by the U.S. Supreme Court, that granted *certiorari* in the *Actavis litigation* (*FTC v. Actavis, Inc*., 133 S. Ct. 2223, 2013). On June 17, 2013, the U.S. Supreme Court, disagreeing with

competition authorities and courts has been rigorous and these agreements are usually qualified as *by object* restrictions of competition, with the consequence that they are deemed to be illegal under antitrust law without engaging in more discretionary *by effect* analyses and hence regardless of evidence of their anticompetitive effects.[121]

In this more general framework, with respect to the core topic of this dissertation, both in the U.S. and in Europe the relation between patent settlements and CO by institutional investors has not been assessed so far by antitrust authorities. Should it come on the radar of these enforcers, the presence of common shareholders in the share capital of originators and generic companies should not justify a too rigorous stance. In a scenario in which the originator simply tries to extend the validity of its patents in the absence of further innovation, the patent is weak, and it is likely that a court will uphold its invalidity. As a consequence, patent settlements are not functional to protect incentives to innovate and it is reasonable to assume that generic companies will incur the risk of patent litigation to enter the market. In fact, even if one assumes the presence of common (minority) shareholders in the share capital of originators and generic manufacturers, the majority of the shareholders' base of the generic company will be made up of non-common shareholders with an interest in

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the scope of patent and the quick look tests, upheld a *rule of reason* approach. In the words of the Supreme Court, while presumptive rules (*e.g.*, quick look) are justified when "*an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets*", reverse payment settlements "*do not … meet this criterion*". They are complex agreements, and their anticompetitive nature could depend on several factors, including the size of the payment, its value in relation to anticipated litigation costs or the lack of any convincing justification.

[121] See the recent EU Court of Justice's judgment in *Lundbeck* upholding the European Commission's decision which had fined the originator Lundbeck and various generic companies for having entered into settlements of patent disputes, that had to be qualified as restriction of competition *by object* in violation of Art. 101 TFEU, simply aimed at delaying generics' entry into the market in the absence of any substantiated pro-competitive effect associated with those agreements (CJEU, Case C-591/16P, *Lundbeck v Commission*, 25 March 2021). See also, General Court, Case T-691/14, *Servier and Others v Commission*, 12 December 2018, and European Commission, Case AT.39686, *Cephalon*, 26 November 2020.

entering the market immediately. As such, the decision as to whether to enter into a patent settlement does not rest on the presence of common shareholders, but rather on non-common owners representing the majority of the shareholder basis of the generics, which should be compensated for the loss they suffer as a result of the delay in entering the market.

If one indeed assumes that the strategies of the generic companies were only defined by common shareholders, even though they hold minority shareholding, one should also consider that the conclusion of patent settlements is unreasonable and irrational: why should originator companies enter into patent settlements and give up to financial resources to compensate generic companies, also (and mainly) to the benefit of non-common shareholders, to block generics from entering the market if they could obtain the same result by simply orienting the commercial strategies of these companies without incurring any cost? The premise upon which that argument rests may be hence erroneous.

It is more logical to think of patent settlements as a means to induce generic companies, subject to control of non-common shareholders, to refrain from entering the market in case of "strong" patents, but which could be still contested in court. Accordingly, even if originator and generic companies have common shareholders, no specific rules are needed to assess the possible anticompetitive effects that patent settlements among these companies may have, with the final aim of balancing IP protection and fair competition.

(ii) *CO in the pharmaceutical industry and the boundaries of relevant market definitions*

Finding an equilibrium between IP protection and fair competition is not an easy task in the pharmaceutical industry, where the same definition of relevant markets, that is a first step in competition law assessments, is tricky. This is all the more true in connection with the CO theory, that looks at competitive dynamics in the *industries* in which portfolio companies of common institutional investors are active, rather than preliminarily defining

the relevant markets in which these minority-owned companies compete. The incorrect definition of relevant markets may lead to erroneous antitrust assessments. In addition, in the pharma sector, market definition has traditionally been controversial because of the complexity of identifying substitutable drugs from a demand side standpoint since prices are not necessarily indicative in this respect. This is further complicated by the fact that, in many jurisdictions (including Italy), prices of drugs are not strictly regulated but depend on severable variables (for example, when it comes to reimbursed pharmaceuticals, the final price depends on commercial arrangements between the pharmaceutical company and the competent regulatory authority, it involves combination pricing schemes or rebates, and pay-back obligations on pharmaceutical companies in case of sales exceeding specific company market shares).

In light of the complexities of this industry and the fact that prices of medicines may have little to do with industry-wide trends upon which the CO relies, the application of the CO theory to the pharma sector is even more controversial. As a consequence, the assessment of the potential anticompetitive effects due to the existence of corporate governance links in the form of common shareholding between originator and generic companies should be conducted on a *case-by-case* basis by preliminarily considering the specific relevant markets – from a competition law standpoint – where pharmaceutical companies are active, instead of relying on wide industry trends.

The analysis of industry rather than of specific relevant market dynamics may lead to the misapplication of competition law principles, which in turn could jeopardize the originators' incentives to innovate and consumer welfare more generally. Precisely for these reasons, to maintain a competitive pharmaceutical marketplace, the application of the CO theory to the pharmaceutical industry should be assessed carefully as an erroneous antitrust intervention may negatively impact on firms involved in continuous R&Ds activities.

V. ANY CONCLUSION TO BE DRAWN?

In the preceding paragraphs the fascinating CO theory has been tested in industries where the observed increase in prices could have been caused by alternative factors rather than to the presence of common institutional investors in the shareholders' basis of firms active within the same markets.

As detailed above, with respect to the U.S. airline industry, where CO has been causally linked to an increase in airfares, various reasons may justify the observed higher prices of airline tickets. First of all, in a relatively short period of time, there were various mergers among the main U.S. airline carriers which resulted in a consolidation of the sector. In a more concentrated industry, a supra-competitive pricing equilibrium could have been sustained and monitored more easily and the airfares' increase may have been due to the legitimate parallel conducts adopted by the few competitors rather than to anticompetitive coordination imputable to common shareholders.

The same trend towards the concentration of the industry may in turn also explain the presence of common investors within the shareholders' basis of the main airline carriers. As pointed out above, the trend towards the consolidation of the sector may have induced the biggest institutional investors and AMCs to invest in airline carriers, with the consequence that CO may have not been the cause of supra-competitive airfares, but the effect of the industry consolidation.

Likewise, the U.S. banking sector experienced a wave of consolidations starting from the late '80s. This trend allowed the main banks to acquire a significant position within the relevant local markets. In that context, the observed increase in pricing of banking services may have been due to the oligopolistic structure of the industry rather than to CO.

The above arguments are even more sound in view of the attention reserved by the antitrust authorities to both industries during last years. As detailed above, the banking and the airline sectors have been for years

on the radar of the antitrust enforcers, which so far have not referred to CO as a possible cause of distortive pricing effects, but they rather focused on other corporate structures which could raise some competition law concerns (such as IDs).

In the pharmaceutical industry as well, where CO has been claimed to have caused anticompetitive effects by limiting market access of generic manufacturers through patent settlements, I have explained the reasons why that thesis may raise criticisms in view of the peculiarities of that sector. In addition to pricing effects, in the pharma industry innovation is particularly relevant and it represents an important competitive driver for pharmaceutical companies. In this context, the decision of generic manufacturers as to whether or not conclude patent settlements with brand manufacturers according to which they delay their market entry in exchange of financial compensation may not be due to the presence of minority (common) shareholders, but rather to the majority (non-common) shareholders. The latter should be compensated for the loss suffered because of the delay in market entry and this in turn may legitimately justify the conclusion of patent settlements.

More than in other more stable and less dynamics sectors, in the pharmaceutical industry the application of the CO theory also raises an additional concern due to the higher difficulties of identifying the relevant markets in which pharma manufacturers compete and hence of assessing where the effects of CO should be effectively analysed.

The complexities highlighted so far suggest, on the one hand, that the CO theory is fascinating, but it may not be well-founded because of the difficulties of identifying *a causal relation* between the presence of minority common shareholders in the corporate structures of competing firms and the claimed anticompetitive effects, which in turn imply that minority shareholders should have the ability to exercise antitrust control upon these competing firms. On the other hand, because of the inherent weakness of the CO theory and of the adequacy of the existing antitrust framework to cope with the potential competitive concerns raised by corporate structures

and by mechanisms that connect independent firms, one might even more question the need to introduce radical changes in antitrust law, such as those suggested by eminent doctrine so far (see § III above).

In light of the above, it could be indeed considered whether the existing financial regulations play any role in orienting the course of action of institutional investors, in turn minimizing the CO antitrust concerns, should they ever materialize. As I will point out in the next chapter, the financial industry is highly regulated and institutional investors are subject to a plethora of obligations enshrined both by hard and by soft laws, which already limit the scope of action of institutional investors and make them accountable before financial authorities with the aim of safeguarding the stability of financial markets and of a multitude of stakeholders, *in primis* consumers and more precisely savers in their quality of final indirect investors.

In this scenario, differently from most of the studies on CO carried out so far, in the following chapter I will look at the CO theory under a regulatory angle. This approach aims at understanding to which extent the regulatory measures already in place (and to which institutional investors have to comply with) are sufficient to guide the conducts of these investors, while at the same time protecting competitive dynamics in the markets where their portfolio companies are active. On this basis, the rigorous enforcement of antitrust rules against CO may be even more inappropriate and it could have negative effects on the activities of a plethora of financial institutions, which as I will point out play a fundamental role in modern economies.

CHAPTER III

INSTITUTIONAL INVESTORS IN THE NEW FINANCIAL ERA: REGULATIONS, CORPORATE GOVERNANCE AND MARKET DYNAMICS

I. INTRODUCTION

In this chapter, I will analyse the CO theory under a new regulatory angle by looking at the regulatory framework in which institutional investors carry out their activities. In particular, I will explore the extent to which the regulatory framework, by limiting institutional investors' scope of action and by strictly disciplining their activities, adequately minimizes the claimed risks that these investors engage in anticompetitive strategies when they are present with minority stakes within the share capital of competing companies.

In the previous chapters I introduced the CO theory of harm by discussing the studies touching upon this theory and set out the reasons why the antitrust criticisms raised so far are unjustified and the traditional antitrust tools are suitable to deal with them should they ever materialize. Doubts remain as to the likelihood that the main institutional shareholders, in their role of minority investors of various companies active within the same industry, could effectively be in the position of influencing the management of these companies and then actively steer their commercial strategies in the market.

In this chapter, I will look at the main regulatory frameworks to which institutional investors have to comply with, in order to identify any regulatory gap in the CO theory of harm with a view of trying to answer the following question. Could sectoral regulations and stewardship obligations, to which institutional investors are subject, be helpful to mitigate any competition policy concern of CO?

This preliminary analysis is valuable to assess the extent to which the underlying regulatory framework hinders institutional investors' activism over portfolio companies, which under the CO theory is claimed to grant to

these investors control upon their minority participated companies and, in turn, distort their market decisions with a negative impact on competition. I start by categorizing the types of institutional investors under the applicable legal framework to explore the value that regulation plays in bridling their scope of action. On this basis, I will then focus on what is thought to be key in managing portfolio companies: corporate activism. Understanding how different institutional investors are regulated and whether they can "actively" influence market strategies of the companies in which they invest is helpful to assess the competition law concerns that arise from minority shareholding.

In the following paragraphs I will hence contribute to the current legal debate on the CO theory by looking at the value played by corporate governance and sectoral regulation in orienting institutional investors. These rules have not been given due consideration so far in the CO debate but may be valuable to understand the intrinsic limits to institutional investors' activities. I will propose a regulatory approach to the analysis of CO with a view of avoiding the undue application of antitrust rules in the absence of proved anticompetitive effects stemming from the activities of institutional investors. This approach relies on the acknowledgment that the enforcement of antitrust rules in cases where a prejudicial effect on market dynamics is not clearly proved may unduly limit the activities of these valuable financial players and thus prevent the emergence of possible financial benefits that they may bring about both at a micro-economic and a macro-economic level (*e.g.*, stability of financial systems, liquidity, diversification of financial risks, reduction of investment transaction costs). A comparative overview will be presented, and I will briefly look at the U.S. and at the European regulatory approaches to identify possible areas of convergence.

II. INSTITUTIONAL INVESTORS: A DIVERSIFIED CATEGORY

II.1. Banking institutions

Financial institutions like banks have been initially reserved the floor for collecting and managing clients' assets. In the U.S., banking institutions have historically played a prominent role, leading the legislator to limit their activities in the attempt of restricting speculative uses of bank credit. Under the Banking Act of 1933, the so-called commercial banks were only allowed to deal with deposits or loans to companies or individuals, while investment banks could purchase and sell bonds and stocks of companies. While this strict prohibition of mixing banking functions was repealed in 1999, banking institutions are still strictly regulated.[122] Regulation of banking activities has been particularly strengthened after the 2008 financial crisis to minimize the risk that the default of large financial institutions could jeopardize the stability of the entire financial system. As a result, excessively risky activities have been limited or banned altogether.

A similar approach has been followed in Europe, where banking institutions focus on payment services and are key in easing day-to-day purchases of goods and services, they also inject liquidity in the real economy by funding long-term loans in exchange of repayment guarantees. Over time traditional banking functions performed by commercial banks have been complemented by the offer of several investment services, complementary to those of receiving deposits or other repayable funds from the public and granting credits. To carry out their activities, banks set up risk profiles and creditworthiness of borrowers, which makes bank-client relationship essential. In this context, the strict regulatory approach aims at guaranteeing safe and sound banking practices.[123]

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[122] The Financial Services Modernization Act of 1999 repealed part of the 1933 Banking Act, removing the prohibition for an institution to act in parallel as an investment bank, a commercial bank or an insurance company.

[123] In particular, banking institutions can operate in the European market if authorized by the competent supervisory authority. In Italy, for example, banks play a prominent role in the financial ecosystem. In this respect, as of May 2019, 156 banks were active in Italy, 52 of which included in banking groups, with 11 of them qualifying as significant banking groups (see Bank of Italy, Annual Report of 31 May 2019, 168). To operate, these institutions have to comply with a specific set of rules to ensure sound and careful performance of various banking services. In addition to the traditional business of

Both in the U.S. and Europe, banks must disclose how investments are consistent with the profile and duration of their liabilities and how they contribute to the medium and long-term return on their assets. Bank managers must be also suitable for the entrusted tasks, meet requirements of professionalism, independence and competence. This rigorous approach relies on the assumption that financial stability is essential for pursuing long-term goals and, as I have previously noted (see Chapter II, § IV.2.2(i)), for the whole economy.

It is also true that by exploiting synergies between payment and investment services, banks help clients with identifying the investments which are more suitable to their specific needs. This is due to *active* investment strategies, requiring constant research of investment opportunities, monitoring the course of action of the companies in which their clients' money have been investing and quickly adapting to market dynamics to outperform, even in periods of market stress, predetermined targets. In this context, while strict regulation bridles the activities of these financial players, market dynamics indicate that it may make sense to entrust them with a leading role in overviewing the conducts of the

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collecting savings or granting credit, banks may engage in other financial activities to the extent they are connected or instrumental to their key business (see Legislative Decree of 1st September 1993, No. 385, the "Banking Code"). In this context, in Italy banking groups have emerged to provide clients with a wide range of financial solutions and services, from collecting and lending money to investing through funds. Banking groups often include asset management companies that provide collective and individual asset management services, *i.e.* SGRs, SICAV, SICAF and SIM. SGRs are authorised to manage mutual funds, provide portfolio management services, investment advisory service or management of alternative investment funds (AIF, namely mutual funds that invest in financial instruments and real estate assets characterized by a lower degree of liquidity than other mutual funds). SICAVs are variable capital investment companies, while SICAFs are fixed capital investment companies, both responsible for collective investments, introduced into the Italian legal system by Legislative Decree 84/1992 and Legislative Decree 44/2014, and currently governed by Legislative Decree 24 February 1998, No. 58 (the "Consolidated Law on Finance"). Investors of a SICAV may at any time obtain repayment of their investment; investors of a SICAF are bound to maintain their investment for the entire duration of the company. SIMs are indeed securities brokerage firms authorised to provide investment services in compliance with the Consolidated Law on Finance. SGRs, SICAVs, SICAFs and SIMs are subject to the supervision of the Bank of Italy and Consob and are listed in special registers held by the Bank of Italy.

companies in which they invest their clients' portfolios to the extent this is beneficial in terms of outperformance of market benchmarks via portfolio diversification. However, active monitoring of the actions of the companies in which they invest does not imply influence upon the management of such companies and in turn distortion of their market strategies. In this framework, does sectoral financial regulation play a complementary role to competition law in steering the activities of these investors, potentially minimizing any antitrust concerns raised by the CO theory? In my opinion, the answer to this question should be positive. This premise is valuable to avoid the misapplication of antitrust rules in cases in which regulation proves to be suitable, and sufficient to downplay *ex ante* the claimed risk that institutional investors, like banks, jeopardize competitive dynamics in the relevant markets where their portfolio companies are active.

II.2 Insurance companies and pension funds

Similar to banking institutions, insurance corporations and pension funds are subject to strict regulations both in the U.S. and Europe. Hence, what has been discussed above in relation to the value of the regulatory framework in bridling the activities of banks – and on the likelihood that they may interfere with their portfolio companies – could be applied to insurance companies.[124] In particular, insurance companies should invest

[124] Insurance companies are corporations that are mainly engaged in financial intermediation by pooling risks through direct insurance or reinsurance. They collect financial resources and invest them in funds to provide either life or non-life insurance services, where policyholders make regular or one-off payments to receive an agreed sum of money when the insured risks materialize (e.g., death, accidents, sickness, credit default). They may offer reinsurance services, where insurance is bought by the insurer to protect itself against an unexpectedly high number of exceptionally large claims. In the U.S., the sector has been historically regulated at State level. However, in 1945 the Congress enacted the McCarran-Ferguson Act, which declared that the business of insurance is in the public interest, and federal regulation gradually begun to step in. In response to the 2008 financial crisis, in 2010 the Congress passed the Dodd-Frank Wall Street Reform and the Consumer Protection Act to further monitor the insurance industry and identify any gaps in State regulations. To identify and proper respond to potential risks to the financial stability of the United States, the Dodd-Frank Act also established the Financial Stability Oversight Council charged with monitoring non-bank financial entities, including insurance companies, under the supervision of the Federal Reserve if they

in accordance with the *prudent person principle* and are required to invest in assets and financial instruments whose risks can be properly identified and monitored. Investments in financial derivatives have to be based on efficient management of portfolio assets and be kept to prudent levels. In this respect, investments should be appropriately diversified to avoid excessive reliance on a particular asset or a specific geographic area. These rules are relevant to ensure the financial stability of the entire industry, considering its growing relevance as demonstrated by net flows of money channeled to insurance companies.

A form of insurance is also granted by pension funds, which collect and invest savings to provide future income at retirement, and benefits in case of death and disability. They provide clients with a wide range of investment options, with different risk-return profiles. More importantly, due to the nature of their liabilities, these investors usually focus on long-term results. Pension funds are subject to regulation in the U.S. to control

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qualified as systemically important financial institutions ("SIFIs"). Thus, insurance companies are still subject to enhanced prudential standards, including specific reporting and risk management obligations.

In Europe, insurance companies should similarly comply with sectoral regulations aimed at guaranteeing their sound and prudent management. In this respect, see Regulation of the European Central Bank on statistical reporting requirements for insurance corporations (ECB/2014/50), 28 November 2014, Article 1, § 1, lett. (a)(b)(c). In Italy, see Legislative Decree of 9 September 2005, No. 209 (the "Code of private insurance"), as subsequently updated by Legislative Decree No. 74/2015, implementing the EU Directive 2009/138/EC (Solvency II), laying down new obligations for insurance companies to manage financial risks associated to their business. In Italy, the Bank of Italy reported that, as of 2018, insurance companies play an important role and they have increased both in life and non-life branches, which have respectively collected 29 and 12 billion (see the Annual Report of 31 May 2019, 183).

and improve the quality of their services and are regulated by federal and state laws.[125] The same applies in Europe, including Italy.[126]

It is clear that, similar to banks, insurance companies and pension funds should adopt investment strategies in compliance with specific sectoral rules in pursuit of higher profits for their final clients. If one applies the CO theory to the activities that these investors carry out, it is at least questionable that these entities, in their quality of institutional investors in a plethora of competing companies, are in the position to influence their strategies to pursue anticompetitive strategies.

First, it is questionable and not empirically proved that, by investing in various companies of which they may detain limited shareholdings, these institutional investors can exercise controlling powers upon each of them and steer their commercial strategies as it would be the case for a majority shareholder. Second, in light of the strict regulatory obligations that these investors have to comply with, the likelihood that they may not limit themselves to monitor the course of action of these companies and divert investments in cases of market distress, but they could coordinate the commercial conducts of these companies or induce each of them to pursue strategies which would have anticompetitive effects appears rather theoretical.

The above-mentioned *prudent person principle* provides that insurers should invest in liabilities that benefit their clients according to their

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[125] The most important piece of legislation is the Employee Retirement Income Security Act of 1974 (ERISA), that is a federal law setting minimum standards for retirement plans in private industry. Interestingly, this law set forth the prudent person rule, according to which investments have to be made for the exclusive benefit of final beneficiaries. Common law fiduciary standards of care even strengthen such obligations, by requiring pension funds to act with skill, prudence, diligence and paying attention at investment diversification to minimize risks of losses.

[126] In particular, in Italy, in compliance with European regulations, pension funds operate under authorization and strict supervision of the competent authority (the so-called COVIP) and have to comply with specific rules on board composition, scope of activities and internal controls, including the obligation to define systems of risk management that take into account client interests (see, Legislative Decree of 5 December 2005, No. 252, as recently amended last May 2019).

respective risk profile. By their nature and because of the ensuing obligations to which they are subject, insurance companies and pension funds generally pursue long-term objectives because final clients usually claim the insurance premium or cash in pensions after a certain period of time. Accordingly, the argument that their sole minority investments in competing companies raises risks as they could favour anticompetitive coordination among the companies in which their clients' funds are invested, and so leading to supra-competitive market conditions (*e.g.*, higher insurance *premia* than what users would have paid in a competitive industry), casts doubt at least under a regulatory standpoint as it is at odds with the regulatory obligations that institutional investors have to comply with.

