Passive – Aggressive Investments: Minority Shareholdings and Competition Law

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Abstract

Minority share acquisitions between competitors have been mistakenly considered of concern only in case they result in a change of control.

First the economic theory, closely followed by courts and doctrine, explained and demonstrated that even the acquisition of non-controlling shareholdings may distort competition and requires a close scrutiny by competition authorities.

This article analyzes the impact of minority shareholdings on the incentives of rival firms and ascertains whether the authorities are provided with adequate tools to investigate and address the potential anticompetitive effects.

The results of the economic theory are the starting point to assess whether the legal treatment of minority shareholdings under the EU and US antitrust systems is appropriate and adequate.

1. Introduction

Antitrust issues concerning minority shareholdings are of the widest variety. Authorities have addressed them under merger control rules, rules on agreements between undertakings, rules on abuse of dominance and even as unfair methods of competition.

A wide definition of "minority shareholding" is provided by the OECD which describes it as a shareholding of "less than 50% of the voting rights or equity rights in a target firm".[1]

This definition, however, does not give much insight on the relevance and the ramifications of the effects that the acquisition of a minority shareholding may have on competition. In certain cases minority shareholdings may entitle the holder to sole control over the target firm,[2] while in others they entail no influence whatsoever on the other firm's business conduct.

It is thus possible to divide minority shareholdings into three broad categories:

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[1] Organisation for Economic Co-operation and Development (OECD), "Antitrust Issues Involving Minority Shareholding and Interlocking Directorates" (DAF/COMP(2008)30) <www.oecd.org/dataoecd/40/38/41774055.pdf> accessed 9 July 2011, at 9.

[2] The target firm is the firm in which the shareholding is held.

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(1) Controlling shareholdings: i.e. minority shareholdings giving the shareholder the legal or de facto power to determine the target's strategic commercial behavior, e.g., through preferential shares, due to the wide dispersion of the voting rights or the supermajority requirements provided by the company's statute or corporate law. Control may be sole or joint, legal or de facto;
(2) Non controlling active shareholdings: i.e. shareholdings providing voting and/or representation rights, thus allowing the shareholder to exert some influence over the target and access competitively sensitive information;
(3) Non controlling passive shareholdings: only financial rights are attached to these shareholdings and the shareholder is prevented from directly influencing the policy of the target firm.

When a minority shareholding entails some form of control over a competitor, merger control applies, allowing antitrust authorities to fully analyze the impact of the acquisition on competition.

In case the minority shareholding falls, instead, within the second or third category, competition authorities have shown uncertainty even regarding the opportunity to scrutinize them under antitrust rules.

The discussion concerning the presence and magnitude of the anticompetitive effects of non controlling minority shareholdings is still ongoing. The same can be said with regards to the opportunity and ability of the competent authorities to pursue these effects and the most effective remedies to impose.

Intuition might suggest that non controlling minority shareholdings are less competitively problematic than the ones conferring control on the account that parties continue to compete with one another. Some authors arrived even at the conclusion of completely excluding any anticompetitive concern arising from non controlling shareholdings.[3]

Soon after, the economic analysis proved them wrong,[4] but the extent and even the presence of anticompetitive effects, under certain circumstances, is still under discussion.[5]

The first research question, therefore, regards specifically the anticompetitive potential effect of active and passive non controlling shareholdings in competitors.

These holdings will be analyzed both from an economic and a legal point of view in order to assess the likelihood of harm to competition and to analyze any counterbalancing efficiency or tempering factor which may undermine the competition con-

[3] P Areeda and DF Turner, "Antitrust Law" (1980) P. 1203d, at 322.

[4] RJ Reynolds and BR Snapp, "The Competitive Effects of Partial Equity Interests and Joint Ventures" (1986) 4 International Journal of Industrial Organization 141.

[5] E.g., DP O'Brien and SC Salop, "Competitive Effects of Partial Ownership: Financial Interest and Corporate Control" (2000) 67 Antitrust Law Journal 559, JB Dubrow, "Challenging The Economic Incentives Analysis of Competitive Effects in Acquisitions of Passive Minority Equity Interests" (2001) 69 Antitrust Law Journal 113 and DP O'Brien and SC Salop, "The Competitive Effects of Passive Minority Equity Interests: Reply" (2001) 69 Antitrust Law Journal 611.

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cerns. Do non controlling shareholdings in competitors have any anticompetitive effect? Are there sufficient efficiencies to justify an exemption from antitrust scrutiny? To ensure vigorous competition it is necessary that rival firms take business decisions independently from each other. Minority shareholdings between competitors (and the rights attached to them) may jeopardize this essential requirement affecting both unilateral incentives and the ease of collusion.

It is interesting however to note that, while competition law considers minority shareholdings as potentially harmful devices, the general approach of corporate law has always been that of protection of minorities against the "dictatorship of the majority". This has led to improvements in the conditions through which minority shareholders participate in the management and influence the target firm determining the enhancement of the potential for anticompetitive effects of these acquisitions.

A second research question follows the first one: in case a non controlling minority shareholding in a competitor is deemed to have anticompetitive effects, under which provisions may the authorities scrutinize it? Are these rules adequate to address and eliminate the competition concerns raised by the acquisition? Both antitrust rules and case law will be analyzed in order to find an answer to the abovementioned questions.

1.1. Magnitude

The analysis of the potential anticompetitive effects of minority shareholdings in competitors and their evaluation by the antitrust authorities is of paramount importance both from a theoretical and a practical standpoint.

The phenomenon of structural links between competitors has been the object of a large number of empirical studies which demonstrate the widespread of the practice and provide empirical examples of the (reduced) level of competition usually characterizing these markets.[6]

Noticeable examples of industries featuring complex webs of minority shareholdings in competitors include the Japanese and the US automobile industries, the U.S. mobile telephone industry, the Dutch financial sector, the Nordic power market, the global steel industry and the Spanish electricity sector.[7]

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[6] It is nonetheless important to note that it is very difficult to demonstrate empirically a direct connection between the presence of minority shareholdings in competitors and a reduced competition in the market since a myriad of factors comes into play.

[7] WA Alley, "Partial Ownership Arrangements and Collusion in the Automobile Industry" (1997) 45 Journal of Industrial Economics 191; PM Parker and LH Roller, "Collusive Conduct in Duopolies: Multimarket Contact and Cross-Ownership in the Mobile Telephone Industry" (1997) 28(2) The RAND Journal of Economics 304; E Dietzenbacher, B Smid and B Volkerink, "Horizontal Integration in the Dutch Financial Sector" (2000) 18 International Journal of Industrial Organization 1223; E Amundsen and L Bergman, "Will Cross-Ownership Re-Establish Market Power in the Nordic Power Market" (2002) 23 The Energy Journal 73; J Campos and G Vega, "Concentration Measurement Under Cross-ownership: The Case of the Spanish Electricity Sector" (2003) 3(4) Journal of Industry, Competition and Trade 313. As cited in D Gilo, Y Moshe, and Y Spiegel, "Partial Ownership and Tacit Collusion" (2006) 37 The RAND Journal of Economics 81.

Other examples are provided with regards to the Italian financial and insurance market,[8] the European cement industry,[9] the entire Italian[10] and UK[11] corporate governance system.

A clear example of the relevance of the competition concern represented by minority shareholdings in competitors is provided by Trivieri[12] with regards to the Italian financial and banking sector. This industry (once defined a "petrified forest" by the at the time chairman of the Italian competition authority, Giuliano Amato)[13] is characterized by a complex web of cross-ownership and interlocking directorship[14] which represents an objective limit to the competitive dynamic that such sector could generate.[15] Table 1 summarizes the cross-ownership of major relevance linking, on 31 December 2000, the largest national banking groups.

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[8] Autorità Garante della Concorrenza e del Mercato (AGCM), "La corporate governance di banche e compagnie di assicurazioni" (IC 36)(2008), <http://www.agcm.it/indagini-conoscitive-db/download/C12564CE0049D161/26FE72DE86F8B4D9C1257546004B404D.html?a=IC36+.pdf> accessed 9 July 2011. With regards to interlocking directorates see F Ghezzi, "Legami personali tra intermediari finanziari e diritto della concorrenza : sull'opportunità di introdurre uno specifico divieto anti-interlocking nell'ordinamento italiano" (Jan. – Feb. 2010) 5 Rivista delle Società 997; V Farina, "Banks' Centrality in Corporate Interlock Networks: Evidences in Italy" (2009) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1343641> accessed 9 July 2011.

[9] K Wagner and M Vassilopoulos, "The European Cement Industry" (2000) Background Assessment for the IPTS BAT-Competitiveness Project. <http://ftp.jrc.es/EURdoc/AppendixC1.pdf> accessed 9 July 2011.

[10] M Bianchi, M Bianco and L Enriques, "Pyramidal Groups and the Separation between Ownership and Control in Italy" (2010) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=293882> accessed 9 July 2011; M Bianco and M Bianchi, "The Evolution of Ownership and Control Structure in Italy in the Last 15 Years" (2008) at <http://www.bancaditalia.it/studiricerche/convegni/atti/corp_gov_it/session1/evolution_ownership_control_structures.pdf> accessed 9 July 2011; M Bianchi, M Bianco, S Giacomelli, AM Pacces, S Trento, "Proprietà e controllo delle imprese in Italia" (Il Mulino, Bologna, 2005). See also, with specific regards to interlocking directorates, C Drago, F Millo, R Ricciuti and P Santella, "Corporate Governance Reforms, Interlocking Directorship Networks and Economic Performance in Italy (1998–2007)" (2009) <http://dse.univr.it/pilar/userspace/FrancescoMillo/Corporate%20Governance%20Reform,%20Interlocking%20Directorship%20Networks%20and%20Economic%20Performance.pdf> accessed 9 July 2011; P Santella, C Drago and A Polo, "The Italian Chamber of Lords Sits on Listed Company Boards: An Empirical Analysis of Italian Listed Company Boards from 1998 to 2006" (2009) <http://ssrn.com/abstract=1027947> accessed 9 July 2011.

[11] S Meadowcroft and D Thompson, "Minority Share Acquisition: an Impact upon Competition" (Office for Publications of the European Communities, Luxembourg, 1986).

[12] F Trivieri, "Does Cross-ownership affect Competition Evidence from the Italian Banking Industry?" (2007) 17(1) Journal of International Financial Markets, Institutions and Money 79, at 82.

[13] In relation to the reform of the credit system in 1992.

[14] U Inzerillo, M Messori, "Le privatizzazioni bancarie in Italia" in S. de Nardis, "Le privatizzazioni italiane" (Il Mulino, Bologna, 2000); M Messori, "La concentrazione del settore bancario: effetti sulla competitività e sugli assetti proprietari" (2001) 151 Quaderni Ceis 1.

[15] GL Zampa and E Gilardi, "The Italian Antitrust Authority gives Conditional Clearance to A Merger Giving Rise to one of the Largest European Banking Group Subject to a Number of Structural and Behavioural Remedies (Unicredit/Capitalia)" (2007), e-Competitions, N. 14295.

Table 1
Cross-ownership in the Italian banking system (31.12.2000)

Banking group	Owner											
	Fondazione Cariplo	Banca Intesa	Compagnia di San Paolo	San Paolo IMI-BN	Fondazione MPS	Ente CariFirenze	Mediobanca (via Spafid)[a]	Montedison[b]	Generali[c]	Gruppo Agnelli	Reale Mutua	ABN Amro
BANCA INTESA	9.917								6.054			
UNICREDIT							2.471					
SAN PAOLO IMI-BANCO DINAPOLI	2.273		16.155§		6.170	2.592				4.909	3.00	
BANCA DI ROMA-MCC								2.109		10.05		10.209
BANCA MPS				2.071	66.03			2.008				
BANCA NAZIONALE DEL LAVORO				2.032					7.620			
BANCA CARDINE#				10.80								
BIPOP-CARIRE		2.024							1.500		6.290	
BANCA LOMBARDA E P.							2.517					
CdR FIRENZE				19.109		44.97§						
CARINORD#		31.00§										
CREDEM				2.057								

Source: CONSOB and Il Sole 24 Ore. *Notes:* all the figures are in percentage terms. Symbol (#) denotes that the banking group was not quoted on the Italian Stock Exchange on 31.12.2000. Symbol (§) denotes a majority ownership share.

[a] Mediobanca owned the 100% of shares.

[b] Mediobanca owned the majority of shares (14.53% directly and 4.35% via Spafid).

[c] Mediobanca owned the majority of shares (10.09% directly and 5.15% via Spafid).

A more recent study[16] confirmed the relevance of personal and structural links between some of the most important Italian companies (see figures on page 581).

The case law presented in chapter 4 further demonstrates the importance of the issue at stake with regards to the maintenance of effective competition in the market and to an effective enforcement of competition law.

2. Controlling Minority Shareholdings

The first category of minority shareholdings to be analyzed is that of minority shareholdings conferring control (they are analyzed briefly being the focus of this work on the non controlling ones).

Controlling minority shareholdings are the one giving the acquiring company the power to decide, either solely or jointly, the competitive behavior of the target firm.

It is generally assumed that the larger the financial interest, the greater the degree of control. However, this relationship is neither automatic nor immutable. The degree of control is also related to the voting rights attached to the financial interest, the participation of other shareholders to the decision making and the rules and constraints established by statute and corporate law.

As anticipated, in analyzing minority shareholdings' anticompetitive effects, it is very important to distinguish between purely financial interest entitling the acquiring firm to a share of the profits, and corporate control, granting the acquiring firm the ability to determine the target's competitive behavior.

The acquisition of controlling and non controlling active, as opposed to passive, minority shareholdings have in common the possibility to exercise a direct (and in the first case, decisive)[17] influence over the target firms' competitive behavior. A financial interest instead affects only the incentives of the acquiring firm. Only in case of control, the two competitors cease to be independent pricing entities able to freely decide their own prices, outputs and all other variables central to vigorous competition.

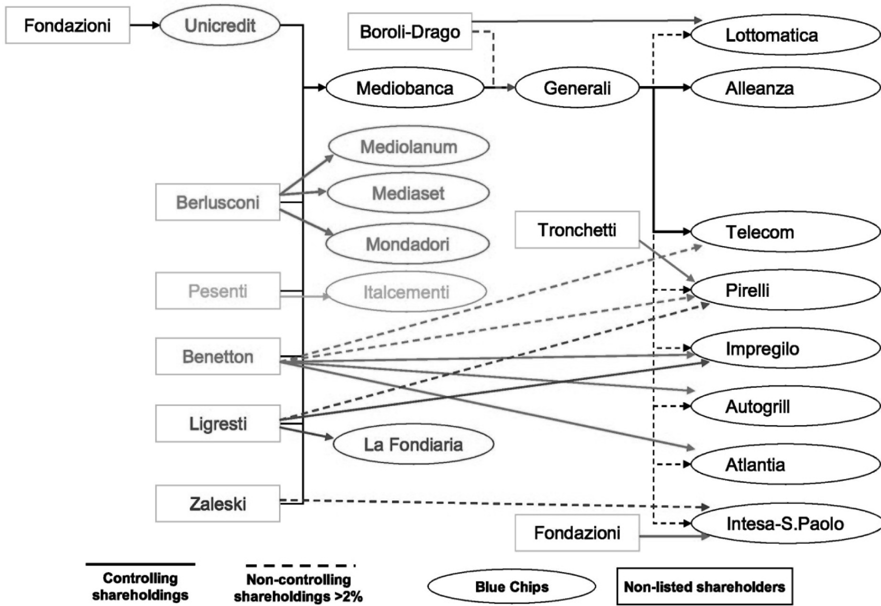
The firm acquiring a minority shareholding conferring control will have the incentive to make the competitor charge higher prices, since it will recapture some of the lost customers. This effect, present also in case of full mergers, is even stronger considering that the acquiring firm pays only a share of the costs linked to the target's price increase (and the following loss of customers and profits).

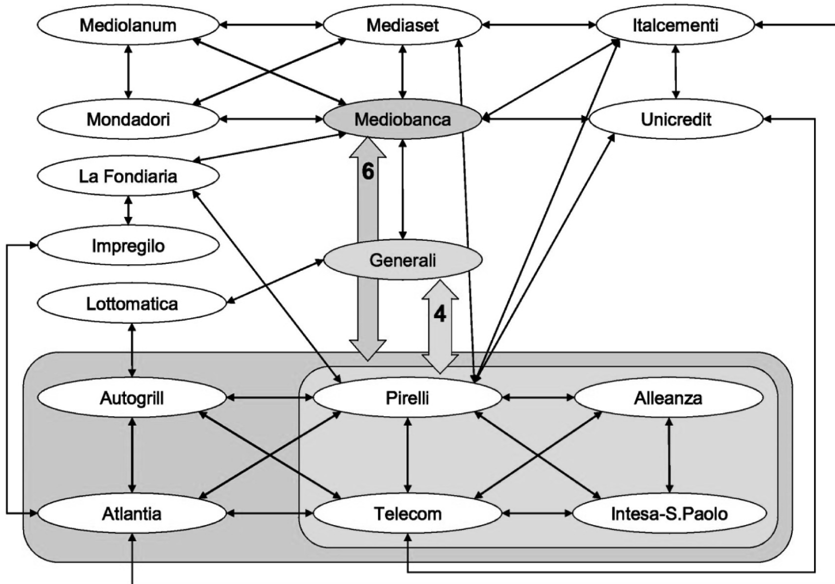
The incentive to make the target raise its prices, indeed, decreases as the financial interest of the controlling shareholder grows.[18] With a small financial interest conferring control, the acquiring firm is keener on taking a free ride on the losses suffered

[16] C Drago, S Manestra and P Santella, "Interlocking Directorships And Cross-Shareholdings Among The Italian Blue Chips" (2011), <http://ssrn.com/abstract=1799168>.

[17] The definition of the influence exercisable by the controlling shareholder as "decisive" is based on that contained in the EU Merger Regulation (Council Regulation (EC) 139 / 2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24).

[18] This is a typical free rider problem, the higher the stake in the rival firms' profits, the higher the cost of a price increase borne by the acquiring firm.


The Mediobanca Galaxy in 2008 (shareholdings)
Fondazioni
Unicredit
Boroli-Drago
Lottomatica
Mediobanca
Generali
Alleanza
Mediolanum
Berlusconi
Mediaset
Mondadori
Tronchetti
Telecom
Pesenti
Italcementi
Pirelli
Benetton
Impregilo
Autogrill
Ligresti
La Fondiaria
Atlantia
Zaleski
Fondazioni
Intesa-S.Paolo
Controlling shareholdings
Non-controlling shareholdings >2%
Blue Chips
Non-listed shareholders


The Mediobanca Galaxy in 2008 (directors)
Mediolanum
Mediaset
Italcementi
Mondadori
Mediobanca
Unicredit
La Fondiaria
6
Impregilo
Generali
Lottomatica
4
Autogrill
Pirelli
Alleanza
Atlantia
Telecom
Intesa-S.Paolo

by the acquired firm[19] in order to increase its own operational profits through the diversion of the target's lost sales.[20] When an acquiring firm has control over its rival's pricing decision, but owns less than 100% ownership stake, the effects on consumer welfare can therefore be worse than in a complete merger.

This free riding problem, in the extreme case of a tiny financial interest (giving rise to total control), could even lead to a decision of the acquiring firm to completely shut down the target, in order to maximize the profit on its own products.[21] The controlling minority shareholder does not represent the average of the owners and may (as in the cases presented above) decide to their detriment. Corporation should therefore carefully consider these possible effects when choosing a governance structure that permits negative control to arise.[22]

2.1. Sole Control

Corporate control may be divided into two, sole and joint control. Sole control is acquired if one undertaking alone can determine the business conduct of another undertaking.[23]

Minority shareholdings do not usually confer sole control over the target company. Nevertheless a minority shareholder may exercise sole control in two situations:

– Firstly if, pursuant to corporate governance provisions, shareholders agreements or otherwise, it has the right to determine the strategic, commercial and competitive behavior of the target (e.g., the business plan, the approval of the budget

[19] Since these will be borne mainly by the other shareholders.

[20] In this case the (relatively small) negative effect suffered from the smaller profits earned off the stakes is probably swamped by the positive effect on the profits of the acquiring firm's own operations. In the simplified case of only two firms in the market where the acquired firm's customers switch to the acquiring firm in case of a price increase, the controller would bear only a percentage of the target's loss while receiving 100% of the profits from the diverted sales.

[21] It would gain the benefit of more customers diverted from the acquired firm bearing only a tiny share of the costs.

[22] See O'Brien, "Competitive", cit., at 569.

[23] It may be either positive or negative. In the first case, "the solely controlling undertaking enjoys the power to determine the strategic commercial decisions of the other undertaking". Negative control, instead, refers to the situations "where only one shareholder is able to veto strategic decisions in an undertaking, but this shareholder does not have the power, on his own, to impose such decisions. In these circumstances, a single shareholder possesses the same level of influence as that usually enjoyed by an individual shareholder which jointly controls a company, i.e. the power to block the adoption of strategic decisions. In contrast to the situation in a jointly controlled company, there are no other shareholders enjoying the same level of influence and the shareholder enjoying negative sole control does not necessarily have to cooperate with specific other shareholders in determining the strategic behaviour of the controlled undertaking". Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01), para. 54.

and the appointment of senior management).[24] If the minority shareholder is the only one having this right, it has sole control.[25]

– Secondly, if the minority shareholder does not enjoy such rights, it may exercise a de facto sole control[26] in case (i) the remaining shareholder interests are widely dispersed among numerous other small shareholders; (ii) only a small percentage of the other shareholders normally attend and vote at shareholder meetings, so that the minority shareholder's interest is likely to represent the majority of all votes cast at future meetings; and (iii) no other shareholder is deemed to share joint control over the acquired entity.[27]

2.2. Joint Control

The presence of joint control implies, instead, that none of the shareholders has the power to solely determine all the strategic decisions of the target company, which can only be taken if two or more shareholders agree with each other.

In this sense, decisive influence refers to "the power to block actions which determine the strategic commercial behavior of an undertaking. […] [J]oint control is characterized by the possibility of a deadlock situation resulting from the power of two or more parent companies to reject proposed strategic decisions. It follows, therefore, that these shareholders must reach a common understanding in determining the commercial policy of the joint venture and that they are required to cooperate."[28]

It is not required to have exactly equal shares or voting rights or equal representatives on the governing bodies.[29] Joint control may, indeed, exist even where there is no equality between the two parent companies in votes or representatives. The joint venture agreement, the Articles of association or the actual conduct of the shareholders may, despite the inequality, cause the parent companies to be mutually dependent on each other, at least with regards to the most important decisions; thus forcing them to agree on a common policy for the joint venture in order to avoid reciprocal blocking votes (deadlock situations).

Joint control may arise from corporate governance rules requiring supermajority votes for certain business decisions. If the firm's corporate governance rules require a supermajority vote of, say, 75% before the company can incur any capital expendi-

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[24] E.g., Case IV/M.232 *PepsiCo/General Mills,* Commission Decision of 5 August 1992, OJ C 228/6, at 7; Case IV/M.062 *Eridania/ISI,* Commission Decision 20 July 1991, OJ C 204/12 at 3–5. As cited in B Hawk and H.L Huser, "Controlling the Shifting Sands: Minority Shareholdings under EEC Competition Law" (1994) 17 Fordham Int'l L.J. 294, at 298.

[25] E.g., Case IV/M.258 *CCIE/GTE,* Commission Decision of 25 September 1992, OJ C 258/12.

[26] Commission Consolidated Jurisdictional Notice, cit., para. 59.

[27] E.g. Case IV/M.025 *Arjomari-Prioux/Wiggins Teape Appleton*, Commission Decision 10 December 1990, OJ C 321/16 at 4 and Case IV/M.159 *Mediobanca/Generali*, Commission Decision of 19 December 1991, OJ C 334/23 at 6–11. As cited in Hawk, "Controlling", cit., at 298.

[28] Commission Consolidated Jurisdictional Notice, cit., para. 62.

[29] If so, they will obviously have to cooperate on a permanent basis. See Commission Consolidated Jurisdictional Notice, cit., para. 64.

tures above a certain threshold, a 30% shareholder alone can block any proposal that could be detrimental to its business. Joint control may also arise where a legally binding pooling agreement is in place or if the minority shareholders transfer their rights to a jointly controlled holding company.[30]

On a de facto basis joint control may be present in cases where two or more minority shareholders are united by sufficiently strong common interests.[31]

3. Non Controlling Minority Shareholdings

After this brief analysis of controlling shareholding, it is time to move to the heart of my work, the acquisition of non controlling minority shareholdings.

Financial accounting standards define a non controlling interest as "the portion of equity in a subsidiary not attributable, directly or indirectly, to a parent."[32]

In economic terms, a non controlling interest is an interest in the performance of a firm which does not provide the holder with the ability to decide the target firm's behavior. This definition does not necessarily imply that the holder exercises no influence at all over the firm, but rather that the interest is not sufficient to allow the holder to exercise control over the conduct of the target.

This chapter analyzes both active and passive non controlling shareholdings, from an economic point of view, while their legal treatment will be considered in chapter four.

The aim here is to answer to the first research question: Do non controlling shareholdings in competitors have any anticompetitive effect? Are there sufficient efficiencies to justify an exemption from antitrust scrutiny?

In light of the large amount of research papers and the acknowledgement reached by case law and legislation, it is possible to say that also shareholdings not conferring control may have anticompetitive effects on the market.[33]

In many jurisdictions, the notification requirements are not limited to share acquisitions leading to sole or joint control over another undertaking (as is the case of the European one). Some of these legislations set out specific percentage levels that trigger the mandatory notification. See, for example, Japan and Canada.

Rather than using only shareholding percentages, some jurisdiction considers also other factors to decide whether minority interests fall within the scope of the relevant legislation. In Germany, for example, the ARC[34] not only requires notification of any

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[30] Commission Consolidated Jurisdictional Notice, cit., para. 75.

[31] Commission Consolidated Jurisdictional Notice, cit., para. 76–79.

[32] Financial Accounting Standards Board Statement No. 160, "Non controlling Interests in Consolidated Financial Statements-an Amendment of ARB No. 51".

[33] We can consider outdated Areeda and Turner finding in 1980 that "non controlling acquisition has no intrinsic threat to competition at all". See Areeda, "Antitrust Law", cit., at 322.

[34] German Act against Restraints of Competition (ARC). An English version of the ARC is available at <http://www.bundeskartellamt.de/wEnglisch/download/pdf/GWB/0911_GWB_7_Novelle_E.pdf> accessed 9 July 2011.

acquisition of 25% or more of the capital or voting rights of another undertaking,[35] but also acquisitions falling below the 25% threshold provided that the transaction enables the buyer to exercise "a competitively significant influence" over the target company.[36] Similarly, the United Kingdom's OFT guidelines state that acquisitions of minority shareholdings between 10% and 15% may be subject to merger review to the extent that such shareholdings may give rise to the ability to exercise "material" influence over the target company, taking into account any special voting or veto rights, board representation and/or financial interdependence.[37] The United States generally requires notification of any share acquisition exceeding the thresholds provided by the Hart–Scott–Rodino Act (HSR)[38] (annually adjusted for inflation), irrespective of the resulting percentage shareholding. Acquisitions of minority stakes of 10% or less (15% or less in case of institutional investors such as banks and investment companies) are exempted from the notification requirement under the HSR if made "solely for purposes of investment."[39]

Active and passive investments do not substantially differ with regards to the type of anticompetitive effects. As it will be demonstrated, active investments posses the same effects as passive ones, reinforced by the possibility to influence the target and have access to sensitive information, and may entail also other and more serious concerns for competition.

When reviewing the acquisition of a non controlling minority shareholding in a competitor, authorities take usually into account four possible anticompetitive effects.

First, the lessening of competition may be caused by the reduction of the incentives of the acquiring firm to compete aggressively with the firm in which the investment was made or, in case the investment is in a potential competitor, to enter into its market. Vigorous competition would cause losses to its competitor reducing the value of the shareholding acquired. The minority shareholding allows also the acquiring firm to recapture a share of the sales lost to the target, increasing the former's interest to unilaterally increase prices. This is true even in case of a purely passive shareholding.

Second, a minority shareholding (even if passive) can be used to signal the intention to compete less vigorously. Due to its intrinsic unilateral effect, it may represent a commitment device employed to induce other firms in the market to equally commit to collusion. This coordinated effect is particularly strong when the investment is made by the maverick firm.[40]

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[35] ARC, Section 37 (1) n.3.

[36] ARC, Section 37 (1) n.4.

[37] Office of Fair Trading (OFT), "Mergers – Substantive Assessments Guidance" (2003), <http://www.oft.gov.uk/shared oft/business leaflets/enterprise act/oft516.pdf>, at 9.

[38] Hart–Scott–Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94–435, Section 201, 90 Stat. 1390 (15 U.S.C. Section 18a).

[39] 15 U.S.C. Section 18a, section (c)(9) and Rule 802.64 (16 CFR 802.64).

[40] The maverick firm is a firm "that plays a disruptive role in the market to the benefit of customers". "For example, […] [a] firm [that] threatens to disrupt market conditions with a new technology or business model […]. Likewise, [a firm having] the incentive to take the lead in price cutting or other competitive conduct or to resist increases in industry prices. A firm that may discipline prices based on its ability and incentive to expand production rapidly using available capacity also can be a maverick,

Third, a minority shareholding may reduce competition in case the acquiring firm obtains the ability to influence the competitive behavior of the target firm through voting,[41] specific governance rights, such as the right to appoint members to the board of directors (i.e. interlocking directorates)[42] or other rights granted to protect the minority shareholders against the controlling one(s). The acquiring firm can use its influence to induce the target firm to compete less aggressively or to coordinate their conducts.

Fourth, a partial acquisition can lessen competition by giving the acquiring firm access to the competitor's non-public, competitively sensitive information on prices, costs, future strategies and other key decisions.

Access to sensitive information can lead to adverse unilateral or coordinated effects, enhancing the ability of the two firms to reach explicit or tacit collusion and to monitor the adherence to such agreements.

In addition, the existence of these links (both structural and personal) may, in the long run, lead the firms involved to abandon aggressive competition in favor of quiet life regimes.[43]

3.1. Active Minority Shareholdings

An active minority shareholding may be defined as a shareholding conferring the right to influence, but not to determine, the business conduct of the target. This influence may be exerted, for example, through the appointment of directors which are a perfect instrument to share or otherwise gain knowledge of commercial policy of rivals, establish cooperation and monitor the competitive behavior of the target. The exchange of competitively sensitive information may lead to collusion on the marketplace and improves the stability and longevity of the collusive "agreement"; this in particular when the number of firms in the market is limited[44] and/or the minority shareholdings involve the majority of them.[45]

As outlined before, information, board representation and other ways to influence the target are usually granted to minority shareholders in order to protect them against the "dictatorship of the majority". These rights aim at avoiding two problems: prevent the minority shareholders' interests to be removed from the most important decisions

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as can a firm that has often resisted otherwise prevailing industry norms to cooperate on price setting or other terms of competition". U.S. Department of Justice and the Federal Trade Commission, "Guidelines on the assessment of horizontal mergers" (19 August 2010) <http://www.justice.gov/atr/public/guidelines/hmg-2010.html> accessed 9 July 2011, section 2.1.5, p 3.

[41] This regards the cases in which a list vote systems is in place or the acquisition is friendly.

[42] See below chapter 3.1.1.

[43] F Ghezzi, "Intrecci azionari e concorrenza. Il caso Generali/Ina" (2000) 2 Mercato, concorrenza, regole 245.

[44] Reynolds, "The Competitive", cit.

[45] F Ghezzi, "Intrecci Azionari", cit., at 256, 259.

and avoid their investments being threatened by management choices taken against their financial interests.[46]

Different shareholding thresholds convey different rights on the basis of corporate law of each specific country. For example, minority interests above 5% in the U.K., 10% in Germany and approximately 0.50% for large listed companies in France permit minority shareholders to request items to be placed on the agenda of meetings. Qualified majorities required for certain "qualified resolutions" give minority shareholders with shareholding exceeding 25% in the U.K. and Germany, 33.3% in France the right to veto such resolutions as changes to the Articles of association, execution of agreements regarding distribution of profits or control of the entity's operations, and the recall of members of the entity's supervisory board. The stock exchange regulations impose certain obligations of disclosure and even the compulsory submission of bid offers above certain interest thresholds, again not the same in all countries: 30% in the U.K. or Germany, 33.3% in France.[47]

With a minority interest of 5% in the U.K. it is possible to prevent the reappointment of auditors, 10% permits to request a general meeting, 15% to apply to Court to object to a variation of classes of rights.[48]

In Italy minority shareholders with at least 10% (5% for listed companies) may convene the shareholder meeting and report to Court serious irregularities committed by the directors.

These rights give minority shareholders a way to influence the firm in which the shares are held. When the minority shareholder is a competitor of the target it is necessary to keep them in mind to determine the potential anticompetitive effect on the market of the minority share acquisition.

3.1.1. Interlocking Directorates: Influence and Information

> "The practice of interlocking directors is the practice of many evils. It offends laws, both human and divine. Applied to rival corporations, it tends to the suppression of competition [...] applied to corporations which deal with each other, it tends to disloyalty and violation of the fundamental law that no man can serve

[46] F Russo, "Abuse of a Dominant Position? Minority Shareholdings and Restriction of Market's Competitiveness in the European Union" (2006), Amsterdam Centre for Law and Economics, Working paper No. 2006–12, at 47. "Analyzing the final report of the High Level Group (the Winter Report, named after the group's chairman), strongly based on the concept of "primacy of the shareholders", in the section regarding shareholders' rights (chapter 3, para. 3, pp 47–48) a series of rights that should be recognized as constituting a minimum standard of rights to be guaranteed in all Member States' national legislation is listed. The Winter Report states that "shareholders need to be able to ensure that management pursues [...] their interests" and that for them it has to be possible "to influence the decisions of the company and, in addition, appears attractive for them to do so".

[47] OECD, "Antitrust Issues", cit., at 239, 240.

[48] Office of Fair Trading (OFT), "Minority Interests in Competitors" (2010), Report by DotEcon, <http://www.oft.gov.uk/shared_oft/economic_research/oft1218.pdf> accessed 9 July 2011, at 18.

two masters. In either event, it tends to inefficiency for it removes incentives and destroys soundness of judgment."[49]

Interlocking directorates refer to situations in which one or more companies have in common one or more members of their respective boards.[50] A broader definition refers to the situation in which a member of the board of directors of a company, a top executive of that company or a close relative serves as a member of the board of directors of another corporation.[51]

Interlocking directorates have been pictured with a very smart analogy: marriages between members of different dynasties.[52] History has plenty of examples of royal houses using the holy matrimony to seal precious alliances. The idea behind both practices is to achieve proximity, trust and cooperation. These personal and structural links between competitors may indeed lead to a "meeting of the minds", a convergence of objectives and behaviors of the interlocked firms, thus stimulating a long-term quiet life policy, on the basis of a more friendly and sympathetic relation between each other than one would expect between competitors.[53] This quiet life regime, which may present itself only in the long run, could even be unintentional; based on the perception the linked firms have of themselves, not as competitor but more as close partners.

The establishment of an interlocking directorship may be motivated by reasons other than anticompetitive, particularly in industries where experienced and knowledgeable individuals are fundamental and in "short supply". It is nevertheless easy to see how interlocking directorates between (even only potential) competitors may raise antitrust concerns. This is valid also when the interlock is indirect, through a common source[54] or an unrelated third company (in the board of which they sit together).

When interlocking directorates link together two or more competing companies, they may affect the quality and independence of board decisions.

A minority shareholding coupled with board representation creates a concrete potential for coordinated practices and thus a reduction of competition on the market.

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[49] L Brandeis, Pujo committee report (1913), House of Representatives. See also H Bowman, "Interlocking Corporations" (1913) 19 Mich. L. Rev. 1–15.

[50] Executive or non-executive (same rights and obligations, different functions) board members or other officers of a company hold additional positions serves as a director in one or more other company boards. See OFT, "Minority", cit., at 8 and 23.

[51] This is the definition outlined in various analysis, e.g., in OECD, "Antitrust Issues", cit., at 24. The inclusion of the "family" interlocking directorate, not considered in the US Clayton Act Regulation, may be of interest for all the countries where family capitalism is predominant, e.g. Italy.

[52] E Moavero Milanesi, "Legami personali fra imprese ("interlocking directorship") e diritto comunitario della concorrenza: riflessioni", Governo dell'impresa e mercato delle regole: scritti giuridici per Guido Rossi 943 (Giuffrè, Milano, 2002), at 948.

[53] For an analysis, Ghezzi, "Legami", cit., at 1007.

[54] A common holder (e.g. a private equity firm) has a shareholding in both the competing firms and nominates the same director or directors to sit in the boards of both competitors.

Having own directors in a rival firm may improve the flow of competitive sensitive information[55] back and forth between firms. Wider and quicker knowledge of rivals' intentions would significantly help firms solving coordination problems, reach common understandings as to the coordinated behavior to adopt on the market and monitoring the other firms' conduct; thus increasing the sustainability of a collusive equilibrium.[56]

Interlocking directorship permits to "personally" tie, through one or more directors, two competing firms; providing them helpful means to reach collusion and monitor target's adherence to the commonly agreed conduct,[57] leading to a reduction of competition in the market.[58] The tie and in general the potential anticompetitive effects are more serious in case the interlocking directorship is reciprocal.

It is sometimes suggested that competition authorities should be comforted by the fiduciary duties of directors, either included in the corporate charter, required by the public stock exchange or imposed by corporate or antitrust law. Setting aside that it is extremely difficult for shareholders to detect and prove violations of fiduciary obligations,[59] it is important to consider that a director might have competing fiduciary duties.[60]

A director in two competitors' board will be obviously influenced by the information gathered and may keep them into consideration when deciding the business policy and competitive conduct of the firms on whose board he sits. He could also, when voting or expressing his opinion, take into consideration the goals of the two firms; goals which are then acknowledged also by the other members of the boards.[61] In considering this behavior it is necessary to keep in mind that his fiduciary duties oblige him to use all the information in his possession to ensure the best outcome for the shareholders of both firms on whose board he sits.[62] He has, as a member of both

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[55] Information which should not be accessible to the general public and especially competitors, e.g., on firms' strategies, demand, costs, entry in other market segments and/or other geographic areas… OECD, "Antitrust Issues", cit., at 129.

[56] P Buccirossi and G Spagnolo, "Corporate Governance and Collusive Behaviour" (2007) <http://ssrn.com/abstract=1136675> accessed 9 July 2011, at 10. Moavero, "Legami", cit., at 960.

[57] CR Leslie, "Trust, Distrust, and Antitrust" (2004) 82(3) Texas Law Review 515, at 583, underlines how interlocking directorates historically had a fundamental role in preserving and strengthening the trust between participants to a collusive agreement. As cited in Ghezzi, "Legami", cit., at 1008.

[58] Bianchi, "Proprietà", cit., at 39.

[59] This can be solved by independent directors themselves who might have the incentives, expertise, and information needed to prove, and are well situated to publicize, the violation.

[60] OECD, "Antitrust Issues", cit., at 12.

[61] Ghezzi, "Legami", cit., at 1008.

[62] The Italian antitrust authority (AGCM) stated in its decision of the 12 April 2007, Banche Popolari Unite/Banca Lombarda e Piemontese, Section 139–140: "[il] cumulo di incarichi appare di rilievo nell'analisi dei potenziali effetti restrittivi della concorrenza in considerazione del fatto che i soggetti aventi tali incarichi non possono, agendo nell'interesse degli azionisti dai quali hanno ricevuto i diversi mandati, non tener conto dell'intero set informativo a loro disposizione nel momento in cui operano nei vari organi di gestione e controllo. Alternativamente, ed in contraddizione con quanto sopra affermato, si dovrebbe presumere che tali soggetti agiscano volontariamente in maniera sub-ottimale per gli azionisti che rappresentano. La situazione appena descritta dà quindi la ragionevole certezza agli

boards, the obligation to serve the best interest of all shareholders and both corporations considered as entities.[63]

This does not necessarily mean the director has to abstain from any collusive behavior; to the contrary. Being the shareholders' and the firms' interest to maximize their profits, the interlocked director should, to the best of its possibilities (and information), try to achieve this goal. He would respect his fiduciary duties if he pursues supracompetitive collusive profits, to the benefit of both the interlocked firms and their shareholders, but to the detriment of consumers.

The maximization of the interlocked companies' joint profits would be even more welcomed by the shareholders in case the two firms are linked through minority shareholdings. In this case, indeed, their total profits will be influenced by the operational profits of the competitor. In these regard it can be said that the incentives of the interlocking directors to soften competition in a collusive manner may be considered aligned with the shareholders of both companies' objectives.[64] In addition, in case the directors' remuneration packages are closely tied to the companies' performance, also their personal incentives to maximize joint profits will be enhanced.[65]

Antitrust regulation in most countries does not have any specific rule concerning interlocking directorates.[66]

In these countries, in order for authorities to address the competitive concerns arising from interlocking directorates, it is thus necessary to apply provisions established for agreements between undertakings, abuses of dominant position and concentrations.

These provisions are neither designed nor appropriate to address effectively this issue, permitting to intervene only ex post, when the effects on competition have already been produced.[67]

It is now important to take briefly into consideration efficiencies and non anticompetitive reasons behind the establishment of interlocking directorates. It is possible to consider the market for directors and other high-level executive talent as any other market. Candidates for executive positions offer their services in the marketplace to

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azionisti di entrambe che egli, agendo correttamente nell'interesse di cui sono portatori: i) opererà perseguendo l'obiettivo di massimizzare i profitti di ogni banca, ma godendo di un in-sieme informativo, legittimamente acquisito nei vari moli assunti, che attenua quel margine di incertezza tipico dell'agire tra concorrenti; ii) individuerà le soluzioni che evitino di avvantaggiare una banca penalizzando l'altra".

[63] O'Brien, "Competitive", cit., at 571. As stated in Interlocks in "Corporate Management", Staff Report of the House Committee on the Judiciary (Antitrust Subcommittee), 89th Cong., 1st Sess. 25–26 (Comm. print 1965), at 7 "in the antitrust field, an interlocking director is in a position to serve as a liaison officer between the two companies and to ensure that the pursuit of the best interests of one is not seriously detrimental to the other".

[64] OFT, "Minority", cit., at 61.

[65] OFT, "Minority", cit., at 60.

[66] Only Japan, Indonesia, Korea, the United States and now Italy have specific prohibitions of interlocking directorates. In Germany, Section 19(2) No. 2 GWB states only that ties between competitors should be taken into account in order to establish control. Ghezzi, "Legami", cit., at 1014.

[67] Ghezzi, "Legami", cit., at 1015.

the consumers of talent, the companies.[68] An indiscriminate prohibition of interlocking directorates would impede firms to hire directors with the most appropriate skills for the job, resulting in a limitation of the consumers' freedom of choice.[69] This problem is particularly serious in industries where expertise is important and difficult to find on the market.[70] Interlocking directorates between competitors have in these cases various benefits for the hiring companies, including legitimacy, prestige and expertise.[71] "By appointing individuals with ties to other important organizations, the firm signals to potential investors that it is a legitimate enterprise worthy of support."[72]

Another important economic explanation for establishing interlocking directorates, far from anticompetitive purposes and more in line with minority shareholder's protection, is the one of monitoring the policy of the target firm, in order to protect the value of the investment.

3.1.2. Acquisition by Private Equity Firms

An interesting issue to consider briefly is the acquisition of non controlling minority shareholdings in rival companies by a private equity firm. The minority shareholdings acquired by a private equity firm may be divided into active (including controlling and not) and passive ones, giving rise to three possible combinations: (i) two passive, (ii) two active or (iii) one active and one passive minority shareholdings in competing firms. Obviously the consequences differ.

As for the first case, these acquisitions are usually exempted as they may be considered made solely for the purpose of investment.[73] These investments do not affect the incentives of either of the target firms because passive investments may directly change only the incentives of the acquiring firm and the private equity firm is not competing with the target firms. In the second and third case, the participation confers the private equity firm a way to directly influence the competitive conduct of the competing firms. In case the minority shareholding confers control, the third case can be considered as a passive investment by the controlling shareholder analyzed in chapter 3.3.5..[74] In case none of the active investments confer decisive influence, the

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[68] BM Gerber, "Enabling Interlock Benefits While Preventing Anticompetitive Harm: Toward an Optimal Definition of Competitors under Section 8 of the Clayton Act" (2007) 24 Yale J. on Reg. 107, at 3.

[69] AH Travers Jr., "Interlocks in Corporate Management and the Antitrust Laws" (1968) 46 Tex. L. Rev. 819.

[70] Travers, "Interlocks" at 854 and Ghezzi, "Legami", cit., at 1009.

[71] Gerber, "Enabling", cit., at 4–5. "An individual who currently serves as a director or manager of another corporation may simply be more qualified for a similar directorship position than an individual without this experience".

[72] MS Mizruchi, "What Do Interlocks Do? An Analysis, Critique, and Assessment of Research on Interlocking Directorate" (1996) 22 Annual Review of Sociology 271, at 276.

[73] EUMR, Article 3(5)(a) and 15 U.S.C. Section 18. With regards to the US, concerning the notification requirement, see Hart–Scott–Rodino Act of 1976, 802.64 – Acquisitions of voting securities by certain institutional investors.