II.3 The new era of Asset Management Companies and index funds

AMCs and index funds invest in a plethora of financial vehicles, such as mutual funds, exchange traded funds ("ETFs") or other entities that, in turn, invest client pooled funds in portfolios which mechanically track the performance of specified benchmark indexes (such as the S&P 500 or the Russell 3000). Similar to traditional investors, index funds collect money of thousands of customers and invest it in portfolio companies that are included within the tracked index. To (passively) track a benchmark, they charge a negligible fee, as opposed to the higher fees required for active management of investments. Precisely for this reason, market entry of these financial players has substantially reduced investment management fees.[127]

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[127] Within the wide category of financial investors, mutual funds invest in securities such as stocks or bonds, whereas alternative mutual funds, such as private equity funds, directly purchase or try to acquire control of financially distressed companies to improve their financial outlook and resell them. Mutual funds can be open funds, which allow subscription and redemption of units at any time. These funds normally invest in listed financial assets. Closed-end funds allow units to be subscribed only during the offer period and normally be redeemed when the fund expires. Closed-end funds are usually reserved to illiquid and long-term investments (real estate, unlisted companies). Moreover, a global mutual fund invests in assets around the world, including the investor's home country, while an international fund invests worldwide except in the investor's home country. Most

In that financial context, if one looks at regulation, these entities can be included in the wide category of the shadow banking framework, and

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mutual funds are available both to individual retail investors and to large institutional clients.
With respect to the applicable regulatory framework, in the U.S., under the Private Fund Investment Advisers Registration Act of 2010, funds managing over $100 million should register as investment advisors with the Securities and Exchange Commission ("SEC") and disclose financial data to monitor risks and protect investors.
In Europe, financial vehicles with a value exceeding €100 million are subject to the European Directive on Alternative Investment Fund Managers ("AIFMD"). This Directive not only applies to the worldwide activities of alternative investment fund managers based in the European Union but also to activities performed inside the EU by funds based in third countries. They should obtain prior authorization from national authorities to operate and, once granted, they need to satisfy additional requirements, such as the adoption of annual reports addressed to investors disclosing investment strategies, or reports to regulatory authorities on matters such as liquidity or risk management arrangements. Financial intermediaries, including index funds, are also governed by the corporate governance rules contained in the Directive 2014/65/EU on markets in financial instruments, adopted on 15 May 2014 (the "MIFID II"). Moreover, mutual funds authorized for sale in Europe are also subject to the Undertakings for Collective Investment in Transferable Securities Directive 2009/65/EC, adopted on 13 July 2009 (the "UCITS").
In Italy, the supervisory function over these funds is entrusted to the Bank of Italy and to the authority responsible for monitoring listed companies ("Consob"). These funds are governed by the Consolidated Law on Finance, whereas the Ministry of Economy and Finance determines the general criteria to be met by mutual funds to operate, including in which cases they may derogate from the prudential rules on risk containment established by the Bank of Italy.

With respect to other categories of funds, hedge funds are indeed more focused on short-term profits and may disregard the prudential rules on risk containment. Finally, ETFs are collective investment vehicles whose units/shares are traded at market prices on national stock exchanges. Investors can buy several ETFs in different markets to create a personalized investment portfolio. ETFs offer investors a wide range of advantages over traditional mutual funds, including lower expenses (normally, 0.04% of assets) and transparency by publishing fund participations on a daily basis. ETFs may be structured as open-end funds or as unit investment trusts ("UITs"), which make a onetime public offering of only a specific, fixed number of redeemable securities that will terminate on a specific date. ETFs can be divided into various categories with respect to their main features. The most known type is that of passive ETFs, which seek to track an underlying security index and replicate its risk-return profile. Investors and advisors may use these funds to target a specific sector at low costs, such as emerging markets. However, there are examples of active ETFs, which try to replicate an index by taking a hands-on approach to outperform market. Like passive ETFs, active ones allow investors to trade during market hours at competitive pricing and fiscal advantages but charging higher management fees. ETFs have the same legal structure of mutual funds. Therefore, Italian ETFs are subject to the Consolidated Law on Finance, while foreign ETFs, such as the U.S. ones, are considered as non-harmonized OICRs – namely, collective investment entities not subject to the European harmonized legal framework.

historically they have not been subject to the application of the rigorous set of rules applied to banks. However, following the 2008 worldwide financial crisis, the structural weaknesses of this banking system led to the creation of "too big to fail" entities that increased systemic risks and financial instability. As such, legislators adopted stricter regulations to monitor the activities of these financial institutions and increase transparency in the sector, with a particular focus on the biggest companies.

Thus, like other institutional investors, index funds and AMCs have been obliged to comply with a set of rules that aim at avoiding that their assets are concentrated in a few portfolio companies. Among the most relevant AMCs, BlackRock, Vanguard and SSGA can be listed. These AMCs are well-known as the "Big Three" on the assumption that they hold an increasingly large proportion of the equity of public companies. As of the second quarter of 2021, BlackRock held $9.5 trillion under management, Vanguard $7.5 trillion and SSGA $3.6 trillion.[128]

Under a competition law standpoint, the sole fact that these AMCs have significant financial resources and hold shares in a myriad of listed companies, included in some of the most important financial indexes on a global scale, does not imply that they are in the position of (i) controlling the management and influencing the commercial strategies of each minority-participated company included in these financial indexes, and then (ii) distorting market dynamics by being capable of orienting the market decisions of these portfolio companies, which may not even be "competitors" since being active within the same industry does not necessarily means that they compete within the same relevant market. As I have clarified, all these issues remain unsettled so far.

On these premises, in the following sections I will delve into the regulatory analysis of institutional investors to evaluate whether the rules

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[128] Their financial strength has increased over the last three years. As of 2019, they have been found to hold 5% or more in a large number of companies included in the S&P 500 index (see in this respect, LUCIAN A. BEBCHUK & SCOTT HIRST, The Specter of the Giant Three, 99 Boston University Law Review 721, 735-736, 2019).

of corporate governance effectively support the absence of clear *ex-ante* competition law risks due to the presence of institutional investors within the share capital of companies active within the same industrial sector as minority shareholders.

III. INVESTORS AND CORPORATE ACTIVISM IN MODERN FINANCE

As I have observed in the previous chapters, the CO theory rests on the assumption that institutional investors, and AMCs in particular, leverage their unrivalled market strength to engage in activism over their competing portfolio companies to influence their commercial strategies. However, even assuming that some portfolio companies were competitors under an antitrust standpoint (see above, Chapter II, § IV.3.2(ii)), the likelihood that minority shareholders that do not enjoy veto powers on the adoption of strategic decisions or right of appointment of senior managers could effectively influence the management of each commonly participated company and interfere in the adoption of their market strategies would imply more than just passive tracking.

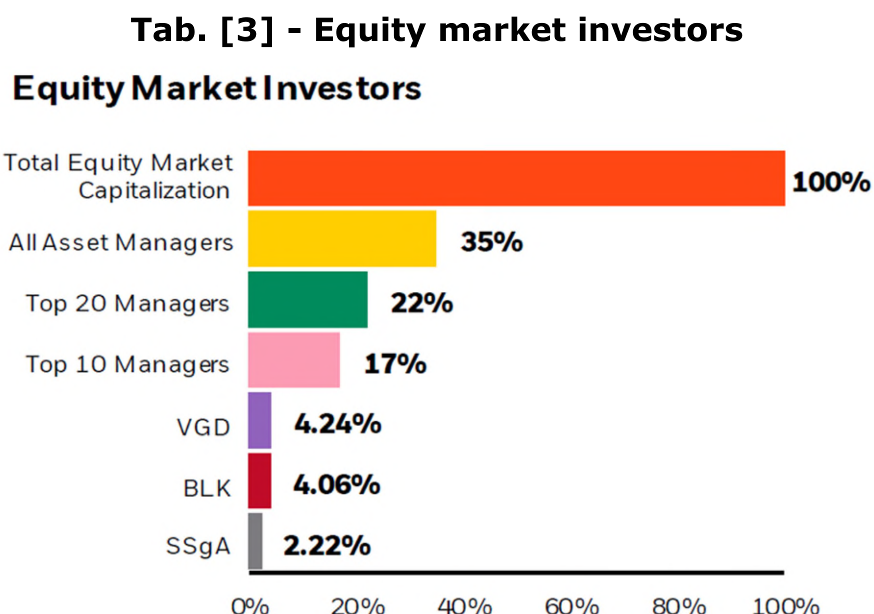
To overcome this criticism, those supporting the CO theory assume that institutional investors can take advantage of their prominent role in the global financial industry to "have a voice" upon the commercial strategies of their portfolio companies. In the following paragraphs, I will assess whether that assumption is well grounded, and the extent to which activism by the biggest investment funds over their minority-participated portfolio companies may effectively distort market dynamics, or instead contribute to their fair management and safeguard the competitiveness of the markets in which they are active.

III.1 The real global financial strength of institutional investors

The basic assumption that the three main AMCs – *i.e.*, BlackRock, Vanguard and SSGA – have a widespread presence in almost all public corporations that are listed in the financial indexes does not necessarily hold true. In 2019, BlackRock published reports asserting a misconception

about this idea.[129] If one looks at global equity assets, BlackRock reports that equity ownership was dispersed across a wide range of investors. In particular, each of the Big Three accounted for between 2% and 4% of global equity markets; in aggregate they managed just over 10% of total global equity market capitalization. The other 90% of equity assets was spread across in-house asset managers, independent asset managers, activist investors, and individuals with different strategies and investment objectives. If the above-mentioned evidence was correct, the very same premises upon which the CO theory rests could not be well-grounded.

Tab. [3] - Equity market investors



Source: BlackRock 2019 Annual Report (p. 25), on the basis of the World Bank database as of 30 January 2019

III.2 <u>Corporate governance and institutional investors' activism: an empirical analysis of listed companies</u>

In addition to what I noted above as to the real presence of AMCs within the equity market, the idea that institutional investors control public companies despite holding minority percentage ownership of their share capital (and without enjoying any veto power or rights upon appointment

[129] BlackRock, Investment Stewardship Annual Report (2019).

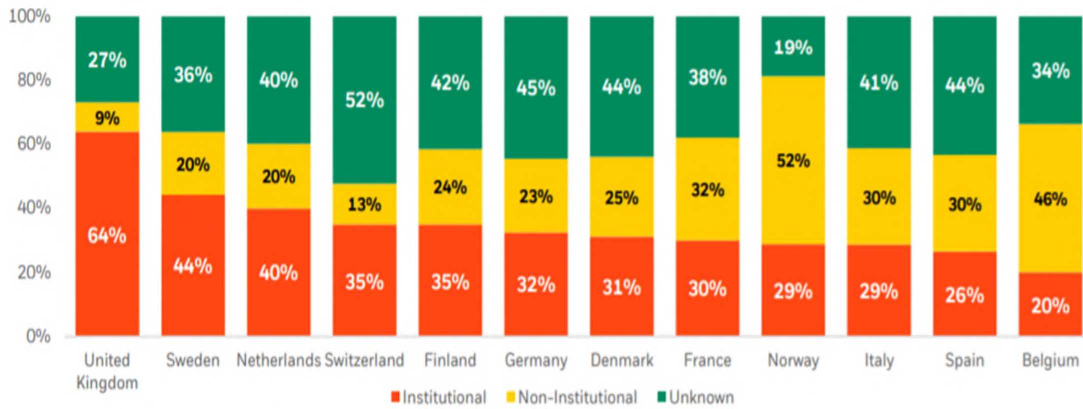
of senior managers) has been tested for listed companies included in the MSCI Europe index. As of February 2020, the MSCI Europe index contained 437 large and medium sized listed companies in Europe, with a value ranging between $3 billion and $322 billion.

By taking the MSCI Europe index as a proxy, BlackRock carried out a study that challenged the assumption that institutional investors are effectively in the position to manage listed companies.[130] The study indeed revealed that 39% share capital of the companies included in that index was held by unidentified shareholders, probably because their shareholdings fell below national reporting thresholds,[131] 22% was in the hands of holding companies or families, and the remaining 39% was collectively held by financial institutions, including both traditional investors and AMCs. The breakdown differed from jurisdiction to jurisdiction, with the UK companies showing the highest presence of institutional investors; in contrast, countries like Italy, Spain, France, Norway and Belgium had the lowest presence of institutional investors, below the cut-off point of 40%.
The "Big Three" held a marginal percentage of the overall share capital of listed companies. The shares that BlackRock managed were found to account for 3.52%, followed by Vanguard with the 2.45%. SSGA was only at the sixth position in the list of top 30 institutional investors, accounting for 0.67%. The remaining institutional investors had negligible shareholdings.

Tab. [4] - Institutional and non-institutional ownership breakdown of companies in the MSCI Europe index

[130] BlackRock, Europe's listed companies: their governance, shareholders and votes cast, Public Policy, ViewPoint (2020).

[131] The EU Transparency Directive sets the threshold for reporting at 5% of the target company's voting rights, but a number of EU Member States require lower thresholds.

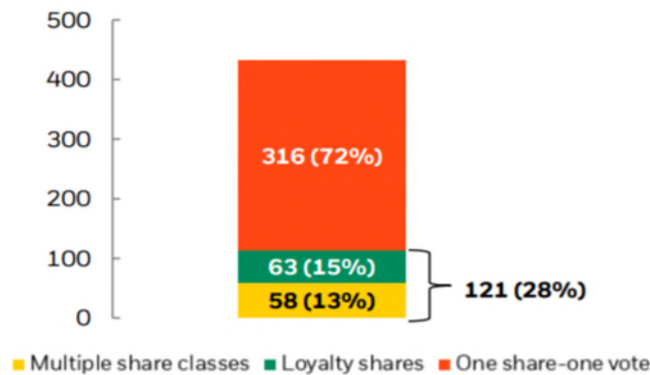


Source: BlackRock's 2020 Report on Europe's listed companies (p. 6), on the basis of FactSet ownership database as of 31 December 2019

On the basis of the above data, it is thus clear that the companies included in the index had a very diversified shareholder base, with a multitude of small institutional investors that were not necessarily guided by consistent investment strategies. Moreover, as discussed in the first chapter, the presence of companies opting for multiple share classes added an additional layer of complexity by amplifying the divergence between participation in share capital and corporate control. The study reports that 28% of the companies in the MSCI Europe index issued multiple share classes or loyalty shares (see table No. [5] *infra*). As clarified in chapter I, this CEM structure is relevant for companies relying on strong family ties and where founders need to be provided with special rights, but inevitably expose minority shareholders with single voting shares, including many institutional shareholders, to the further dilution of their voting rights. That reduces the chance that minority investors can leverage their presumed preeminence in the financial landscape to effectively impose their views on each of their portfolio companies and, in turn, distort competition in the relevant markets where these companies compete. By contrast, companies having majority shareholding or "significative" minority shareholding could effectively exercise control upon their investment portfolio companies. On the basis of BlackRock's findings, controlling shareholdings still are a significant feature of listed companies (primarily in Europe), and 38% of companies in the MSCI Europe index were found to be controlled either by

majority shareholders, such as founders, parent companies or governments, (holding over 50% of voting rights) or by shareholders holding at least 30% of voting power.

Tab. [5] - The application of the "one share one vote" principle and differentiated voting rights in companies in the MSCI Europe index



Source: BlackRock's 2020 Report on Europe's listed companies (p. 8), on the basis of the MSCI Europe index as of 31 December 2019

The analysis undertaken so far shows the potential regulatory gaps of the CO theory. First, the evidence presented to date does not support the idea that the main AMCs and funds, in their quality of minority investors, due to their global financial strength and presence in a multitude of companies listed in the main financial indexes, are effectively in the position to control the minority-participated companies and, in turn, capable of influencing their commercial strategies by inducing them to refrain from competing or to collude with peers. The empirical analysis of the market presence of institutional investors in one benchmark financial index has indeed shown a misalignment between the theoretical assumptions of the CO theory and the effective market relevance of these investors.

Most crucially, instead of investigating the global market presence of institutional investors in the main financial indexes, which include a plethora of companies that are active within several industries, the CO theory should first *re*-consider corporate governance structures of minority-owned companies to assess to which extent investment funds with minority

stakes may effectively impose their voice upon these companies and then, whether the latter are actually competitors from a competition law standpoint when they are simply active in the same industry.

Even in cases where price increases in an industry are observed, it should be considered whether they are due to anticompetitive conducts ascribed to the (minimal) presence of institutional investors within the shareholders' base of a certain number of companies, or instead to unrelated factors, as I have indeed argued so far (see Chapter II).

III.3 Minority investors' corporate activism and its value for market dynamics

The analysis set forth above demonstrates from an empirical standpoint that AMCs, although being relevant financial players on a global scale, are not necessarily in the position to leverage that financial position to exercise a significant influence so to actively control *each* of their portfolio companies and, in turn, coordinate and in any event interfere with their commercial strategies. As discussed in the previous sections, institutional investors are subject to diversified rules and should comply with specific regulations that limit their room for *maneuver*, casting doubts on institutional investors' ability to effectively engage in corporate activism to manage the companies in which they invest in order to distort market dynamics. Precisely for that reason, in addition to what I noted above, a more in-depth analysis of what corporate activism means under a regulatory angle may help to clarify and contextualize the CO debate.[132] This dissertation hence aims at casting a doubt on the findings of the CO studies alleging the existence of a causal relation between common institutional investors and anticompetitive effects on market dynamics even under a wider regulatory angle which takes into account corporate

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[132] For a detailed analysis of activism and corporate governance, see JEFFREY N. GORDON & WOLF-GEORG RINGE, The Oxford Handbook of Corporate Law and Governance, OUP sub Part II, Shareholder Activism A Renaissance (2018).

governance rules and the value of accountability and stewardship principles to which modern institutional investors have to comply with.

(i) *Corporate activism in tips*

Corporate activism refers to the situation in which engaged shareholders do not consider an investment they make purely from a financial perspective, but also from a strategic perspective. Investors usually play a more active role when they are dissatisfied with the management and performance of portfolio companies. Activism also reduces the risk of rational apathy that arises when minority shareholders refrain from protecting their rights because of their limited presence in the share capital of a company.[133] This obviously implies that to be "active" an investor should hold a not too minimal shareholding percentage, granting it a certain number of voting rights at shareholders' meetings. If not, independently from activism, the phenomenon of shifting majorities usually materializes, and there are no shareholders which actually are in the position to exercise antitrust control over a company.

In this context, it is important to understand the extent to which, under a regulatory standpoint, minority shareholders can actually engage in activism upon their portfolio companies to significantly influence their commercial strategies and whether it can succeed. As clarified so far, national legal frameworks are valuable in governing the scope of action of active institutional investors in managing their portfolio companies. In

[133] Activism may take various forms. The activation of such instruments often comes after publication of a document (the so-called White Paper), that discusses the management weaknesses as well as the measures that should be adopted to increase the market value of the company and manage it effectively. Shareholders' activism may also be exercised by means of less formal instruments. For example, institutional investors may try to gather support from other shareholders. If allowed by the applicable legal framework, activists may ask managers to call meetings, add items to the agenda, propose candidates when renewing the board of directors, or requiring proxy solicitation. On the point, see for example the applicable legal framework in Italy, under Article 2367 of the Italian Civil Code and Articles 126-bis, 136 and 147-*ter* of the Consolidated Law on Finance (see STUART GILLAN & LAURA T. STARKS, Institutional Investors, Corporate Ownership and Corporate Governance: Global Perspectives, Journal of Applied Finance, 2003).

addition to the various regulations that have been detailed above in connection with the activities of institutional investors (*e.g.*, banks, insurance companies, pension funds and index funds), different rules have been implemented in various jurisdictions on the rights of minority shareholders and they are also valuable to assess whether minority shareholders may have any influence over their portfolio companies. For example, in Germany, holding one single share gives the minority shareholder the right to attend, speak, and vote at *general* meetings, file countermotions before as well as during general meetings, and simply file *proposals* for the election of supervisory board members or auditors. A share of 5% entitles the shareholder to call a shareholder meeting or request amendments to the meeting agenda. However, only a shareholder holding 10% of the share capital may vote on dismissing members of the management or supervisory board, but it is usually not the case of institutional investors and AMCs.[134] In Italy, the *status* of minority shareholders is partially protected. Shareholders who hold at least a minimum percentage of share capital[135] may either challenge the decisions adopted by the majority shareholders or exit. Minority shareholders can call shareholder meetings if they hold at least 10% of the share capital.[136]

Although various jurisdictions grant certain corporate rights to minority shareholders, they aim at protecting their financial interest and they are to a certain extent limited by several factors. First of all, for an

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[134] AMADEUS MOESER, Shareholder Activism in Germany, HLS Forum on Corporate Governance (2019).

[135] The percentage of share capital allowing shareholders to challenge resolutions of the board differs for venture capital companies as opposed to other companies, respectively amounting to 1‰ of the share capital and to 5%. However, by-laws may either increase or reduce those percentages (Article 2377 of the Italian Civil Code).

[136] It is debated whether in Italy minority shareholders may propose amendments to shareholder meetings' agenda. Legal practitioners have sometimes acknowledged the existence of such a right, see inter alia C. PASQUARIELLO, sub Art. 2367 of the Italian Civil Code, in MAFFEI ALBERTI, The New Company Law, A systematic comment to Legislative Decree No. 6 of 17 January 2003, updated by Legislative Decree No. 310 of 28 December 2004, Padua, 459 (2005).

activist campaign to be successful, minority shareholders have to take into account the ownership structures of the minority-participated company and specific disclosure obligations. These transparency obligations imply additional layers of control on the activities of minority shareholders, mitigating any potential prejudice to the target that an activist campaign may cause.[137] The existence of these disclosure obligations ensures that the listed company is aware of any activity that minority shareholders would like to perform. They also help the listed company to be prepared in case of hostile campaigns that are launched by minority shareholders to try to obtain full control of the company. Therefore, to the extent that minority shareholders are subject to disclosure obligations, their activities are monitored and the risk of detrimental outcomes for the listed company are mitigated. In addition, country specific factors are relevant in evaluating whether minority shareholders may have any voice upon their portfolio companies. For example, in Germany retail investors and proxy advisors favor minority investors like BlackRock, Vanguard and SSGA, as they perceive their campaigns to be beneficial to the minority-participated companies.[138]

However, the more notable aspect is the fact that minority investors and the management of listed companies may have diverging interests leading to agency costs,[139] that add a further layer of complexity in the assessment of institutional investors' activism and of the CO theory that,

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[137] For example, in the U.S., Section 13(d) of the Exchange Act requires a shareholder or group acquiring, holding, voting, or disposing more than 5% of shares of a listed company to file a Schedule 13D to disclose its intended aims. A similar legislation exists in Europe. In Italy, shareholders of listed companies are subject to disclosure obligations when low share-capital percentages are exceeded. In particular, if the initial minimum threshold of 3% of the share capital is exceeded, the purchaser should notify Consob. A 5% threshold applies to small and medium enterprises. When the 10% threshold is exceeded, the acquirer is required to disclose the objectives it wants to pursue in the following six months, agreements entered into with third parties and intentions about appointment and revocation of the target's corporate bodies.

[138] AMADEUS MOESER, Shareholder Activism in Germany cit.

[139] For a more detailed analysis of agency costs, see Chapter I of this dissertation, page 15, footnote no. 8.

as said, rests on the assumption that the interests of these two categories of economic agents are aligned. Agency costs can be hardly eliminated completely, it can be also reduced by finding an alignment between company shareholders and the management in voting at shareholders' meeting.[140] Organization of voting for the adoption of important decision in case of large listed companies with innumerable shareholders is expensive, and activists usually incur such costs only if reimbursed by company shareholders, for example in cases in which large shareholders need support of minority investors in proxy fights.[141]

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[140] For example, activists may settle potential conflicts of interests with the management of a firm. In this scenario, activists receive private benefits and the risks that the majority shareholders agree with the minority and vote on decisions that risk jeopardizing the role of the management is minimized. This is so as these settlements silence the activists and, in many cases, they are reached because of the high costs of activist campaigns. Moreover, settlement usually includes a standstill provision, which prohibits activists from engaging in certain activities within a prescribed period of time. A recent market-study on standstill provisions in settlements agreements in 2019 reports that, in 98% of cases, these clauses aimed at prohibiting activists from engaging in any solicitation of proxies or from influencing any person on voting company securities. In 89% of cases, these clauses also prohibited activists from seeking to elect or remove any directors or otherwise seeking representation on the board; while in 73% of cases they prohibited any actions aimed at controlling or influencing the firm or management, such as trying to change the composition of the board, or any material change in the firm's management, business or corporate structure.