[74] With the important remark that, being the controlling shareholding a minority one, the negative effects on competition and consumer welfare are particularly negative.

acquisition may:[75] (i) alter the unilateral incentives of one or both firms to compete;[76] (ii) alter the coordinated incentives of the firms involved;[77] (iii) facilitate the sharing, exchange or access to competitively sensitive information, with the aim of helping coordination. The private-equity firm would be in the position to act as a conduit for the flow of information between the two rival companies in which it holds a minority share.

It is nonetheless important to verify whether, in the case at stake, the exceptions usually provided for acquisitions of securities by financial institutions are applicable.[78]

A very important case in these regards is the *Kinder Morgan* case, analyzed below in chapter 4.5.4.12.

3.2. Passive Minority Shareholdings

A passive investment occurs when a firm acquires nonvoting shares entailing the right to a share of the rival's profits, but neither influence over the rival's competitive behavior nor access to competitively sensitive information.[79]

With regards to passive investments, it is definitely more difficult to answer the first research question.

Even though the efficiencies linked to these acquisitions are few and, most of the times, negligible; the presence of tempering factors and the difficulties to detect and prove the impact of passive shareholdings on competitive incentives, have led to a situation of economic and legal uncertainty.

The most part of the following chapter will therefore consentrate on the results of the economic theory in these regards in order to determine whether a reduction of competition may be considered deriving from passive investments under certain circumstances. Obviously the peculiarities of the potential anticompetitive effects of active shareholdings will be analyzed as well.[80]

3.3. Anticompetitive Effects

The main competitive concern related to both active and passive minority shareholdings is that "[t]he mere fact that an undertaking has an interest in the economic

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[75] BJ Reed, "Private Equity Partial Acquisitions: Towards a New Antitrust Paradigm" (2010) 5(2) Virginia Law & Business Review 303, at 330–333.

[76] The private equity firm may try to influence the competitive behavior of at least one of the competing firm causing it to compete less vigorously after the acquisition of a stake in a competitor in order to benefit from the recoupment of diverted sales.

[77] This refers only, with regards to the direct effect, to the second case, where the private equity firm may nominate the same director in both firms, realizing an indirect interlocking directorship via a common source.

[78] See below ch. 4.1.1.3. and 4.5.3.

[79] D Gilo, "Passive Investment" (2008) 3 Issues in Competition Law and Policy 1637, at 1637.

[80] As anticipated, active minority shareholdings have the same basic effects of passive ones, reinforced by the possibility to influence the target and receive sensitive information.

performance of another undertaking from which it was previously independent or less dependent, might lead to a change in the strategic behavior of the acquiring, and perhaps of the acquired, undertaking. This may certainly be the case if the undertakings in question are competitors, are in vertical relation, or even active on neighboring markets."[81]

The acquisition of a minority shareholding in a competitor, where there are only few significant firms in the market,[82] may have significant competitive implications.

The anticompetitive effects of the acquisition of minority shareholdings may be divided into two main categories:

(1) unilateral anticompetitive effects (i.e., effects existing absent collusion), affecting the acquiring firm's payoffs,[83] and
(2) coordinated anticompetitive effects (i.e., effects arising from the improved potentials for collusion), changing the incentives to collude, deviate from collusion and punish deviation.

As stated by Gilo: "the [acquiring] firm has an incentive to compete less aggressively since it internalizes a portion of the rival's profits through its investment. This basic intuition translates directly into unilateral anticompetitive effects and indirectly into coordinated anticompetitive effects."[84]

Reynolds and Snapp[85] and Farrell and Shapiro[86] have been the first one to study the anticompetitive effects of partial ownership between competitors. In the context of a single-period modified Cournot oligopoly model,[87] they show that the market output is a declining function of the extent to which firms are linked by minority shareholdings. The higher the level of ownerships in competing firms, the higher the incentives of the firms to lower their output given the output of the other firms.[88] The equilibrium in the market (without cooperation) becomes therefore less competitive: aggregate output falls toward monopoly levels and firms' profits rise.

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[81] RA Struijlaart, "Minority Share Acquisition Below the Control Threshold of the EC Merger Control Regulation: an Economic and Legal Analysis" 25(2) World Competition Review 173, at 173–174.

[82] In such markets, often called oligopolistic, price is usually above the marginal cost of supplying the product or service. In these markets barriers to entry exist, impeding (or strongly limiting) new firms to enter the market, even in case entry would be profitable.

[83] The acquiring company has as an interest in the competing company's profits, thus it "internalizes a competitive externality". Reynolds, "The Competitive", cit., at 144–148.

[84] Gilo, "Passive", cit., at 1637.

[85] Reynolds, "The Competitive", cit.

[86] J Farrell and C Shapiro, "Horizontal Mergers: An Equilibrium Analysis" (1990) 80(1) The American Economic Review 107.

[87] As explained in Russo, "Abuse", cit., at 6: "The classic Cournot model represents an oligopolistic market in which there is a coordination of the competitive behavior among the few players of the market based on setting of production quantity that is possible to obtain only due to the extremely high degree of market (most of the time tacit) transparency that allows the players to correctly assume how much the competitors will produce and maximize the profit according to that prediction".

[88] This because a share of the lost sales will be recaptured through the participation in the rival's profits.

The model and its conclusions are premised on one essential condition: the entry in the market is difficult if not impossible. If entry is easy, firms attracted by the higher industry profits could compensate the lower production caused by the decreased competition and jeopardize any attempt to unilaterally raise prices. It is also necessary that the firms involved in the acquisitions hold a significant amount of market power. Reynolds and Snapp also stated that the "equilibrium market changes only modestly when few firms are linked and those links are small."[89] On the other hand, when the links include all the players in the market, the drop in output can be significant.

Minority shareholdings may create an incentive on the acquiring firm to reduce output (or increase prices) because such links "internalize" a competitive "externality"[90] (namely the profits of a rival). In other words the unilateral effect is the consequence of the positive correlation among the profits of the firms linked by the minority shareholding. The profits of the linked rivals suddenly become of relevance for the acquiring firm which will act accordingly, reducing its output (or increasing its prices). These links therefore affects the profit-maximization decisions of the acquiring firm inducing it to compete less vigorously with a view to joint profit maximization. This incentive to reduce competition, reducing output and raising prices, is based on the fact that the acquiring firm is in a position to recoup all or part of the lost sales through its financial interest[91] in the rival firm.

It is important to note that minority shareholdings will have unilateral anticompetitive effects whatever the reason to buy them. These effects stem indeed from an "automatic" realignment of the incentives on the part of the acquiring firm and not on the ability to influence the behavior of the firm in which the investment was made.

Reynolds and Snapp provide a quantitative example of a market with five Cournot competitors having a 10% equity stake in each other. They demonstrate this would result in a 10% loss of the equilibrium market output. In case the structural links are reciprocal, the drop in market output is doubled. They calculated also the Cournot equilibrium with ten firms, each having a 10% market share and a 10% equity interest in each other. This could even lead to a total production output at a monopoly level.[92]

It is similarly possible to assume that increased minority shareholdings would lead to greater similarity of interests and smaller incentive to cheat (part of the losses inflicted on competitors would be suffered by the cheating company), which in turn would encourage, particularly if the shareholding is reciprocal, collusion among rivals. Applying their model to cartels, Reynolds and Snapp write that "[f]or a given level of policing costs and cheating, an increase in ownership interests will bring about a re-

[89] Reynolds, "The Competitive", cit., at 146. The model shows an output decline of 0.1% if, in a market with ten equally-sized and unlinked firms, one firm acquires a 10% share in a competitor. The drop in output would double if there are only five firms in the market.

[90] Reynolds, "The Competitive", cit., at 148.

[91] Defined as "the right to receive the stream of profit generated by the firm" in which the minority interest is held. See O'Brien, "Competitive", at 569.

[92] Reynolds and Snapp conclude that "when ownership shares are at the maximum level which is feasible, given the number of firms in the market, the monopoly output level will result regardless of the number of firms". Reynolds, "The Competitive", cit., at 147.

duction in cheating, leading to lower average output and higher profits than otherwise would be the case."[93]

From above it follows that in case of acquisition of a minority shareholding in a competitor, in oligopoly markets, the industry prices will rise (and quantities fall) even if not all firms in the industry invested in a competitor. This effect can be explained with an example. Suppose there are three firms in the market: National, Avis, and Hertz. If National invests in Avis, it becomes a less vigorous competitor and decreases output. This can be demonstrated to cause total industry output to fall and prices to rise, even in case Avis and Hertz do not invest in their competitors' stock. "The result is the same even in cases where Avis and Hertz respond to National's reduction of output by themselves raising output. National's contraction of output can be shown to dominate,[94] so that total industry quantity indeed diminishes. Therefore, industry price will still rise."[95]

When National reduces its output following the minority shareholding acquisition and thus the internalization of a competitive externality, even if Avis and Hertz respond raising their output, thus raising the profits from the participation, they will do it only up to the level where the costs of producing an additional unit of output equal the revenues. For each additional unit produced, the aggregate supply increases and the prices decrease. Hence, the marginal revenue from producing an additional unit decreases every new unit produced, until finally it is no longer worthwhile to produce an additional unit. The total expansion of output is therefore lower than the initial output reduction.[96]

It is also possible that Avis and Hertz may themselves tend to reduce output and raise prices in response to National's contraction of output production. This is due to the collusion facilitating effect of minority shareholdings. In this sense investments in rivals may be used to signal a commitment to compete less vigorously by the acquiring company. The aim of this commitment is to induce competitors to compete less vigorously themselves favoring a collusive equilibrium to the benefit of the firms in the market and to the detriment of consumers.

A numerical example may help picturing these effects.[97] In a market with only two firms, National and Avis, vigorous competitive action (e.g., a price cut) would lead National to gain $1 (e.g. due to an increase of its market share) and Avis to lose $4

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[93] Reynolds, "The Competitive", cit., at 149.

[94] Reynolds, "The Competitive", cit.

[95] D Gilo, "The Anticompetitive Effects of Passive Investment" (2000) 99(1) Michigan Law Review 1, at 11.

[96] Reynolds, "The Competitive", cit. and Gilo, "The Anticompetitive", cit., at 12. See generally Tirole, "The Theory", at 220. This without considering the actual ability of the other firms in the market to increase their output should the acquiring form choose to reduce its production (i.e. capacity constraints).

[97] Gilo, "The Anticompetitive", cit., at 8.

(e.g. caused by the decreased market share and the price war following National's price cut)[98]. National would therefore have the incentive to compete vigorously.

When minority shareholdings come in the way the situation changes. In case National acquires 26% of Avis's stock it would share 26% of its competitor's profit flow incurring also in Avis's losses. In the previous example of price cut, National would still earn $1 from its operations but loses 26% of $4 (greater than $1), due to its stake in Avis. National would therefore prefer to refrain from price cutting (and in general from vigorous competition). This is the unilateral effect on the incentives to compete of a minority share acquisition.

Avis could even anticipate National's vigorous competition. Knowing National will price cut anyway, it may cut prices first causing losses of 4$ to National. This may be avoided by the acquisition of a minority shareholding. The investment can indeed act as a commitment device not to price cut making vigorous competition unprofitable for the acquiring firm. Avis, knowing this, would be reassured and would refrain from price cutting itself.

Anticompetitive unilateral and coordinated effects will depend on various factors which influence the firms' incentives to compete. They may be structural (e.g., the degree of market concentration, entry conditions, the presence of powerful buyers, the homogeneous or differentiated nature of the products concerned,[99] the respective diversion ratios,[100] the type of competition[101] in the market, its transparency and the number of companies already linked to each other) or transaction specific (e.g., the companies' respective costs and margins,[102] their market shares, the size of the minority shareholding, the rights connected to it, the reciprocity of the links, the presence of instruments other than minority shareholdings strengthening the anticompetitive

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[98] As explained in Gilo, "The Anticompetitive", at 9: "It is not unnatural to assume that Avis loses $4 from National's price cut while National is making only $1. Price cutting on a cartel is a good example of a case in which a firm usually makes less from competing vigorously than its rivals lose from this vigorous competition: when National cuts a cartel price, it makes a short-term profit from price cutting and stealing business, in the short run, from its rivals. Its rivals are expected to respond, however, by price cutting themselves, and a price war will follow. This reduces National's net gains from price cutting. Avis, on the other hand, loses from National's price cut in two ways: it endures a short-term loss from losing business to National, as well as a long-term loss due to the price war following the price cut. Therefore, it is reasonable to assume that National's net gain from price cutting is smaller than Avis's total loss from National's price cut".

[99] "The more differentiated products are, the more beneficial it is to take shares in other firms". See OFT, "Minority", cit, at 48. The more the products are differentiated, the less, in case of a price increase, customers will switch to competitors' products. If this is combined with a high diversion ratio between the involved firms, it is very likely that a price increase, after a minority share acquisition, would be a profitable strategy.

[100] I.e. the amount of demand captured by Firm B in the event of a price increase by Firm A. The greater the diversion ratio the higher the incentive to raise price because a lot of customers will be partially recaptured by the passive stake in B.

[101] Bertrand or Cournot.

[102] The magnitude of the anticompetitive effects is more significant if Firm B's margins are larger than A's.

effects, the industrial and commercial relation between the firms involved[103] and the fact that the acquirer is the controlling shareholder). Additionally it is necessary to keep in mind other real-world factors such as the availability of information about the target, manager's incentives and the acquiring firm's ability to capture benefits.

3.3.1. Unilateral Effects

In perfectly competitive markets, minority shareholdings have no unilateral effects.[104] In a market with two firms producing a homogenous good, if firm A, after an investment in firm B, increases its prices it will lose all of the market to firm B because consumers see the two firms' products as perfect substitutes and it is assumed there are no capacity constraints. Moreover, under perfect competition, firm B's price equals its marginal costs, so that firm B's expanded market share does not raise firm B's profits and therefore A's share of them. In such markets the only competitive concern is the increased possibility of coordinated conducts.

The unilateral anticompetitive effects of minority shareholdings arise only in case of imperfect competition where, even absent these investments, the equilibrium prices are above marginal costs. Imperfect competition occurs, for example, in markets characterized by product or geographic differentiation.[105] This may also be the case when the firm's capacity is constrained (e.g. because of limitation in the plant size, distribution channels, input supplies…) because if it were to lower its prices it would only reduce its profits since it could not increase its output.[106]

Also in these imperfectly competitive markets, to maximize profits a firm must weigh the benefits and costs of a price increase. Following a price increase, in fact, some sales (and profits) will be lost from diversion of some customers to competing firms. At the same time each sale maintained will be characterized by a larger price-cost margin. The net effect on profits is the sum of these two effects. The firm's profit-maximizing price is one at which further price increases reduce the level of profits because the cost outweighs the benefit.

The optimal combination of price and output is affected by the firm's cost, the number of competitors in the market, the degree of product and geographic differentiation, possible capacity constraints and the prices charged by the other firms.

It is possible to assume that rival firms compete either according to Cournot[107] (by setting quantities) or Bertrand[108] (by setting prices) strategies and play either simulta-

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[103] E.g. side agreements between the two firms, which could facilitate long-term collusion.

[104] Gilo, "Passive", at 1639.

[105] In case of product differentiation, customers perceive firms' products as different and are therefore willing to pay more for a specific firm's brand. Nonetheless if the price difference is sufficiently large, the consumer would switch to the less expensive brand. Another example relates to markets in which geographic location is fundamental. The consumer will prefer the closer supplier as long as the price difference is not too large. See Tirole, "The Theory", ch. 7.

[106] Tirole, "The Theory", ch. 5.

[107] Under Cournot competition firms' strategic variable is the quantity they wish to offer, with prices adjusting to match demand to the quantity supplied.

[108] Under Bertrand competition the strategic variable is price, and quantity then adjusts to meet the demand at the given price. In markets with undifferentiated products and perfect competition, equilib-

neously or by the Stackelberg scenario with one first mover. In the first case since none of the players knows the strategy of its competitor, their actions will be "tit-for-tat". The Nash equilibrium[109] will thus be to cooperate (not undercut its competitor's price) in the first move and afterwards play whatever the competitor has played in the previous move.

An oligopolistic firm's profit-maximizing price, absent minority investments, is constrained by the risk that higher prices would drive some of its consumers into the hands of competitors. Minority investments in competitors reduce this loss. The same reasoning applies to non-price competition, such as quality or service competition, or competition with regard to the development of new technology. A firm that has invested in its competitor may also be less inclined to enter the geographic markets or population segments served by this competitor.[110]

Economic theory found that the anticompetitive effects, leading to increased prices and lower output, are stronger under Bertrand competition rather than Cournot.[111] Some authors[112] have taken the view that in a Cournot oligopoly it is not rational for a single firm to acquire a minority shareholding in a competitor when this behavior is unilateral. This is mainly based on the assumption that in a Cournot model, quantities are "strategic substitute", meaning that a less aggressive behavior by the acquiring firm (a reduction of the output produced), will lead its competitors to compete more vigorously (increasing their quantities).[113] Opposite is the case of Bertrand competition, where prices are considered "strategic complement". In this situation, the optimal response of the competitors to an increase in price by the acquiring firm is to increase their prices as well. These authors believe that only in case of Bertrand competition it is optimal to show to be "soft", in the sense of being prepared unilaterally to compete less aggressively, since this is the only case where the coordinated effects of minority shareholdings are present.

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rium should be reached when price equals marginal cost. Any attempt to sell at a higher price would lead the firm to lose all its customers to competitors. This is not the case if the firms engage in either explicit or tacit collusion.

[109] Each undertaking is doing the best it can, given the actions taken by its competitors. See RS Pindyck and DL Rubinfeld, *Econometric Models and Economic Forecasts* (McGraw-Hill, New York, 1991), at 441.

[110] Reynolds, "The Competitive", cit., at 150. As cited in Gilo, "The Anticompetitive", at 11.

[111] This because, under Bertrand competition, firms are supposed to respond to a price increase increasing their prices as well. This means that it is easier the profits of the acquiring firm will increase in case of a price increase. Minority shareholdings in rivals increase the incentive to further make partial acquisitions due to their increase in value following the price increase in the whole industry, as competition lessens.

[112] DA Malueg, "Collusive Behaviour and Partial Ownership of Rivals" (1992) 10 International Journal of Industrial Organization 27; OFT, "Minority", cit., at 10; D Flath "When is it Rational for Firms to Acquire Silent Interests in Rivals?" (1991) 9 International Journal of Industrial Organization 573; D Reitman, "Partial Ownership Arrangements and the Potential for Collusion" (1994) 42(3) Journal of Industrial Economics 313.

[113] It is nonetheless important to note that the rivals' output increase will also increase the profits earned from the minority shareholdings will not cover for all the output lost due to the decrease following the minority share acquisition. Capacity constraint and goods differentiation may also be an issue.

Dietzenbacher et al.[114] conducted a theoretical and empirical study on the Dutch Market in which they contradicted this theory demonstrating that in both Cournot and Bertrand model, competition is reduced by minority shareholdings between competitors.

Reynolds and Snapp research[115] analyses a Cournot-type model of a homogeneous-product industry in which choices of quantities represent strategies and "firms fail to recognize the interdependent nature of their actions with respect to output and investment decisions". In this work they show that market output will decrease the more firms are linked by financial interests.

In case a firm invests in a competitor, its profits will include also a share of the target's profits.[116] Every acquisition or increase in already detained minority shareholdings of competitors may thus incentivize the acquiring firm to decrease its output given the output of competitors in order to raise the latter's profits and its share of them.

In a Cournot model, firms unaffected by the ownership changes (firms that do not own minority shareholdings in rivals) may react to output contractions expanding their own production. However the expansion will never fully replace the output contraction since it is limited to the point where marginal revenue equals marginal cost.[117]

On the other hand, as explained by Buccirossi and Spagnolo, "any decision that has a negative impact on the rival's profit (such as increasing output) will be carried out up to the point where the marginal gain stemming from its own profits equals the marginal loss stemming from the reduction of profits of the competing firm."[118] This is caused by the fact that the acquisition partially internalizes the external effects of aggressive competitive strategies.

Even in case where the investment in a competitor does not confer any control or information rights, the acquiring firm will take into account the effect of its decisions on the behavior and profits of the acquired competitor in order to maximize the sum

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[114] Dietzenbacher, "Horizontal Integration", cit.

[115] Reynolds, "The Competitive", cit., at 143.

[116] "Under the rules of competition, A would like nothing better than to force B out of the market through A's greater efficiency. As a result of partial acquisition [by A in B] however, A suddenly has a strong financial interest in B's welfare. The risk of tacit or express collusion may increase dramatically". H. Hovenkamp, "Federal Antitrust Policy. The Law of Competition and Its Practice" (West Group, 1994), at 497.

[117] It is obviously possible that the acquisition of certain levels of minority shareholdings does not, on the basis of structural or transaction-specific factors, have anticompetitive effects. In these cases an output reduction would cause more losses (reduction of the operational profits) to the acquiring firm than gains from the participation to the profits of the target firm (increased by the increase in sales as a response to the acquiring firm's reduction of output). In these cases it could be considered unprofitable and irrational for a firm to invest in a rival since an output reduction would improve the position of the rival firms at the expense of the investing firm. Different is the case in which the firm has actually invested in a rival, which is the focus of this work. Absent some other profit-enhancing reason, it would be quite difficult to rule out the unilateral anticompetitive effect of the minority share acquisition, given the rationality of the firm (otherwise the acquiring firm would have taken a decision detrimental to itself).

[118] Buccirossi, "Corporate", at 8–9.

of its own profits and the return on its minority investment. The investor may thus decide to produce less and charge more than it would have absent the investment.[119]

It is nonetheless important to remember that barriers to entry have to be high enough to prevent the entry of new competitors in order for minority shareholdings (as mergers) to have durable anticompetitive effects. If entry is quick and easy the higher profits from reduced market output will attract new firms whose entry will eliminate every anticompetitive effect. If entry is blockaded, lengthy or just difficult, on the other hand, the unilateral anticompetitive effects will last over time.[120]

A numerical example may help understanding clearly the unilateral anticompetitive effects of minority shareholdings.[121] Firm A has constant marginal cost of $80 per unit, the initial price is $100 ($20 margin of price over cost) and has 16 customers. In case of a 10% price increase it would lose $20 on each customer lost (say only 1) and increase its profits by the price increase ($10) multiplied by the customers retained (16–1=15). In choosing its profit-maximizing price, the firm has to balance benefits and costs. In the example provided it would lose $20 to gain $150. Thus, the net effect of the price increase would be to raise its profits by $130. As a result, this firm would have the incentive to raise its price.

If the same price increase would cause the firm to lose 8 customers instead of only 1, then the costs would be $160 (8 x $20) and the benefits only $80 (8 x $10). In this case the price increase would not be profitable.

The firm's incentives change if it acquires a minority shareholding in one of its competitors. In this case some of the customers it loses with a price increase will be diverted to its competitor, allowing the acquiring firm to recapture a share of the profits lost. This increases the acquiring firm's unilateral incentive to raise prices. A link between the profits of competing firms increases the unilateral incentives to adopt a joint profit maximization strategy. This leads the acquiring firm, when taking decisions about prices, output, and investments, to take into account its financial interest in a competitor. Instead of trying to maximize solely its own profits, it will try to maximize the sum of the profits from its operations and the investment income earned off its investment in the target. The investment income equals, in the simplest case, the profits of the target times the acquired firm's financial interest share of the target. This can be written as $T = P_A + \%P_{B;}$ where T represents the total profits of the acquiring firm, P_A the profits of the acquiring firm's own operations, P_B the profits of the target firm's operations and % the percentage of shares of the target firm held by the acquiring firm.

Returning to the previous example, the assumption is that a 10% price increase would cause firm A to lose 8 customers (and $80 of profits) and that 4 of them would be diverted to firm B. The price increase benefits therefore the latter, which we assume having a margin of $40 on each customer. It will therefore increase its profits by $160 (i.e., 4 x $40).

[119] Gilo, "The Anticompetitive", at 10.
[120] Reynolds, "The Competitive", at 147.
[121] O'Brien, "Competitive", cit., at 574–6.

Suppose now that firm A acquires a 25% shareholding in firm B. This investment entitles firm A to 25% of firm B's increased profits ($160 x 25% = $40).[122]

The price increase would still be unprofitable but this additional benefit would lower the lost profits to $40 (i.e. $80 – $40). A smaller price increase, e.g., 2.5%, assuming it causes the acquiring firm to lose 2 customers, one of which diverted to the acquired firm; would lead to a different result. Absent the minority shareholding, firm A's profit would be reduced by $40 (2 x $20) and increased by $35 ($2.50 x 14) for a net loss of $5. In case of a 25% share acquisition, firm B would gain $40 more for the one customer diverted to it and the acquiring firm A would recapture $10 (i.e., 25% of $40). Thus, the net effect of the price increase would be a net gain of $5 making the price increase profitable.

Firm A's profit-maximizing price increases the larger the market shares of firm A and firm B, and the larger firm A's investment stake in firm B.[123]

When the minority shareholding is symmetric, industry profits are certainly larger and prices higher than in case of a one-way investment in a competitor; this is because a larger share of the market is subject to the direct unilateral incentives to reduce quantities and raise prices.[124]

As already pointed out these unilateral anticompetitive incentives apply only to the acquiring firm. There may be a direct impact on the unilateral pricing incentives of the acquired firm only in case the transaction gives the acquiring firm a way to influence the target (e.g., in case it permits to appoint a director).

The anticompetitive unilateral effects are however probabilistic in nature and may be difficult to detect and prove by antitrust authorities. In practice, the potential unilateral effects, as anticipated, depends on the combination of various structural and transaction-specific factors on which the authorities may lack sufficient information, making it difficult to demonstrate the likely effects on competition of a minority shareholding acquisition.

3.3.2. Quantitative Analysis

In their treatise, Areeda and Turner show skepticism about the possibility to quantify the magnitude of these effects on competition. As they conclude, "Unfortunately, there is no formula that can describe the likelihood of such effects [...] Inappropriate, for example, would be a formula that attempted to discount market shares according to the acquirer's shareholding [...] [T]here is no reason to suppose that the effects of lesser acquisitions are in any way proportional to shareholdings."[125]

This view has been challenged by the economic literature. Economists have adapted methodologies used traditionally to assess the impact of full mergers between competitors, to analyze partial ownership acquisitions and suggested two different methods.

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[122] Assuming the profits belong entirely to the shareholders.

[123] E.g., Reynolds, "The Competitive", cit.; F Bresnahan, SC Salop, "Quantifying the Competitive Effects of Production Joint Ventures" (1986) 4 Int'l J. Indus. Org. 155; O'Brien, "Competitive", cit.

[124] Merlone, "Minority", cit., at 5.

[125] Areeda, "Antitrust Law", at 322.

The first one, developed by Bresnahan and Salop[126] as a modification to the standard Herfindahl-Hirschman Index (HHI),[127] widely used by antitrust enforcers for horizontal mergers, is called the Modified Herfindahl-Hirschman Index (MHHI). This method is based on a Cournot oligopoly model of quantity competition between firms producing homogeneous products.

The second one, the Price Pressure Index (PPI), based on a work by Carl Shapiro,[128] takes into account margins and diversion ratios between firms and is premised on a Bertrand model of price competition between firms producing differentiated goods.

The traditional antitrust theory is based on the idea that the competitive behavior and the performance of the undertakings are (at least partially) the result of the structure of the market on which they operate (the so-called "Structure-Conduct-Performance (SCP)-paradigm").[129]

The PPI and MHHI confirm this paradigm and the fundamental importance of market definition, market shares, and the nature of competition between the relevant firms in analyzing the anticompetitive effects of minority shareholdings. The key inputs into the models are the market shares of the firms in the same market (MHHI), or the relative profit margins, combined with a measurement of the closeness of the merging firms' products and the diversion ratios for differentiated products (PPI).[130]

However, these methodologies are predictive in nature and cannot be relied upon to affirm that a certain transaction will necessarily result in a significant lessening of competition.[131]

3.3.2.1. The MHHI

As anticipated, the revised version of the HHI (MHHI), created by Bresnahan and Salop and summarized by O'Brien and Salop in Table 1[132] (below), covers a broader range of scenarios then the HHI, permitting to roughly estimate the effects on competitive incentives of minority shareholdings acquisitions.

The two firms involved have pre-acquisition market shares of S_a and S_b, respectively and β represents the ownership share. The right-hand column gives the results

[126] Bresnahan, "Quantifying", cit.

[127] The HHI is calculated by summing the squares of the individual firms' market shares, and thus gives proportionately greater weight to the larger market shares. It ranges from zero (perfect competition) to 10,000 (monopoly). See the US "Guidelines on the assessment of horizontal mergers", at 18–19, which indicate 1500 as the maximum threshold for an unconcentrated market. See also the EU Commission Consolidated Jurisdictional Notice. By comparing the results pre- and post-merger (the so-called "delta"), it is possible to measure the likely effect on the level of concentration in the market of a merger between competing firms. The increase in the HHI is equal to twice the product of the market shares of the merging firms.

[128] C Shapiro, "Mergers with Differentiated Products" (1996) 10 Antitrust 23, <http://faculty.haas.berkeley.edu/shapiro/diversion.pdf> accessed 9 July 2011.

[129] J Faull and A Nikpay, *The EC Law of Competition* (Oxford University Press, Oxford, 2007).

[130] Dubrow, "Challenging", cit., at 131.

[131] OECD, "Antitrust Issues", cit., at 28.

[132] O'Brien, "Competitive", cit., at 594.

Table 1
Modified HHI Deltas

	General Formula	*Results from Example*
Full Merger:	$\Delta = 2S_aS_b$	400
Silent Financial Interest:	$\Delta = \beta\ S_aS_b$	40
Total Control:	$\Delta = (\beta + 1/\beta)\ S_aS_b$	1040
One-way Control:	$\Delta = (1 + \beta)\ S_aS_b$	240
Coasian Joint Control:	$\Delta = 2S_aS_b$	400
Proportional Control:	$\Delta = (\beta + \beta/((1 - \beta)^2 + \beta^2))\ S_aS_b$	99

for an acquisition of a 20% financial interest in a competitor (β=0,2), when firm A has a market share of 20% and firm B has a market share of 10%.

Because the effects of minority shareholding depend on the distribution of control rights, for given ownership shares the index will differ depending on the specific pattern of control.[133] If the investment is passive the acquisition has no effect on the competitive incentives of the acquired firms, therefore the MHHI delta is the lowest. On the contrary, the delta is the largest in case of total control.

In a complete merger, the change in the HHI is twice the product of the market shares of the merging firms ($2S_aS_b$). This to take into account the fact that each firm is effectively a half-owner of the other and has full control over its output. Instead, if the transaction involves the acquisition of a passive shareholding, the resulting change in the MHHI (the delta) equals the partial ownership share times the product of the market shares of the two firms (βS_aS_b). This is based on the fact that neither firm has any control over the output of the other.

A numerical example should help understanding how the MHHI works.[134] Suppose Firm A buys a 45% silent financial interest in firm B (β = 0.45) and their market shares are 20% each (S_a= 20, S_b= 20). A full merger between firm A and B would increase the MHHI by 800 points (i.e., 2 x 20 x 20). In contrast, firm A's acquisition of a 45% passive shareholding in firm B would increase the MHHI by only 180 points (i.e., 0.45 x 20 x 20).

3.3.2.2. The Price Pressure Index

If the acquisition of minority shareholdings involves firms competing according to Bertrand competition and producing differentiated goods, Carl Shapiro has shown how the Price Pressure Index may be a more adequate measure of the change in unilateral incentives.[135] The PPI measures the direct incentive effects in response to a change in the ownership structure on the basis of the degree of closeness of the products of the firms involved. It is based on the differences in margins of the respective

[133] O'Brien, "The Competitive", cit., at 614, who take into account six control scenarios deriving from the previous study of Bresnahan and Salop.

[134] Ibid.

[135] C Shapiro, "Mergers", cit.

Table 2
Modified PPI Deltas

	ΔPPI_a	ΔPPI_b
Full Merger:	$\delta_{ba}\ (P_b - C_b)/C_a$	$\delta_{ab}\ (P_a - C_a)/C_b$
Silent Financial Interest:	$\beta\ \delta_{ba}\ (P_b - C_b)/C_a$	0
Total Control:	$\beta\ \delta_{ba}\ (P_b - C_b)/C_a$	$(1/\beta)\ \delta_{ab}\ (P_a - C_a)/C_b$
One-way Control:	$\beta\ \delta_{ba}\ (P_b - C_b)/C_a$	$\delta_{ab}\ (P_a - C_a)/C_b$
Coasian Joint Control:	$\delta_{ba}\ (P_b - C_b)/C_a$	$\delta_{ab}\ (P_a - C_a)/C_b$
Proportional Control:	$\beta\ \delta_{ba}\ (P_b - C_b)/C_a$	$[\beta/((1-\beta)^2 + \beta^2)]\ \delta_{ab}\ (P_a - C_a)/C_b$

firms for their products and their diversion ratios, and predicts the effect on prices of a change in the ownership structure.[136]

Table 2 is presented by O'Brien and Salop.[137] Firm A obtains a financial interest in firm B entitling it to a fraction β of the profits of firm B. The fraction of sales lost by firm A and diverted to firm B is denoted by δ_{ab}. The marginal profit of the target (Price – marginal Cost) relative to the acquiring firm's marginal Cost is represented by $(P_b - C_b)/C_a$.

The PPI measures the pressure on the acquiring firm to increase prices after the acquisition, on the basis of the margins of the two firms and the amount of sales lost by the acquiring firm and recaptured by the target (diversion ratio). In case the target has higher marginal profits and is a close substitute of the acquiring firm, the incentive to raise prices, after the acquisition, are enhanced. This is because the higher the margins of the target and the greater the diversion ratio from the acquiring to the acquired, the greater the profit recaptured by the acquiring firm through the minority shareholding and the lower the opportunity cost of raising price (constituting a higher incentive to do so). In other words, if firm B marginal profit is greater than firm A's (high marginal profits), and if firm B is a particularly close substitute for firm A's products, such that a large portion of the latter's lost sales would likely be captured by the former (high diversion ration), then firm A's cost of raising its price may be relatively low and it would be inclined to do so.

The disadvantage of the PPI is that it requires more sophisticated inputs than the MHHI and, therefore, may be more difficult to apply. Unlike the MHHI, which is a market-wide index, there is a separate delta for each firm, and the deltas depend on measures of the firms' margins relative to marginal cost [$(P_b - C_b) / C_a$ and $(P_a - C_a)/C_b$ respectively] and diversion ratios (δ_{ba} and δ_{ab} respectively) rather than market shares alone. On the other hand one of the advantages of the PPI approach over the MHHI is the possibility to incorporate efficiency benefits into the analysis.[138] When marginal costs decreases after the transaction, they can offset some or all of the adverse

[136] OECD, "Antitrust Issues", cit., at 29.
[137] O'Brien, "Competitive", cit., at 598.
[138] O'Brien, "Competitive", cit., at 600.

competitive effects or even dominate them. In this last case the net impact of the acquisition might be an increase of consumers' welfare.

3.3.3. Coordinated Effects

The second type of anticompetitive effects potentially caused by the acquisition of non controlling minority shareholdings in competitors is represented by the coordinated effects which exacerbates the unilateral anticompetitive effects. This is the case when the acquiring firm's competitors react to the unilateral decrease in competition, following a minority shareholding acquisition, becoming less aggressive themselves. This has been demonstrated to be the case in Bertrand-type price-setting models.[139] Most of the Cournot-type quantity-setting models, instead, predict that firm A's rivals would react to a unilateral reduction of output, expanding their quantities and taking market share from the acquiring firm.[140]

Reynolds & Snapp concentrated their work on the effects of an acquisition of a minority shareholding absent collusion. They nevertheless discussed a possible extension of their economic model to collusion-facilitating effects. Specifically they briefly outlined the possibility to use non controlling investments by maverick firms in dominant competitors as a commitment not to vigorously compete. They assigned to minority shareholdings the ability to strengthen the stability of a collusive arrangement and its long-term sustainability.[141]

In a market where firms choose prices, a collusive outcome would exist whenever prices are higher than the one-shot Bertrand equilibrium price; where firms choose quantities, whenever they are lower than the one-shot Cournot equilibrium quantities. Collusion coincides therefore with an outcome (high enough prices, low enough quantities), and not with the specific form through which that outcome is attained.[142]

Collusion harms consumers because competitors are collectively able to charge supracompetitive prices, reduce product quality, quantity, or slow the rate of innovation.[143]

Ceteris paribus, collusion is more likely the smaller the number of firms in the market. This because, in case of many firms in the market, each one gets only a small share of the market during collusion. In case of deviation, a single firm could get all the market for itself incredibly increasing its market share and therefore its profits. It is then probable that this extraordinary gain from deviation would easily outweigh the collusive profits foregone during the punishment period. In case of only few firms in the market, instead, the gains from deviation are definitely smaller since each firm already has a significant share.

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[139] Flath, "When is it Rational", cit.

[140] As explained above, the total industry output will however remain lower (and prices higher) than before the investment.

[141] Reynolds, "The Competitive", at 149.

[142] M Motta, *Competition Policy, Theory and Practice* (Cambridge University Press, 2004), at 138.

[143] ABA, *Section of Antitrust Law – Antitrust Law Developments* (6th edition, 2007), Chapter 3B.

To establish the likelihood of collusion it is very important to consider also the presence of barriers to entry. In case of easy entry into the market it is extremely difficult to sustain collusion. This because in case of high prices and profits new firms would be attracted into the industry. With their entrance it is possible to picture two scenarios. In the first scenario, the entrant is a maverick firm, a firm substantially different from rivals since it has higher incentives to compete aggressively. This will subtract market shares to the firms already in the market which will have to decrease prices in order to keep their customers, thus breaking the collusive equilibrium. Anticipating that entry might occur, the incumbent firms will be forced to keep prices low.

In the second scenario, the entrant takes part in the (explicit or tacit) collusive behavior. In this case collusion is more difficult to sustain simply because the number of firms in the market will increase.

Competition authorities and Courts also regard symmetry between market shares, costs and capacities as factors facilitating collusion. It is, indeed, probable that firms in a similar position find it easier to agree on a common conduct on the market.

It is possible to identify collusion in two situations: when it is pursued through an organized cartel (explicit collusion), and when firms act in a purely parallel way (tacit collusion).

Explicit collusion is definitely less likely to happen, due to the fear of intervention by competition authorities; tacit collusion, on the contrary, is a more probable threat in industries with only few significant firms.

"Tacit collusion" refers to a situation in which firms charge cartel-like prices even in the absence of any communication among them.[144] Each firm refrains from undercutting the collusive price because it understands that this would trigger a long-term price war which could involve long-term losses that might outweigh the short-term profits from the price cutting, making all firms, including the price-cutter, worse off in the long run.[145] Unlike explicit collusion, tacit collusion is very difficult for competition authorities to detect or prove.

Collusion is more likely to occur in markets where the firms have the ability to reach a common understanding on the terms of coordination. Three elements are necessary for collusion to be sustainable,[146] elements directly taken from paragraph 62 of the General Court's judgment in *Airtours v. Commission*.[147] First it must be possible for coordinating firms to monitor the other firms' adherence to the terms of coordination and detect, in a timely way, that a deviation has occurred (a firm setting a lower price or producing a higher output than the collusive levels). The second element consists in the availability of credible retaliatory instruments to maintain the discipline

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[144] Gilo, "The Anticompetitive", cit., at 10.

[145] Tirole, "The Theory", cit, ch. 6.

[146] Guidelines on the Assessment of Horizontal Mergers Under The Council Regulation on the Control of Concentrations Between Undertakings (2004/C 31/03), OJ EU C 31/3, paras 41–43. See also Motta, "Competition", cit., at 139–140 and Whish, "Competition", cit., at 860–861.

[147] Case T-342/99 *Airtours PLC v. Commission*, Judgment of the Court of First Instance of 6 June 2002, [2002] E.C.R. II-2585, [2002] 5 CMLR 317.

of the coordinating firms and to keep collusion internally stable. The punishment might take the form of rivals producing much higher quantities (or selling at much lower prices) in the period after the deviation has occurred, thus depressing the profit of the deviating firm.[148] Only if a firm knows that any deviation will be detected promptly and punished severely, it might refrain from breaking collusion.

The third element for coordination to be sustainable refers to the absence of constraint from outsiders that could jeopardize the results expected from coordination and make it internally unstable.

The analysis of collusion is therefore based on the so-called incentive constraint for collusion: each firm tacitly colluding faces a trade-off; it compares the immediate gain from a deviation with the profit it gives up in the future, when rivals identify the deviation and punish it.[149]

Short-term profit can be made by price cutting on the collusive price (which expands the deviating firm's market share). Long-term loss is determined by the price war following the deviation. Only if the former is lower than the latter collusion will be sustainable.

Between the collusion-facilitating factors there are also minority shareholdings in competitors, even when not conferring control.

This is obvious in case of interlocking directorates since they permit an easier coordination of policies, exchange of information and monitoring of deviation.

Nevertheless also in case of merely passive minority shareholdings the incentives to compete vigorously might be reduced. Indeed, the profits of the target firm would affect the acquiring firm's financial performance; an aggressive market strategy on the part of the acquirer (as is deviation from a collusive price) would be less profitable since vigorous competition decreases, in fact, the returns on the financial investment.[150]

With a price cut the competitor's profits will fall and so will the value of the acquiring firm's investment in the competitor.

To explain this trade-off it is possible to use an example.[151] National and Avis, the only firms in the market, are tacitly colluding. National gains $4 by price cutting and the expected future loss caused by a price war is $3. Price cutting is therefore more profitable than collusion. Suppose now that Avis loses, e.g., $8 from the price cut and the price war that follows and that National passively invests in 25% of Avis's stock. In case National decides for a more aggressive competition, it will now lose $5 ($3, due to its own operations, and 25% of $8, due to its stake in Avis). Following the acquisition of the minority shareholding in Avis, National's incentive to price cut changes, finding now collusion a more profitable behavior.

This is nevertheless only the unilateral effect on the acquiring firm's incentives to compete vigorously, already explained above. Even though passive investments might change National's incentives to price cut, they do not directly change Avis's (the firm

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[148] Note that this more aggressive market behavior hits also the punishing firms.

[149] Motta, *Competition,* cit., at 139–140.

[150] Motta, *Competition*, cit., at 144.

[151] Gilo, "The Anticompetitive", cit, at 11,12.

in which the investment was made) nor the one of the other competitors. Their eagerness to price cut would therefore cause collusion to break down.

This has been considered by some authors as meaning that all firms in the market need to invest in a competitor in order for collusion to be facilitated.[152]

Other authors[153] considered, instead, the relative trigger-happiness[154] of the firms in the market as a discrimen. It will be necessary for all firms to invest in rivals, only if they all are equally trigger-happy. It is, indeed, only with a commitment by all of them that they will not fear the others will price cut, and collusion will be sustainable. When some firms are more prone to price cut than others (maverick firms), it is enough if they are the only ones investing in a competitor for collusion to be facilitated. We can use the example above to illustrate it.

National gains $4 from price cutting and loses only $3 due to the following price war. Avis instead gains $4 price cutting and loses $5 from the price war. Avis would therefore prefer not to price cut on a collusive price. In this sense, National is more trigger-happy than Avis.

If it was up to Avis, it would not price cut since it finds more profitable to sustain collusion. Knowing National's tendency to price cut, however, Avis will not charge a collusive price in the first place. This harms also National since it means that there is no collusive price to undercut. National would thus prefer collusion and supracompetitive prices instead of a competitive outcome in which collusion is not sustainable. In this sense, a firm's trigger happiness is an inconvenience rather than an advantage. The only way for the trigger-happy firm to induce its less vigorous competitors to tacitly collude, and thus make all firms better off, is to commit to becoming a less vigorous competitor itself. This can be done, in the example above, if National, in order to reassure Avis that collusion is sustainable, passively invests in 25% of Avis's stock, making a price cut unprofitable for itself.

Contrary to Farrell and Shapiro's conclusions, according to which an acquisition by a low-cost firm of a shareholding in a high-cost firm is "profitable only if [the former] gains control over [the latter's] actions... ";[155] when repeated interaction among firms are introduced, the low-cost firm (usually more "trigger-happy") may want to invest in one of its high-cost competitors to commit to avoid price cutting in order to facilitate collusion. This would reassure its competitors, preventing them from anticipating vigorous competition ("strike first") not charging collusive prices in the first place. When the trigger happy firms are more than one it is only necessary for all of them to credibly commit, investing in one of their competitors. Investments in competing firms signals, to the rest of the market, the intention of the acquiring firms to commit themselves to a less vigorous competition. When the firm acquiring the share in a competitor is the maverick firm, the commitment is particularly convincing.

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[152] E.g., Struijlaart, "Minority", cit.

[153] E.g., Gilo, "The Anticompetitive", cit., at 16.

[154] Highly incentivized to deviate from collusion.

[155] J Farrell and C Shapiro, "Asset Ownership and Market Structure in Oligopoly" (1990) 21 RAND J. ECON. 275, at 287.

Coordinated anticompetitive effects will thus emerge or be enhanced only when is the firm most likely to cheat,[156] the maverick firm, that invests in its rival. The maverick firm is the only firm that can determine whether collusion is sustainable.[157]

If the industry maverick does not invest in a rival and thus its incentive to deviate remains intact, any acquisition of a minority shareholding by the other competitors will not have the effect of facilitating collusion, since collusion would not be sustainable.[158] On the other hand, if it, through the acquisition of a minority shareholding in a rival firm, changes its incentives to deviate, collusion becomes sustainable. This may induce even competitors without any minority shareholding in other firms to reduce the competitive pressure and favor a collusive equilibrium, to the detriment of consumers.