For a further analysis, see S&C Review and Analysis of 2019 US Shareholder Activism (2019); and JOHN C. COFFEE, The Agency Cost of Activism: Information, Leakage, Thwarted Majorities, and the Public Morality, ECGI Law Working Paper (2017).

[141] A proxy contest refers to the action of a group of shareholders joining forces in a bid to gather enough shareholders' support to win a corporate vote. In the most active investment funds, such as hedge funds, proxy contests usually aim at pressuring the management to make changes to the firm's governance and strategies. In this respect, they could seek to place outside directors on the board if minority shareholders attempted to take control of the firm. The crux of the debate lies in the intrinsic goals pursued by these joined actions and in the extent to which they can effectively improve firm's performance or indeed lead to short term results, negatively impacting the firm or society as a whole.
J.C. Coffee provides an example of the unsuccessful campaign carried out by the Trian Fund to place its founder on the Proctor & Gamble ("P&G") board. Despite the costs of the campaign were estimated at least at $25 million, the fund preferred incurring them on the assumption that it may have reached a private settlement with the majority shareholders for reimbursement of these expenses.

Because of these complexities, the qualification of the true nature of an investment vehicle as an active or passive minority shareholder is not straightforward and requires a factual assessment of its effective *modus operandi*. The analysis presented so far reveals the complexity of corporate activism and the inadequacy of allegations built exclusively on the economic position (and the assumed market power, if any) held by the biggest institutional investors in their *status* of minority shareholders in a multitude of companies included in financial indexes. As discussed, complex business relationships may be in place between minority investors, majority shareholders and the management of their portfolio companies. In some cases, corporate activism may result in additional agency costs or trigger regulatory obligations that can prevent minority investors from being active. In other cases, the strategies put in place by active investors are instrumental to reduce agency costs, but do not say much about the possibility for the active investor of interfering with the adoption of the commercial strategies of the minority-participated company. Therefore, a *case-by-case* analysis is relevant to evaluate whether an investment vehicle is more prone to corporate activism as well as whether such activism may have an influence over the decision-making process of the minority-participated companies. In such a context, the assumption underpinning the CO theory – *i.e.*, the idea that the biggest institutional investors can

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See also GIOVANNI STRAMPELLI, Are Passive Index Funds Active Owners? Corporate Governance Consequences of Passive Investing, San Diego Law Rev, 55, 803 (2018).

According to the author, the costs of activism are key in the assessment of institutional investors' strategies and they help with explaining why in some circumstances these shareholders may refrain from investing in stewardship. The reason should not be identified within short termism, rather within costs of activism. This holds even more true if one considers the limited benefits that institutional shareholders receive from being active: by holding several minority shareholdings in a certain number of investee companies, institutional investors should incur significative costs to actively oversee the activities of their portfolio companies and receive in turn limited benefits as a result of their minimal presence within each portfolio company. This increases the free-riding risk by those who would prefer refrain from investing and taking advantage of the activities carried out by other shareholders. This also explains why institutional investors and AMCs usually refrain from engaging in high-cost governance activities such as monitoring of M&A, and prefer engaging in ESG issues, requiring low-cost interventions but that are likely to lead to substantial benefits to society as a whole.

make use of corporate activism to pursue anticompetitive goals – in addition of not being empirically demonstrated, may not be in line with the financial and corporate rationale of regulatory obligations to which minority shareholders have to comply with.

(ii) *Corporate activism and the value of stewardship rules*

Stewardship rules add another layer of complexity in the assessment of whether investment funds may engage in activism upon portfolio companies to distort the dynamics in the area of corporate control of these companies and, in turn, influence their commercial strategies in the relevant markets where they offer their goods and services.[142] A growing number of international companies have implemented stewardship codes which, in addition of being beneficial from a consumer welfare perspective,[143] limit the scope of action of institutional investors.

Stewardship rules require asset managers to responsibly allocate, manage, and oversee the companies they manage to benefit final clients. On this basis, as the COVID-19 pandemic has made clear, asset managers should promote well-functioning financial markets and respond to unpredictable market-wide and systemic risks, without affecting competitive dynamics.[144] In this respect, authoritative scholars noted that

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[142] For an extensive analysis of stewardship principles and activism, see LUCIAN BEBCHUK & SCOTT HIRST, Index funds and the future of corporate governance: theory, evidence, and policy, Colum. L. Rev. 119, 8 (2019). See also BERNARD S. BLACK, Agents Watching Agents: The Promise of Institutional Investor Voice, 39 UCLA L. Rev. 811 (1992).

[143] During recent years, because of stewardship commitments institutional investors and AMCs have increased their attention to socially responsible investments by investing in several environmental, social and governance index funds ("ESG"). For example, SSGA has focused on gender diversity and set up the "SHE" index, specifically reserved to investments aimed at promoting women. BlackRock has set up a sustainable investing team to coordinate the firm-wide effort to incorporate ESG into all investment processes. The BGF Sustainable Energy Fund, the BSF Impact World Equity Fund and the BGF Nutrition Fund are examples of BlackRock's ESG funds.

[144] The unexpected COVID-19 pandemic is having a harsh impact on global economy, including the activities of index funds. The lockdown measures to combat the coronavirus led to a sharp financial shock, jeopardizing several industries and leading to the prospect of prolonged economic damage. However, the benefits of COVID-19 may be substantial in

large institutional investors are "*more interested in the state of whole economies. Consequently, their preferences might be closer to those of society at large*", with the consequence that for at least those companies that can produce significant (negative) externalities at the aggregate level, "*corporate law should be structured in a way that enhances the voice of [portfolio value maximizing] shareholders*" like the Big Three.[145]

Therefore, compliance by institutional investors to stewardship principles can be valuable in the assessment of whether these investors could influence the management of portfolio companies to distort market dynamics (as argued by the CO theory) and whether corporate control rules could be actually flexed to oversee the activities of these investors and, in turn, further reduce the risk that they may interfere with the dynamics in the markets where their portfolio companies compete.

As clarified, stewardship rules steer investment funds' activism towards long-term objectives. Accordingly, to maintain or enhance the

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a long-term prospective and firms committed to stewardship and social obligations during this crisis may be rewarded. Investing in the pharma industry, in labour and community focused indices may support research for vaccines and contain the financial shock that the pandemic is causing in several markets, including the labor market. Until now, BlackRock has taken actions to support people impacted by this global crisis and has committed millions of dollars to help with meeting immediate needs of those most affected and addressing the financial hardship and social crisis due to job disruptions, school closures and unexpected parental, childcare and medical costs.

At the end of April 2020, following a series of requests from central banks in an attempt to mitigate the negative economic effects of the pandemic, also SSGA announced that it would have offered its State Street PriceStats series (*i.e.*, a comprehensive set of indicators for monitoring retail product price trends and consumer demand in twenty-two countries) free of charge to central banks around the world. This helped banks with tracking the daily price fluctuations of millions of consumer goods sold by hundreds of online retailers worldwide, synthetizing the data through econometric algorithms and monitoring inflation trends.

[145] LUCA ENRIQUES & ALESSANDRO ROMANO, Rewiring Corporate Law for an Interconnected World Arizona Law Review, Issue 64:1 (2021). For example, they refer to an important engagement aimed at reducing carbon emissions by Royal Dutch Shell, whose CEO was initially contrary to a project to reduce the net carbon footprint of its company, but after pressure from a coalition of institutional investors it agreed to that ambitious plan. In support of this climate change plan, BlackRock CEO affirmed that climate change is "*a defining factor in companies' long-term prospects*", with the consequence that sustainability should be at the center of BlackRock's new business model.

value of the assets under management to the benefit of their final clients, institutional investors may meet with the management of portfolio companies or focus on key issues such as executive remuneration packages to orient managers to pursue long-term strategies.[146] In this respect, fixed-price options that are based on company relative performance or systems that link management pay packages to a peer-group benchmark (so that the executives are rewarded only when they outperform competitors) may be preferred to compensation schemes based on short term volatility of share prices. These issues are certainly valuable to the CO theory considering that pay schemes have been mentioned as a mechanism through which institutional shareholders may induce the management of their portfolio competing companies to align their commercial strategies and thus pursue anticompetitive objectives. In this respect, it has been claimed that in companies with dispersed ownership, the absence of strong major shareholders may leave the floor to opportunistic behaviors by the management in cases where compensation packages depend on industry rather than on single firm objectives. However, as discussed, in many cases pay schemes are designed to induce managers to increase the profitability of the managed firm, rather than to lead to over-competitive profits for the whole industry, as claimed by the CO theory.

The Big Three have repeatedly stressed their commitment to stewardship and long-term value creation to the benefit of market dynamics. BlackRock described its approach in its 2020 Investment Stewardship Annual Report, identifying certain key drivers to improve the value of portfolio companies, which in turn has a positive effect in the industries where these companies are active. Among its 2020 engagement priorities, BlackRock identified various areas: governance, environmental risks and opportunities, corporate strategy, human capital management and compensation packages. Firstly, governance and board composition of each portfolio company is key. The achievement of long-term goals requires

[146] For example, see the 2020 UK Stewardship Code, 4, 11, 17.

boards to be engaged with the management on the implementation of such objectives. To this end, dialogue between shareholders and the management and participation to meetings with the representatives of portfolio companies is essential. Sound practices in relation to environmental factors inherent to a company's business model can be also a signal of operational excellence and management quality. Compensation of executive managers is also valuable: pay policies should be based on performance measures that are closely linked to the company's long-term strategy and goals to make the management of portfolio companies committed to long-term objectives, not to short-term results depending on share prices volatility. BlackRock provides statistics on the engagement activities that it carried out in the last years, including participation to meetings and proxy contests to protect the value of each client's assets. Blackrock reports that, in the period July 2019 to June 2020, it participated in over 16,000 meetings, the majority of which concerned corporate governance issues, with nearly 2,800 companies. BlackRock engagement activities interested the U.S., the European and Asian markets. In many cases, management recommendations were challenged (and not shared as the CO theory implies) if perceived not to be in line with *long-term objectives*.

Tab. [6] - BlackRock breakdown of meetings voted by region

Country	Number of meetings voted	% of meetings voted against management recommendations
U.S. and Canada	4,190	30.5%
Latin America	507	57.6%
United Kingdom	775	31.5%
EMEA	2,434	57.6%
Japan	2,350	35.7%
Asia-Pacific (without Japan)	5,945	33.5%
Totals	16,201	**37%**

Source: BlackRock's 2020 Investment Stewardship Annual Report (p. 19)

BlackRock’s activities also focused on board quality on the underlying premise that board quality is a top engagement priority since high-performing boards can ensure strong management and, in turn, support sustainable financial performance. The main concerns were identified in lack of directors’ independence, insufficient board diversity, and directors’ overcommitment since they did not adequately commit to their functions by sitting in more than two boards. The table below gives an overview of BlackRock’s engagement in connection with boards’ quality in the period 2019-2020.

Table [7] - Top 3 board quality concerns resulting in votes against directors in 2019-20

Board quality concern	Total	Americas	APAC	EMEA
Director independence	1,762	246	1,058	458
Insufficient board diversity	1,569	1,367	24	178
Overcommitted directors (*i.e.*, sitting in more than 2 boards)	728	202	93	433

Source: BlackRock’s 2020 Investment Stewardship Annual Report (p. 28)

In relation to executive compensation, in 2020 BlackRock engaged with hundreds of companies on this topic, being aware that the best executive pay policy rewards and retains competent directors for the long-term sustainable growth of the company. An empirical analysis of its global voting campaigns shows that, in 2019-20, it voted against management sponsored equity plans in 18% of the plan votes, when those plans were perceived not to be functional to that long-term aim.

Table [8] - BlackRock’s pattern of voting

Reporting period	Number of equity plan votes globally	Votes against equity plans	% of votes against
2017/2018	2,351	633	27%
2018/2019	2,455	577	24%
2019/2020	2,431	428	18%

Source: BlackRock's 2020 Investment Stewardship Annual Report (p. 65)

The analysis of BlackRock's engagement in connection with remuneration plans reveals the value that pay programs play for these investors to appropriately incentivize executive managers to focus on long-term financial performance of the managed firm. Company executive pay proposals range from non-binding say on pay proposals especially in the U.S., compensation reports and compensation policy proposals in EMEA and Australia. According to BlackRock, in structuring executive compensation plans, it is key to ensure that pay to executives is linked to the performance of the managed firm which, in turn, ensures returns to shareholders. This questions one of the underlying assumptions of the CO theory, namely the idea that common minority investors, like BlackRock, allegedly incentivize their portfolio companies to adopt industry (instead of single firm) pay performance models, as these models could justify the alignment of commercial strategies of competing portfolio companies.

Moreover, in addition to stewardship commitments towards long-term results, in some jurisdictions also the regulatory framework calls institutional shareholders to vote on board and management remuneration packages to foster long-term value creation of portfolio companies.[147]

[147] See, *inter alia*, the European Commission Recommendation on the regime for the remuneration of directors of listed companies, 30 April 2009 (2009/385/EC). It clarifies that "*award of variable components of remuneration should be subject to predetermined and measurable performance criteria. Performance criteria should promote the long-term sustainability of the company and include non-financial criteria that are relevant to the company's long-term value creation, such as compliance with applicable rules and procedures*" (*sub* § 3 on Structure of the policy on directors' remuneration); and "*shareholders, in particular institutional shareholders, should be encouraged to attend*

Benefits to each portfolio company preserve their market value and, in turn, the competitiveness in the markets where these companies offer their goods and services. Far from causing negative effects on market dynamics, the role of institutional investors in having a certain (non-significant) oversight upon the management may indeed improve corporate

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general meetings where appropriate and make considered use of their votes regarding directors' remuneration" (*sub* § 6 on Shareholders' vote).
Moreover, on June 2013, the European Commission adopted the fourth capital requirements directive, (the "CRD IV") – *i.e.*, the directive on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms (2013/36/EU) – which has introduced an "*express obligation for credit institutions and investment firms to establish and maintain, for categories of staff whose professional activities have a material impact on the risk profile of credit institutions and investment firms, remuneration policies and practices that are consistent with effective risk management*" and "*remuneration policies should be aligned with the risk appetite, values and long-term interests of the credit institution or investment firm. For that purpose, the assessment of the performance-based component of remuneration should be based on long-term performance and take into account the current and future risks associated with that performance*" (Whereas 62-63, see also articles 92-96).
Then, on May 2017, the European Commission also adopted the Directive 828/2017 on the encouragement of long-term shareholder engagement (the "SRD II Directive"), which included measures aimed at improving corporate governance of listed companies for their long-term sustainability and introduced a '*say-on-pay*' requirement, allowing shareholders to vote at the general meeting on directors' remuneration policy, as well as annually on a report that details individual directors' remuneration in the previous financial year. It also clarifies that "*the remuneration policy should contribute to the business strategy, long-term interests and sustainability of the company and should not be linked entirely or mainly to short-term objectives*" (Whereas 29).
See also the UK Corporate Governance Code, adopted by the Financial Reporting Council (July 2018), which clarifies that "*remuneration schemes should promote long-term shareholdings by executive directors that support alignment with long-term shareholder interests*". Remuneration packages should be also set by a committee of independent directors, which should annually report on the engagement that has taken place with shareholders and the impact this has had on remuneration policy and outcomes.
See also the Italian Corporate Governance Code (July 2005), which for listed companies clarifies that "*the remuneration of executive directors and key management personnel shall be defined in such a way as to align their interests with pursuing the priority objective of the creation of value for the shareholders in a medium-long term timeframe. With regard to directors with managerial powers or performing, also* de-facto*, functions related to business management, as well as with regard to key management personnel, a significant part of the remuneration shall be linked to achieving specific performance objectives, possibly including non-economic objectives, identified in advance …"* (Article 6 on Remuneration of directors).

governance by helping to oversee management more effectively than dispersed owners.[148]

In this context, the assumption that institutional investors control and hence interfere with the management of their portfolio companies to jeopardize the dynamics in the relevant markets in which they are active may not fit with the real scope of action of these investors. It is hence clear why the recent focus on the activities of institutional investors risks being "*a red herring that distracts antitrust regulators*" and may disincentivize investors' engagement in stewardship which, as mentioned, not only limits the room for *maneuver* of these investors, but most importantly may benefit consumer welfare.[149]

(iii) *Any (additional) value of minority investors' corporate activism?*

The CO theory implicitly assumes that minority investors, by influencing their portfolio companies and indirectly managing them, are in the position to interfere with their business strategies, thus making use of corporate activism to distort competition in the markets in which these minority-owned entities compete. However, in addition to what has been discussed so far on stewardship obligations with respect to board composition and remuneration packages and on the recent engagement activities carried out by institutional shareholders of the caliber of BlackRock, there are also other important shortcomings that campaigns carried out by minority shareholders may address to improve performance of their participated companies. This form of minority investors' activism – instead of distorting competition in the markets where portfolio companies are active – helps with preserving and increasing the profitability of

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[148] See, Study requested by the ECON Committee, European Parliament, Barriers to Competition through Joint Ownership by Institutional Investors (2020).

[149] LUCIAN BEBCHUK & SCOTT HIRST, Index funds and the future of corporate governance: theory, evidence, and policy, cit..

portfolio companies which, in turn, maintains healthy competition between these companies in the relevant markets where they operate.[150]

Furthermore, there are cases where the same nature of an investment fund orients its investment strategies towards long-term objectives. Index funds replicate the results of the index in which they invest. To this end, they have to invest in all companies that are included in the index and, until portfolio companies remain in the index, they cannot exit the index. In this context, even if those funds were in the position to influence the strategies of their portfolio companies, they would reasonably orient them towards long-term goals.[151] This is so as short-term strategies, that aim at increasing the share value, may damage the participated

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[150] For example, in companies with a fragmented shareholders' base, AMCs may contrast activist strategies pursued by other minorities. In this respect, BlackRock, SSGA and Vanguard have several times criticized the objectives pursued by some hedge funds and have collectively supported cutting-edge social reforms on gender diversity and climate change to the benefit of social welfare. On other occasions each of these three AMCs have indeed pursued different goals and left room to other minorities to emerge.
It has been the case of the recent campaign carried out by the Trian Fund Management to place its founder, Mr. Peltz, on the board of Procter & Gamble. Trian only held 1.5% of the stock, while individual investors (including many P&G's employees), who traditionally supported the management, collectively held 40%. Vanguard, BlackRock and SSGA jointly held more than 17%, while the remaining investors – in favour of Peltz – held about 40%. The "Big Three" could consequently play a decisive role. However, while Vanguard backed the management, BlackRock and SSGA supported Peltz. On the basis of securities filing, in its final vote tabulation Peltz received 972,766,372 votes, less than the 973,264,684 votes received by the company director. The misalignment resulted in Trian losing the battle, since it merely obtained one seat in a board of 13 members.
According to scholars, one reason justifying Trian's defeat should be found in its choice of focusing the election campaign on long-term value strategies for P&G, while the dissident made clear that it was not proposing any measures prejudicial to employees, such as cuts to pension benefits, nor any reductions in R&D, which paid off (see, ANELIYA S. CRAWFORD, BRANDON S. GOLD & DANIEL A. GOLDSTEIN, Lessons Learned from Trian's Campaign at Procter & Gamble, HLS Forum on Corporate Governance, 2018).

[151] In this respect, see GIOVANNI STRAMPELLI, Are Passive Index Funds Active Owners? Corporate Governance Consequences of Passive Investing, San Diego Law Rev., 55, 803, 2018 ("*the ability of passive investors to effectively oversee investee companies is considered limited because they do not have the ability to influence mangers by threatening to withdraw from the company*" and, more importantly, "*because passive investors are, by definition, permanent shareholders, they should naturally be incentivized to monitor managers to improve the company's performance*"), citing IAN APPEL ET AL., Passive Investors, Not Passive Owners, 121 J. FIN. ECON. 111, 113-114 (2016).

companies before the fund can exit the index. By contrast, long term goals that would not simply preserve the value of these companies but more generally incentivize them to compete in the relevant markets, are more in line with the index funds' nature.[152]

The considerations made so far show the risk of a *per se* ban on large institutional investors and AMCs in particular, on the assumption that they are capable of actively influencing the decision-making process of their portfolio companies and then, in turn, of distorting competitive dynamics in the relevant markets where these companies operate. By contrast, a *case-by-case* approach of the scope of action of institutional investors is necessary to assess whether their activism is functional to maintain portfolio companies' incentives to compete or instead to increase the share price of portfolio companies to the sole benefit of common institutional investors, for example via a collusive strategy orchestrated by them. As it is clear, the competitive and welfare-enhancing arguments presented so far in connection with the activities of institutional investors show the complexity and ambivalence of the CO theory under a competition law standpoint and consequently recommend a careful and *ad hoc* approach in evaluating the antitrust criticisms (if any) raised by these financial players.

IV. INSTITUTIONAL INVESTORS AT THE FOREFRONT OF COMPETITION AND REGULATION

In light of what I have discussed above, both in the U.S. and in Europe the relevant regulatory regimes limit the scope of action of

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[152] This reasoning holds even more true in case of private equity acquisitions. Private equity investors acquire shares of financially distressed private companies to improve their performance through management changes, streamlining operations, expansion or eventually delisting them from public stock exchanges. By their nature, these funds focus on the long-term potential of the acquired assets to eventually resell them for a profit. To this end, they may team up with major investors and form coalitions which may lead to the removal of CEOs, the appointment of new board members, amendments to compensation-based schemes, reduction of incentives to engage in value destroying acquisitions, or the divestment of poorly performing assets. In this respect, see NICKOLAY GANTCHEV, MERIH SEVILIR & ANIL SHIVDASANI, Activism and Empire Building, ECGI Finance Working Paper No. 575/2018 (2019).

institutional investors and pose them under the eyes of supervisory agencies. The existence of a complex set of rules that economic agents have to comply with calls into question the boundaries of regulation and competition and the legitimacy of competition law interventions to sanction conducts that are in line with financial regulations, such as the mere acquisitions of non-controlling stakes in the absence of clear evidence of the claimed anticompetitive effects of the possession of minority shareholdings by institutional investors. This holds especially true in cases where the misapplication of antitrust rules risks having a prejudicial impact on the activities of institutional investors which, as I have clarified, can lead to substantial benefits to consumers and to financial markets more generally.

To contextualize the debate on the tensions between antitrust and sectoral regulation, as well as on the misapplication of antitrust rules to institutional investors, it is key to assess whether regulation should replace or rather complement the application of competition law. In this respect, the first and eventually more relevant question is whether competition and sectoral regulation are two incompatible sets of rules. Regulation usually relies on strict legislative provisions, that on the one hand limit the room for *manoeuvre* of market players by setting *ex ante* certain limits to their activities, and on the other hand give them legal certainty by drawing a clear framework within which they may legitimately operate. Antitrust rules are indeed more generally framed, and they are based on the underlying premise that market operators have to compete with each other to benefit final consumers. This is nonetheless possible to the extent that economic agents compete in a free market. As a result, antitrust rules generally steer and limit the activities of market players with the aim of avoiding prejudice to fair competitive dynamics.