This means that a necessary condition for coordinated anticompetitive effects to arise, in case there is a maverick firm in the market, is that the maverick makes the investment. Accordingly, Courts and antitrust agencies should primarily determine whether the investing firm is the (only) maverick firm in the industry. Only in this case the investment could be considered as a credible commitment to make deviation less likely and induce its rivals to collude.

In addition, in order for the investment to serve as an effective commitment not to price cut, it is necessary that the transaction is visible to the market[159] and credible.[160]

When the non controlling minority shareholding is active, its acquisition may facilitate the establishment of a collusive equilibrium or its stability in two ways: (i) increasing transparency and (ii) negatively affecting the target firms' incentives to compete.

Active minority shareholdings, if accompanied by the right to appoint a representative in the target's board of directors (interlocking directorates), increase market transparency as they provide an opportunity for a privileged view on the commercial activities of the rival firm in terms of access to information facilitating collusion and monitoring of adherence to the commonly agreed conduct. Even in case the minority shareholder has no active participation in the management of the target the shareholding may grant access to information that an independent competitor would not have, such as plans to merge with or acquire other firms, enter into new investments, expand production or enter new markets.

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[156] It may be the maverick firm because it has lower marginal costs, which makes it more likely to deviate from the cartel price as its cost advantage makes it more likely to earn profits even during a price war. Alternatively it may possess a smaller market share. Through price cutting, in fact, the small firm can potentially earn a high short-term profit by expanding its market share considerably. Another reason may be that the maverick has more opportunities to make secret price cuts, e.g., because its customers are mainly large wholesalers. See Gilo, "Passive", cit, at 1640; Gilo, "The Anticompetitive", cit, at 15.

[157] Gilo, "Passive", cit, at 1639.

[158] Unilateral effects remain nonetheless unchanged.

[159] This could be an issue if companies are closely held, while it should not pose any problem for companies whose shares are publicly traded. The latter type of companies is subject to disclosure requirements under national and international securities regulations.

[160] Gilo, "The Anticompetitive", cit, at 19.

With regards to the second way of enhancing collusion, in addition to everything explained in this chapter (valid both for active and passive investments), it is important to note that active minority shareholdings entail the possibility to directly influence the competitive behavior (thus the incentives) of the target using voting and other rights granted to minority shareholders or appointing a representative in the board of directors (when possible).

A clear and complete analysis of coordinated effects is provided by models studying the impact of minority shareholdings on the sustainability of a collusive equilibrium in infinitely repeated games, but the authors are few.[161]

Malueg considers a repeated Cournot game with only two symmetric firms in the market holding identical stakes in one another. He supposes that firms follow trigger strategies that determine reversion to the static non cooperative equilibrium forever if either firm deviates from the collusive outcome. Each firm chooses the collusive output as long as the other has done so in the previous period.

His conclusions are that, for some demand conditions, increasing the degree of minority shareholdings to certain level may decrease the ease or likelihood of collusion and therefore be potentially pro competitive.

This is based on two effects of a minority shareholding: "first, it reduces the gain from cheating on a collusive agreement; second, it softens the punishment that would follow cheating. The first effect makes collusion more likely; the second makes collusion less likely. The net effect of these two forces is ambiguous."[162]

The first effect consists substantially in the internalization by the acquiring firm of part of the losses it inflicts on rivals when it deviates. It makes deviation less attractive.

At the same time the punishment following the break-down of collusion is softened by the unilateral effect of minority shareholdings which reduce competition in the market (raise prices and profits), even absent collusion. This diminishes the gain of collusion in comparison to the non-collusive equilibrium. Since it is conventionally assumed that, during price wars, firms revert to charging the prices they would have charged in equilibrium absent collusion, the presence of minority shareholdings reduces the effectiveness of the threat of punishment (thus the likelihood of collusion), making the reversion to non-collusive prices (following deviation) less "costly."[163]

The first effect reduces the incentives to deviate, the second strengthen them.

The relative strength of these opposing effects is said to depend on the nature of demand.

Malueg shows that under certain conditions the latter effect may outweigh the former, and in such cases a minority shareholding hinders tacit collusion.

This contrasts with static Cournot models as Reynolds and Snapp's and Farrell and Shapiro's which arrive at the conclusion that an increase of minority shareholdings in

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[161] Malueg, "Collusive", cit.; Gilo, "Partial", cit.

[162] Malueg, "Collusive", cit., at 33–34.

[163] "The competitive outcome that would be reached if all firms reverted back to their non-collusive strategies would be characterized by higher prices and lower quantities as in the absence of [minority shareholdings]". See OFT, "Minority", cit., at 51.

competitors generates a more collusive outcome, but it is in line with Flath's and Reitman's results.

Malueg's study is, however, of little policy significance remembering the firms elect the level of their investments. If firms are rational, they will not invest in a competitor in a way that will hinder collusion, if there are no other motivations worth hindering collusion and sacrificing monopoly profits.[164]

Gilo et al. thus believe that "in practice, the first effect is likely to dominate the second, otherwise firms would have no incentive to invest in rivals."[165] In their analysis they use a Bertrand model, instead of a Cournot, in order to neutralize the second, negative effect on collusion and focus on the first positive one.

The anticompetitive effect of the acquisition of a minority shareholding will be stronger the larger and more profitable is the target. This because the acquiring firm will place more weight on the stake in its rival and hence will be induced to compete less vigorously. From this it follows that the larger the level of investment, the stronger the potential anticompetitive harm.

They demonstrate that non controlling minority shareholdings in competitors may facilitate tacit collusion[166] and tends to raise the collusive price. When the most efficient firm (the industry maverick) invests in its less efficient rivals, the collusive price rises, since its level is based on the less efficient firm's monopoly price. On the other hand, they show that collusion becomes more sustainable the more efficient the firm in which the investment had been made by the maverick is. In fact the acquiring firm would gain part of the higher profits of the target (the more efficient the firm, the lower its costs, the higher its collusive profits) and has therefore more to lose undercutting the collusive price.

These two results imply that the maverick firm would prefer to invest in its most efficient and larger rivals since this can facilitate collusion more effectively.

Merlone tries to empirically demonstrate, for the period between 1985 and 2001, that this description of reality is plausible.[167] He shows that, at the announcement of the acquisition of a stake by a competitor the share price of the target and of the other competitors (a lot less) increases. This suggests that an investment in a competitor is often expected to be followed by a decrease in competition benefiting the whole industry. The effect on the share price of the buyer is ambiguous as it must trade off the future increase in its total profits (and in the value of the stake just bought) against the price paid for it.

Another important consideration regards the increase in the number of firms in the market.[168] Absent minority shareholdings, an increase in the number of firms hinders

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[164] Gilo, "The Anticompetitive", cit., at 20.

[165] Gilo, "Partial", cit., at 83.

[166] They also demonstrate that a minority shareholding in a competitor never hinders collusion. In the presence of investments, firms have either the same or stronger incentives to collude.

[167] U Merlone and C Salleo, "Minority Stakeholdings as an Anti-Competitive Device" (2003) International Industrial Organization Conference (Boston), <http://www.ios.neu.edu/iioc2003/paper/merlone.pdf> accessed on 9 July 2011, at 8.

[168] Gilo, "Partial", cit, at 83–90.

collusion. In the presence of symmetric shareholdings (i.e. all firms hold exactly the same ownership stake in each other) this is no longer necessarily true. When the aggregate stake of rivals in each firm exceeds 50%, an increase in the number of firms with stake in each other facilitates collusion, rather than hinders it.[169] Each firm, indeed, receives a larger fraction of its profits from rivals and has therefore more to lose in case of deviation from collusion. A price cut which hurts rivals become less attractive the more the profits of the firm depends on its share in the profits of competing firms. This is true only when the aggregate stake of rivals in each firm exceeds 50%; this means that if each firm holds a stake of 10% in a rival, moving from six to seven firms will facilitate collusion, whereas moving from four to five firms will hinder it.

Another way in which collusion may be facilitated, also in case of passive minority shareholding, is through a mismanagement suits against the managers of the target firm.[170] A passive minority shareholder would have to bear all the costs of the suit, receiving only a small part of the benefits. However, if the shareholder is a competitor, the suit or the threat to suit may be sufficient to exert some influence over the management of the firm in which the investment was made causing it to compete less aggressively.

3.3.4. Incentives to Enter and Exclusionary Effects

Passive investments may also be used as a device to commit not to entry a certain market. In case a firm outside of the market passively invests in a firm inside the market its incentives to enter the market or at least enter it vigorously, are lowered. This way it would, in fact, internalize the loss imposed on the acquired competitor in case of entry.

It has nevertheless to be kept in mind that the acquisition of the minority shareholding before entering a market may have also reasons other than anticompetitive, e.g., of market investigation.[171] It may, indeed, be useful to evaluate the profitability of entering a new market. A minority shareholding would, above all if provided with board representation, provide the firm with sensitive information gathered directly from one of the market players. To distinguish between these two possible reasons it is useful to refer to the "holding time". In case the shares are held for a reasonably short time it is possible to consider them having a "market study" justification. This is not the case when the shareholding is stable.

It is possible to consider another anticompetitive effect,[172] arising in case the minority shareholding is acquired, by a firm already in the market, in a potential new entrant,

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[169] Since we consider passive investments in rivals, the fact that rival firms have a combined share of more than 50% in the profits of each firm does not mean that these firms jointly control it.

[170] Dubrow, "Challenging", cit, at 612 who cites the case *LVMH Moet Hennessy Louis Vuitton SA and others v. Gucci Group NV and others*, Enterprise Chamber of the Amsterdam Court of Appeal, Case No. 167/990K. A legislative example is provided by Articles 2393-bis and 2409 of the Italian civil code.

[171] MC Corradi "Le partecipazioni societarie che non veicolano il controllo: riflessioni di economia e diritto antitrust" (2008) CV(4–5-6) Rivista del Diritto Commerciale e del diritto generale delle obbligazioni 363, at 386,7.

[172] Corradi, "Le partecipazioni", cit., at 388.

with the aim of deterring the latter from entering into the market. The firm already in the market could indeed, when the target enters the market, sell all its shares in the new entrant, channeling a negative signal to the financial markets through the decrease in value of the shares that would follow. Naturally the firm already in the market could keep the participation and send instead a positive signal to the new entrant in order to invite it to collude.

3.3.5. Acquisition of Minority Shareholdings by the Controlling Shareholder
Minority shareholdings may be of concern for competition authorities, even when it is not directly the competing firm to acquire them. The potential unilateral and coordinated anticompetitive effects of minority shareholdings are present, not only in case it is the competitor itself to invest in a rival, but also when it is its controlling shareholder.

Although the industrial organization literature usually assumes that the management maximizes the firm's profit, the assumption that a controlling shareholder controls the firm, appointing directors affiliated to it, in its own interest and to pursue its own profit maximization, is common in the financial literature.[173]

The acquisition of a minority shareholding by a rival's controller can serve as an even stronger commitment to reduce competition than an investment by the firm itself. Moreover, the controller can strengthen the anticompetitive effect by diluting its stake in the firm it controls.

> "When a firm's controller (be it a parent corporation or an individual) invests in the firm's competitor, in addition to the controller's stake in the competitor, the controller's stake in the firm it controls becomes important. The smaller the controller's stake in the firm it controls, the less aggressively will the controller cause the firm it controls to compete. This is because, the smaller the controller's stake in the firm it controls, the more weight the controller places on its stake in the competing firm. This further implies that even relatively small stakes the controller holds in the competing firm could substantially lessen competition if the controller has a diluted stake in the firm it controls."[174]

A meaningful example of investments by the controlling shareholders existed in the car rental industry. National Car Rental's controller, GM, acquired a 25% stake in National's competitor, Avis.[175]

Let's say that initially GM holds 100% of National. Assume that if National competes vigorously it makes a net gain of $3 and Avis loses $8. Assuming GM indeed

[173] J Dahya, O Dimitrov and JJ McConnell, "Dominant Shareholders, Corporate Boards and Corporate Value: A Cross-Country Analysis" (2006), ECGI – Finance Working Paper No. 99/2005 <http://ssrn.com/abstract=887383> accessed 9 July 2011.

[174] Gilo, "The Anticompetitive", cit, at 26.

[175] Gilo, "The Anticompetive", cit, at 24.

controls National's pricing policy,[176] it will have the incentive to make National compete aggressively, since it makes $3 (100% of $3) from price cutting, and loses only $2 (25% of $8) from its passive investment in Avis.

However, this changes in case GM dilutes its stake in National to, say, 55% (or it already controlled National with this stake). Assuming that its business decisions have the objective of maximizing its own profits, notwithstanding the profits flowing into the hands of National's non controlling shareholders, it will now refrain from making National price cut. GM gains now only $1.65 (55% of $3) from a price cut, and loses $2 (25% of $8) from its stake in Avis. The effect is obviously greater in case the controlling shareholding is a minority one.

This is the demonstration that in case the acquisition of a minority shareholding is carried out by the controlling shareholder, both the size of the investment in the target firm and the stake in the firm it controls are important. An active or passive investment in a competitor is more effective in strengthening the controller's (and thus the firm's) incentive to reduce competition, the smaller is its stake in the controlled firm.

Indeed, the smaller the stake in its own firm, the higher the weight assigned to the participation in the competitor's profits and losses. This weakens the controller's incentive to deviate from the collusive scheme making it run the controlled firm as a less vigorous competitor. A dilution of its controlling shareholding would lower its gain from the controlled firm's price cut, while the loss suffered by the partially owned rival (in which it participates) would be left unchanged.

Irrelevant is the controller's stake in the firm it controls and any future dilution, in case it is the controlled firm itself to invest in its competitor. This because the controlling shareholding affects the controller's gains and losses from the firm price cut in equal proportions. If the controlling shareholder direct stake in its firm is diluted also the indirect stake in the rival will be diluted proportionately.[177]

Resuming the example above, suppose GM holds 55% of National and controls its pricing decisions and that National had invested in 25% of Avis's stock. GM gains $1.65 (55% of $3) from making National price cut, and loses 55% x 25% x $8 = $1.1, due to National's stake in Avis (since GM holds 55% in National and National, in turn, holds 25% in Avis, GM has an indirect stake of 55% x 25% in Avis). The incentive of GM will thus be to price cut, being it the more profitable decision. Opposite to the decision it would have taken in case it held the stake itself.

From what explained above it is also possible to infer that the acquisition or the increase of the shareholding in a competitor is not the only device that may be used as a strategic commitment to a less vigorous competition. In case of minority shareholdings by the controlling shareholder, also the dilution of the controller's stake in its own firm (within the boundaries of control over the firm's actions), strengthens its

[176] It is assumed that the controlling shareholder has control over the appointment of the board of directors and managers of the firm and monitors executives' decisions. The firm's managers and directors will obviously base their decisions on the controller's interest in order to maintain their positions.

[177] Gilo, "The Anticompetitive", cit, at 24.

incentives to make its firm compete less aggressively with the aim of inducing also the other firms to compete less vigorously themselves.

It is therefore important that consent decrees approving investments by controlling shareholders are conditioned upon a commitment of prior notification or approval of any future dilution of the controller's stake in the firm it controls.[178] Such dilution would, indeed, have the same effect as an increase of the controller's stake in the competing firm.

In the previous analysis it is assumed that the controlling shareholder takes only its own interests into account disregarding the profits flowing to minority shareholders. This is usually considered as an "agency cost" or breach of the controller's fiduciary duty, lowering the value of the minority's shares.

Minority shareholders could claim a breach of the controller's fiduciary duty in case it decides not to price cut alleging that the controller refrained from doing so only to protect its own investment in the firm's rival, ignoring their interests. These shareholders would nevertheless find it very difficult to prove in Court that the controller's conduct was not the optimal strategy for the firm. Indeed the fact that the controlling shareholder takes only its own interests into account, disregarding the profits flowing to the minority shareholders, is not obviously detrimental to the latter. It instead tends to benefit the minority shareholders enabling them to share in supracompetitive profits. Indeed, the fact that the controller ignores minority shareholders' interests strengthens the commitment of the controlled firm to soften competition. In various industry settings,[179] it is a profitable strategy for a firm to commit being a less vigorous competitor, since this induces the other competitors to behave less vigorously themselves. On the other hand the ability of firms to collude is greatly diminished when a firm's controller internalizes the interests of the minority shareholders and acts to maximize the controlled firm's profits rather than its own. This has in fact the exact opposite effect of diluting the controller's share.

The results of the acquisition by the firm controller, analyzed in this chapter, are the same in case of investments by a firm's manager. Vigorous competition would reduce the value of his investment, thus leading the manager to manage the firm in a less aggressive way. Even a very small stake held by the manager in a competing firm is sufficient to substantially lessen competition if it has no stake in the managed firm to counterbalance its effect on incentives.

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[178] See below, e.g., *Nordbanken/Postgirot* and *Time Warner/Turner* cases where this condition should have been imposed.

[179] It is excluded in case of Cournot competition in P Charlety, MC Fagart and S Souam, "Incentives for Partial Acquisitions and Real Market Concentration" (2007) <http://ssrn.com/abstract=968239> accessed 9 July 2011.

3.4. Tempering the Economic Theory

The anticompetitive effects of minority shareholdings explained above have been questioned. An author in particular[180] complains that the economic analysis ignored real-world factors, such as information deficiencies, personal incentives of the firm's managers and the inability to capture the predicted benefits, which lessen the likelihood of competitive harm. From these real-world factors depend the existence and the magnitude of the anticompetitive incentives arising from the acquisition of a minority shareholding in a competitor.

In their reply to Dubrow, O'Brien and Salop[181] explain the reasons why these real-world factors may not in reality have the effects assigned to them. They nonetheless agree that the inability to capture benefits can have a dampening influence on the incentives of the acquiring firm, not on the basis of the market risk, as proposed by Dubrow, but on the basis of the acquiring firm's lack of control over the target's management coupled with lack of confidence in its capabilities. This complicating factor may reduce significantly the unilateral effects of non-controlling minority share acquisitions on the acquiring firm's managers.

Another factor reducing the unilateral effects of minority shareholdings is the negative impact of actions based on anticompetitive aims on the acquiring firm's reputation.[182]

3.4.1. Incomplete Information

The first factor deemed to lessen the opportunity for anticompetitive effects is the incompleteness of the information on competitive dynamics available to the executives of the acquiring firm. Specifically it is criticized the idea that the management may, ex ante, "determine and execute competitive decision making with a high degree of accuracy and […] calculate the economic returns, both for their own firms and others in which they may have invested."[183]

It is unlikely that managers have sufficient information to be sure that, when modifying their own competitive behavior, certain effects on the profitability of the target will follow, particularly how much business will be diverted and captured. This may be caused by an overall lack of data or by unforeseeable actions taken by firms in the marketplace.

This first criticism, however, "could be read as striking to the heart of the economic analysis used in antitrust and industrial organization more generally."[184]

Managers are always facing a problem of incomplete information since this is one of the basic traits of economy itself. They have therefore to deal with it whenever they have to take a business decision. Industrial organization economics is premised on the

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[180] Dubrow, "Challenging", cit., at 131–132.
[181] O'Brien, "The Competitive", cit., at 615–616.
[182] Reed, "Private", cit., at 327.
[183] Dubrow, "Challenging", cit., at 133.
[184] O'Brien, "The Competitive", cit., at 616.

assumption that managers are able to operate actively and successfully in an economic environment characterized by incomplete information. Managers are expected to gather all the possible information and take decisions maximizing expected profits, notwithstanding the incompleteness of the data available.[185]

Accepting Dubrow's criticism would lead to think that incomplete information paralyzes managers to the point of making them renounce to profitable investment opportunities and conducts.

An example may clarify this conclusion.[186] Imagine that GM increases its prices expecting some customers to be diverted to Ford, in which it has invested. This decision may be detrimental in case a competitor runs a simultaneous price promotion capturing all the diverted sales.

It is obvious that certain expectations could deter GM from price increasing. It is nevertheless sound to assume that all these expectations will be analyzed by GM's managers when taking the decision of price cutting.

3.4.2. Management's Incentives

The second criticism regards the actual incentives of the management to raise prices with the aim of maximizing the overall profits of the managed firm. The economic incentives theory posits that the acquiring firm, represented by its board of directors, its officers, and its managers, has the goal of maximizing the total income, investment activities included.[187] This would require the firm to harm its own business operation in order to increase its financial profits from the shareholding in a competitor.[188] It may nonetheless be difficult to see as an individual interest of the managers of one firm, to lose sales and profits in favor of a competitor.[189] They are more likely to make pricing decisions to maximize "their" firm long-term competitive strength by gaining market share and increasing the company's profits. This, not only because they are likely compensated and "valued" in the "market for managers" on the basis of the short-term performance of the business they are responsible for operating and not the overall profitability of the entire corporation,[190] but also to avoid damaging the relationship

[185] E.g., Tirole, "The Theory", cit.

[186] O'Brien, "The Competitive", cit., at 617.

[187] Dubrow, "Challenging", cit., at 133.

[188] O'Brien, "Competitive", cit., at 572.

[189] MC Jensen, "Agency Costs of Free Cash Flow, Corporate Finance and Takeovers" (1986) 76(2) The American Economic Review, Papers and Proceedings of the Ninety-Eight Annual Meeting of the American Economic Association 323. Jensen noted that corporate managers have a conflict of interest in making payouts to their own shareholders, as doing so they reduce the resources under their control. Managers are "not driven by maximization of the value of the firm, but rather by the maximization of "corporate wealth", which is the amount of assets (e.g., available cash or credit) that are available for management's strategic use".

[190] Jensen, "Agency", cit., at 323 ("Managers have incentives to cause their firms to grow beyond the optimal size. Growth increases managers' power by increasing the resources under their control. It is also associated with increases in managers' compensation, because changes in compensation are positively related to the growth in sales"). See also Corradi, "Le partecipazioni", at 377.

with distributors, decrease brand recognition and affect the availability of resources to fund the firm's activities.[191]

This tempering factor, however, is to be excluded too. First, antitrust generally assumes that corporate and securities laws ensure that managers and board of directors act in the interests of the shareholders with the aim of maximizing their profits (i.e., the market valuation of the corporation).[192] Each manager has fiduciary duties towards the company and all of its shareholders to maximize corporate profits. This may be incentivized using executive compensation packages positively linking the remuneration of the managers, not to the performance of their individual businesses, but to the overall corporate profits, including the firm's financial interests (e.g. stock options). This incentivizes managers to act in the interests of the entire corporation, maximizing both the firm's operational and financial profits, leading the managers to take into consideration also the economic success of the firm in which the minority shareholding is held.

The second reason to exclude the factor at stake is that, as the one before, it may be taken far beyond the analysis of minority shareholdings, to the very foundation of the economic analysis used in antitrust. As O'Brien and Salop put it "if one were to assume that managers were interested only in the profits of their specific business and totally ignored the implications for the corporation, then a merger among GM, Ford, Toyota, and Daimler/Chrysler would be permissible because it could be assumed that all the models would be priced independently by managers with a narrow focus, similarly could not be presumed that merger plans were designed on average to increase efficiency."[193]

3.4.3. Inability to Capture Benefits

The last real-world factor is the inability to capture benefits. It refers to the risk that the acquiring firm will not be able to realize the expected benefits from the price increase. This may be the case, e.g., when the firm in which the minority investment is held has other businesses, not competing with the acquiring firm. In this case the profits on the noncompeting products are left unaffected by the decisions of the acquiring firm. Since the investment is in the whole firm and not in a division thereof, there is a substantial risk that the profits deriving from customers' diversion will be offset by the losses incurred in other markets.[194]

Another case in which the inability to capture benefits may be of concern, is related to the so-called "stock market or equities market risk."[195] The economic models assume that the firm with a financial interest in a competitor is entitled to receive a portion of the profits of the other firm.[196]

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[191] Dubrow, "Challenging", cit., at 134.

[192] O'Brien, "The Competitive", cit., at 619.

[193] O'Brien, "The Competitive", cit., at 620.

[194] Dubrow, "Challenging", cit., at 134–6.

[195] Ibid.

[196] "Financial interest refers to the right to receive the stream of profits generated by the firm from its operations and investments". O'Brien, "Competitive", cit., at 569. The silent financial interest model

To the contrary, a minority shareholder is not entitled to a portion of the "stream of profits" of the firm.[197] It may receive some benefits in the form of dividends, but there is no direct and immediate profit sharing; potential dividends have not to be (and usually are not) equal to a pro rata division of the profits of the target firm. The acquiring firm usually realizes the possible capital gain from the investment only in the future when the financial interest is sold. The incentives calculus becomes thus much more complicated having the acquiring firm to balance lost profits today with possible capital gains, based on the increased value of the acquired firm, tomorrow. At that time, it is possible the capital gain from the acquiring firm's less vigorous competition has disappeared.

O'Brien and Salop respond to this critic noting that "whether the return to the acquiring firm is in the form of dividends or capital gains flowing from retained earnings, both increase the value of the acquired firm. Indeed, retained earnings and capital gains are tax advantaged, so that they should lead to a larger increase in the valuation of the acquiring firm."[198]

Furthermore if, as the target, also the acquiring firm does not pay out its profits, a decision to increase prices would lead to an increase in the value of the minority shareholding and a decrease in the value of the acquiring firm's operations. The investing firm's shareholders would consider increased the overall value of their investment, which incorporates (and aggregates) both effects, in case the increase outweigh the decrease.

With regards to the other criticism, the potential for variations to the target's profits caused by other businesses or market risk, the two authors state that "if the acquiring firm pulls its competitive punches, the statistical expectation of the target's profits will improve. This higher expectation in turn will be reflected in a higher expected stock market valuation or higher dividends on average."[199]

Nonetheless O'Brien and Salop agree that a benefits-recapture problem exists. It arises from the fact that a minority shareholder, by definition, cannot control how the target uses the extra profits generated by its actions.

Pulling its competitive punches, the acquiring firm exchanges some of its own profits with a, seemingly larger, share in the profits of the target, which are however controlled by the latter's management. The acquiring firm's management (and/or controlling shareholders) may think that the target firm's executives are less skillful investors and would not administrate the higher profits in the best way possible, whether this means distribute them as dividends or invest them in profitable busi-

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assumes that "the acquiring firm is entitled to a share of the acquired firm's profits". Ibid., at 577. The MHHI calculation assumes that the investing firm is entitled to a fraction... of the profits" of the firm in which it has invested. Ibid., at 595. See also Reynolds, "The Competitive", cit., at 141, 143–44.

[197] "Clearly, for accounting purposes, a minority-owned firm's revenues and profits cannot be consolidated on the acquiring firm's financial statements". Dubrow, "Challenging", cit., at 135.

[198] O'Brien, "The Competitive", cit., at 621.

[199] O'Brien, "The Competitive", cit., at 622.

nesses. In the extreme they may fear that the higher profits would be completely wasted.

The acquiring firm may therefore be willing to sacrifice some nominal earnings in view of higher profits on the earnings under its direct control, thanks to more skillful managers and better investment plans.[200] This is likely the case when the investment is totally passive, has been obtained passively (as part of a bigger transaction) and the target has poor investment records.[201] "The acquiring firm would "discount" the increased profits earned by the target by a "discount rate" to reflect its inability to control the disposition of these profits. Applying this discount rate does not eliminate the incentives of the acquiring firm to raise its price […] [It] has the same effect as a comparable reduction in the acquiring firm's financial interest."[202]

This same discount rate has to be applied when calculating the MHHI or PPIs. O'Brien and Salop suggest to use either the magnitude of the control premium or the minority ownership discount for tax purposes permitted by the Internal Revenue Service. This specific real-world factor has been used to contradict the authority finding in the Time Warner acquisition of Turner Broadcasting.[203]

3.5. Reasons other than Anticompetitive

The acquisition of a minority shareholding in a rival firm, even if it does not confer control, may be motivated by reasons other than reducing competition in the market and may potentially generate efficiencies. These reasons may justify the establishment of such structural links counterbalancing the anticompetitive effects a partial acquisition in a competitor may have, regardless the aim pursued by the acquiring firm. In case the efficiencies are meaningful enough, they may be used to convince a Court or a competition authority of a countervailing efficiency defense. This is more likely the case if the efficiencies could not be achieved through any other less anticompetitive means than a minority shareholding.[204]

As the President's Council of Economic Advisors stated: "The challenge for antitrust scholarship and public policy is to provide an integrated framework for all these or-

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[200] This unless the profits flowing from the investment are large enough to overcome the risks from lack of control.

[201] O'Brien, "The Competitive", cit., at 625.

[202] O'Brien, "The Competitive", cit., at 623.

[203] For an analysis see S Besen, EJ Murdoch, DP O'Brien, SC Salop, J Woodbury, "Vertical and Horizontal Ownership in Cable TV: *Time Warner-Turner*", in JE Kwoka and LJ White, *The Antitrust Revolution: Economics, Competition, and Policy* (1999), at 452–475; and below Ch. 4.5.4.5.

[204] E.g., *Federal Trade Commission v. Univ. Health, Inc*., 938 F.2d 1206, 1222–23 n.30 (11th Cir. 1991) (indicating that Courts should require "proof that the efficiencies to be gained by the acquisition cannot be secured by means that inflict less damage to competition"); *Federal Trade Commission v. Cardinal Health, Inc*., 12 F. Supp. 2d 34, 61–62 (D.D.C. 1998) ("efficiencies, no matter how great, should not be considered if they could also be accomplished without a merger"); *Federal Trade Commission v. Staples*, Inc., 970 F. Supp. 1066, 1088–89 (D.D.C. 1997) (holding that cost savings must be specific to the combination of the merging parties). As cited in Reed, "Private", cit., at 335.

ganizational innovations [such as minority shareholdings] that properly accounts for both competitive and efficiency effects. These types of transactions evoke intertwined issues in corporate governance and competition policy, and so an integrated framework supports sound policymaking."[205]

To cite the OECD, the objective of competition policy is to "protect competition as the most appropriate means of ensuring the efficient allocation of resources – and thus efficient market outcomes – in free market economies."[206]

Efficiencies and synergies associated with common control of two merging firms do not arise in case of non controlling investments. Both firms, after the investment, are managed independently, as they were before. Because of this, even though the anticompetitive effects of minority shareholdings are considered usually weaker than those of full mergers, they are also less likely to be motivated by efficiency objectives.[207] In the absence of any significant countervailing efficiency, it would be difficult to consider minority shareholdings in competitors desirable.[208] Minority shares acquisitions, even in case they do not determine welfare-enhancing effects, may have explanations other than anticompetitive.

Minority shareholdings may be used, for example,:[209] (i) as a first step before a full merger bid is launched (pre-merger holding), (ii) to prevent another company from taking over the "target" company (blocking holding), (iii) to fund and implement cooperative arrangements (such as R&D), (iv) to establish and strengthen business relationships, (v) to access and secure the returns from new technologies or innovative managerial practices, (vi) to allocate the production more efficiently, (vii) to raise capital for the target firm, (viii) to diversify and spread costs and risks.

The first motivation refers to the case where the minority share acquisition is a pre-merger acquisition. The reason of the acquisition, in this first case, is that the acquirer may be able to take advantage of information asymmetries in the stock market (e.g., with regards to the size of the benefits for the merging firms or the timing of the takeover) and buy small amounts of shares before the market understands that a take-over bid is likely to take place and the prices rise up. This results in a different distribution of the benefits arising from a merger, from the shareholders of the target company to the shareholders of the acquiring company. It has on the other hand the effect of delaying the implementation of the takeover and the realization of its full benefits. A requirement to disclose minority share acquisitions would partially avoid

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[205] President's Council of Economic Advisers, Report (2002), Yale Journal on Regulation, <http://www.kdischool.ac.kr/UserFiles/File/2006%20Summer/2.%20MBA%20Courses/MSS057/Westlaw_Document_05_32_30_3472.rtf> accessed 9 July 2011.

[206] Organisation for Economic Co-operation and Development (OECD), "Competition Policy and Efficiency Claims in Horizontal Agreements" (1995), (OCDE/GD(96)65), <http://www.oecd.org/dataoecd/1/4/2379526.pdf> accessed 9 July 2011.

[207] OFT, "Minority", cit., at 57.

[208] Gilo, "Passive", cit., at 1658.

[209] OECD, "Antitrust Issues", cit., at 21; Meadowcroft, "Minority", cit.; Reynolds, "The Competitive", cit.; Gilo, "Passive", cit., at 1658–9; Gilo, "The Anticompetitive", cit, at 44–5.

this information asymmetry[210] while at the same time it would worsen the coordinated effects.[211]

As for the second reason, it refers to the acquisitions used as blocking holdings. In these regards the policy implications depend upon what effect the blocked takeover would have had upon competition. A minority shareholding bought to avoid a merger or an acquisition that could have led to more effective competition on the market (e.g. determining economies of scale, better management…), may have anticompetitive effects (and motivations). These effects are more likely in markets where concentration is high and direct entry is difficult. On the other hand, in case the concentration blocked would have caused a reduction of competition (e.g. because it would have strengthen the dominant firm), the acquisition may have pro competitive effects.

Concerning the third, fourth and fifth reasons, they refer to cases in which minority shareholdings are used in support or in lieu of contractual arrangements. Where agreements are incomplete or difficult to implement effectively, it may be beneficial to establish a structural link in order to internalize part of the transaction costs which would otherwise be competitive externalities. Profit sharing may solve problems of incomplete contracting and fears of opportunism between the parties.[212] With the acquisition of minority shareholdings the risk of cheating on the contract is diminished as the cheating party will now have to bear part of the costs it imposes on its rival. A minority shareholding may also be helpful to gather information, monitor the behavior of the other party, strengthen the business relationship and, only in case the shareholding is active, exert some influence in order to ensure compliance.

These effects may be anticompetitive or efficiency-enhancing, it depends on the aim at which they are directed and the content of the agreement in support of or in lieu of they are established. The result may be the improvement of the trading relationship, but also a reduction of competition between the firms involved.

A meaningful example is represented by the licensing agreements, with these agreements one firm licenses its technology to a competitor. The licensor generally faces difficulties in appropriating the returns on its technological innovation.[213] Investment by the technology's licensor in the licensee's stock, free of charge or at a very low price (compared to the profits expected), may assist the licensor in appropriating these returns.[214]

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[210] E.g. the UK Companies Act provide that anyone acquiring more than 5% of the share capital of a company has to notify the target company, the latter has to publish details of minority holdings of 10% or more in its Annual Report and Accounts. See Meadowcroft, "Minority", cit., at 36.

[211] In order for collusion to be enhanced, it is necessary for the minority share acquisition (used as a commitment device) to be visible to the other competitors.

[212] OD Hart, *Firms, Contracts, and Financial Structure* (Oxford: Clarendon Press, 1995), chapter 2.

[213] RE Caves, H Crookell and JP Killing, "The Imperfect Market for Technology Licenses" (1983) 45 Oxford Bull. Econ. & Stat. 249; R Zeckhauser, "The Challenge of Contracting for Technological Information" (1996) 93 Proc. of the National Acad. of Sci. 12743.

[214] RW Wilson, "The Sale of Technology Through Licensing" (1975), PhD diss., Yale University, New Haven, Connecticut.

Passing to the sixth reason, the more efficient allocation of production among firms, it arises in case the less efficient firm invests in the stock of a more efficient competitor. In this case, absent collusion, the former would lower its production, due to the unilateral effect of minority share acquisitions, while the low-costs firm would increase it. Although aggregate output in the industry is reduced, the allocation of production becomes more efficient since the high-cost firm produces less of the overall industry's output while the low-cost firm produces more.[215]

The seventh reason derives from the superiority of information at the competitor's disposal. Operating in the same market, the acquiring firm has normally more information regarding the target firm, its product market and its prospects than other possible investors. Because of this, in case the target firm issues new stock in exchange for the minority investment, the sale (and thus the acquisition) may be an efficient way of raising capital for the firm in which the investment is made. This would not be the case if the investor acquires shares from existing shareholders.[216]

The last reason considered is diversification. The motivation determining the acquisition would be to invest in industrial sectors considered more profitable or stable in order to optimize the risk structure of the firm's portfolio and insure against the fluctuation of its performances.

When the investment is in a competitor, however, the last three efficiencies may be considered a bet by the acquiring firm on an increase in the profitability of a firm operating in the same market. Since the rival's profits depend (at least partially) on the competitive behavior of the acquiring firm, it would be very difficult to exclude anticompetitive effects in case the investment is motivated by either of these reasons. The question would thus be if the efficiencies arising are sufficient to counterbalance the harms.

3.6. Instruments with Analogous Effects to Minority Shareholdings

This chapter, in light of the results of the economic analysis and to anticipate the considerations emerging from the analysis of antitrust rules and case law, analyses briefly instruments other than minority shareholdings having similar anticompetitive effects. These instruments may be used coupled with minority shareholdings in order to strengthen their effects, but also as substitutes in order to achieve similar anticompetitive effects in case the acquisition of a minority shareholding would be prohibited or at least cause the competition authorities' intervention.

3.6.1. Acquisition of Debts or Extension of Loans

The first instrument to consider is debt. A firm generates cash flow from its capital which may have two main sources: equity and debt. In economic terms, shareholders and creditors are both security holders, with different claims to the firm's cash flows

215 Gilo, "The Anticompetitive", cit., at 44.

216 Gilo, "Passive", cit., at 1658.

and, in the event of liquidation, from the sale of assets.[217] Shareholders have a claim to the residual cash flows, indefinite in time and value, after all the costs have been paid, on the basis of their property right. Creditors have a prior claim, to interest and principal payments, contractual in nature, fixed in time and capped in value.[218]

Both creditors and shareholders are in control of their downside risk: their liability is respectively limited to the principal of the loan and the investment. What is different is the upside potential: the one of the shareholders is unlimited while the creditors have a fixed rate of return. This means that the shareholders may earn more from their investments, but they face also the risk of earning less, as well as a bigger risk in case of default.[219]

When a firm (or its controlling shareholder) extends credit to a competitor, there is the concrete possibility for competition to be lessened. The lender could exploit its contractual position to exercise influence over the borrower and/or to gain access to the competitively sensitive information. Moreover, having a financial interest in the debtor's "well being", the creditor may have the unilateral incentive to compete less vigorously, thus facilitating collusion.

These anticompetitive effects, however, are limited to the case where the debtor is insolvent.[220] As long as the borrower is in good economic conditions (and, as a consequence, has viable refinancing options) a debt investment does not significantly reduce the incentives to compete, nor it involves meaningful influence, information exchange or may be used as a commitment device. On the other hand, when the creditor can accelerate the loan and thereby cause the borrower's bankruptcy, the situation changes and the creditor's de facto influence over the target increases significantly and may even exceed the influence conferred by a comparable equity investment.

For starters, credit agreements often require the borrower to provide the lender regularly updated financial information and may give the lender a right to request additional financial and non–financial information;[221] this does not mean that the lender has access to all the competitively sensitive information and records. The information the creditor has the right to receive and request is only the one necessary to assess changes in the credit risk.[222]

With regards to the influence over the corporate decisions of the borrower, this may be exercised only through the threat of accelerating the loan. If the debtor is solvent, it may ignore the creditor's requests, giving it the right to accelerate the loan; it may

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[217] MW McDaniel, "Bondholders and Corporate Governance" (1986) 41 Bus. Law 413.

[218] A Damodaran, *Applied Corporate Finance: A User's Manual* (John Wiley & Sons 1999), at 214–224.

[219] HF Kaiser, "Debt Investments in Competitors Under the Federal Antitrust Laws" (2004) 9 Fordham Journal of Corporate and Financial Law 605, at 617.

[220] Kaiser, "Debt", cit., at 605.

[221] S Stern, *Structuring and Drafting Commercial Loan Agreements* (A. S. Pratt & Sons rev. ed. 2001), at 5.01 [4]-[5].

[222] Ibid. Where the debtor voluntarily provides competitively sensitive information to a competing creditor, it is possible to presume it has collusive intentions and the loan is used as a facilitating device.

also refinance the loan and remove the competitor as a creditor. This is not the case where the debtor is in financial distress. In these cases it cannot refinance the loan nor risk an acceleration that would lead it to bankruptcy.

As to the unilateral effects, unlike a shareholder, a creditor does not have the right to a share of the profits of the debtor; any diverted sale following a price increase would not be recaptured in any portion. The incentives of the creditor slightly change in case of insolvency of the borrower, when there is not sufficient collateral to guarantee the loan. In this case the former would have the unilateral incentive to compete less vigorously, since the contrary would increase the probability of the debtor's bankruptcy. Should the gain from the debt investment value increase exceed the loss from the diverted sales, a price raise would be a profitable strategy. However, unlike equity, debt investments do not provide a continuous income stream; the debt appreciation happens only once and is limited to the value of the debt.[223]

When it is a firm's controlling shareholder to extend the debt to a competitor, the anticompetitive effect may be enhanced by a dilution of the stake in the firm it controls. The lower is the stake in its own firm, the more weight it would place on the value of the debt and the probability of repayment.[224]

Debt investments may also, in case of financial distress of the debtor, serve as a credible commitment not to compete aggressively. To be credible the commitment has to change the incentives of the creditor, increasing the payoff for cooperation or decreasing the payoff for competition. Equity does both, but debt only does the latter.[225] In case of extension of debt to a competitor, the lending firm is implicitly committing not to compete vigorously when the likelihood with which the credit will be repaid depends on the intensity of competition. If the creditor's choice to compete aggressively would push the borrower into bankruptcy and thus lower or exclude any possibility of repayment; the acquisition of a debt constitutes an auto imposed penalty on the part of the creditor with the aim of ensuring collusion.[226] Nonetheless the credibility of this commitment would last only until the competing debtor remains at the brink of bankruptcy. This has three consequences. First, as soon as the debtor becomes solvent collusion may easily break down. Second, the required state of financial weakness of the debtor exposes it to competitive actions of other competitors and unrelated events in the marketplace which could lead the creditor to lose its loan even without breaking collusion. Third the debtor may, due to its poor financial conditions, be more inclined to compete vigorously, using the threat of bankruptcy to avoid punishment.[227]

The extension of a loan to a competitor in financial distress may have also another anticompetitive reason, to save it from bankruptcy when its exit would cause it to be

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[223] Kaiser, "Debt", cit., at 623.

[224] Gilo, "The Anticompetitive", cit., at 7.

[225] Kaiser, "Debt", cit., at 626.

[226] Gilo, "The Anticompetitive", cit., at 21.

[227] Kaiser, "Debt", cit., at 630. It has nonetheless to be considered that competitive decisions are taken by managers, who face the risk of losing their jobs in the punishment phase if the firm goes bankrupt.

replaced by a stronger and more aggressive competitor. The latter's entrance would increase competition in the market and reduce profits being therefore less convenient for the creditor than an investment in a weak (and even an insolvent) competitor.[228]

In the United States the treatment of debt acquisition having anticompetitive effects has been analyzed under Section 7 of the Clayton act which prohibits the acquisition of stock, other share capital or assets where the effect may be substantially to lessen competition or to tend to create a monopoly.[229] The Mr. Frank decision contains an important discussion concerning the possibility to include a loan in the definition of "asset" under Section 7.[230]

In the Mr. Frank decision the Court decided that only qualified debt, i.e., debt in connection with other circumstances giving the creditor "appreciable power over [the debtor's] actions"[231] constitutes an asset, to the acquisition of which section 7 is applicable. In all the other cases debts are analyzed under section 1 of the Sherman Act prohibiting "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce."[232]

As for the European Union, paradigmatic has been the Gillette case,[233] in which the Commission changes its approach to debt investments taken in the Philip Morris case.[234] In this case, Gillette participated to the leveraged buyout of a competitor, acquiring 22% of the loan stock and 13.6% of the total debt of the investor group (Eemland) buying the rival firm. This participation has been considered to be in violation of Article 102 TFEU, condemning the abuse of a dominant position. At first Gillette was prevented, by the U.S. Department of Justice (DOJ), to do anything to cause Eemland (which, acquiring the competitor, became one) to become insolvent.[235] This was nonetheless considered insufficient by the European Commission to exclude an "adverse effect on competition", caused by the "creation of a link between Gillette and its leading competitor" considered sufficient to exercise "some influence."[236] The Commission stated: "The options which are open to the company are severely limited by the burden of debt which it carries" and again "The highly leveraged nature of the buy-out means that Eemland is in a weak position because of the burden of debt which

[228] Gilo, "The Anticompetitive", cit., at 21.

[229] 15 U.S.C. Section 18.

[230] *Mr. Frank, Inc. v. Waste Mgmt., Inc.*, 591 F. Supp. (N.D. 111. 1984) at 866 (stating that "[Assets] is not a word of art, nor is it given a built-in definition by statute [...]. As used in this statute, and depending upon the factual context, "assets" may mean anything of value").

[231] Ibid., at 866–867.

[232] 15 U.S.C. Sections 1.

[233] Cases IV/33.440, IV/33.486 *Warner – Lambert/Gillette* and *Bic/Gillette and others,* Commission decision of 10 November 1992 (93/252/EEC), [1993] OJ L 116/21.

[234] Joined cases 142 and 156/84 *British-American Tobacco Company Ltd and R. J. Reynolds Industries Inc. v. Commission of the European Communities*, Judgment of the Court of 17 November 1987, ECR [1987] 4487 (the *British-American Tobacco and R. J. Reynolds v. Commission*). In this case a 50% investment in convertible bonds, side by side with a lot of other arrangements, was considered falling outside the reach of Article 101 and 102 TFEU.

[235] *United States v. Gillette Co.*, 55 Fed. Reg. 28,312 (Dep't of Justice Apr. 4, 1990).