Within this framework, at first glance there would be no need for reconciliation of antitrust and regulation as they would be two separate toolkits, both aiming at identifying a perimeter within which economic actors may legitimately operate. Nevertheless, as mentioned, the degree

of pervasiveness of regulation and competition law is different. Whereas both in the U.S. and in Europe antitrust principles are broadly designed so that they can cover an indefinite number of market conducts that may be generally categorized as concerted or unilateral anticompetitive practices; sectoral regulation nonetheless disciplines more specifically market players' behaviors by posing stricter boundaries to their actions. As such, competition law ensures a higher degree of flexibility and its application to regulated sectors should consider the distinctive economic and legal setting of the industry it applies to. When it comes to the financial industry, the antitrust enforcement can provide a residual additional benefit that is to ensure an efficient and effective competitive process where financial players are found to have breached competition law as a result of a *case-by-case* assessment.

It is true that if one were to compare the decisional practice of the U.S. and of the European competition enforcers on the relationship between antitrust and regulation, a different approach emerges. The reasons of this divergence are disparate.[153] In the U.S., under certain circumstances, a conduct that is in line with sectoral regulation may be exempted from the

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[153] As I will clarify, the European antitrust enforcer has usually applied a more interventionist position than the U.S. antitrust enforcer: under EU competition law the fact that a conduct is in line with sectoral regulation does not shield the undertaking from the application of competition law. This rigorous approach may be read in light of the weakness of some national regulatory systems (see MARCO ROSATO, The relationship between Competition and Regulation through two apparently different approaches: US Trinko case and EU Deutsche Telecom, Law and Policy of the Media in a Comparative Perspective, 2017). In addition, as the European General Court clarified in *Telefonica II*, the different approach may be explained by the fact the European competition law has a constitutional value being enshrined in the TFEU, which prevails over national sector-specific regulations, whereas the Sherman Act has the same legal value of other federal statutes (see General Court, case T-398/07, *Spain v Commission* (*Telefónica II*), 2012; see also, ALEXANDRE DE STREEL, The Antitrust Activism of the European Commission in the Telecommunications Sector, in European Competition Law Annual 2012: Competition, Regulation and Public Policies, authored by PHILIP LOWE and MEL MARQUIS, and containing papers presented at the 17th Annual EU Competition Law and Policy Workshop held at the European University Institute, Florence, 13-14 July 2012).

antitrust scrutiny,[154] whereas in Europe competition rules may be applied in parallel and prevail over sectoral regulation regardless of a previous

[154] In the U.S., the relation between competition and regulation has been flexible over the years and mainly reflected the evolving market trends. Starting from a first "interventionist" phase in the 1940s, where the U.S. Supreme Court recognized that in regulated sectors there is no immunity from antitrust law if Congress does not expressly authorize (in particular, see the *United States v. Borden* decision (1939) and then *Georgia v. Pennsylvania Railroad* decision, 1945), then in the 1960s the Supreme Court began worrying that conflicts would emerge if antitrust laws were applied in situations where regulation was pervasive and where a regulatory agency comprehensively controlled a firm's market behaviour.

In its 1963 *Pan American World Airways v. United States* decision, the Supreme Court found that the Civil Aeronautics Board had "broad jurisdiction" over the behaviour of airlines, with the consequence that antitrust law was not entitled to investigate airline cartels and thus introduced an implied antitrust immunity, even though the applicable sectoral legislation (*i.e.*, the Federal Aviation Act) was silent in this respect and it did not expressly refer to an antitrust immunity. However, there was the idea that regulation could be a complete substitute of antitrust to govern market forces. In any event, since that approach could not result in a multiplication of regulation, practically limiting in a considerable way the actions of economic players, the key issue was thus of balancing economic freedom and competitiveness so that when a further regulatory intervention was not needed, market players should freely operate under the supervision of the regulatory authorities.

A decade later, the new and still modern idea of antitrust law as an instrument to fill in regulatory gaps emerged in *United States v. Philadelphia National Bank*, where the Supreme Court held that, although banking regulators had the power to approve bank mergers, antitrust enforcers could intervene to evaluate their competitive effects. This gap-filling idea paved the way for the modern more transactional approach to the relationship between regulation and antitrust, relying on the premise that regulation should not be regarded as a comprehensive and exclusive framework of rules, whereas each challenged conduct although regulated may be opened to a competition law scrutiny. Hence, no *ex ante* competence to the antitrust authority is entrusted, whereas that enforcer may step in if competitive concerns within a regulated sector emerges. This is so since, as the U.S. Court clarified in 1981, "*even when an industry is regulated substantially*", that does not entail "*an intent to repeal the antitrust laws with respect to every action…taken within the industry*", whereas there may be immunity "*when a regulatory agency has been empowered to authorize or require the type of conduct under antitrust challenge*." This approach, coupled with a substantial deregulation of entire economic sectors as of 1980s to prompt the free emergence of economic forces, led to the gradual expansion of antitrust law to fill regulatory gaps. It is not antitrust purpose to "fix" regulation, but it may step in to solve competition law concerns that regulation may not catch.

The relation between sectoral regulation and antitrust law continued to be discussed by legal practitioners and in 2004 the Supreme Court made a step forward in *Trinko*, where it announced a principle that should still guide in the application of antitrust to regulated sectors (Verizon Communications v. Law Offices of Curtis V Trinko, LLP, 540 U.S. 398, 2004). More precisely, the court called into question the supremacy of competition law

authorization by a national regulator,[155] without raising a *ne bis in idem* concern.[156] On the point, the European Commission and Courts have repeatedly clarified that competition law and regulation pursue *different objectives*, meaning that an antitrust decision simply complements a regulatory decision and, as such, the *ne bis in idem* principle is not jeopardised.[157] In practice, when a certain market conduct is authorized through legislation, the antitrust bans should not prevail, where in Europe it could.

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over regulation by holding that when the regulatory framework is well-structured to even safeguard competition, the antitrust function can be effectively performed by the regulatory system. In that judgment, the scope of action of antitrust law was certainly reduced because of the high enforcement costs due to the parallel application of competition and regulatory rules. Therefore, in highly regulated sectors, regulatory agencies may be better placed to intervene. This approach holds certainly valuable in cases where sectoral regulators already sanctioned the conduct then subject to the scrutiny of the antitrust agency.

[155] In Europe a tendency towards the supremacy of competition law over regulation has generally prevailed and competition law applies to regulated industries unless there is a specific exemption in the law. Without engaging in an historical analysis of that debate, the *Deutsche Telekom* case is certainly instructive in exemplifying the intersections between competition and regulation (Commission Decision, case 37.451, Deutsche Telekom, 21 May 2003). In that case, the Commission imposed a fine of € 12.6 million against the German incumbent Deutsche Telekom for a margin squeeze between its wholesale charge for full unbundling of the local loop and its retail prices for access lines, although the company's wholesale and retail charges had been subject to the control and approval of the German regulator. Therefore, competition law applies *in addition* to regulation unless regulation completely removes the autonomy of the undertaking concerned. As the CJEU clarified in Deutsche Telekom "*competition rules laid down by the* [TFEU] *supplement in that regard, by an ex post review, the legislative framework adopted by the Union legislature for ex ante regulation of the telecommunications markets*" (Case C-280/08, P Deutsche Telekom AG v Commission, 2010). It is also true that, as the General Court clarified in Deutsche Telekom, when a competition authority investigates whether a competition law violation has been committed, in assessing the conduct of the firm it should take into account the regulatory framework in which such conduct has been implemented (General Court, case T-271/03 Deutsche Telekom AG v Commission, 2008).

[156] For the principle of *ne bis in idem* to be violated, three conditions should be met, namely (i) identity of facts, (ii) unity of the offender and (iii) unity of the legal interest protected (CJEU, joined cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, Aalborg Portland A/S and Others v Commission, 2004).

[157] General Court, case T-271/03 Deutsche Telekom AG v Commission, 2008; Commission Decision, case COMP/39.325, Telekomunikacja Polska, 22 June 2011.

As regards the activities of institutional investors active in highly regulated sectors, the application of antitrust law in the absence of clear evidence of competitive concerns is certainly critical to the extent that those activities are in line with sectoral regulation – *in primis* with the principle of investment diversification – with the consequence that the application of antitrust rules should be carefully evaluated and in that respect "the more lenient" U.S. approach should be favoured. Likewise, for all the reasons mentioned above on the criticism implied by the CO theory to investment funds, the stringent approach followed by the European enforcer on the relation between regulation and antitrust should not result in the misapplication of competition rules. What matters is not whether institutional investors, being already subject to regulatory obligations, should be *ex ante* shielded from the application of competition rules, but rather whether anticompetitive effects due to the presence of common shareholders within companies active in the same relevant market can arise and are robustly demonstrated by the antitrust enforcer. If those effects are purely theoretical and could be potentially ascribed to other factors (see, in this respect, Chapter II), antitrust rules should not be applied to merely condemn the (minimal) presence of institutional investors within the share capital of competing companies. Therefore, the issue is not one of lack of enforceability of antitrust rules due to the presence of an overlapping sectoral regulation, that controls and orients the activities of institutional investors, but rather of the legitimacy of institutional investors' actions from an antitrust standpoint in the absence of a competition harm thereof. Under this line of reasoning, regulation does not prevent the application of competition law to institutional investors, but rather reduces the risks that investors effectively influence the management of their (competing) portfolio companies and then distort their market strategies, as the CO theory indeed claims. This is so since, as I have made clear, regulation limits the activities of institutional investors to guarantee the stability of the financial system and protect the interests of stakeholders, including consumers in their *status* of savers. Precisely for these reasons,

the antitrust enforcement should remain anchored to a finding of likely anticompetitive effects, which for the reasons set out above could not be invariably predicted in connection with the activities of institutional investors but should be proved thorough case-by-case assessments.

CHAPTER IV

THE EUROPEAN APPROACH TO COMMON OWNERSHIP

I. INTRODUCTION

As widely detailed in the previous chapters, the theory of harm underpinning CO implies that institutional investors, in their quality of minority shareholders in competing undertakings, are in the position to influence the management or anyhow interfere with the commercial strategies of their portfolio companies. As a consequence, institutional investors are claimed to distort competitive dynamics in the markets where their portfolio companies offer goods and services. In such a context, so far I have tried to identify some gaps in that theory of harm by assessing the industry dynamics where the CO theory has been investigated (chapter II). I then evaluated how regulation and stewardship obligations may minimize the CO concerns by bridling the scope of action of institutional investors (chapter III). As also noted, the recent decisional practice of the antitrust authorities confirms that the CO debate is still in its infancy and CO does not represent an antitrust enforcement priority (chapter I, § II.1(vi); and chapter II).

In this chapter, I will assess the CO theory under a sole European angle to see whether common shareholders are likely to raise antitrust concerns in Europe and recommend a prompt antitrust intervention. Although the European debate on the CO theory is still in its early stages, policy initiatives and recent antitrust merger cases scrutinized by the European competition enforcer have somehow involved common shareholders. In spite of these latest developments, similarly to what I have observed in connection with the U.S. approach, CO is not perceived in Europe as an antitrust enforcement priority and in the few cases where it may have raised competitive concerns, the existing competition law toolbox has nonetheless been sufficient to tackle any risk of distortion of market dynamics. As I will point out in the following paragraphs, these findings

recommend a cautious approach to CO, particularly in the context of enforcing antitrust rules with respect to conducts of undertakings active in the European Union, subject to a higher instability of ownership structures and to a more prominent role of States as non-common investors. In this respect, a very recent study – by looking at the ownership patterns in the largest 25 European banks in the period 2003-2015 – empirically proved that the alleged economic strength of common owners of the caliber of the Big Three is unstable over time and subject to unexpected market shocks.[158] This finding in turn implies not only that one of the premises upon which the CO theory relies – *i.e.*, the particularly economic strength of institutional common investors – may not hold necessarily true, but also that caution is recommended before restructuring the European antitrust toolbox to apply it to the activities of institutional investors.

II. COMMON AND MINORITY OWNERSHIP UNDER THE EUROPEAN LENS

II.1 CO in the European agro-chemical industry

(i) *The EU Commission in Dow/Du Pont*

A first assessment of the effects of CO may be found in the European Commission's conditional clearance decision of the merger between Dow and Du Pont. More precisely, on 22 June 2016, the European Commission received a notification of a proposed concentration by which The Dow Chemical Company ("Dow") and E.I. du Pont de Nemours and Company ("DuPont") entered into a full merger.[159] Following an in-depth phase II

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158 See ALBERT BANAL-ESTAÑOL, NURIA BOOT & JO SELDESLACHTS, Common ownership patterns in the European banking sector, cited above, footnote 110. In particular, the study looked at the 2007-2009 financial crisis, that had a serious impact on the ownership structures of the biggest EU banks by capitalization, which experienced a reduction in the number of common institutional investors and an increase of traditional non-common shareholders, mainly governments.

159 European Commission, case M.7932, Dow/DuPont, 27 March 2017. The transaction was structured as a merger between Dow and DuPont. At a later stage, Dow and DuPont

review, the European Commission had concerns that the merger would have reduced competition on price and choice in a number of markets for pesticides, and it would have reduced innovation in connection with the existing products and with new active ingredients. The crop protection industry was concentrated, with only five main players and with high barriers to entry due to recent industry consolidation, which led to an increase in regulatory costs. Moreover, although innovation was key, during the last years the sector had experienced a reduction in R&D's expenditure and a decline in the number of filed patents. In that context, by consolidating the activities of two out of a limited number of significant innovators, the notified merger risked reducing product innovation and impacting on competitive dynamics.[160]

Interestingly, in its assessment the European Commission investigated whether the existence of common shareholders among the merging parties and the few remaining competitors would have interfered with market dynamics. In annex 5 of the clearance decision, the Commission looked at the economic literature on CO and focused on its potential effects in the agrochemical industry, by stressing the risks that the presence of "active" common shareholders in the share capital of the few agrochemical companies may have had on innovation[161] The

agreed on the creation from their combined activities of three separate publicly traded companies focusing on agriculture, material science and specialty products.

[160] Innovation in that sector is key because firms compete against each other in the process of introducing innovative products, rather than just competing in the market for current products. This is so since a firm captures significant sales from rivals when innovating (*i.e.*, the diversion effect). By applying the merger control unilateral effects theory of harm, the diversion effect is eliminated when an innovator is acquired by a close competitor, so that the merger between the two main competitors may reduce the level of industry innovation. Reduced incentives to innovate may take various forms, such as discontinuation of existing pipeline products or more generally reduction in future R&D efforts since the merger annuls the profits that the innovator would have obtained as a result of diversion of sales from the non-innovating firm.

[161] With respect to active engagement activities of common investors, the European Commission referred to the study carried out by Fichtner, Heemskerk and Garcia-Bernardo in 2016, who investigated to what extent BlackRock, Vanguard and SSGA pursue active corporate governance strategy upon their minority participated companies. The study

Commission found that the agrochemical industry was characterized by a significant level of common and cross ownership. Each of BASF, Bayer, Dow, DuPont, Monsanto and Syngenta had a concentrated shareholder structure and they had a significant number of common shareholders. In particular, "*on the basis of the reported equity holders, Dow, DuPont and Monsanto seem*[ed] *to be the most "consanguine" agrochemical firms, as they share*[d] *a significant number of equity holders with, overall, large positions on all of these three firms*". As a result, the European Commission investigated whether the merger may have affected innovation since the decision taken by one company to innovate may have had an impact on the expected future profits of its consanguine competitors. In this context, according to the preliminary assessment of the Commission, there could be the risk that the merging party may have had lower incentives to engage in innovation, but higher to increase prices.

To support the argument that the high presence of common shareholders in the industry where the merging parties and third parties competed could have reduced incentives to innovate, the European enforcer referred to the proxy fight between Trian and DuPont, in which Blackrock, Vanguard and SSGA played a pivotal role. More precisely, Trian notified DuPont of its decision to invest in Du Pont in June 2013 and proposed to split up the company, but Du Pont resisted. As a result, in 2015 Trian formally initiated the proxy contest to allow DuPont to achieve "*best in class revenue growth*", since its performance in recent years had been

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made use of the data provided by the proxy voting advisory firm Institutional Shareholder Services (ISS). On this basis, the study claims that BlackRock, Vanguard and SSGA tend to vote similarly in many instances, and they tend to ally with the management against the majority shareholders' proposals, save for the election of directors. However, as I have widely clarified so far (*sub* chapter III), the possibility for institutional investors to succeed in actively managing their portfolio companies is influenced by innumerable factors and, should that activism be successful, it does not necessarily have negative effects on market dynamics. Therefore, rather than confirming that common investment funds support management of portfolio companies to distort competition in the markets where they compete, the degree of institutional shareholders' engagement should be subject to case-by-case assessments and that engagement may also benefit portfolio companies and positively impact on market dynamics.

below that of competitors, in particular Monsanto. Trian lost the proxy since Du Pont won the support of Vanguard, SSGA and BlackRock. Trian would have indeed prevailed had one of these AMCs voted differently. According to the European Commission, these investors did not back Trian because they held shares in Du Pont's competitors, including Monsanto, and Trian's strategy would have prejudiced the value of their overall portfolio.

In the following paragraphs I will explain why that proxy fight does not support the assumption – and, in any event, it is insufficient to prove – that CO may have reduced the incentives of agrochemical undertakings to innovate. First of all, although original, the CO theory as applied to the Du Pont proxy fight raises concerns because the AMCs' decision to oppose Trian's proposals may be due to an alternative and plausible justification. The Big Three's conduct did not necessarily rely on the fact that they were interested in the value of their joint share portfolio (including both Du Pont and its competitor Monsanto), which may have been prejudiced by Trian's strategy. By contrast, a more in-depth analysis of Trian's idea of splitting up Du Pont and of selling important assets reveals why that strategy may have not been acceptable for the Big Three as it would have destroyed the long-term value of Du Pont.[162]

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[162] At the time, Du Pont's CEO was Ellen Kullman, who had spent its entire career at Du Pont, and she focused on its long-term profitability. The company had already implemented a strategy aimed at improving its financial outlook and Kullman was also shifting development and distribution of its agricultural products to markets closest to its largest customers, such as Argentina, Brazil, China and India. Du Pont also had in the pipeline future plans to expand the activities of the 214-year-old company. In that context, Trian not only proposed to break up the company, but also to sell a research lab located in Wilmington, where Kullman had repositioned Du Pont to make the company to grow, to sell the hotel Du Pont and the head quarter, that were particularly valuable for high-quality employees living in the downtown center of Wilmington.
This background gives a clearer picture as to Kullman's concerns against Trian's campaign. Kullman was indeed open to spin-off a specialty chemical unit and add two board members backed by Trian. In this turbulent scenario, in 2016 Du Pont appointed a new CEO and agreed to merge with Dow and then to split up the company into three separate entities as the investors had asked for (see HARBIR SINGH & MICHAEL USEEM, The Strategic Leader's Roadmap: 6 Steps for Integrating Leadership and Strategy, Wharton School Press, 98, 2016).

Furthermore, as confirmed by the academic debate,[163] the European Commission mainly relied on public statements (and not on factual evidence) to claim that common investors may influence the commercial strategies of the undertakings of which they hold minority shareholding. In my opinion, these statements are by themselves not sufficient to corroborate the existence of the claimed anticompetitive effects of CO. There are studies which indeed oppose such findings and recommend a more cautious approach in the absence of clear evidence of the antitrust risks implied by CO.[164]

In addition, it should be also considered that although antitrust authorities may make use of extensive investigative powers in merger control proceedings, in *Dow/Du Pont* the European Commission did not find any factual evidence of the ability of common shareholders to influence the strategies of competing undertakings included in their investment portfolios, nor of the anticompetitive effects caused by CO in the agrochemical industry. This lack of empirical evidence is even more critical if we consider that the European Commission looked to a record-breaking number of documents. In addition, in view of its extensive investigative

[163] THOMAS WILSON, Common ownership – where do we stand?, Kluwer Competition Law (2019).

[164] For example, as I have clarified in chapter III, doubts arise in connection with the idea that the biggest institutional investors influence the management of the competing undertakings of which they hold shares by voting in favour of executive compensation packages based on industry, as opposed to single-firm performance. Recent experience shows indeed that performance packages are becoming key in promoting long-term strategies and rewarding executives for achievement of success of the single-managed firm. In many cases, managers obtain stock options based on relative performance of the managed firm and the price of the option is linked to a market or peer-group index, with the consequence that they are rewarded only when outperform competing companies (see GUIDO FERRARINI & MARIA CRISTINA UNGUREANU, Executive Remuneration, The Oxford Handbook of Corporate Law and Governance, edited by Jeffrey N. Gordon and Wolf-Georg Ringe, 2018).
In addition, not all categories of institutional investors can immediately sell their shares in reaction to managers' behaviors that they do not agree with. The index funds that have catalyzed the major slide of the CO debate cannot. They are thus deprived of an instrument functional to deter managers from implementing conducts that are prejudicial to the value of their whole portfolio, which may include competing undertakings.

powers, instead of relying on academic literature the European Commission may have further investigated the extent to which common shareholders of competing agrochemical undertakings were effectively in the position to align their commercial strategies.

Above all, in spite of the presence of significant links among these competitors, the European Commission finally adopted a conditional clearance decision and authorized the notified transaction under commitments to divest the Du Pont's pesticide business to a third-party suitable purchaser. Hence, the European antitrust enforcer made use of its traditional merger control instruments to tackle the potential anticompetitive effects that the notified transaction may have caused in the relevant markets (*e.g.*, herbicides, insecticides, fungicides). It is thus clear that a causal link between CO and the risk of anticompetitive effects in a post-merger scenario was not empirically proved. In any event, the existing antitrust toolbox was deemed to be sufficient to deal with any potential risks to competition that the notified merger may have caused. No reference to harsh measures, such as breaking up the industry or requiring common shareholders not to possess more than a minimum percentage of shares in companies active within the agrochemical industry was imposed.

This decision is a simple illustration of the flexibility of merger control rules and of competition law principles more generally to adapt to new market dynamics. CO was not *per se* problematic under a competition law standpoint and the antitrust authority only took it into account as an "*element of context*" in the assessment of the potential competition law concerns that the notified transaction raised.[165] In this context, the idea that the biggest global investors, when holding minority shareholding in several potentially competing undertakings have ability and incentives to align their strategies, or anyhow induce each of them not to compete, may effectively prove to be theoretical.[166]

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[165] Dow/DuPont, §§ 4-81 of Annex 5.

[166] DANIEL RUBINFELD & EDWARD B. ROCK, Antitrust for Institutional Investors, 82 Antitrust L.J. 221 (2018). Although calling the attention of institutional investors on the

Presumption of anticompetitive effects because of the existence of CO links among entities active within the same industry (not necessarily the same relevant market) is unwarranted. It is well-known that in competition law assessments presumptions may ease the decision-making process and help with provisionally condemning a conduct if experience shows that it is anticompetitive in most cases.[167] However, due to the criminal nature of the antitrust infringements,[168] presumptions should not be broadly applied.[169] In my opinion CO is clearly not the right candidate for such a short-cut analysis. Moreover, in *Dow/DuPont*, the absence of a probative support in connection with the anticompetitive effects of CO was even more relevant if we consider that the transaction was carried out in a sector in which innovation is particularly relevant, and a more in-depth analysis would have been advisable before raising a red flag on CO.

To conclude, the analysis carried out so far supports the value of *case-by-case* approaches, as opposed to legal presumptions of anti-competitiveness of corporate governance structures, such as the presence of common shareholders in potentially competing undertakings. This holds even more true in sectors where R&D and innovation are crucial, and which could be prejudiced by incorrect competition law assessments.

(ii) *The EU Commission in Bayer/Monsanto*

The agrochemical industry went again under the attention of the European antitrust enforcer in *Bayer/Monsanto*. On 30 June 2017, the European Commission received a notification of a proposed concentration

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potential competitive concerns raised by CO, Rubinfeld and Rock question some of the assumptions and findings underlying the studies carried out so far on CO, including the idea that the largest common shareholders necessarily share convergent incentives (p. 11-13).

[167] CYRIL RITTER, Presumptions in EU Competition Law, working paper (2017); see also DAVID BAILEY, Presumptions in EU Competition Law, E.C.L.R. 362, 363 (2010).

[168] ECtHR, A. Menarini Diagnostics srl v. Italy, 2nd section, 27 September 2011.

[169] CJEU, case C-521/09 P Elf Aquitaine, 29 September 2011, § 62. See also case C-501/11 P Schindler, 18 July 2013, § 107.

by which Bayer Aktiengesellschaft ("Bayer") intended to acquire sole control of the whole of Monsanto Company ("Monsanto"). The transaction would have led to the creation of the global number one integrated player for seeds and pesticides, and the number two player for fungicides. In terms of geographic presence, the merged entity would have been the leader across the U.S., Latin America and the EEA.[170] The European Commission expressed some concerns since the notified merger would have reduced competition within an industry that was already concentrated. The seeds and agrochemical industries had moved towards an oligopoly in the course of the last twenty to thirty years, with only a handful of players active on a global scale. The notified merger would have further decreased the number of players active in both seeds and crop protection from four to three (Bayer/Monsanto, Dow/DuPont, ChemChina/Syngenta). That scenario was complicated by the presence of extensive links between industry players, in the form of R&D cooperation agreements, cross-licenses and common shareholders.

In this context, the European Commission collected data on corporate governance structures of BASF, Bayer, Dow/DuPont and Monsanto by looking at their shareholding structures as of 30 September 2017. It found that BlackRock, Vanguard, Capital Street and SSGA were common investors of these agrochemical companies, but with minimal share capital percentages.

Table [9] – Reported equity holders with shares in BASF, Bayer, DowDuPont and Monsanto as of September 2017

AMCs	BASF	Bayer	DowDuPont	Monsanto
BlackRock	6.04% (1)	6.89% (1)	6.64% (2)	6.40% (2)
Vanguard	2.45% (4)	2.46% (3)	7.28% (1)	7.10% (1)
Capital Street	0.91% (10)	2.90% (2)	6.49% (3)	2.26% (7)

[170] European Commission, case M.8084 – Bayer/Monsanto, 21 March 2018.

SSGA	1.09% (9)	1.21% (7)	4.28% (4)	4.55% (3)

Source: European Commission's analysis of S&P Global Market Intelligence (Capital IQ) data

In addition to CO by institutional investors, there were also cross-shareholding links among competitors and, as in Dow/DuPont, the antitrust enforcer acknowledged that "*DowDuPont and Monsanto seem*[ed] *to be the most 'consanguine' agrochemical firms, as they share*[d] *a significant number of equity holders with, overall, large positions in both firms*".[171] More precisely, DowDuPont owned 62% of Monsanto (*plus*, 24% of BASF and 32% of Bayer), whereas Monsanto held in turn 61% of DowDuPont (*plus*, 29% of BASF and 34% of Bayer). Bayer and Monsanto had 236 common equity holders representing a significant equity share of DowDuPont as well (respectively, 29% and 43%). All BASF, Bayer, DowDuPont and Monsanto shared 106 common shareholders, collectively accounting for an equity share in each of these companies of 23.09%, 28.04%, 40.83% and 35.25% respectively.

As common in merger control assessments, to evaluate whether common equity holders and institutional investors had any ability to influence the decisions adopted by competitors, the European Commission looked at the attendance levels and at voting patterns at shareholders' meetings of common investors. As a result of this in-depth assessment, the antitrust enforcer excluded any competitive risk, holding that "*common shareholders are often funds, with long investment horizons and infrequent selling, and tend not to buy and sale shares for the purpose of influencing managerial decisions*".[172]

What precedes is particularly valuable as it supports the findings of my analysis. Currently, there seems to be no clear evidence neither of the ability and incentive of common investors to influence the commercial strategies of the undertakings of which they hold minority shareholding nor,

171 *Ibid.*, § 217.

172 *Ibid.*, § 214.

in turn, of the prejudice to competitive dynamics that they could cause. As repeatedly highlighted, that theory relies on the assumption that the largest global investors make use of their minimum shareholding in a multitude of competing undertakings to influence the managerial decisions of each of them and then distort fair competition among these minority-participated companies. Again, as in Dow/DuPont, in Bayer/Monsanto the European Commission did not find any evidence in that respect. This is even more valuable if one considers the in-depth analysis that the competition law authority carried out in Bayer/Monsanto, where it assessed 2.7 million internal documents.

According to the European Commission, CO could be only taken into account "*as an element of context in the appreciation of any significant impediment to effective competition*" raised by the notified transaction. This acknowledgment is clearly far from the antitrust concerns implied by the CO theory and, in particular, from the idea of the existence of a direct causal link between CO and the decision-making process of horizontal minority-owned companies. The presence of common shareholders may be simply valued, together with a number of other elements (*e.g.*, oligopolistic nature of the industry, additional corporate governance links among competitors such as IDs), in the assessment of the likely effects on competition of a merger. This finding is perfectly consistent with the argument that CO has not been found to be *per se* problematic from a competition law perspective, and it should be indeed subject to a case-by-case analysis in view of the peculiarities of each industry.

Moreover, in assessing the likely effects on competition that the Bayer/Monsanto transaction would have produced, the European Commission focused on price and innovation in various relevant markets. As a result of its assessment, it adopted a conditional clearance decision by imposing binding commitments upon the parties, which also included a divestment package aimed at selling a part of Bayer's business to a third-party suitable buyer. Bayer proposed BASF as the purchaser of the remedy package. In evaluating whether BASF could acquire the divested assets

although being itself linked to other competitors of the merging parties, interestingly the Commission "*consider*[ed] *that the presence of common shareholders does not, as such, disqualify BASF as a suitable purchaser*". That finding was grounded on several reasons. First, as we have mentioned, "*unlike other indicators of concentration such as the market shares or the Herfindahl-Hirschman Index ("HHI"), the presence of common shareholders should* [only] *be taken as an element of context in the appreciation of possible significant impediments to effective competition*". Second, "*the debate regarding common shareholdings is relatively recent and not yet entirely settled*", with the consequence that an antitrust theory of harm should not be grounded upon the presence of common investors in the share capital of competitors. Third, the aim of the remedy was to replicate the role of Bayer in the market absent the transaction and, irrespective of the sale to BASF, it would have in any event been "*a player characterised by certain shareholders that are common with some of its competitors*". In any event, the final commitments were appropriate to ensure that "*a sufficient number of independent competitors was preserved*" in each of the markets where competitive concerns had been identified.[173]

Therefore, as a result of an in-depth merger control review, CO was not found to pose concrete antitrust risks. It was only a contextual element, which in that specific situation was not likely to seriously prejudice competitive dynamics in the relevant markets where the merged entity would have been active.

As the above makes clear, the analysis of the specific counterfactual scenario was essential. In spite of the existence of shareholding links between BASF and some competitors, the sale of part of Bayer's business to BASF was not critical under a competition law standpoint since, in a counterfactual scenario in which the dismissed package had not been sold to BASF but to another potential buyer, the main competitors in the crop

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[173] *Ibid.*, § 3303-3306.

protection industry would have still been connected by several links, reasonably including the new buyer. This is so since the whole sector was particularly concentrated, with only a few competing companies, almost all of them connected by cross-shareholding and CO. Therefore, in a scenario where market-concentration and not CO may raise competitive concerns, the traditional competition law principles on the assessment of oligopolistic markets apply and the emphasis on the *new* potential risks posed by global institutional investment companies appears rather excessive.

Furthermore, the fact that the European antitrust enforcer has expressly acknowledged that the debate on CO is recent and still not settled is valuable, as it simply confirms that a robust antitrust theory of harm may not be based on theoretical assumptions, or on market mega-trends – in this case, to be identified in the existence of inter-linked corporate governance structures, which are claimed to be under control of global institutional investors. As I have already highlighted, because of the harsh penalties that a finding of an antitrust infringement may cause and of the particularly prejudicial effects to industry dynamics that may derive from the implementation of the solutions proposed so far to deal with CO (*e.g.*, restructuring of entire industrial sectors), an *ad hoc* and market-based assessment of CO and of its potential anticompetitive effects remains key.

II.2 Common shareholders and the case of *hub & spokes* agreements

Besides the application of merger control rules, if there is evidence that minority shareholding is an instrument to coordinate the commercial conducts of competitors, in Europe Article 101 TFEU may be applied. In the previous chapters I have explained in detail the complexities that arise in connection with a finding of an anticompetitive collusion caused by the presence of common investors in the share capital of undertakings active within the same industry. However, a new angle may be explored to eventually apply Article 101 TFEU to CO. In particular, by holding shares in potentially competing undertakings, institutional investors may be a conduit for the exchange of confidential information among competitors.

However, understanding when information exchanges among the institutional shareholders and the management of their minority-participated competitors becomes illegal under an antitrust standpoint is not an easy task. In this context, the so-called hub & spoke antitrust theory of harm may be explored ("H&S").

That theory has been framed to tackle the exchange of sensitive information among competing undertakings (*i.e.*, the spokes) through a common agent to enter into an anticompetitive agreement (*i.e.*, the hub, which in a CO scenario coincides with the common shareholder).[174] Because of its trilateral structure, that theory may be valuable for the CO debate. In this respect, for a finding of a concerted action in breach of competition rules, bilateral communications between the common shareholder and the management of competing companies are insufficient unless these vertical relations favor a horizontal stable collusion among the minority-owned competitors (*i.e.*, the competing undertakings included in institutional investors' portfolios). In this respect, achieving mutual understanding among the spokes that they will abide by the collusive equilibrium involves more than sharing the intentions of other spokes. The horizontal hub (*i.e.*,

[174] PATRICK ACTIS PERINETTO, Hub-and-spoke arrangements: future challenges within Article 101 TFEU assessment, 15(2-3) Eur. Comp. J., 281-317 (2019); NICOLAS SAHUGUET & ALEXIS WALCKIERS, Hub-and-Spoke Conspiracies: the Vertical Expression of a Horizontal Desire?, 5(10) J. Eur. Competition L. & Prac. 711, 713 (2014); ELIZABETH PREWITT & GRETA FAILS, Indirect information exchanges to hub-and-spoke cartels: enforcement and litigation trends in the United States and Europe, 1(2) Comp. Law & Policy debate, 63-72 (2015); OECD, policy roundtable on Hub-and-spoke arrangements in competition, 4 December 2019.
Although the H&S theory has recently occupied the European competition law debate, reference may be also found in the U.S. antitrust doctrine. In particular, as clarified by the U.S. courts, in a "hub-and-spoke" conspiracy an entity at one level of the market structure, the "hub," coordinates an agreement among competitors at a different level, the "spokes." These arrangements consist of *both* vertical agreements between the hub and each spoke and an horizontal agreement among the spokes "*to adhere to the* [hub's] *terms*" often because the spokes "*would not have gone along with* [the vertical agreements] *except on the understanding that the other* [spokes] *were agreeing to the same thing*" (United States v. Apple, Inc., 791 F.3d 290, 314, 2nd Cir., 2015). See also PHILLIP E. AREEDA & HERBERT HOVENKAMP, Antitrust Law, § 1402c, 3rd ed., 2010; JOSEPH E. HARRINGTON & JR. PATRICK T. HARKER, How Do Hub-and-Spoke Cartels Operate? Lessons from Nine Case Studies, working paper, The Wharton School, University of Pennsylvania (2018).

the institutional common investor) not only shares confidential information of strategic relevance among competitors to orient their market strategies but takes all spokes on board by reassuring them that they would all comply. Therefore, monitoring compliance to the collusive equilibrium is essential for its stability.

As it is clear, the H&S doctrine is valuable to make common shareholders liable under antitrust law in their *status* of third parties that do not directly compete in the relevant markets where their portfolio companies are active. This theory is also valuable since it does not imply the application of a more lenient standard of proof to enforce Article 101 TFEU. To this end, factual evidence of the existence of a collusive equilibrium among portfolio companies coordinated by their common shareholders should still be found. This argument helps with dismissing another concern that has been raised in connection with the CO theory, namely the idea that the possibility for institutional investors to have contacts with the management of their portfolio companies is functional to the implementation of a collusive equilibrium among these undertakings.

In reality, the exercise of a legally empowered right that aims at safeguarding the *status* of minority financial investors cannot be assumed to be functional to distort market dynamics, nor it says anything on the incentives of the management of the minority-owned companies to rely on the information that they may eventually receive by common shareholders when structuring commercial strategies. As I have clarified above, even if one assumes the existence of communication flows among the common shareholder and the management of its portfolio companies, this is not sufficient to find collusion. That exchange may be relevant under competition law if the common shareholder effectively reassures at least two portfolio companies that they will all comply by the defined equilibrium, and then an alignment of the strategies of these companies is observed in the market. In such a scenario, it can be presumed that competing undertakings have taken into account the confidential information shared by the common investor to design their commercial strategies, and hence

departing from the strategy that they would have unilaterally implemented. In this case, institutional investors effectively operate as a vehicle for the exchange of commercial sensitive information to ease the conclusion of anticompetitive agreements among competitors and the traditional competition law ban set forth by Article 101 TFEU may be applied.[175]

It is thus clear that the H&S theory widens the scope of the antitrust prohibition of concerted conducts by envisaging a trilateral relation among the common shareholder at the top and portfolio companies at the bottom, with the aim of making the non-competing undertaking (*i.e.*, the common investor) liable for the conclusion of an anti-competitive agreement between direct competitors (*i.e.*, the portfolio companies). However, the H&S theory does not relieve competition authorities of their burden of proving that an infringement of Article 101 TFEU has been effectively committed and that it is imputable to common investors.

In this context, to deal with the antitrust criticisms that the CO theory is claimed to cause, there is no need for restructuring markets whereas the existing competition law toolbox is sufficient to that purpose. This holds even more true if we consider that, because of its complexities, CO could not be assumed as an instrument to enter into an hard-core restriction of competition (*i.e.*, a traditional price fixing cartel), and it may raise concerns under the antitrust standpoint if a *plus* factor is found.[176] That *plus* factor may be represented by factual evidence (as opposed to theoretical assumptions) of the involvement of institutional investors in orchestrating the commercial strategies of the undertakings in which they have minority

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[175] EDWARD B. ROCK & DANIEL L. RUBINFELD, Antitrust for Institutional Investors, 82 ANTITRUST L. J.,1, 222 (2018). According to these authors, illegal H&S conspiracy would result from portfolio manager's "*acting as a 'cartel ringmaster,' who organized a cartel among the competing* [portfolio companies] *in order to restrict output and increase prices*".

[176] THOMAS A. LAMBERT, Mere Common Ownership and the Antitrust Laws, University of Missouri, Legal Studies Research Paper Series, research paper No. 2020-09, 5.
See also the U.S. courts, according to which "*the 'hub-and-spoke' metaphor is somewhat inaccurate – the plaintiff must also prove the existence of a 'rim' to the wheel in the form of an agreement among the horizontal competitors*" (see *Dickson v. Microsoft Corp.*, 309 F.3d 193, 203-04, 4th Cir. 2002).

shareholding and, in turn, of effective distortion of market dynamics in the industries where these undertakings compete. As highlighted in the previous chapters of this dissertation, this finding applies overseas as well and it has been authoritatively supported by an eminent American judge, who recently reminded that "*common ownership does not require antitrust enforcers to apply an entirely new analytic framework to the purported problem; traditional antitrust principles suffice and remain applicable. The evidence cited by proponents suggests their underlying concern is with conventional types of anticompetitive conduct, namely hub-and-spoke conspiracies, the exchange of competitively sensitive information, and conscious parallelism*".[177]

II.3 Policy proposals and CO: any room for a reform?

II.3.1 The European Commission's study on CO

As briefly mentioned in chapter I, the European Commission's science and knowledge service, in collaboration with the joint research center, recently carried out a study on common minority shareholding by institutional investors in companies active in the same industry. In the final report published on September 2020, the Commission acknowledged that the debate on CO by pension funds, AMCs and other institutional investors – and its potential antitrust effects – is currently on the agenda of all major think tanks and institutions worldwide, but it is still in its infancy and little evidence is available to date in connection with its claimed anticompetitive effects (the "JRC Report").[178] Common shareholders were found to occupy the 12.8% of all shareholders' base of the companies included in the dataset (14.9% in 2007), whereas almost 87.2% of these shareholders had shares in *one* company (85.7% in 2007). This finding is not irrelevant since

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[177] DOUGLAS H. GINSBURG & KEITH KLOVERS, Common sense about common ownership, Concurrences review No. 2/2018, 6.

[178] ROSATI NICOLETTA, BOMPREZZI PIETRO, FERRARESI MASSIMILIANO NARDO MICHELA & FRIGO ANNALISA, Joint Research Center Technical Report, Common Shareholding in Europe, EUR 30312 EN, Publications Office of the European Union, Luxembourg (2020).

the CO theory assumes that the biggest institutional investors are in the position to coordinate the commercial strategies of their portfolio companies by holding shares in a certain number of competitors *per* industry, regardless of their minimal presence in each undertaking included in their investment portfolios. If the main institutional shareholders have indeed diversified portfolios and, in many industries, they are not present in the share capital of various competitors, one of the premises upon which the CO relies is clearly put at stake.

The JRC Report then focused only on five industries (each of them articulated in various relevant markets), which were relatively concentrated with a limited number of firms having large market shares (*i.e.*, Oil & Gas, Electricity, Mobile Telecoms, Trading Platforms and Beverages). In these sectors, the investment portfolios of institutional shareholders were found to be significant, since they had shares in up to 30%-40% of the companies. Building on these findings, the report went on to investigate the extent to which a causal relationship could be identified between CO and competitive dynamics and whether higher prices could be due to an increase in CO. The study also looked at the 2009 merger of BlackRock with Barclays Global Investors (BGI), that was of unprecedented proportions in the history of mergers between asset management funds. After the merger, the firms that were already participated by BlackRock and/or BGI showed an increase in profitability.

However, as a result of its assessment, the European Commission opted for a cautious approach. This is so since the possibility for asset managers having minority shareholding in various portfolio companies to have an influence upon them is dubious and depends on a number of circumstances. It should for example be proved the effective existence of forms of consensus between asset managers and the management of portfolio companies, or the possibility for the former to exercise some controlling rights to the extent that they possess at least a shareholding of these portfolio companies exceeding certain thresholds.

In such a context, the report concluded that the phenomenon of CO is particularly complex and still unsettled. Little evidence is available to date about its anticompetitive effects in Europe in the industries where competing undertakings included in institutional investors' portfolios are active. Many issues remain still open, including the difficulties of identifying the relevant markets in which these commonly owned portfolio companies are effectively active. As said, the presence of two undertakings in the same industry does not necessarily imply their presence in the same relevant market. As mentioned, this adds another layer of complexity in the antitrust assessment of the CO theory since it is certainly not sufficient that the minority-owned portfolio companies are active in the same industry to be considered competing undertakings, whereas they should compete in the same relevant markets.[179] Similarly, the same concept of market strength of some institutional investors like the Big Three is unclear,[180] nor there is

[179] In this respect, the same JRC Report finds that the clear identification of relevant markets' boundaries is critical (pp. 151-152). This is so as official codes of economic activity (NACE for Europe, NAICS, SIC for the US) have been used for such a definition. However, those classifications are not precise for all firms and markets. In Europe, NACE codes are assigned according to the value added produced by the company and this classification is generally quite stable in time and reflects changes in company's activity only after a certain period. Therefore, that classification may not be suitable for sectors where technological progress rapidly changes production and products. Moreover, for groups that carry out very different activities and thus operate in different markets, a unique classification may not be suitable as well. Nor there are specific codes for all types of activities. In some countries, firms are also given the opportunity not to use sectoral codes, or simplified accounting rules (without the indication of NACE). Difficulties could also arise in case of comparison of data coming from different classifications (typically NACE for Europe and NAICS or SIC for US). In such a complex framework, looking at the presence of common investors in the share capital of companies active in the same industrial sectors may be misleading as it does not rightly catch dynamics within the relevant markets where they actually compete, which is indeed relevant from an antitrust standpoint.

[180] In addition to what I have noted in chapter III in connection with the complexities and uncertainties related to the real financial strength of the main institutional investors on a global scale (chapter III, *sub* § II), the JRC Report points out some criticisms related to the notion of market power, that is applied by the literature on CO (p. 154). Market power refers to the ability of a firm to raise and maintain the price above the level that would prevail under perfect competition. To this end, the mostly used indicator is the Lerner index, based on industry mark-up. The indicator varies from zero to one, with zero being the situation of perfect competition in which prices are equal to marginal costs, while

a consensus on the existence of a causal link between the presence of common minority shareholders in the share capital of portfolio companies and the anticompetitive effects that are observed in the industry where the latter are active. To conclude, despite recommending further research, the report did not find any evidence as to the effective risks to competition that CO is currently claimed to cause.

II.3.2 Minority shareholding in Europe and merger control rules: any gap to be filled-in?

(i) *Minority shareholding and EU merger control rules: the* statuo quo

The debate on CO in Europe would be inevitably incomplete without an analysis of the studies that the European Commission has carried out on the application of competition law principles to minority shareholders, regardless of their *status* as institutional investors. In brief, the acquisition of a non-controlling minority shareholding does not necessarily trigger a notification obligation under the European merger control regulation (the "EU Merger Regulation").[181] And in most cases it does not.

However, the acquisition of a minority shareholding may be subject to the merger control scrutiny only if the minority shareholder is granted – either *de iure*, or *de facto* – control upon the target. This could for example happen in a scenario in which that shareholder is granted some veto rights on the adoption of the business plan, budget, strategic investments or on the appointment of apical managers of the target (*i.e.*, *de iure* control) or if, on the basis of an analysis of attendance at shareholders' meetings, the minority shareholder is found to prevail in the adoption of strategic

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it takes value one where the monopolist faces zero marginal costs. However, it is only a proxy of the firms' market power, but it has some economic limitations, such as the fact that it does not include the cost of capital.
The above is certainly interesting as it clarifies why incorrect definitions of industry mark-up may lead to an erroneous identification of institutional investors' market power, raising doubts on one of the premises upon which the CO theory of harm relies.

[181] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings.

decisions concerning the minority participated company (*i.e.*, *de facto* control). It is evident that, in such scenarios, the minority shareholder has all the prerogatives of a majority shareholder and it may orient the decision-making process of the target. However, it is usually not the case for financial investors which have traditionally acquired shares within an undertaking not to manage it as industrial owners, but for mere investment purposes by holding less than 10% of its share capital.