[236] EU *Gillette* case, cit., para. 23–27.

that company is carrying."[237] It also affirmed that Eemland (now Gillette's competitor) could "not reasonably be expected to ignore this financial dependence on Gillette",[238] and obliged the latter to dispose of its interest as a creditor.

These decisions demonstrate how debt investments, when coupled with other rights, not necessarily voting or representation rights, may be considered as giving the possibility to exercise some influence over the target's behavior, and thus infringe antitrust rules.

3.6.2. Contracts for Differences

The Contracts for Differences (CfDs) are a particular type of over-the-counter financial derivative product that allows buyers and sellers to take positions on the future performance of an underlying financial instrument, earning the difference between the price at the opening date and at the closing date of the contract. To buy a CfD means to bet on an increase in the value of the underlying instrument price; to sell it stands for the opposite. The underlying instrument (e.g. equity shares) is not traded itself. This permits to go "short" on the shares, i.e. to sell them without having them. It is only the difference between the opening and the closing price that matters.

Furthermore the CfDs operate on a leveraged basis. The investor does not need to fund the total cost of the underlying shares, but only an initial margin (or deposit). This permits to hold significant positions with a small initial capital expenditure.

Long positions through the CfDs give the holder the same financial interest, in the performance of the firm whose shares constitute the underlying instrument, as the acquisition of a shareholding, with two peculiarities.[239]

First, the CfDs allow firms also to "sell" them (i.e. to "go short"). In this case the firm would benefit directly from its rivals' decreased profits. This can be considered both an incentive to compete aggressively (avoiding or deviating from collusion)[240] and to undertake exclusionary behavior.[241] Going short could be used even to reduce the cost and increase the effectiveness of the punishment phase when the punishing firms "sell" the CfDs of the deviating firm (they will then have an interest in the rival earning lower profits). "Going long" on competitors during collusion, and "going short" during the punishment phase increases therefore the potential for collusion. Put differently, the CfDs permit to get the collusion-enhancing part of the minority share-

[237] EU *Gillette* case, cit., para. 28–29.

[238] EU *Gillette* case, cit., para. 25.

[239] The effects associated with the CfDs may also flow from other derivative products such as futures or options, with different specificities. See OFT, "Minority", cit., at 72.

[240] This because the fall in profits suffered by the competitor is added, and not subtracted, to the benefits of deviation from the collusive outcome. In case there is an obligation to disclose such CfDs, the other firms would get a signal of the firm's intention to deviate and quickly respond.

[241] Going short on a competitor or a potential entrant, the acquiring firm commits itself to compete aggressively in order to push out from or impede the entrance in the market. The CfDs reduces the short-term losses through the reduction of the rival firm's share market value and discourage entry. See OFT, "Minority", cit., at 82.

holdings, without having to bear the costs of carrying out the punishment in case of deviation.[242]

The second peculiarity is that the CfDs are more flexible instruments than shares themselves, positions can be quickly cancelled or reversed with an investment lower than the price of the underlying instruments. This peculiarity may have opposite effects on collusion. The flexibility makes the commitment less credible since the acquiring firm could easily eliminate the "auto-imposed penalty" and even reverse it. In addition, the leveraged nature of the CfDs permits the commitment to be stronger than in case the same amount is invested in minority shareholdings. This however works both ways, the firm may commit either to collusion (going long) or to vigorous competition (going short).

Unilateral and coordinated anticompetitive effects, except for the considerations related to these two peculiarities, are the same as passive minority shareholdings.

3.6.3. Executive Compensation Packages

The last instruments analyzed are the executive compensation packages, which represent the remuneration given to directors and managers. The anticompetitive effects arise from the linkage of the components of these packages to the industry's or the competitors' profits. In these cases it would be difficult to justify them with any welfare-enhancing efficiency, as would be the case when the components are linked to the profits of the firm they manage (e.g. the firm's stock or options).[243]

Components linked to the industry's or competitor's profitability have the same effect on managers' incentives that the acquisition of a stake in a competitor would have.[244] Such packages induce managers to make the firm compete less aggressively in order to divert customers from the firm they manage to the firm on the profits of which they are compensated. Vigorous competition would reduce the competitors' profits and thus the value of the components positively linked to the industry's or the competitors' profitability.[245] Such remuneration could be used as a commitment device to demonstrate the intention of the firm to compete less aggressively in order to facilitate collusion. This could increase the firm's profits and be beneficial to the firm's shareholders.[246] The anticompetitive effects will be stronger, the smaller the interest of the managers in the profits of the firm they manage is (e.g. through shares, options, other components positively linked to the firm's profits…).[247]

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[242] OFT, "Minority", cit., at 77–78.

[243] The only exception is the above-mentioned improved allocation of production in case the compensation of high-cost firms' managers are positively linked to a low-cost rival's performance. See Gilo, "The Anticompetitive", cit., at 44–45.

[244] Which are, in turn, similar to those of a controlling shareholder acquiring a shareholding in a rival firm.

[245] For an economic model, RK Aggarwal and AA Samwick, "Executive Compensation, Strategic Competition, and Relative Performance Evaluation: Theory and Evidence" (1999) 54 J. Fin. 1999.

[246] Here too, what is conventionally thought of as an "agency cost", turns out, in the current context to be benificiary to the firm's shareholders.

[247] Gilo, "The Anticompetitive", cit., at 6.

In order for components in an executive compensation package to properly function as commitment devices they, as all the other commitment devices, need to be observable by competitors.

If the company is not obliged to publicly disclose such executive compensation schemes and their components, making them directly observable by competitors, even if it is willing to voluntarily publish them, competitors would not be reassured, since it could change the components at any time, without them knowing. This strongly limits the collusion facilitating effect, while it leaves the unilateral anticompetitive effects on the managers' incentives untouched.[248]

It is possible to explain the effect of the executive compensation packages with an example.[249] In a market with only two firms, National and Avis, National would make $3 from price cutting while Avis loses $8. The remuneration of National's managers is positively linked to the firm's profit in a way equivalent to a 1% share and to the industry's so as to grant 0.7% worth of the aggregate profits.

Under such a compensation scheme the managers make $0.03 (1% of $3) from National's price cut while they lose 0.7% of $5 (the industry's aggregate loss from National's price cut) which is $0.035.

As a result, the managers will refrain from vigorous competition since the components of their compensation packages made it unprofitable. This may lead to a less vigorous competition also on the part of Avis.

From a legal policy perspective, if these packages are held to be legal and only anticompetitive minority shareholdings are prohibited, firms could lawfully use such instruments to achieve the same anticompetitive effects they would have achieved using minority shareholdings.[250] The same consideration is valid for all the other instruments analyzed in this chapter.

3.7. Conclusions from the Economic Theory

The end of this chapter implies the need to find an answer to the first research question: Do non controlling shareholdings in competitors have any anticompetitive effect? Are there sufficient efficiencies to justify an exemption from antitrust scrutiny?

The answer, on the basis of all the analysis and theories presented, is, as the best legal doctrine teaches, "it depends".

What is certain is that the practice of investing in rivals is widespread[251] and these investments give rise to competition concerns which should be addressed on a case by case basis by the competition authorities. In concentrated markets with high barriers to entry there are strong arguments, based on theoretical and empirical demon-

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[248] Gilo, "The Anticompetitive", cit., at 28.

[249] Gilo, "The Anticompetitive", cit., at 27.

[250] In the U.S., for example, the only provision applicable to ban these packages is Section 5 of the Federal Trade Commission Act (15 U.S.C. Section 45(a)) condemning "unfair methods of competition".

[251] A large number of sectors are characterized by the presence of structural and personal links, e.g., the Japanese and the U.S. automobile sector, the U.S. mobile telephone industry, the Dutch and Italian financial sector, the Nordic and Spanish electricity sector, etc.

strations, in favor of a finding of anticompetitive effects, regardless the minority shareholding's active or passive nature. Both active and passive investments, in fact, may have unilateral and coordinated anticompetitive effects.

The unilateral effects of these investments are based on a "logical" consideration; a participation in the rival's profits adds an element to the profit-maximization calculus of the acquiring firm (it "internalizes" a competitive externality). When deciding its competitive behavior, the acquiring firm will, in fact, take into account also (its share of) the target's profit. This reduces its incentive to compete vigorously, knowing that this would lower the value of its investment. At the same time it increases the incentive to reduce competition, since some of the lost sales will be recaptured through the participation in the rival firm. What is under discussion is whether this change in the elements considered relevant to take competitive decisions is enough to determine a change in the competitive behavior or it is negligible.[252] The actual change in the acquiring firm's unilateral incentives depends on various transaction- and market-specific elements,[253] requiring a case by case analysis. For example, in case it is the controlling shareholder to invest in one of the controlled firm's competitors, its unilateral incentive to reduce competition is usually stronger. This because the smaller the controlling shareholding, the more weight the controller will put on the stake in the competitor. The controller may even strengthen the anticompetitive effects diluting its stake in the firm it controls, without the necessity to increase the one in the competing firm.

This "dependence" on the transaction- and market-specific factors influence also the coordinated effects. While they are more likely in case of Bertrand competition, also in case firms are competing according to Cournot coordinated anticompetitive effects may arise. A minority shareholding may be used to signal to the market the intention of the acquiring firm to compete less aggressively, in order to induce its rivals to reduce competition as well. This commitment-effect of minority share acquisitions arises from the auto-imposed penalty triggered by vigorous competition (i.e. the unilateral effects discussed above). It has been demonstrated that these effects are present only in cases where the industry mavericks invest in a rival and the investment is credible and visible to every market participant.

In case the non controlling shareholding is active; board representation, access to competitively sensitive information, voting and other minority shareholder's protection rights strengthen the potential anticompetitive effects of the investment. A wider and quicker information flow enhances the ability of the two firms to reach collusion and permits the acquiring firm to monitor the target's behavior. Representation, voting and other rights allow the acquiring company to influence the target and induce it to compete less aggressively or coordinate their conducts.

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[252] Various tempering factors might be considered, the most important of which is the inability to recapture benefits.

[253] Some of these elements are taken into account to calculate the MHHI and the PPI, indexes used specifically to assess the change in the incentives of the acquiring and acquired firm due to the minority share acquisition.

Active investments raise also concerns regarding the development, in the long run, of a quiet life policy between the firms connected by wide structural and personal links.

Both the unilateral and the coordinated effects are further strengthened when also the target acquires a shareholding in the acquiring firm (cross-shareholdings), and in case a lot of firms in the market are directly or indirectly connected through structural and personal links (circular holdings). Another important element to take into account is the presence of other instruments with effects similar to those of minority shareholdings. Debts, contracts for differences and executive compensation packages have to be considered together with the minority share acquisition to assess whether the latter has a negative effect on competition and the magnitude of this effect.

With regards to efficiencies and pro-competitive effects, minority shareholdings require a careful case by case scrutiny by the competition authorities in order to verify their presence which may counterbalance the potential anticompetitive effects. The main efficiencies related to the acquisition of minority shareholdings in competitors are based on the improvement of the "relationship" between the linked firms (helpful in case of explicit and tacit agreements). However an "improved relationship" between competitors and an increase in their cooperation and structural linkage, in most of the circumstances does not have an overall welfare-enhancing effect.

The scarcity and not very convincing nature of the efficiencies and procompetitive effects on the one hand, and, on the other hand, the well-known and strong anticompetitive potentials of these investments (particularly if active), have frequently led competition authorities and Courts to order either full divestiture or the conversion of the active investment into a passive one.

The result of these considerations is that, even though the anticompetitive effects of non controlling shareholdings are probabilistic in nature and their detection and proof may be difficult, it could be adequate to consider applying a "quick look" technique.[254] In case countervailing efficiencies or, at least, non anticompetitive explanations are completely missing and certain transaction- and market-specific circumstances are present,[255] the acquisition of a minority shareholding may be considered either neutral or completely undesirable on the competition point of view. This supports a decision of severance even without the demonstration of actual or potential anticompetitive effects.

It has to be kept in mind, in fact, that it is not only hard to demonstrate the presence of anticompetitive effects, but also to exclude them. A careful scrutiny of the specific circumstances of the case is thus crucial to determine the likely effect of the acquisition of a minority shareholding on competition.

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[254] Corradi, "Le partecipazioni", cit., at 417.

[255] See chapter 3.3.

4. The Legal Treatment of Non Controlling Minority Shareholdings

Having concluded the economic analysis, and on the basis of its results, it is now time to move the analysis into the legal treatment of minority shareholdings. The aim of this chapter will be to answer to the second research question: In case a non controlling minority shareholding in a competitor is deemed to have anticompetitive effects, under which provisions may the authorities scrutinize it? Are these rules adequate to address and eliminate the competition concerns raised by the acquisition?

This chapter analyzes the relevant provisions and the (Courts' and authorities') case law in some of the most relevant legal systems. Consistently with the economic theory, there appears to be a general consensus amongst antitrust enforcers that the acquisition of a minority shareholding in a competitor is not, "per se", illegal. Nonetheless structural links among competing firms may, under certain circumstances, raise competition concerns and should be analyzed closely by competition authorities on a case by case basis.

Merger review rules are the most frequently used to examine the competitive effects of minority shareholdings, above all with regards to the remedies imposed by the competition authorities in order to allow the merger of two firms.

Under the EU merger regulation only transactions leading to the acquisition of control, or to a qualitative change in the nature of control, are subject to review. Thus only in case the minority shareholding confers control over the target, competition authorities may use this provision to review the acquisition. To the contrary, in case the minority shareholding does not allow the exercise of control, the transaction escapes the ex ante antitrust scrutiny. In case also the rules on restrictive agreements and unilateral conducts do not apply, the potential anticompetitive effects of non controlling minority shareholdings may be completely out of reach impeding the prevention or the removal of a potential restriction of competition.

Different is the legal treatment provided by other jurisdictions where a wider range of acquisitions falls within the scope of the merger review rules. E.g., in the United Kingdom, the jurisdiction of the competition authorities extends over the minority shareholdings permitting the acquiring firm to "materially influence" the target. "Material influence" is not equivalent to full control, even non controlling minority shareholdings may thus be reviewed by the authorities.

In the United States, the merger control system has a very extensive reach, since its applicability is not based on the concept of change in control, and can in principle cover every acquisition of minority shareholdings. Thanks to this the agencies are able to focus their analysis on the effects of any minority share acquisition, verifying whether it might substantially lessen competition. The system contemplates however an exemption in case the acquisition is made "solely for investment".

Also provisions concerning restrictive agreements and unilateral conducts, unrelated to the acquisition of control or influence over the target, have been applied to the acquisition of minority shareholdings. The former applies in case of anticompetitive agreements or concerted practices and anticompetitive effects can be established. If the shareholding does not lead to direct coordination between the two firms (e.g.

through an exchange of information) or to the acquisition of influence over the commercial conduct of the target company, as is the case of passive investments, authorities have faced difficulties and demonstrated uncertainty in enforcing the relevant antitrust provisions.[256]

In the United States, the Supreme Court acknowledged that the acquisition of voting securities may be challenged under Section 1 of the Sherman Act, which prohibits contracts, combinations or conspiracies in restraint of trade.[257] Similarly, the European Court of Justice in the Philip Morris case and the Commission in the Gillette case recognized the applicability of Article 101 (and Article 102) TFEU to the acquisition of a minority shareholding.

Nonetheless it has to be noted that, unlike merger review, the rules on horizontal agreements permit only an ex post review of the acquisition.

In a similar way, the application of provisions on unilateral conducts is confined to cases in which it is possible to show substantial market power or dominance and that the acquisition constitutes, by itself, an unlawful conduct.

It is also important to keep in mind that dominant firms are less likely to invest in competitors because they are supposed to charge already near-monopoly prices, which leaves little room for further unilateral price increases. At the same time, with regards to the coordinated effects, dominant firms have the more to gain from collusion and are therefore less likely to cheat.[258]

Antitrust rules on abuse of dominance are definitely better suited to pursue purely unilateral effects than those on horizontal agreements. However, because of the strict requirements for their application and the limited cases in which a dominant firm passively invest in a competitor, the enforcement of such provisions has been quite limited.

4.1. European Union

Under the EU competition law, three regulatory instruments can potentially be used to analyze transactions involving minority shareholdings: the European Union Merger Regulation (EUMR),[259] Article 101 and Article 102 TFEU.[260]

In case the minority shareholding leads to de facto or legal control over the target firm the framework is clear and the EUMR applies. On the contrary, non controlling minority shareholdings are not covered comprehensively by these regulatory instruments. This determines an enforcement gap which may leave outside the reach of the

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[256] OECD, "Antitrust Issues", cit., at 45.

[257] *U.S. v. First Nat'l Bank & Trust Co.*, 376 U.S. 665, 671–72 (1964) ("Where [...] merging companies are major competitive factors in a relevant market, the elimination of significant competition between them, by merger or consolidation, itself constitute a violation of §1 of the Sherman Act"). As cited in OECD, "Antitrust Issues", cit., at 44.

[258] Reynolds, "The Competitive", at 149. This makes their investment less useful as a commitment.

[259] The EU Merger Regulation, cit.

[260] Consolidated Version of the Treaty on the Functioning of the European Union (30.3.2010), OJ C 83/47.

European Commission the anticompetitive effects potentially arising from these acquisitions.[261]

Minority shareholdings, in the European legal framework, can be divided into three control thresholds: (i) decisive influence ("graduated" into sole[262] and joint control[263] over the target's business operations);[264] (ii) influence (i.e. active non controlling investment) or (iii) no influence (passive investment) over the commercial activities of the acquired entity. The *Philip Morris* decision[265] has been the first one to delineate the boundaries of these control thresholds and thus to determine the jurisdictional scope of the European Union competition law. It included, within the applicability of Article 101 and 102, "an instrument for influencing the commercial conduct of the companies in question so as to restrict or distort competition on the market on which they carry on business."[266] Through the years, the Commission of the European Union has also expanded the concepts of sole and joint control deemed to constitute "decisive influence" under the EU Merger Regulation in order to reach progressively smaller minority shareholdings and more modest corporate governance rights.[267]

4.1.1. Merger Regulation

The merger control regulation, Regulation 139/2004, covers only mergers, or more precisely concentrations,[268] having a "Community dimension."[269] This is a good ex-

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[261] This has been acknowledged recently by the Competition commissioner Joaquín Almunia himself. In a recent speech he said that, with regards to minority shareholdings (falling short of control), "we are probably looking at an enforcement gap". He indicated that: "The Merger Regulation does not apply to minority shareholders, whereas some national systems – both in the EU and outside – make room for the review of such acquisitions" and "instructed [his] services to look into this issue and see whether it is significant enough […] to try and close this gap in EU merger control". See J Almunia Vice President of the European Commission responsible for Competition Policy, "EU Merger Control has Come of Age", at "Merger Regulation in the EU after 20 years", co-presented by the IBA Antitrust Committee and the European Commission Brussels, 10 March 2011 (SPEECH/11/166).

[262] Commission Consolidated Jurisdictional Notice, para. 54.

[263] Ibid., para. 62.

[264] Ibid., para. 16 and 20.

[265] *British-American Tobacco and R. J. Reynolds v. Commission*, cit.

[266] Ibid., para. 37.

[267] Hawk, "Controlling", cit., at 2.

[268] For a definition see below ch. 4.1.1.1.

[269] The community dimension threshold is based on worldwide and community-wide turnover, not on market share. Minority shareholdings are normally not taken into account for the purpose of calculating the turnover unless the undertakings owns more than half of the other firm's assets, voting rights, members of the relevant boards or has the right to manage the undertakings' affairs (Article 5(4) of the EUMR). The attribution of turnover to the jointly controlling parent companies is normally made per capita. Also mergers by non-European firms may fall within the scope of the Merger Regulation if the thresholds set out in Article 1 are met and thus the merger has effects in the EU. Any enforcement measure must be limited to what is necessary to safeguard or restore effective competition within the Common Market.
"Article 1 does not require that, in order for a concentration to be regarded as having a Community dimension, the undertakings in question must be established in the Community or that the production activities covered by the concentration must be carried out within the Community territory...On the

ample of the subsidiarity principle whereby decisions should be taken at a decentralized level (i.e. by the national authorities) unless there are good reasons to take them at the centralized one.[270]

The Commission may, following a request from the parties[271] or the Member States,[272] refer concentrations having a Community dimension to national authorities; in this case national competition law applies.

Member states[273] and parties[274] may do the same to the Commission in case the concentration is capable of being reviewed under the national competition laws of at least three Member States, but does not have a Community dimension and would thus be subject to the national systems of merger control. In this case the potential impact on competition will be felt in markets that are wider than national in geographic scope[275] and a single outcome is preferable[276] (also in order to avoid the burden of multiple Member State filings).[277]

Merger projects having a Community dimension must be notified to the Commission, under Article 4 of the EUMR, before their implementation and the Commission has a strict time limit to carry out a first round of investigation[278] during which the concentration is suspended. The reviewing process may have three different outcomes: the merger might be allowed, prohibited, or allowed subject to certain conditions or remedies.

Even though the Council (under the advice of the Commission and the Member States' authorities) with the 2004 reform of the Merger Regulation decided not to include a wider assessment of minority share acquisitions, it did change the substantive test used to determine whether a concentration is compatible with the common

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contrary, by setting quantitative thresholds in Article 1 which are based on the worldwide and Community turnover of the undertakings concerned, it […] ascribes greater importance to sales operations within the Common Market as a factor linking the concentration to the Community". Case T-102/96 *Gencor Ltd v. Commission*, Judgment of the Court of First Instance of 25 March 1999, [1999] ECR 11–753, paras 79, 85.

[270] It is undesirable, both for firms and competition authorities, to review a concentration under two or more legal systems. Multiple investigation may lead to inefficiency, duplication, delay, expense, uncertainty and the possibility of conflicting decisions. It is central in the EUMR the idea of one-stop merger control, meaning that concentrations having a Community dimension should be investigated within the EU only by the Commission (EUMR, Article 21). See R Whish, *Competition Law* (Oxford University Press, 2009, Sixth Edition), at 832. Since some national systems permit the authorities to review minority share acquisitions, it may be considered desirable to extend the reach of the EUMR in the name of the one-stop control.

[271] EUMR, Article 4(4).

[272] EUMR, Article 9. In cases in which the concentration affects competition in a market within a Member State which presents all the characteristics of a distinct market.

[273] EUMR, Article 22.

[274] EUMR, Article 4(5).

[275] Commission Notice on Case Referral in respect of concentrations (2005/C 56/02), OJ C 56, para. 28.

[276] Case Referral Notice, para. 29.

[277] Case Referral Notice, para. 32.

[278] Under special circumstances, for example the submission of a remedy, the time limit can be extended.

market. The previous requirement of "creation or strengthening of a dominant position", although the Commission had proposed to retain it, was changed to a new substantive one. Under the "new" EUMR, a merger shall be "declared compatible with the common market" where it would not "significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position."[279] This change in the substantive test was adopted in part to close a "gap" in the previous legislation;[280] some concentrations having anticompetitive effects (mainly unilateral), but not resulting in the creation or strengthening of a dominant position, would not have been caught by the previous "dominance" test.