Precisely for this reason the EU Jurisdictional Notice, that helps with interpreting the notion of "acquisition of control" for the purpose of applying the EU Merger Regulation, acknowledges that in general a mere financial investor does not share a commonality of interests with the target and it is entitled to exercise some rights upon that undertaking to defend the value of its investment, and not to exercise control.[182] Since the acquisition of a minority shareholding by an investment fund does not normally results in the exercise of control upon the target, that acquisition is usually exempted from the merger control review.

It is clear that the EU Merger Regulation is an *ex-ante* framework, that aims at tackling acquisitions which lead to a change of control upon the target and which are likely to have an impact on market dynamics. The EU Merger Regulation does not apply to investment funds' acquisitions that fall short of conferring decisive influence upon the target. The scenario is different only in a limited number of European countries, namely Germany and Austria, where acquisitions by minority shareholders exceeding certain (still significant) thresholds could trigger the application of national merger control rules.[183] To fill the gap, in 2001 the European Commission

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[182] Jurisdictional Notice, § 79.

[183] In Germany, merger control rules provide that acquisition of 25% or more of the shares or voting rights and non-controlling minority interests below 25% constitute a notifiable concentration to the extent they confer "*competitively significant influence*", that fall short from "*control*" upon the acquired entity. Competitively significant influence may for example consist in granting the minority shareholder certain rights upon the corporate structure of the acquired firm, such as information rights upon the operative business of the target or *de facto* blocking minority on the adoption of relevant business decisions.

considered expanding the jurisdictional scope of application of the EU Merger Regulation to capture non-controlling minority shareholdings.[184] Following a consultation process, the Commission did not amend the EU Merger Regulation since "*only a limited number of* [acquisitions of minority shareholdings] *would be liable to raise competition concerns that could not be satisfactorily addressed under Articles* [101] *and* [102 TFEU]."[185] Various reasons supported the decision not to expand the scope of application of the EU Merger Regulation, including the lack of clear evidence about the alleged anti-competitive effects of non-controlling minority shareholdings. Moreover, the European Commission expressly acknowledged that the current competition law framework is generally suitable to tackle structural links between minority investors should they raise competitive concerns.

(ii) *The Aer Lingus/Ryanair saga*

The situation has evolved during the last years. In this respect, the well-known litigation involving the acquisition of a minority shareholding by Ryanair of the competing airline Aer Lingus is certainly valuable in the context of the present analysis. More precisely, between 2006 and 2007,[186] Ryanair gradually increased its participation in Aer Lingus to the level of 29.3%, whereas its attempt of entirely taking over Aer Lingus was blocked by the antitrust enforcer. In June 2007, after a complex phase II

In Austria, acquisitions of non-controlling shareholding below 25% of the capital or voting rights of another undertaking amount to a notifiable concentration if the acquirer is granted certain powers in the corporate governance structure of the target, so that it enjoys a position at least equivalent to that of a 25% shareholder in terms of economic interest and influence.

[184] Green Paper on the Review of Council Regulations (EEC), December 11, 2001, No 4064/89 ("Green Paper").

[185] Green Paper, para. § 109.

[186] More precisely, just before announcing its intention to launch a public bid to acquire the entire share capital of Aer Lingus, Ryanair had acquired a shareholding of 16.03% of Aer Lingus, shortly thereafter increased first to 19.21%, and then to 25.17%. In August 2007, following the adoption of the European Commission's decision blocking Ryanair from acquiring the entire share capital of Aer Lingus, Ryanair acquired a further 4.3% of the capital of Aer Lingus, increasing its shareholding to 29.3%.

investigation, the European Commission blocked Ryanair's attempt to acquire the entire share capital of Aer Lingus by declaring that transaction incompatible with the common market. That transaction would have substantially combined the two leading airlines operating from Ireland, which at the time competed vigorously against each other, and the transaction would have harmed consumers in terms of reduced choice and higher airfares by removing this head-to-head competition. However, although blocking the acquisition by Ryanair of the whole share capital of Aer Lingus, the Commission rejected Aer Lingus' request to order Ryanair to dispose of its minority shareholding. According to the Commission, the sole acquisition of the minority shareholding did not constitute a concentration under the EU Merger Regulation as it did not grant Ryanair *control* upon Aer Lingus, and hence the Commission neither had jurisdiction to review it, nor to order the dismissal of such minority shareholding.[187] Interestingly, the Commission did not depart from its traditional strict interpretation of the notion of control under the EU Merger Regulation although the acquisition of that minority shareholding and that of taking the entire control of Aer Lingus were a single concentration for merger control purposes, upon which the Commission had jurisdiction.

In 2010, the General Court confirmed that the European Commission had acted lawfully in refraining from exercising jurisdiction upon Ryanair's acquisition of a minority shareholding in Aer Lingus. According to the EU Court, "*the concept of concentration cannot be extended to cases in which control has not been obtained and the shareholding at issue does not, as such, confer the power of exercising decisive influence on the other undertaking, but forms part, in a broader sense, of a notified concentration examined by the Commission and declared incompatible with the common*

187 European Commission, Ryanair/Aer Lingus, Case COMP/M.4439, June 27, 2007.

market following that examination, without there having been any change of control within the above meaning."[188]

However, by considering on the one hand that Ryanair's acquisition of a minority shareholding in the competing airline was a single concentration with that aimed at acquiring the whole share capital of Aer Lingus but, on the other hand, that the first one did not confer to Ryanair control upon Aer Lingus and it could not be qualified as a notifiable concentration under the EU Merger Regulation, the European Commission and the General Court interpreted the notions of control and of concentration in a quite conservative way. At first look, to the extent that the acquisition of a minority shareholding within Aer Lingus formed part of a single "anti-competitive" transaction through which Ryanair aimed at acquiring the whole control of the target, and it was thus subject to the European Commission's jurisdiction under the EU Merger Regulation, the imposition upon Ryanair of an obligation to dismiss that minority stake in Aer Lingus would not have widened the scope of application of European merger control rules.[189]

On a closer and more substantive analysis, it seems indeed that the European Commission refrained from ordering the divestiture of that minority shareholding as there was no clear evidence of the competitive risks that such participation may have raised. According to Aer Lingus, that type of minority shareholding between competitors in a duopoly inherently distorted competition. This was allegedly due to the fact that Ryanair,

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[188] General Court, Aer Lingus Group plc v. Commission, Case T-411/07, § 65, 6 July 2010.

[189] Under European merger control rules, structural remedies such as divestitures are intended to maintain or restore the structure of the market by creating a new or enhanced competitive player, without requiring continuous monitoring by the authority or third parties. However, non-divestiture (*i.e.*, behavioral) remedies which could consist in the removal of links between competitors are preferable. For example, in the recent *JNJ/Actelion* case, to resolve the European Commission's competitive concerns relating to pipeline insomnia drugs, JNJ committed not to nominate any board member of the company to which Actelion's competing program was going to be transferred before the merger and not to access any confidential information in relation to that programme (European Commission, Case M.8401 - J&J / Actelion, 9 June 2017).

having a minority shareholding in Aer Lingus, may have had less incentives to compete with its competitor to maintain the value of its shareholding. According to Aer Lingus, evidence in this respect was for example represented by Ryanair's attempts to seek access to Aer Lingus' confidential strategic plans and business secrets during board of directors' meetings, to obtain by the management sensitive information, or to set up a campaign against Aer Lingus' management to weaken it as an effective competitor. However, according to the Commission and the EU Court, such allegations were not confirmed. As made clear by the General Court, Aer Lingus' appeal "*d*[id] *not contain any evidence that confidential information was actually exchanged during such a meeting. In any event, such an exchange of information would not be a direct consequence of the minority shareholding, but would constitute subsequent conduct on the part of the two companies which could potentially be examined under Article* [101 TFEU]".[190] Nor Ryanair could have influenced Aer Lingus' management since it was "*not in a position to be able to impose its will*" upon the competitor.[191] In any event, "[e]*ven if it were true that Ryanair had disrupted the management of Aer Lingus for several weeks, that would still not prove that it was able to exercise decisive influence on that undertaking within the meaning of the merger regulation*".[192]

What clearly emerges from the General Court's judgment is the absence of a probative support with respect to the possibility for Ryanair to effectively control Aer Lingus, and to the potential antitrust criticisms raised by the possession of a minority shareholding within a competitor. First, coherently with the results of this dissertation, the EU Court stressed the fact that the mere possession of a minority shareholding does not *per se* enable the exchange of sensitive information among competitors. If such exchange occurs and there is evidence in this respect, the existing rules (in

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190 Aer Lingus Group plc v. Commission, § 70.

191 *Ibid.*, § 72.

192 *Ibid.*, § 73.

particular, the prohibition of concerted actions under Article 101 TFEU) are perfectly suitable to deal with the envisaged risks to competition. Second, there was no evidence that such shareholding granted Ryanair the power to orient the commercial strategies of Aer Lingus by influencing its management. This argument holds even more true with respect to the activities of AMCs, which usually hold minimum shareholding within their portfolio companies, highly below the 29% held by Ryanair, and they do not even have the *status* of competitors of the undertakings in which they have a minority shareholding as that position is eventually held by some of their innumerable portfolio companies. Therefore, it seems that the European antitrust enforcer first, and the EU Court then, made use of the notion of control to dismiss on *jurisdictional* grounds Aer Lingus' request to order to Ryanair the sale of the minority shareholding, although such dismissal was effectively grounded on lack of substantive factual evidence of the potential antitrust risks raised by the existence of a minority shareholding link.

The *Aer Lingus/Ryanair* affair was also subject to the radar of national competition authorities, that adopted a different approach from that of the European competition law enforcer. In particular, following the General Court's judgment, in the UK the Office of Fair Trading ("OFT") empowered to examine acquisitions of minority shareholdings that confer "*material influence*" initiated its own investigation into Ryanair's minority shareholding in Aer Lingus and decided to refer the case to the Competition Commission ("CC"). The referral was due to concerns that the acquisition of that minority shareholding would have enabled Ryanair to weaken Aer Lingus as a competitor and it resulted (or was likely to result) in a substantial lessening of competition on air transportation routes between Great Britain and Ireland.[193] In its final report of August 2013, the CC confirmed the position of the OFT by holding that the minority shareholding gave Ryanair material influence upon its competitor and resulted in a

[193] *Ryanair/Aer Lingus*, ME/4694/10, OFT decision of June 15, 2012.

substantial lessening of competition. In such a context, the only available remedy to restore competition was the divestiture of the majority of Ryanair's holding in Aer Lingus, by reducing it to no more than 5%.[194] The CC's decision was upheld on appeal by the Competition Appeals Tribunal ("CAT") on 7 March 2014.[195] A further appeal to the Court of Appeal was dismissed on 12 February 2015, and the Supreme Court refused permission to appeal on 13 July 2015.

According to the CC, Ryanair would have been in a position to block certain resolutions that required the support of at least 75% of the voting members, *in primis* those concerning potential combinations with third parties. Ryanair's minority shareholding could have also limited Aer Lingus' ability to manage effectively its portfolio of Heathrow slots. In addition, competitors argued that a potential purchaser would have been concerned about acquiring an airline whose largest shareholder was a competitor. Accordingly, Ryanair's minority shareholding would have affected Aer Lingus' commercial policy and strategy and inhibited its overall effectiveness as a competitor "*albeit without giving Ryanair direct influence over the company's competitive offering on a day-to-day basis*".[196] This is so as, at general meetings, Ryanair would have been able to pass or defeat a resolution only if other shareholders voted in the same way of Ryanair, the Irish Government were to abstain, or the Irish Government's shareholding was dispersed. A scenario that appeared rather "*unlikely*". What precedes makes clear that the concern of the CC was the risk of foreclosure of third-party competitors to access Aer Lingus share capital or to enter into alliances with such market player because of the minority stakes held by Ryanair. In this connection, the following considerations are relevant.

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[194] Competition Commission, "*Ryanair Holdings plc and Aer Lingus Group plc. A report on the completed acquisition by Ryanair Holdings plc of a minority shareholding in Aer Lingus Group plc*", 28 August 2013.

[195] *Ryanair Holdings plc v. Competition Commission* [2014] CAT 3, March 7, 2014.

[196] CC's final report, § 7. 126.

First, the risk that third parties may have not invested in Aer Lingus says nothing as to the market strategies that this airline may have implemented. Not even the CC believed that Ryanair was effectively in the position to have a say on the day-to-day commercial policies of Aer Lingus because of its minority shareholding. The antitrust criticisms underpinning the CO theory imply indeed the existence of a causal link between the minority shareholding and the market course of action adopted by the undertakings included in the investment portfolios of institutional investors.

Second, the more rigorous position adopted by the UK competition authorities as opposed to the European one does not affect the factual context in which the Ryanair/Aer Lingus transaction was carried out. As a result, that position cannot be indicative of the existence of antitrust risks due to the possession of a minority shareholding within the share capital of a competitor. Nor it can support the CO theory of harm implying competition law concerns from the possession of a minority shareholding in various competitors by institutional investors, whose market interests are obviously different from those of an industrial player having a shareholding in a competitor, like Ryanair. As repeatedly mentioned, these investors usually hold minimal percentages of the share capital of their portfolio companies, infrequently exceeding the 5% threshold that Ryanair was still allowed to retain in its competitor.

Third, Ryanair and Aer Lingus were effectively direct competitors in the airline markets, whereas such relation does not usually exist between institutional investors and their portfolio companies, and it does not necessarily exist also among various portfolio companies even in cases in which they operate within the same industrial sector. As already noted, in various cases these companies are active within the same industry, but not necessarily within the same relevant markets as strictly interpreted by antitrust practitioners.

(iii) *Any scope for a reform of EU merger control rules?*

In such a complex context, in June 2013 the European Commission renewed its attention to minority shareholding by publishing a consultative paper on a proposal to expand the jurisdictional scope of application of the EU Merger Regulation to capture the acquisition of non-controlling minority shareholdings (the "Staff Working Document").[197] Although acknowledging that minority shareholdings generally confer more limited influence than full acquisitions of control, it meanwhile made reference to various mergers, which may have still raised some concerns and had been conditionally cleared under commitments to divest minority shareholdings.[198]

Nonetheless, since the number of acquisitions of non-controlling shareholdings that posed antitrust risks had been rather limited, the European Commission doubted on extending the scope of application of the European merger control rules to generally catch these transactions, as opposed to the introduction of a "selective" system whereby it would have asserted jurisdiction under merger control rules only in case of problematic transactions.[199] To decide when to step in, the European Commission proposed two alternative systems: either a voluntary system under which companies had no obligation to notify but the Commission reserved the right to investigate, or a transparency system that required companies to file with the Commission a short information notice in situations involving *prima facie* problematic structural links. To identify only "significant" structural links that were likely to raise competition concerns and should be notified to the Commission, the antitrust enforcer referred to acquisitions above 20%. Whereas in respect of acquisitions of

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[197] EU Commission press Release IP/13/584, "Commission consults on possible improvements to EU merger control in certain areas" (June 20, 2013).

[198] Commission decisions, Veba/Degussa, Case IV/M.942, December 3, 1997; Allianz/Dresdner, Case IV/M.2431, July 19, 2001; Polestar/Prisa/Inversiones Ibersuizas, Case COMP/M.3322, December 15, 2003; E.ON/MOL, Case COMP/M.3696, December 21, 2005; RCA/MAV Cargo, Case COMP/M.5096, November 25, 2008; Glencore/Xstrata, Case COMP/M.6541, November 22, 2012.

[199] The Staff Working Document, 6.

shareholdings between 5% and 20%, jurisdiction could be exercised only in presence of "*additional elements*" that made the minority shareholding potentially problematic. This could be the case of minority shareholding conferring *de facto* blocking rights or giving access to commercially sensitive information. Clearly, these scenarios presented an antitrust risk due to the fact that the minority shareholder was not a mere financial investor, but an entity exercising a certain degree of antitrust control upon the target undertaking (*i.e., de facto* control with the power to influence the commercial conducts of the minority owned company, or in any case a share participation considerably higher than those typically held by investment funds and AMCs, that is usually below the 5% threshold). However, following the public consultation, the proposals set forth in the Staff Working documents were not implemented.

In July 2014, the European Commission issued a White Paper and a further Staff Working Document assessing again the possibility of expanding the scope of application of the EU Merger Regulation to capture acquisitions of non-controlling minority shareholdings. In the related Impact Assessment report, the competition law enforcer acknowledged that the economic effects of minority shareholdings on competition significantly depend not only on the acquiring undertaking's entitlement to a share of the profits of the target, but also on the acquirer's ability to influence the target's competitive decisions and thus on the corporate rights conferred by that minority shareholding.[200]

Hence, in line with the findings of this dissertation on CO, the White Paper identified a series of abstract theories of harm arising from non-controlling minority shareholdings, which applied to the activities of institutional investors. These theories could be summarized as follows: (i) *unilateral effects* due to reduced incentives of competing undertakings, participated by the same minority shareholders, to engage in head-to-head competition; (ii) *coordinated effects* arising from an increased risk that

[200] Impact Assessment, § 22.

minority shareholders favour concerted actions among the minority-participated undertakings to obtain supra-competitive profits; (iii) in situations involving the existence of *vertical links* among the minority shareholder and the portfolio company, non-coordinated effects in the form of *input or customer foreclosure* to the prejudice of portfolio companies' rivals.

These theories of harm are perfectly in line with those identified in the previous Staff Working Document in 2013. That document also referred to another novel doctrine, overlooked by the main studies on CO, namely the idea that minority shareholders hinder third party access to the equity of the target and thus deter entry into the markets of third-party players.[201] Although interesting, that theory implies that the minority investor influences the commercial strategies and the course of action of the target. However, as I have clarified so far, it may not be the case for minority shareholders acting as financial investors.

(iv) *Connecting the dots between minority and common shareholders in antitrust analyses*

The European Commission's proposals, as set out in the Staff Working Document and in the White Paper, are clearly in line with the observations made so far in connection with the CO theory: the presence of common shareholders with minority stakes in competing undertakings could raise antitrust concerns to the extent that minority investors are effectively in the position to influence the commercial strategies of their portfolio companies in the relevant product markets where they compete, by coordinating their commercial strategies or inducing them to refrain from

201 Staff Working Document 2013, Annex 1, para. 15 ("*Acquiring structural links in incumbents may deter potential competitors from entering. Through the structural link, the potential competitor partly internalises the loss that entry inflicts on the incumbent and may therefore credibly commit to not entering. Moreover, a structural link may confer sufficient influence, which allows the minority owner to prevent a potential entrant from entering*").

competing. As mentioned, although apparently plain, that theory is far from simple to be proved in practice.

To this end, it is key to prove that minority shareholders effectively have a voice in the commercial decision-making process of each undertaking in which they hold or acquire a minority interest. As I have widely clarified in the previous sections, minority shareholding results in *de iure* or at least *de facto* antitrust control upon an undertaking only in limited circumstances. The "control test" is hence tricky and requires a factual analysis of the specific peculiarities of each case, as opposed to abstract theories of harm.[202] The likelihood that minority shareholders can exercise a form of antitrust control upon other undertakings and be in the position of interfering with their commercial strategies is hence challenging to be proved by an antitrust authority. This is further complicated by the complexities under competition law of identifying the relevant markets where portfolio companies compete.

Moreover, in a CO scenario, it should be also proved that the minority shareholder is not simply in the position to have an influence upon one target that competes with other undertakings included within its investment portfolio, but that it is in the position to "orchestrate" their business conducts.

For these reasons, as made clear by the German legislator in regulating acquisitions of minority shareholding under merger control law,

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[202] Only as an example, in the very recent saga that concerned the potential acquisition by the French company Vivendi S.A. of *de facto* joint control over Telecom Italia S.p.A. (currently, Tim), the Italian Council of State in ruling on the validity of CONSOB's decision (*i.e.*, the regulatory authority responsible for regulating the Italian securities market) – which had acknowledged that Vivendi, although holding a participation in Telecom's share capital below 25%, had *de facto* control since in the shareholders' meeting of May 4, 2017 it had been able to appoint the majority of Telecom's management – annulled such decision. According to the Italian judge, that regulatory authority did not duly assess whether such control had been exercised in practice. That analysis would have indeed required a fact-based assessment of whether Vivendi had effectively exercised a dominant influence upon Telecom, which should have been assessed in view of its concrete capacity to determine the outcome of the shareholders' meetings (Council of State, judgment No. 7972 of 14 December 14, 2020).

the competition authority should have jurisdiction only over transactions which confer to the acquirer a "competitively" significant influence, and which may pose a competition law risk. If we apply this reasoning to a CO scenario, the minority investor should be in the position to influence and thus to orient the commercial decisions of a plethora of undertakings composing its portfolio, potentially active within the same relevant market. Absent any evidence in this respect, the presence of common investors with minimal shareholding in the share capital of various companies active in the same sector is not necessarily problematic under competition law.

As acknowledged by authoritative doctrine, also under an economic perspective, the idea that the acquisition of a minority shareholding within the share capital of a competing undertaking would necessarily cause anti-competitive effects irrespective of the effective possibility to influence in practice its market decisions to a significant extent, would prove too much. In such a scenario, if the objective of competition authorities is that of avoiding any risks that the acquirer may even indirectly have any form of oversight upon the acquired company, any acquisitions of shareholding in competing undertakings should be prohibited *per se*. A scenario clearly undesirable because of the benefits set out above due to the activities of institutional investors.[203]

In this context, it is clear why the European Commission decided not to pursue the reforms envisaged in the Staff Working Document and in the White Paper, but it also remained open to re-evaluate minority shareholding in the future should more serious antitrust concerns be found. By the way, the cautious position of the European antitrust enforcer not to expand the existing merger control framework partially deviates from the U.S. approach, where merger rules may be applied to acquisitions of non-controlling minority shareholdings more broadly. In the U.S., the acquisition of a minority shareholding by institutional investors may be

[203] GUSTAVO OLIVIERI, Minority Shareholdings e controllo delle concentrazioni: Nihil sub sole novi?, Italian Antitrust Review, 1 (2014).

scrutinized by the antitrust authorities under Section 7 of the Clayton Act provided that the transaction is not carried out solely for investment purposes (*de minimis* exemption),[204] and the effect of such acquisition is that of substantially lessening competition.[205] Therefore, the scope of application of Section 7 is broader than the EU Merger Regulation and not limited to acquisition of *control* over the target.[206] In addition, as the FTC

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[204] In the Clayton Act, no clarification as to the scope of "solely for investment" purpose may be found. However, under the Hart-Scott Rodino Act, to the extent that the acquirer will hold post-transaction the 10% share capital of the target, that exception applies. Acquisitions above the 10% need to be reported unless the acquirer is an "institutional investor", a scenario in which the 10% exemption could be raised to 15%.
Under a CO scenario these thresholds may not be helpful since in the majority of cases the biggest AMCs individually hold minimal share capital of their portfolio companies, highly below the 15% threshold, and the same may be even true if one looks at the shares that the "big four" (*i.e.* BlackRock, Vanguard, SSGA and Fidelity) collectively hold. In that scenario, the question remains open as to whether these investors acquire a target for mere financial purposes or to have a voice in their market strategies as the CO theory implies. In this respect, it is hence essential to evaluate whether, on the basis of the specific structure of the transaction (*e.g.*, corporate governance prerogatives that are granted to the shareholder) and the dynamics in the industry (*e.g.*, particular concentrated sector, stable as opposed to dynamic sectors, or the existence of barriers to entry), the acquisition of a minority shareholding has the effect of lessening competition in the market where the target is active.

[205] Section 7 has been precisely designed to prevent acquisitions of assets or stock having the effect of substantially lessening competition or tending to create a monopoly, and it is applicable to acquisitions carried out by institutional investors when they are not pursued solely for investment purposes. This may be the case when the peculiarities of the relevant markets (*in primis*, the market where portfolio companies offer their products and services) make the materialization of anticompetitive effects more likely. Section 7 is applicable even because the current version, as amended by the by the Celler-Kefauver act in 1950, does not require the existence of a competitive relation between the acquirer and the target – that usually does not exist between the financial investor and the target. Competition in the relevant market, rather than between the merging firms, matters (64 Stat. 1125 (1950), current version at 15 U.S.C. § 18).

[206] As of late '50s, the U.S. courts have reviewed non-controlling acquisitions and in *EI. du Pont de Nemours*, the U.S. Supreme Court clarified that acquisition of control is not necessary for a finding of a breach of Section 7 of the Clayton Act provided that such acquisition is likely to substantially lessen competition (104 US v EI. du Pont de Nemours & Co 353 US 586, 592, 1957). Again, in *Von's Grocery* the U.S. Supreme Court struck down a merger between two Los Angeles supermarket chains that together accounted for only 7.5% of the Los Angeles retail grocery market but risked prejudicing small competing companies as the transaction was carried out in a context of decreasing single-store ownership and increasing chain ownership (United States v. Von's Grocery Co., 384 U.S. 270, 1966). In line with the considerations set out in chapter II on market concentration

and the DoJ's guidelines on horizontal mergers clarify, *partial acquisitions* that do not result in effective control may nonetheless raise competitive concerns, although being subject to a distinct analysis from that applied to acquisitions of total control.

Therefore, the U.S. and EU competition frameworks at least apparently follow a slightly different approach with respect to asserting jurisdiction to review concentrations, since only the former gives the antitrust authority jurisdiction to review acquisitions of non-controlling minority shareholding. Nonetheless, at closer look, also in the U.S. merger rules may apply to acquisitions of minority shareholding to the extent that such transactions effectively grant the minority investor any material influence upon the target with the aim of influencing their market conducts, and not solely for investment purposes. As I have repeatedly highlighted, this is usually not the case of the biggest institutional investors and of AMCs in particular, which typically engage in acquisitions for financial purposes by purchasing minimal percentages of the share capital of the target, and these transactions are far from entrusting them material influence upon the target.

The circumstance that also in the U.S. merger rules should apply to minority shareholding acquisitions should they involve the existence of competitive links and, in turn, not qualify as "solely for investment purposes", is confirmed by the FTC's proposal to amend merger rules so as to limit the scope of application of the de minimis exemption to acquisitions resulting in the acquiring person holding 10% or less of the voting securities of the issuer "*so long as the acquiring person does not have a competitively significant relationship with the issuer*".[207] In practice, the *de minimis*

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trends and on the value of avoiding *ex ante* the creation of oligopolistic structures, where the conclusion of a collusive equilibrium may be easier, in *Von's Grocery* the underlying rationale of applying U.S. merger control law was identified in the need for preventing the rising tide toward concentration into too few hands, to the prejudice of consumers.

[207] Federal Trade Commission, Notice of Proposed Rulemaking (NPRM) of significant changes to the implementing rules of the Hart-Scott- Rodino (HSR) Act of 1976, September 21, 2020,

exemption only would apply if: (i) the acquiring person is not a competitor of the issuer; (ii) the acquiring person holds 1% or less of the voting securities or non-corporate interests of any competitor of the issuer; (iii) no person acting on behalf of the acquiring person (including principals, employees, and agents) is an officer or director of the issuer (*i.e.*, there is no interlocking); and (iv) there is no vendor-vendee relationship between the acquiring person and the issuer.

In this context, on the one hand, it is clear that competition authorities are looking at the potential impact of CO on market dynamics not *per se*, but to the extent that the existence of competitively significant links among two companies participated by the same minority shareholders risks having an impact on markets. In such cases, the traditional antitrust theories of harm remain fully applicable. On the other hand, the potential antitrust risks posed by the CO theory shall be reasonably re-interpreted in light of the more general debate on minority shareholding and on its value in competition law analyses (*in primis* in the context on merger control cases). As said, at this stage there seems to be no need for further expanding the scope of application of the existing antitrust framework in Europe (as well as in the U.S.) to deal with common and more broadly with minority shareholding.

III. FINAL REMARKS

The sections above stressed the fact that, as of today, CO raises (if any) limited antitrust risks, which may be already dealt with under the existing EU (and U.S.) competition law frameworks. As the European debate on the acquisitions of minority shareholding has clarified, the proposals to expand the scope of application of the EU Merger Regulation to this type shareholding could increase antitrust enforcement costs, and it may be disproportionate.

By contrast, only when structural links among companies active within the same, or into close relevant markets, could effectively be an instrument to vehicle sensitive information among competitors and a

collusive outcome is favoured, competition law enforcers may intervene. In that respect, Article 101 TFEU (even in the form of the H&S theory) may be applied.[208] In addition, under EU competition law, Article 102 TFEU prohibiting abuses of dominance may be explored to fill in the existing gap of merger control rules by assessing whether the acquisition by a minority shareholder of further shares in undertakings that compete with its existing portfolio companies qualifies as an abusive conduct.[209] Although the application of this *ex post* set of rules requires the competition law authority to meet a high burden of proof, it is an optimum balanced choice in the absence of clear evidence as to the significant risks to competition caused by CO.[210]

The above makes clear that evaluating the effects on market dynamics of CO is not straightforward and *case-by-case* assessments help with identifying when competition law authorities should step in.[211] In any

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[208] CJEU, Cases 142/84 and 156/84 British American Tobacco Company Limited and R.J. Reynolds Industries Inc. v. Commission [1987] ECR 4487 ("Philip Morris"), §§ 37–38, 50–51.

[209] See the European Commission decision, Case IV/33.440, Warner/Lambert/Gillette (10 November 1992), which involved the acquisition by Gillette, the dominant producer of disposable razors, of a 22% share in a competitor, Wilkinson Sword. In this case the European Commission held that Gillette had abused its dominant position by acquiring "some influence" over Wilkinson Sword and it was therefore obliged to dispose of its equity stake. See also Philip Morris, where the CJEU held that that the creation of structural links among competitors as a result of an acquisition could amount to an abuse of a dominant position provided "*the shareholding in question results in effective control of the other company or at least in some influence on its commercial policy*", § 65.

[210] These arguments find support in the study carried out by the European Commission in October 2016, examining enforcement practice in those jurisdictions that empower their respective competition agencies to review the acquisition of non-controlling minority shareholdings. The study underlines the administrative burden due to the application of merger rules to acquisitions of minority shareholdings (see DG Competition, Support study for impact assessment concerning the review of Merger Regulation regarding minority shareholdings, October 2016).

[211] That approach has been confirmed by the U.S. antitrust enforcer, which in the Horizontal Merger Guidelines clarified that "*partial acquisitions*" (*i.e.*, minority shareholding) "*vary greatly in their potential for anticompetitive effects. Accordingly, the specific facts of each case must be examined to assess the likelihood of harm to competition*" (see, the DOJ and FTC, Horizontal Merger Guidelines, August 19, 2010).

event, the antitrust criticisms raised so far by CO are of a "conventional nature" and both in Europe and in the U.S. the current *ex ante* (*i.e.*, merger control rules) and the *ex post* competition law prohibitions are perfectly suitable to deal with any potential antitrust criticism that common minority shareholders may eventually raise.

To conclude, it is fair assuming that at this stage no gap should be filled to make CO an "antitrust offence". As this dissertation has made clear, CO does not represent an enforcement priority and it can be properly assessed under the existing set of rules.

CONCLUSIONS

This dissertation attempted to clarify the reasons why the still new and fascinating theory of common ownership as a means of distortion of market dynamics has a long way to go before being an antitrust enforcement priority. The premise upon which it relies is open to various criticisms (*i.e.*, the idea that the same presence of institutional investors as minority shareholders in a plethora of undertakings active within the same industries raises antitrust risks by reducing competitive pressure among competing undertakings).

Beforehand, competition law practitioners are called to assess the specific course of action of various categories of institutional investors with a view to assess whether their (minimal) presence within the share capital of potentially competing undertakings is sufficient to allow them to control and to influence the market-decisions of these competitors. This may be the case when a minority shareholder is granted special corporate rights in the management of the portfolio company in spite of its minority interest (*e.g.*, veto powers on business plans, or on the appointment of apical managers). Could the biggest institutional investors on a global scale leverage their strength in the financial industry to control the multitude of competing undertakings included within their portfolio and of which they usually hold a minimal percentage of their share capital (typically highly below 10%)?

As I have pointed out, differently from corporate structures like interlocking directorates – which, under some circumstances, might raise antitrust criticisms since they create personal connections among independent competing undertakings – institutional investors may not be in the position of actively influencing the management of their innumerable portfolio companies when having particularly low shareholdings. Various variables may play a role in this respect and misalign minority shareholders and the objectives pursued by the managers of their portfolio companies. Hence, only *case-by-case assessments* that look at whether, in the context

of adopting a certain market conduct, institutional shareholders backed the management because of common ownership as such or because the management position was preferable in a specific situation, may be effectively helpful to understand and assess under competition law the course of action of institutional investors. Case-by-case evaluations are typical of, and should guide any competition law theory of harm.

It is hence clear why, in my opinion, the underlying assumptions of the common ownership theory – and *in primis* the idea that the biggest institutional investors on a global scale are naturally in the position to control their portfolio companies in which they have minority shareholdings and in turn to influence their management – is far from being proved and should be indeed tested case-by-case. The issue is not whether or not a minority investor may be a controlling shareholder under antitrust law, but whether institutional investors having minimal participations and no special rights granting them at least *de facto* control upon their portfolio companies may influence the decisional process of such undertakings. This dissertation tried to explain why the answer should be negative, by looking at the main criticisms raised by the common ownership theory under various angles.

First, under an empirical standpoint, it is debatable the same notion of the existence of a *direct causality* between common ownership and anticompetitive effects – *i.e.*, the fact that common institutional investors with shares of competing undertakings can exercise antitrust control upon them and cause distortion of competitive dynamics in the "downstream" markets in which they are active. Alternative variables other than common ownership, like the same (oligopolistic) market structure or the peculiar market dynamics in the industries where common ownership is claimed to have caused distortive effects may explain why in a certain period a raise in prices has been observed. This empirical analysis led me to conclude that a direct causal link between common ownership, antitrust control and the observed raise in prices in the industries where the common ownership theory has been tested so far is far from having met the antitrust standard of proof, that antitrust authorities should meet before intervening. In cases

where the claimed distortive effects may be due to exogenous factors inherent to the structure of an industry, rather than to the presence of common investors in that industry, the new CO theory of harm cannot stand under competition law.

Second, this thesis made a step further by looking at the regulatory framework in which institutional investors operate and at the business model of modern institutional investors, which as well-known implies investments' diversification. In turn, this means that investors like the Big Three and other global asset management companies typically engage in acquisitions of minority shareholding for sole financial purposes, and not for managing the plethora of their portfolio companies in which they have minimal shareholding. Precisely for this reason, both in the U.S. and in Europe, although with some differences, merger control rules generally do not apply to acquisitions of minority shareholding carried out by institutional investors. And the reason why competition law does not typically look at these transactions is clear: to the extent that they are pursued solely for investment purposes and post-transaction minority investors are not assigned any right to have an overview upon the commercial decisions of the minority participated companies, minority investors do not aim at controlling and hence at having an influence upon the management of these undertakings.

Asset management companies like the Big Three and investment funds to which the new common ownership theory is addressed to have typically no-minority controlling rights, neither *de iure* or *de facto*. In other words, this dissertation has tried to demonstrate that an additional shortcoming of common ownership is the same business model adopted by those institutional investors to which that theory is applied, and not minority shareholding *per se*. Minority investors (*i.e.*, investment funds and asset management companies) that have so far caught the attention of the common ownership theory are not those minority investors to which competition law enforcers have traditionally looked at because of their controlling influence upon the participated undertaking.

In view of the above criticisms, I can reasonably assume that, even looking at sectoral regulation, if no influence can be exercised by an institutional investor having minimal shareholdings within a plethora of undertakings composing its diversified portfolio, clearly an antitrust risk cannot be *ex ante* identified. If minority investors have no ability and hence no incentive to influence the market strategies of competing undertakings, they can neither facilitate a collusive outcome, nor induce independent firms to refrain from competing. By contrast, common ownership may eventually lead to distortions of market dynamics to the extent that one assumes and proves that institutional investors, in spite of being minority shareholders with no veto rights upon the adoption of market decision of their portfolio companies, are still in the position to exercise control upon these undertakings and, in turn, to influence their respective management to either coordinate their commercial strategies or refrain from competing. And this probative standard is hard to be met by an antitrust authority.

In addition to the above, by looking at the common ownership theory under a regulatory angle, it emerges that the specific regulations to which institutional investors are subject help with reducing the perceived criticisms implied by that theory. Institutional investors are subject to a multitude of regulations and to stewardship obligations which aim at ensuring the stability of the financial sector. Although there might be cases where there could be a clash between financial stability and the need for protecting competitive markets, to the extent that these regulations make institutional investors accountable before retail investors (*i.e.*, final consumers of financial products and services) and protect the value of financial diversification, they implicitly benefit final consumers and hence pursue the same objective of competition law. This finding does not mean that institutional investors may not distort market dynamics because they pursue social and not for profits aims, but that institutional investors may not be claimed to distort competition only because of their presence in various competing portfolio companies, whereas they instead aim at acquiring shares in such companies since diversification of financial risks

remains the main purpose. As said, diversification does not simply help with ensuring the stability of the financial system, but at the same time it is beneficial to consumers.

In any event, if potential antitrust risks were effectively found to materialize, the traditional competition law toolkit and the current regulatory obligations to which institutional financial investors have to comply with, are suitable and sufficient to deal with the potential concerns that the common ownership theory eventually brings about.

In the U.S., *in primis* merger control rules are valuable to minimize the potential risks raised by common ownership in their quality of minority investors. As clarified in this dissertation, Section 7 of the Clayton Act, that has a broader scope of application of the EU Merger Regulation, is valuable to that end since it may not only already capture minority shareholding acquisitions, save for those carried out solely for investment purposes, but it can also operate as an *ex-post* tool to look at consumed transactions having the effect of distorting market dynamics. In addition, both Section I of the Shearman Act banning anticompetitive restraints of trade and Section V of the FTC Act to prosecute unfair acts of competition are appropriate to minimize the antitrust risks that common ownership may eventually raise (if any). As I made clear, in the few cases in which the U.S. antitrust enforcers have so far looked at the effects upon market dynamics of transactions involving minority shareholding, or at the risks raised by interconnected corporate structures, they have traditionally applied the existing antitrust toolkit and not even mentioned the need for introducing new antitrust enforcement tools.

Under the EU Merger Regulation, although acquisitions by minority shareholders are not theoretically captured by that legislation, the situation may be different whenever these transactions entrust to minority shareholders the ability to have at least *de facto* control upon the acquired target. These transactions do not escape the antitrust scrutiny when they meet the relevant turnover thresholds. As this dissertation made clear, the European antitrust enforcer carried out various analyses on minority

shareholding and, more recently, on common ownership, but because of the very limited criticisms raised so far by minority shareholding, no action has been deemed necessary such as widening the jurisdictional scope of application of the EU merger control framework.

However, recent developments primarily aimed at catching problematic transactions in the digital sector and the well-know "killing acquisitions" testify the flexibility of the current merger control rules. Precisely to widen the power of the EU Commission to review transactions falling short of its jurisdiction, the forgotten Article 22 of the EU Merger Regulation has been dusted off and its scope of application widened. Accordingly, even those transactions that theoretically escape the merger control scrutiny both at the national and at the EU level, but which could affect trade within the EU common market and threaten to significantly affect competition within a national market, as it could be the case of transactions in the digital space having effects that go beyond national borders (and the same reasoning could apply to transactions involving global financial investors), could come on the radar of the antitrust enforcer. This development is certainly relevant as it shows the flexibility of merger control law to adapt to evolving market situations and the adequacy of the existing antitrust toolbox to face new challenges. In some cases, one should simply dust off the old unenforced rules.

In any event, as already noted with respect to the U.S. framework, whenever institutional investors were effectively found to pose competitive risks in terms of coordination of market dynamics, or of reduction of competitive pressure among competing undertakings, the *ex post* antitrust toolkit and in particular the over-comprehensive ban of coordinated anticompetitive conducts set forth by Article 101 TFEU is appropriate and sufficient to address these potential risks.

All the above findings recommend a cautious approach to common ownership in view of the negative effects that too strict and rigorous rules could have on the activities of a plethora of financial institutions. As repeatedly reminded, financial investors play a fundamental role in modern

economies both for the economic support they give to a plethora of industrial sectors as a result of their same business model, and for the beneficial effects on retail investors and hence on final consumers due to investments' diversification. The economic support they may provide to various economic sectors is even more valuable in periods of financial distress which, as the current COVID pandemic had made clear, are unforeseeable.

To conclude, common ownership should not qualify as the new antitrust enforcement priority because of its fascinating but highly complex nature. A cautious approach based on *ad hoc* and *case by case* assessments is indeed recommended to evaluate the effects on market dynamics of the presence of minority shareholders within the share capital of competing undertakings. This recommendation is even more valuable in a period of financial crisis, as the current one. Our economy is undoubtedly facing huge challenges and it is more important than ever to protect competitive markets, while at the same time allowing financial entities and *in primis* investment funds to support the economy. This awareness does not mean that antitrust authorities should not continue monitoring common ownership. As the EU Commission Vice-President recently reminded although not specifically addressing the common ownership debate, the protection of competitive markets remains the imperative of competition authorities and, "*as Julius Caesar would have said, the die is cast. And the months and years ahead will show the results*".[212] And the same holds true for common ownership, "the die is cast" and it may eventually come on the radar of competition law enforcers should it be effectively found to cause anticompetitive effects in the relevant markets in which institutional investors' portfolio companies are active.

[212] Vice-President Margrethe Vestager, speech held at the Italian Antitrust Association's annual conference, Rome, 21-22 October 2021.

BIBLIOGRAPHY

CHAPTER I

- **LUCA ENRIQUES & ALESSANDRO ROMANO**, *Rewiring Corporate Law for an Interconnected World*, Arizona Law Review, Issue 64:1 (2021)
- **YARON NILI**, *Horizontal Directors*, Northwestern University Law Review, Vol. 114, No. 5, 1228 (2020)
- **FEDERICO GHEZZI & CHIARA PICCIAU,** *The Curious case of Italian Interlocking Directorates*, Bocconi legal studies research paper series (2020)
- F**EDERAL TRADE COMMISSION & DEPARTMENT OF JUSTICE**, *Antitrust Guidelines for Collaborations Among Competitors* (2020)
- **LUCIAN BEBCHUK & SCOTT HIRST,** *Index funds and the future of corporate governance: theory, evidence, and policy*, Columbia Law Review 119, 8 (2019)
- **DOUGLAS YOUNG**, *IBA Guide on Shareholders' Agreements, California USA* (2019)
- **FEDERAL TRADE COMMISSION, BUREAU OF COMPETITION**, *Interlocking Mindfulness* (2019)
- **LUCA ENRIQUES & ALESSANDRO ROMANO**, *Institutional Investor Voting Behavior: A Network Theory Perspective*, Law Working Paper N° 393 (2018)
- **CARSTEN KOENIG**, *Comparing Parent Company Liability in EU and US Competition Law*, World Competition 41, No. 1, 69-100 (2018)
- **U.S. DEPARTMENT OF JUSTICE**, *Principal Deputy Assistant Attorney General Andrew Finch Delivers Keynote Address at Capitol Forum's Fifth Annual Tech, Media & Telecom Competition Conference*, U.S. Washington DC (2018)
- **FEDERAL TRADE COMMISSION, BUREAU OF COMPETITION**, *Have a plan to comply with the bar on horizontal interlocks* (2017)
- **ERIC POSNER, FIONA SCOTT MORTON & E. GLEN WEYL**, *A proposal to Limit the Anti-competitive Power of Institutional Investors*, 81 Antitrust Law Journal 669 (2017)
- **GUR AMINADAV & ELIAS PAPAIOANNOU**, *Corporate control around the world*, NBER Working Paper, National Bureau of Economic Research (2016)
- **VIDIR PETERSEN**, *Interlocking Directorates in the European Union: An Argument For Their Restriction*, European Business Law Review (2016)
- **SARA SAGGESE, FABRIZIA SARTO & CORRADO CUCCURULLO**, *Evolution of the Debate on Control Enhancing Mechanisms: A Systematic Review and Bibliometric Analysis*, International Journal of Management Reviews, 18, 4, 417-439 (2016)
- **FLORENCE THÉPOT, FLORIAN HUGON & MATHIEU LUINAUD**, *Interlocking Directorates and Anticompetitive risks: An Enforcement Gap in Europe?*, Concurrences (2016)
- **INSTITUTIONAL SHAREHOLDER SERVICES EUROPE, SHEARMAN & STERLING, EUROPEAN CORPORATE GOVERNANCE INSTITUTE**, External Study Commissioned by the European

Commission, *Report on the Proportionality Principle in the European Union, Proportionality Between Ownership and Control in EU Listed Companies* (2016)

- **Federico Cenzi Venezze**, *The Costs of Control-enhancing Mechanisms: How Regulatory Dualism Can Create Value in the Privatisation of State-owned Firms in Europe*, European Business Organization Law Review, 10 (2014)
- **Lewis J. Paper**, *Brandeis: An Intimate Biography of Supreme Court Justice Louis D. Brandeis*, Open Road Media (2014)
- **Lorenzo F. Pace**, *Dizionario Sistematico del Diritto della Concorrenza*, Jovene Ed., (2013)
- **Federico Ghezzi**, *La nuova disciplina dei legami personali in Italia*, Mercato concorrenza regole, a.XIV, n. 2 (2012)
- **Organisation for Economic Co-operation and Development Competition Committee**, Policy Roundtable on *Promoting Compliance with Competition Law* (2011)
- **Luca Enriques**, *Corporate Governance Reforms in Italy: What Has Been Done and What Is Left To Do*, 10 European Business Organization Law Review (2009)
- **Organisation for Economic Co-operation and Development, Corporate Affairs Division**, Directorate for Financial and Enterprise Affairs, report on *Lack of proportionality between ownership and control: overview and issues for discussion* (2007)
- **Marcello Bianchi, Magda Bianco & Luca Enriques**, *Pyramidal Groups and the Separation Between Ownership and Control in Italy*, in Fabrizio Barca & Marco Becht, eds., *The Control of Corporate Europe*, Oxford University Press (2001)
- **Steven C. Salop & Daniel P. O'Brien**, *Competitive Effects of Partial Ownership: Financial Interest and Corporate Control*, 67 Antitrust Law Journal 559-614 (2000)
- **Organisation for Economic Co-operation and Development**, study on *Corporate Ownership and Control, Law Reform and the Contestability of Corporate Control*, by Prof. Guido Ferrarini, Centre for Law and Finance, University of Genoa (2000)
- **Lucian Aye Bebchuk, Reinier Kraakman & George Triantis**, *Stock Pyramids, Cross-Ownership and Dual Class Equity: The Mechanisms and Agency Costs of Separating Control From Cash-Flow Rights*, Harvard Law School Discussion Paper No. 249 (1999)
- **Ginevra Bruzzone**, *Assetti proprietari, governo delle banche e tutela della concorrenza* (1999), in: Masciandaro, D., Riolo, F. (Eds.), Il governo delle banche in Italia, Edibank, Milano, 111–125 (1999)
- **La Porta Rafael, Florencio Lopez-De-Silanes & Andrei Shleifer**, *Corporate Ownership Around the World*, Journal of Finance 54:471-517 (1999)
- **Marco Pagano, Fausto Panunzi & Luigi Zingales**, *Osservazioni sulla Riforma della Disciplina dell'OPA, degli Obblighi di Comunicazione del Possesso Azionario e dei Limiti agli Incroci Azionari*, in Rivista delle Società, 168 (1998)

- **Sanford J. Grossman & Oliver D. Hart**, *One share-one vote and the market for corporate control*, Journal of Financial Economics, Vol. 20, 175-202 (1988)
- **U.S. Case law and decisional practice of Antitrust Agencies**
  - U.S. Supreme Court, *California Dental Ass'n v. FTC*, 119 S. Ct. 1604, 1617-18 (1999)
  - U.S. Supreme Court, *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 432-36 (1990)
  - U.S. Supreme Court, *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 459-61 (1986)
  - U.S. Supreme Court, National Collegiate Athletic Ass'n v. Board of Regents of the Univ. of Okla., 468 U.S. 85, 104-13 (1984)
  - U.S. Supreme Court, *Board of Trade of City of Chicago v. United States*, 246 U.S. 231 (1918)
  - US District Court for the Southern District of New York, *U.S. v. Sears, Roebuck & Co.*, 111 F. Supp. 614 (1953)
  - Federal Trade Commission, In the Matter of *TRW Inc. v. FTC*, 981-0081 (1998)
  - Federal Trade Commission, In re BorgWarner Corp., 101 F.T.C. 863, 1983 WL 486332, modified, 102 F.T.C. 1164 (1983)
  - Federal Trade Commission, In the Matter of *Perpetual Fed. Sav. & Loan Association*, 90 F.T.C. 608, 657 (1977)
- **EU and National Case law and decisional practice of Competition Authorities**
  - Court of Justice of the European Union, case C-595/18 P, *The Goldman Sachs Group Inc. v. EU Commission* (2021)
  - Court of Justice of the European Union, case C-516/15 P, *Akzo Nobel v. Commission* (2017)
  - European Commission, case COMP/M.6844, *General Electric/Avio*, (2013)
  - European Commission, case COMP/M.6541, *Glencore/Xstrata* (2012)
  - European Commission, case COMP/M.4153, *Toshiba/Westinghouse* (2006)
  - European Commission, case IV/M.1712, *Generali/INA* (2000)
  - European Commission, case IV.M.942, *Veba/Degussa* (1997)
  - Italian Competition Authority, case C8660, *Unicredit/Capitalia*, decision No. 17283 (2007)
  - Italian Competition Authority, case C8027, *Banca Intesa/Sanpaolo IMI*, decision No. 16249 (2006)
  - Italian Competition Authority, case C5422 SAI – *Società Assicuratrice Industriale/La Fondiaria Assicurazioni*, decision No. 11284 (2002)

- ITALIAN COMPETITION AUTHORITY, case C5422B, SAI - *Società Assicuratrice Industriale/La Fondiaria Assicurazioni*, decision No. 11475 (2002)

CHAPTER II

- **ALBERT BANAL-ESTAÑOL, NURIA BOOT & JO SELDESLACHTS** *Common ownership patterns in the European banking sector—The impact of the financial crisis*, Journal of Competition Law & Economics (2021)
- **MIGUEL ANTON, FLORIAN EDERER, MIREIA GINE & MARTIN C. SCHMALZ**, *Common ownership, competition, and top management incentives*, Ross School of Business (2021)
- **EINER ELHAUGE**, *The Causal Mechanisms of Horizontal Shareholding* (October 2020) 82 Ohio State Law Journal, Issue 2 (2021)
- **ANDREW KOCH, MARIOS PANAYIDES & SHAWN THOMAS**, *Common ownership and competition in product markets*, Journal of Financial Economics, 139, 109-137 (2021)
- **LUCA ENRIQUES & ALESSANDRO ROMANO**, *Rewiring Corporate Law for an Interconnected World*, Arizona Law Review, Issue 64:1 (2021)
- **EINER ELHAUGE**, *How Horizontal Shareholding Harms Our Economy – And Why Antitrust Law Can Fix It*, Harvard Business Law Review Vol. 10, 2 (2020)
- **EUROPEAN PARLIAMENT**, Study of the ECON committee, *Barriers to Competition through Common Ownership by Institutional Investors* (2020)
- **PAUL BOROCHIN, JIE YANG & RONGRONG ZHANG**, *Common Ownership Types and Their Effects on Innovation and Competition*, online resource (2020)
- **EINER ELHAUGE**, *How Horizontal Shareholding Harms Our Economy – And Why Antitrust Law Can Fix It*, Harvard Law School working paper (2019)
- **JOSEPH GERAKOSY & JIN XIEZ**, *Institutional horizontal shareholdings and generic entry in the pharmaceutical industry*, Tuck School of Business Working Paper (2019)
- **ANGEL L. LOPEZ & XAVIER VIVES**, *Overlapping Ownership, R&D Spillovers, and Antitrust Policy*, Journal of Political Economy, Vol. 127, No. 5 (2019)
- **Y. DING & X. ZHAO**, *Pay-for-delay patent settlement, generic entry and welfare*, International Journal of Industrial Organization 67 (2019)
- **EINER ELHAUGE**, *New evidence, proofs, and legal theories on horizontal shareholding*, Harvard Law School working paper (2018)
- **JOSÈ AZAR, MARTIN C. SCHMALZ & ISABEL TECU**, *Anticompetitive Effects of Common Ownership*, Journal of Finance, vol. 73, issue 4, 1513-1565 (2018)
- **MIGUEL ANTON ET AL.**, *Innovation: The Bright Side of Common Ownership?*, online resource (2018)

- **Eric Posner, Fiona Scott Morton & E. Glen Weyl**, *A proposal to Limit the Anti-competitive Power of Institutional Investors*, 81 Antitrust Law Journal 669 (2017)
- **Sajid Noor**, *Non-price competition in the U.S. airline industry: a VAR model*, Journal of Economic Studies (2017)
- **Benjamin R. Dryden**, *'Horizontal Shareholding': Is Oligopoly Pricing a Symptom or the Disease?*, ABA Newsletter of the Mergers & Acquisitions Committee (2017)
- **UK Financial Conduct Authority,** Final report on *Asset Management Market Study* (2017)
- **Miguel Anton, Florian Ederer, Mireia Gine & Martin C. Schmalz**, *Common ownership, competition, and top management incentives*, Ross School of Business, working paper 1328 (2016)
- **Maureen K. Ohlhausen**, *What Are We Talking About When We Talk About Antitrust?*, Concurrences (2016)
- **Martin C. Schmalz, Jose Azar & Raina Sahil**, *Ultimate Ownership and Bank Competition*, CEPR working paper (2016)
- **Richard Blumenthal**, State of Connecticut, U.S. Senate, *letter to the former DOJ's Assistant Attorney General Mr. William Baer* (2015)
- **Allan Rosas, Egils Levits & Yves Bot**, *The Court of Justice and The Construction of Europe, Analyses and Perspectives on Sixty Years of Case-law*, Asser press 417 (2013)
- **Michael E. Jacobs**, *U.S. Antitrust enforcement involving minority shareholdings*, online resource (2013)
- **F.M. Scherer**, *Financial Mergers and Their Consequences*, Harvard Kennedy School, M-RCBG Faculty Working Paper Series (2013)
- **Paul C. Cuomo Charles Malaise & Changrong Xu**, *Partial Acquisitions: Recent MOFCOM Action Suggests Possible Divergence with U.S. Standards*, CPI Antitrust chronicle (2012)
- **David C. Wheelock**, *Banking Industry Consolidation and Market Structure: Impact of the Financial Crisis and Recession*, Federal Reserve Bank of St. Louis *Review*, 93(6), 419-38 (2011)
- **William Gillespie & Oliver Richard**, *Antitrust Immunity and International Airline Alliances*, Economic Analysis Group of the DOJ's Antitrust Division (2008)
- **Gerald L. Dillingham***, Airline Industry Consolidation: Hearing Before the Subcommittee on Aviation* (2008)
- **Franklin Allen & Douglas Gale**, *Competition and Financial stability, in Journal of Money, Credit and Banking*, Vol. 36, No. 3, Part 2 (2004)
- **Daniel P. O' Brien & Steven C. Salop**, *Competitive effects of partial ownership: Financial interest and corporate control*, Antitrust Law Journal 67, 559-614 (2000)

- **Estelle James, Gary Ferrier, James H. Smalhout, Dimitri Vittas**, *Mutual Funds and Institutional Investments: What Is the Most Efficient Way to Set Up Individual Accounts in a Social Security System?*, Vol. Administrative Aspects of Investment-Based Social Security Reform, University of Chicago Press (2000)
- **Severin Borenstein**, *Airline Mergers, Airport Dominance, and Market Power*, 80 American Economic Review (1990)
- **Severin Borenstein**, *Hubs and High Fares: Dominance and Market Power in the U.S. Airline Industry*, 20 RAND Journal of Economics, 344-365 (1989)
- **Richard A. Posner**, *Oligopoly and the Antitrust Laws: A Suggested Approach*, 21 Stanford Law Review 1562 (1969)
- **Donald Turner**, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals To Deal*, 75 Harvard Law Review 655 (1962)
- **U.S. Case law and decisional practice of Antitrust Agencies**
    - U.S. Supreme Court, *Verizon Communications Inc., v. Law offices of Curtis V. Trinko, LLP*, No. 2-682 (2004)
    - U.S. District Court for the District of Columbia, *United States of America et al. v. US Airways Group, Inc. and AMR Corporation*, Case No. 1:13-cv-01236 (CKK) (2014)
    - U.S. Court of Appeals for the Sixth Circuit, *United States v. Dairy Farmers of America* (DFA's), 426 F.3d 850, 852 (2005)
    - U.S. Court of Appeals for the Seventh Circuit, *Toys "R" Us, Inc.,v. Federal Trade Commission*, Appellee No. 98.4107, 221 F.3d 928 (2000)
    - Department of Justice, *DOJ Requires US Airways and American Airlines to Divest Facilities at Seven Key Airports to Enhance System-wide Competition and Settle Merger Challenge*, 13-1202 (2013)
    - Department of Justice, *Decision to Close Investigation of Southwest's Acquisition of AirTran*, 11-523 (2011)
    - Department of Justice, *Decision to Close Investigation of United Airlines' acquisition of Continental Airlines,* 10-974 (2010)
    - Department of Justice, *Decision to Close Investigation of the Merger of Delta Air Lines Inc. and Northwest Airlines Corporation*, 08-963 (2008)
- **Eu and National Case law and decisional practice of Competition Authorities**
    - Court of Justice of the European Union, Case C-591/16P, *Lundbeck v Commission* (2021)
    - Court of Justice of the European Union, *Ahlström v Commission (Woodpulp Case)*, Case C-89/85 (1993)
    - Court of Justice of the European Union, *Europemballage Corporation and Continental Can Company Inc. v. European Commission*, case 6-72 (1973)
    - General Court, Case T-691/14, *Servier and Others v Commission* (2018)

- EUROPEAN COMMISSION, Case AT.39686, *Cephalon* (2020)

CHAPTER III

- **LUCA ENRIQUES & ALESSANDRO ROMANO**, *Rewiring Corporate Law for an Interconnected World*, Arizona Law Review, Issue 64:1 (2021)
- **BLACKROCK**, *Europe's listed companies: their governance, shareholders and votes cast, Public Policy*, ViewPoint (2020)
- **NICKOLAY GANTCHEV, MERIH SEVILIR & ANIL SHIVDASANI**, *Activism and Empire Building*, ECGI Finance Working Paper No. 575/2018 (2019)
- **LUCIAN A. BEBCHUK & SCOTT HIRST**, *The Specter of the Giant Three*, 99 Boston University Law Review 721, 735-736 (2019)
- **BLACKROCK**, *Investment Stewardship Annual Report* (2019)
- **NICKOLAY GANTCHEV, MERIH SEVILIR & ANIL SHIVDASANI**, *Activism and Empire Building*, ECGI Finance Working Paper No. 575/2018 (2019)
- **LUCIAN BEBCHUK & SCOTT HIRST**, *Index funds and the future of corporate governance: theory, evidence, and policy*, Columbia Law Review 119, 8 (2019)
- **AMADEUS MOESER**, *Shareholder Activism in Germany*, Harvard Law School Forum on Corporate Governance (2019)
- **JEFFREY N. GORDON & WOLF-GEORG RINGE**, *Shareholder Activism A Renaissance* in The Oxford Handbook of Corporate Law and Governance, Oxford University Press, (2018)
- **ANELIYA S. CRAWFORD, BRANDON S. GOLD & DANIEL A. GOLDSTEIN**, *Lessons Learned from Trian's Campaign at Procter & Gamble*, HLS Forum on Corporate Governance (2018)
- **GIOVANNI STRAMPELLI**, *Are Passive Index Funds Active Owners? Corporate Governance Consequences of Passive Investing*, San Diego Law Rev, 55, 803 (2018)
- **JOHN C. COFFEE**, *The Agency Cost of Activism: Information, Leakage, Thwarted Majorities, and the Public Morality*, ECGI Law Working Paper (2017)
- **MARCO ROSATO**, *The relationship between Competition and Regulation through two apparently different approaches: US Trinko case and EU Deutsche Telecom*, Law and Policy of the Media in a Comparative Perspective (2017)
- **IAN APPEL ET AL.**, *Passive Investors, Not Passive Owners*, 121 Journal of Financial Economics 111, 113-114 (2016)
- **ALEXANDRE DE STREEL**, *The Antitrust Activism of the European Commission in the Telecommunications Sector*, European Competition Law Annual 2012: Competition, Regulation and Public Policies, authored by PHILIP LOWE and MEL MARQUIS, papers presented at the 17th Annual EU Competition Law and Policy Workshop held at the European University Institute, Florence (2012)

- **FRANCESCO PASQUARIELLO**, *Art. 2367 of the Italian Civil Code*, in Maffei Alberti, *The New Company Law, A systematic comment to Legislative Decree No. 6 of 17 January 2003*, Padua, 459 (2005)
- **STUART GILLAN & LAURA T. STARKS,** *Institutional Investors, Corporate Ownership and Corporate Governance: Global Perspectives*, Journal of Applied Finance (2003)
- **BERNARD S. BLACK**, *Agents Watching Agents: The Promise of Institutional Investor Voice*, 39 UCLA Law Review 811 (1992)
- **U.S. CASE LAW AND DECISIONAL PRACTICE OF ANTITRUST AGENCIES**
  - U.S. SUPREME COURT, *Verizon Communications v. Law Offices of Curtis V Trinko, LLP*, (2004)
  - U.S. SUPREME COURT, *United States v. Philadelphia National Bank* (1981)
  - U.S. SUPREME COURT, *Pan American World Airways v. United States* (1963)
  - U.S. SUPREME COURT, *Georgia v. Pennsylvania Railroad* (1945)
  - U.S. SUPREME COURT, *United States v. Borden* (1939)
- **EU AND NATIONAL CASE LAW AND DECISIONAL PRACTICE OF COMPETITION AUTHORITIES**
  - COURT OF JUSTICE OF THE EUROPEAN UNION, Case C-280/08, P *Deutsche Telekom AG v Commission* (2010)
  - COURT OF JUSTICE OF THE EUROPEAN UNION, joined cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, *Aalborg Portland A/S and Others v Commission* (2004)
  - GENERAL COURT, case T-398/07, *Spain v Commission* (*Telefónica II*) (2012)
  - GENERAL COURT, case T-271/03 *Deutsche Telekom AG v Commission* (2008)
  - COMMISSION DECISION, case COMP/39.325, *Telekomunikacja Polska* (2011)
  - COMMISSION DECISION, case 37.451, *Deutsche Telekom* (2003)

CHAPTER IV

- **ALBERT BANAL-ESTAÑOL, NURIA BOOT & JO SELDESLACHTS** *Common ownership patterns in the European banking sector—The impact of the financial crisis*, Journal of Competition Law & Economics (2021)
- **THOMAS A. LAMBERT**, *Mere Common Ownership and the Antitrust Laws*, University of Missouri, Legal Studies Research Paper Series, research paper (2020)
- **ROSATI NICOLETTA, BOMPREZZI PIETRO, FERRARESI MASSIMILIANO, NARDO MICHELA & FRIGO ANNALISA** -- Joint Research Center Technical Report, *Common Shareholding in Europe*, EUR 30312 EN, Publications Office of the European Union, Luxembourg (2020)
- **THOMAS WILSON**, *Common ownership – where do we stand?*, Kluwer Competition Law (2019)

- **PATRICK ACTIS PERINETTO**, *Hub-and-spoke arrangements: future challenges within Article 101 TFEU assessment*, 15(2-3) European Competition Journal, 281-317 (2019)
- **ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT**, policy roundtable on *Hub-and-spoke arrangements in competition* (2019)
- **GUIDO FERRARINI & MARIA CRISTINA UNGUREANU**, *Executive Remuneration, The Oxford Handbook of Corporate Law and Governance*, edited by Jeffrey N. Gordon and Wolf-Georg Ringe (2018)
- **DOUGLAS H. GINSBURG & KEITH KLOVERS**, *Common sense about common ownership*, Concurrences Review (2018)
- **DANIEL RUBINFELD & EDWARD B. ROCK**, *Antitrust for Institutional Investors*, 82 Antitrust Law Journal 221 (2018)
- **EDWARD B. ROCK & DANIEL L. RUBINFELD**, *Common Ownership and Coordinated Effects,* NYU Law and Economics Research Paper No. 18-40 (2018)
- **JOSEPH E. HARRINGTON & JR. PATRICK T. HARKER**, How Do Hub-and-Spoke Cartels Operate? Lessons from Nine Case Studies, working paper, The Wharton School, University of Pennsylvania (2018)
- **CYRIL RITTER**, *Presumptions in EU Competition Law*, working paper (2017)
- **HARBIR SINGH & MICHAEL USEEM**, *The Strategic Leader's Roadmap: 6 Steps for Integrating Leadership and Strategy*, Wharton School Press, 98 (2016)
- **EUROPEAN COMMISSION**, *Support study for impact assessment concerning the review of Merger Regulation regarding minority shareholdings*, Final report, Publications Office of the European Union (2016)
- **ELIZABETH PREWITT & GRETA FAILS**, *Indirect information exchanges to hub-and-spoke cartels: enforcement and litigation trends in the United States and Europe*, 1(2) Competition Law & Policy debate, 63-72 (2015)
- **NICOLAS SAHUGUET & ALEXIS WALCKIERS**, *Hub-and-Spoke Conspiracies: the Vertical Expression of a Horizontal Desire?*, 5(10) Journal of European Competition Law & Practice 711, 713 (2014)
- **GUSTAVO OLIVIERI**, *Minority Shareholdings e controllo delle concentrazioni: Nihil sub sole novi?*, Italian Antitrust Review, 1 (2014)
- **UK COMPETITION COMMISSION**, *Ryanair Holdings plc and Aer Lingus Group plc. A report on the completed acquisition by Ryanair Holdings plc of a minority shareholding in Aer Lingus Group plc* (2013)
- **EUROPEAN COMMISSION**, communication IP/13/584, *Commission consults on possible improvements to EU merger control in certain areas* (2013)
- **EUROPEAN COMMISSION,** *Staff Working Document Towards more effective EU merger control* (2013)
- **DAVID BAILEY**, *Presumptions in EU Competition Law*, E.C.L.R. 362, 363 (2010)

- **PHILLIP E. AREEDA & HERBERT HOVENKAMP**, *Antitrust Law*, § 1402c, 3rd ed., Wolters Kluwer (2010)
- **EUROPEAN COMMISSION,** *Green Paper on the Review of Council Regulations (EEC)* No 4064/89 (2001)
- **U.S. CASE LAW AND DECISIONAL PRACTICE OF ANTITRUST AGENCIES**
  - U.S. SUPREME COURT, *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966)
  - U.S. SUPREME COURT, 104 *US v EI. du Pont de Nemours & Co* 353 US 586, 592 (1957)
  - U.S. COURT OF APPEALS FOR THE 2ND CIRCUIT, *United States v. Apple, Inc.*, 791 F.3d 290, 314, (2015)
  - U.S. COURT OF APPEALS FOR THE 4TH CIRCUIT, *Dickson v. Microsoft Corp.*, 309 F.3d 193, 203-04 (2002)
- **EU AND NATIONAL CASE LAW AND DECISIONAL PRACTICE OF COMPETITION AUTHORITIES**
  - EUROPEAN COURT OF HUMAN RIGHTS, *A. Menarini Diagnostics srl v. Italy*, 2nd section (2011)
  - COURT OF JUSTICE OF THE EUROPEAN UNION, case C-501/11 *P Schindler* (2013)
  - COURT OF JUSTICE OF THE EUROPEAN UNION, case C-521/09 *P Elf Aquitaine* (2011)
  - COURT OF JUSTICE OF THE EUROPEAN UNION, Cases 142/84 and 156/84 *British American Tobacco Company Limited and R.J. Reynolds Industries Inc. v. Commission* (1987)
  - GENERAL COURT, Case T-411/07, *Aer Lingus Group plc v. Commission* (2010)
  - EUROPEAN COMMISSION, case M.8084, *Bayer/Monsanto* (2018)
  - EUROPEAN COMMISSION, case M.7932, *Dow/DuPont* (2017)
  - EUROPEAN COMMISSION, Case M.8401, *J&J / Actelion* (2017)
  - EUROPEAN COMMISSION, Case COMP/M.6541, *Glencore/Xstrata* (2012)
  - EUROPEAN COMMISSION, Case COMP/M.5096, *RCA/MAV Cargo* (2008)
  - EUROPEAN COMMISSION, Case COMP/M.4439, *Ryanair/Aer Lingus* (2007)
  - EUROPEAN COMMISSION, Case COMP/M.3696, *E.ON/MOL* (2005)
  - EUROPEAN COMMISSION, Case COMP/M.3322, *Polestar/Prisa/Inversiones Ibersuizas* (2003)
  - EUROPEAN COMMISSION, Case IV/M.2431*, Allianz/Dresdner* (2001)
  - EUROPEAN COMMISSION, Case IV/M.942, *Veba/Degussa* (1997)
  - EUROPEAN COMMISSION, Case IV/33.440, *Warner/Lambert/Gillette* (1992)
  - UK COMPETITION APPEAL TRIBUNAL, *Ryanair Holdings plc v. Competition Commission* (2014)

- OFFICE OF FAIR TRADE, *Ryanair/Aer Lingus*, ME/4694/10 (2012)
- ITALIAN COUNCIL OF STATE, judgment No. 7972/2020