4.1.1.1. Definition of Concentration and Control

The European Commission has jurisdiction to review unilateral and coordinated effects of acquisitions of active minority shareholdings under the EUMR provided that it meets the definition of "concentration", laid down in Article 3 EUMR and commented upon in the Commission Consolidated Jurisdictional Notice, notwithstanding the level of ownership acquired.

A concentration covers operations "bringing about a lasting change in the control of the undertakings concerned" resulting in a change in the structure of the market.[281]

Article 3(1) of the EUMR provides that a "concentration" arises when the change in control on a lasting basis results from two main categories of transactions. First, it applies to transactions whereby (i) two previously independent undertakings, or parts of undertakings, merge into one[282] or (ii) one or more firms or persons controlling an undertaking acquire sole control of the whole or parts of one or more other undertakings, whether by purchase of securities or assets, by contract or by any other means.[283] Secondly, "concentration" covers transactions whereby (iii) two or more firms acquire joint control of another firm, i.e., joint ventures.[284] The regulation, however, applies only to joint ventures that are "full- function", i.e. they perform "on a lasting basis all the functions of an autonomous economic entity."[285]

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[279] EUMR, Article 2(2) and 2(3).

[280] It was previously said only in the recitals of the original Merger Regulation. Van Bael and Bellis, *Competition Law of the European Community* (Wolters Kluwer Law & Business; Alphen aan den Rijn, The Netherlands, 5th ed. c2010). See also Whish, *Competition*, cit., at 852–856.

[281] EUMR, Recital 20 and Commission Consolidated Jurisdictional Notice, para. 28.

[282] EUMR, Article 3(1)(a). "A concentration shall be deemed to arise where a change of control on a lasting basis results from: (a) the merger of two or more previously independent undertakings or parts of undertakings […]".

[283] EUMR, Article 3(1)(b). "(b) the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings".

[284] EUMR, Article 3(4).

[285] Ibid. "The creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity shall constitute a concentration within the meaning of paragraph 1(b)".

The jurisdiction of the European Commission is therefore centered on the notion of "control". Only transactions leading to the acquisition of control or to a qualitative change in the nature of control[286] are subject to review under the EUMR.

Article 3(2) EUMR defines sole and joint control, for the purpose of determining whether there is a concentration, as "rights, contracts or any other means which, either separately or in combination [...], confer the possibility of exercising decisive influence on an undertaking". There may be acquisition of control even if the undertaking does not have the intention to acquire or exercise the decisive influence. Control is defined as the "possibility" of exercising decisive influence. "It is therefore not necessary to show that the decisive influence is or will be actually exercised."[287]

Control can be established on a legal (de jure) or factual (de facto) basis.

The most typical situation, with regards to minority shareholdings, is that of "joint control."[288]

This is the case where two or more shareholders have the power to exercise decisive influence over the most important strategic business decisions of the target. It follows that the jointly controlling shareholders need to reach an agreement to take decisions concerning the commercial policy of the target. Since joint control is determined on a case-by-case basis, veto rights over only some of the major strategic business decisions may be sufficient to give rise to it.[289] Even where a minority shareholder's vote is alone insufficient to allow it to veto any important decisions, it may have joint control if it is likely that the parents will act jointly in the exercise of their voting rights as a result of a legally binding agreement[290] or, de facto, because of "strong common interests" preventing them from voting against each other.[291]

In less typical situations the acquisition of a minority shareholding may result in sole control over the target company. Sole control consists either in the ability, by only one minority shareholder, to determine "the strategic commercial decisions of the other undertaking" or to "veto strategic decisions in an undertaking."[292]

On a legal basis, a minority shareholding may give rise to control in case it involves "preferential shares to which special rights are attached, enabling the minority shareholder to determine the strategic commercial behaviour of the target company."[293]

A minority shareholder may also be deemed to have sole control on a factual basis.

This situation refers to the circumstance in which "the shareholder is highly likely to achieve a majority at the shareholders' meetings" .[294] This evaluation is based on

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[286] From joint to sole control or vice versa and in case of an increase in the number or a change in the identity of the jointly controlling shareholders. Not in case of a change from negative to positive control. See Commission Consolidated Jurisdictional Notice, para. 83.

[287] Commission Consolidated Jurisdictional Notice, paras 16 and 21.

[288] Ibid., para. 62.

[289] Van Bael, *Competition*, cit., at 646.

[290] Commission Consolidated Jurisdictional Notice, para. 75.

[291] Ibid., para. 76.

[292] Ibid., para. 54.

[293] Ibid., para. 57.

[294] Ibid., para. 59.

the level of its shareholding, the past and the likely future attendance at the shareholders' meetings, the dispersion of the remaining shares and the structural, economic or family links existing between the shareholders.

Sole control may be based also on ownership rights coupled with contractual arrangements between two or more shareholders[295] or even on "purely economic relationships", such as very important supply contracts, options or financing arrangements establishing a state of "economic dependence."

4.1.1.2. Non Controlling Minority Shareholdings and the EUMR

The fact that the EUMR application is limited to investments leading to the acquisition of control means that the anticompetitive effects of non controlling minority shareholdings cannot be addressed. The Green Paper on the review of the EU Merger Regulation,[296] published in 2001, took into consideration this issue in order to determine whether it was the case to widen the scope of the EUMR to cover also non controlling investments. In this paper the Commission admitted that a "minority shareholding (potentially coupled with interlocking directorships) may alter the linked companies' incentive to compete and may thus have an impact upon market conditions."[297]

Nonetheless it was decided with the support of many of the Member States,[298] to keep non controlling minority shareholdings outside the scope of the EU Merger Regulation, retaining control as the criterion for its application.

The European Commission stated that, "based on current experience, it appears that only a limited number of such transactions would be liable to raise competition concerns that could not be satisfactorily addressed under Articles [101] and [102 TFEU]. Under this assumption it would appear disproportionate to subject all acquisitions of minority shareholdings to the ex ante control of the Merger Regulation. At the same time it appears doubtful whether an appropriate definition could be established capable of identifying those instances where minority shareholdings [...] would warrant such treatment."[299] Two reasons may thus be identified to explain the decision to keep "control" as the element defining the scope of the EUMR. First, the Commission and the Member States considered Articles 101 and 102 TFEU an adequate tool to address the concerns for competition arising from non controlling investments. Second, the mandatory prior notification foreseen by the EUMR was considered too burdensome, both on the undertakings involved and the Commission, if compared to the limited and uncertain competition concerns arising from a minority shareholding.

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[295] The shareholders' agreement, e.g., in Case IV/M.397 *Ford/Hertz*, Commission Decision of 7 March 1994, [1994] OJ C 121 and Case COMP/M.1920 *Nabisco/United Biscuits,* Commission Decision of 05 May 2000, [2002] OJ 043. As cited in Faull, "The EC Law", cit., at 435.

[296] Green Paper on the Review of Council Regulation (EEC) No 4064/89, COM(2001) 745/6 of 11 December 2001.

[297] Green Paper, cit., para. 107.

[298] See, for example, United Kingdom Response, Department of Trade and Industry, para. 40 and the reply of the German Federal Government.

[299] Green Paper, cit., para. 109.

Some commentators have criticized the decision not to extend the scope of the EU Merger Regulation to acquisitions of non controlling minority shareholdings in competitors.[300] Article 101 and 102 TFEU, in fact, may not be sufficient to avoid all the anticompetitive effects potentially connected with these transactions. A mediation has been proposed to solve the Commission's remarks: apply the EUMR only to those acquisitions which are more likely to cause competition concern. For example, the jurisdiction could be limited by the market shares of the parties involved, the degree of concentration of the markets, the delta in the MHHI, the existence of significant barriers to entry, the reciprocity of the passive investment and the involvement of a maverick firm.[301]

Even though the Commission decided not to include minority shareholdings within the jurisdiction of the EUMR, the Commission's Guidelines on the assessment of horizontal mergers specifically consider minority shareholdings and interlocking directorates. Para. 20, excluding horizontal competition concerns for certain levels of post-merger HHIs and deltas, makes an exception under special circumstances including the presence of "significant cross-shareholdings among the market participants."[302] Referring to the *Exxon/Mobil* case,[303] the Commission states that in such cases it could use a "modified HHI, which takes into account such shareholdings".

The Commission acknowledges also the collusion facilitating effects of cross-shareholdings. It states that "information received through cross-shareholdings or participation in joint ventures may also help firms reach terms of coordination. The more complex the market situation is, the more transparency or communication is likely to be needed to reach a common understanding on the terms of coordination."[304] "Structural links such as cross-shareholding or participation in joint ventures may also help in aligning incentives among the coordinating firms."[305]

It explains that "only the credible threat of timely and sufficient retaliation keeps firms from deviating. Markets therefore need to be sufficiently transparent to allow the coordinating firms to monitor to a sufficient degree whether other firms are devi-

[300] See in particular Russo, "Abuse", cit.; F Caronna, "Article 81 as a Tool for Controlling Minority Cross-Shareholdings Between Competitors" (2004) 29 European Law Review 485 and A Ezrachi and D Gilo, "EC Competition Law and the Regulation of Passive Investments Among Competitors" (2006) 26 Oxford Journal of Legal Studies 327. Contra M Reynolds and DG Anderson, "Acquisitions of Minority Interests in Competitors: The EU Perspective" (2005) <http://apps.americanbar.org/antitrust/at-committees/at-mergers/pdf/minority_interests.pdf> accessed 9 July 2011 and K Fountoukakos and C Pouncey, "Minority Shareholdings: the Gap Between European and National Merger Control" (2011) The European Antitrust Review 2011 Section 2: EU Substantive Areas Mergers <http://www.globalcompetitionreview.com/reviews/28/sections/98/chapters/1082/mergers/> accessed 23 August 2011.

[301] OECD, "Antitrust Issues", cit., at 40. See also Ezrachi, "EC", cit., at 344–348. These elements are already considered by the Commission when assessing the effects of a concentration on the market. See, e.g., EUMR, Article 2(1) and Guidelines on the Assessment of Horizontal Mergers, paras 9–11.

[302] Guidelines on the Assessment of Horizontal Mergers, para. 20, let. c.

[303] Case IV/M.1383 *Exxon/Mobil* (1999), para. 256.

[304] Guidelines on the Assessment of Horizontal Mergers, para. 47.

[305] Ibid. para. 48. It cites Commission Decision 2001/519/EC in Case COMP/M.1673 *VEBA/VIAG,* Commission Decision 2001/519/CE of 10 July 2001, OJ L 188, para. 226 and Case COMP/M.2567 *Nordbanken/Postgirot,* Commission Decision of 8 November 2001, SG (2001) D/292080.

ating, and thus know when to retaliate."[306] "[…] When evaluating the level of transparency in the market, the key element is to identify what firms can infer about the actions of other firms from the available information. Coordinating firms should be able to interpret with some certainty whether unexpected behaviour is the result of deviation from the terms of coordination."[307]

The Commission concludes: "In 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, such as […] voluntary publication of information, announcements, […] may increase transparency or help competitors interpret the choices made. Cross-directorships, participation in joint ventures and similar arrangements may also make monitoring easier."[308]

Although the Commission cannot review an acquisition of a non-controlling minority shareholding alone, Form CO for the notification of transactions to the Commission asks for details of other undertakings in affected markets in which the parties to the transaction have shareholdings of 10% or more.

Furthermore, the Notice on (merger) remedies[309] specifically foresees the necessity, in order to sever structural links between the parties and competitors, to divest minority shareholdings in competitors. This is considered by the Commission the preferable solution in general and the only solution in case even a passive investment would raise competition concerns (the unilateral effects of passive investments are clearly acknowledged).

These points demonstrate that the Commission is perfectly aware of the potential anticompetitive effects of minority shareholdings and considers it necessary to take them into account, in order to have a complete view of the market and the risks of collusion, when considering whether competition could be affected by a concentration.

It is peculiar to read how the Commission transposed almost all the concerns of the economic theory in relation to minority shareholdings inside guidelines and notices on the application of the EUMR, but not in the EUMR itself.

4.1.1.3. Exceptions

Article 3(5) EUMR foresees three exceptional situations in which the acquisition of a controlling interest does not constitute a concentration reviewable under the Merger Regulation.

The first one is the acquisition of securities by "credit institutions or other financial institutions or insurance companies, the normal activities of which include transactions

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[306] Ibid. para. 49. Citations omitted.

[307] Ibid. para. 50. Citations omitted.

[308] Ibid. para. 51.

[309] Commission Notice on remedies acceptable under the Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (2008/C 267/01), OJ C 267, paras 58–59.

and dealing in securities for their own account or for the account of others."[310] This exception applies only if the acquisition is made in the framework of these businesses, if the securities are held on a temporary (investment) basis with a view to reselling them and the voting rights are not exercised other than to protect the investment.

The second case where no concentration is present refers to the acquisition of control by an office-holder according to the law of a Member State relating to liquidation, winding-up, insolvency, cessation of payments, compositions or analogous proceedings.[311]

Third, a concentration does not arise where it is a financial holding company[312] acquiring control over another undertaking.

The exceptions provided by Article 3(5) of the Merger Regulation only apply if the operation would otherwise be a concentration in its own right, but not if the transaction is part of a broader operation in which the ultimate acquirer of control would not fall within the terms of Article 3(5). The Jurisdictional notice explains that these provisions are construed narrowly and they have been applied rarely.[313] E.g., the exceptions do not usually apply to investment fund structures since they often do not limit themselves in the exercise of the voting rights, but appoint the members of the management and the supervisory bodies or even restructure the firm.[314]

4.1.2. Merger Case Law

After this brief presentation of the EUMR, it is necessary to analyze the cases which had required a competitive assessment of non controlling minority shareholdings. As explained above, the Merger Regulation does not directly deal with acquisitions not conferring control, thus the possibility of the Commission to address the competition concerns arising from minority investments within the framework of the EUMR is limited to the sphere of remedies.

In case of a concentration, indeed, the EUMR permits to address the anticompetitive effects of the whole operation, including any non controlling minority shareholding acquired or already existing.

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[310] The EU Merger Regulation, Article 3(5)(a). Commission Consolidated Jurisdictional Notice, para. 111.

[311] The EU Merger Regulation, Article 3(5)(b). Commission Consolidated Jurisdictional Notice, para. 112.

[312] A company the sole objective of which is to acquire holdings in other undertakings, and to manage such holdings and turn them to profit, without involving themselves directly or indirectly in the management of those undertakings. Such companies may exercise the voting rights in the target firm only to maintain the value of the shareholding and not to determine directly or indirectly the strategic commercial conduct of the controlled undertaking. Fourth Council Directive 78/660/EEC of 25 July 1978, OJ L 222, Article 5(3) and Commission Consolidated Jurisdictional Notice, para.113.

[313] Commission Consolidated Jurisdictional Notice, paras 110–116.

[314] Ibid., para.115.

In *Newscorp/Telepiù*,[315] the Commission, referring to *Kali und Salz*,[316] *Gencor v. Commission*[317] and *Exxon/Mobil*,[318] stated that "any decision under the Merger Regulation must cover a transaction bringing about a concentration in its entirety, including minority shareholdings" in "all relevant markets where it could bring about adverse effects" including markets "which were not directly affected by the concentration."[319]

Several mergers raised competition concerns because the parties would have retained structural links and sometimes also personal links to a key competitor. This would have led to a serious reduction in competition after the merger, due to the diminished incentives of rivals to compete.

Most of the case law on non controlling shareholdings is directly connected with merger cases. It consists, in the end, in an ex post analysis within the context of a bigger transaction, in which the Commission requests divestiture or severance of the structural and personal links, as a condition to allow the merger under the EUMR, Article 6(2) for Phase I and Article 8(2) for Phase II investigations.[320]

The Commission may review a minority share acquisition within the framework of the EUMR also in case it decides to prohibit the merger.

As stated in Article 8(4) of the EUMR,

> "where the Commission finds that a concentration: (a) has already been implemented and that concentration has been declared incompatible with the common market [...] the Commission may:
>
> – require the undertakings concerned to dissolve the concentration, in particular through the dissolution of the merger or the disposal of all the shares or assets

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[315] Case COMP/M.2876 *Newscorp/Telepiù*, Commission Decision of 02/04/2003.

[316] Joined Cases C-68/94 and C-30/95 *France and Others v. Commission* [1998] ECR I-1375, [1998] 4 CMLR 829.

[317] Case T-102/96 *Gencor v. Commission* [1999] ECR II-753.

[318] Case IV/M.1383 *Exxon/Mobil,* Commission Decision of 29 September 1999 (2004/284/EC).

[319] Case COMP/M.2876 *Newscorp/Telepiù*, Commission Decision C(2003) 1082 of 02 April 2003, [2004] OJ L 110, paras 278–280.

[320] EUMR, Article 6(2): "Where the Commission finds that, following modification by the undertakings concerned, a notified concentration no longer raises serious doubts within the meaning of paragraph 1(c), it shall declare the concentration compatible with the common market pursuant to paragraph 1(b).

The Commission may attach to its decision under paragraph 1(b) conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the common market".

EUMR, Article 8(2): "Where the Commission finds that, following modification by the undertakings concerned, a notified concentration fulfils the criterion laid down in Article 2(2) and, in the cases referred to in Article 2(4), the criteria laid down in Article 81(3) of the Treaty, it shall issue a decision declaring the concentration compatible with the common market.

The Commission may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the common market.

A decision declaring a concentration compatible shall be deemed to cover restrictions directly related and necessary to the implementation of the concentration."

acquired, so as to restore the situation prevailing prior to the implementation of the concentration; in circumstances where restoration of the situation prevailing before the implementation of the concentration is not possible through dissolution of the concentration, the Commission may take any other measure appropriate to achieve such restoration as far as possible,

– order any other appropriate measure to ensure that the undertakings concerned dissolve the concentration or take other restorative measures as required in its decision."[321]

In those cases[322] the Commission (the General Court and the Court of Justice) had to decide how many steps towards the acquisition of the controlling shareholding constitute a single concentration and also up to what level it may require the disposal of the shares acquired.

With regards to the first issue, recital 20 of the EUMR explains that "it is moreover appropriate to treat as a single concentration transactions that are closely connected in that they are linked by condition or take the form of a series of transactions in securities taking place within a reasonably short period of time".

This, interpreted in conjunction with Article 8(4) EUMR and paragraph 48 of the Commission Consolidated Jurisdictional Notice,[323] means that connected minority share acquisitions, taking place within a short period of time, may be considered as a single concentration and thus dissolved in order to restore the situation prevailing prior to the implementation of the prohibited concentration.

Nevertheless in case the concentration is not implemented it cannot be dissolved.[324] This means that in case the last step of the prohibited concentration, i.e. the share acquisition conferring decisive influence over the target, is not implemented, all the previous steps (acquisitions of non controlling minority shareholdings in a competitor) cannot be scrutinized and dissolved by the Commission under the EUMR.[325]

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[321] Article 8(4) of the first version of the EUMR provided the Commission with the power to order dissolution or divestments and any other action appropriate to "restore conditions of effective competition". Under the revised EUMR, Article 8(4) provides the power to order dissolution or divestments to "restore the situation prevailing prior to the implementation of the concentration", to take any other action appropriate to "achieve such restoration" and to order any other appropriate measure to ensure dissolution of the concentration or take other "restorative measures as required in its decision".

[322] Discussed below in ch. 4.1.2.6.

[323] "Recital 20 of the Merger Regulation further explains that a single concentration will also arise in cases where control over one undertaking is acquired by a series of transactions in securities from one or several sellers taking place within a reasonably short period of time. The concentration in these scenarios is not limited to the acquisition of the 'one and decisive' share, but will cover all the acquisitions of securities which take place in the reasonably short period of time".

[324] Order of the President of the Court of First Instance of 18 March 2008, *Aer Lingus Group Plc v. Commission of the European Communities* (T-411/07 R) [2008] 5 CMLR 7, paras 85–92.

[325] This because under Article 8(4) and 8(5) the Commission may dissolve only a concentration, which implies the acquisition of control. The Commission power to require full divestiture is triggered only by the acquisition of full control over the target. *Aer Lingus* [2008] 5 CMLR 7, para. 97.

The only provisions available to the Commission in order to avoid the potential anticompetitive effects arising from these minority shareholdings are therefore Articles 101 and 102. Their application has been nonetheless limited.

At the same time it is not excluded the possibility, once a notified concentration is prohibited by the Commission and abandoned by the parties, to scrutinize the minority shareholdings under the Member States' merger control regimes.[326]

In case the concentration is implemented, instead, what is to be decided is whether to allow the retention of a non controlling minority stake in the target after the decision prohibiting the merger.[327]

In order to address the competition concerns arising from minority shareholdings, the commitments offered by the parties (and accepted by the Commission) to modify notified transactions, referred to as "remedies", have been mostly the divestiture or (gradual) reduction of the minority shareholdings, in order to remove the structural links facilitating the coordination between the merging company and its competitors. In some cases structural remedies were accompanied by behavioral commitments, e.g. the severance of interlocking directorships and other personal links or the obligation not to exercise the voting rights attached to their shares.

4.1.2.1. *Thyssen/Krupp*

In the Thyssen/Krupp[328] merger, Krupp held a 10% stake in one of Thyssen competitors in the market for escalators, Kone,[329] together with contractual rights of first refusal and an "interlocked" director. Because of the tight oligopolistic nature of this market (only four firms were competing) the Commission was concerned that post-merger competition could be reduced.

This concern was based on the commonality of economic interests between the few competitors in the market, on the privileged access to competitively sensitive information the structural and personal link would have permitted and on the possibility to influence and coordinate the competitive behavior of Kone through the interlocking directorship.

To avoid the merger from being prohibited, Krupp undertook the obligation to formally and irrevocably renounce to the seat in Kone's board of directors and to waive the exercise of the right of first refusal. Under these conditions the Commission

[326] Indeed, Article 21(3) of the EUMR does not apply since these minority share acquisitions are not an integral part of a concentration within the meaning of the EUMR. *Aer Lingus* [2008] 5 CMLR 7, para. 101. This is important when the Member States' merger control regimes are wider than the EUMR and thus permit to scrutinized also minority share acquisitions falling short of control (e.g., UK and Germany).

[327] This is unlikely due to the aim of Article 8(4) which is to restore the situation prevailing prior to the implementation of the concentration.

[328] Case IV/M.1080 *Thyssen/Krupp,* Commission Decision of 2 June 1998, [1998] OJ C 252. For an analysis see Moavero, "Interlocking", cit. and E Moavero Milanesi and A Winterstein, "Minority Shareholdings, Interlocking Directorships and the EU Competition Rules-Recent Commission Practice" (2002) 1 Competition Policy Newsletter 15.

[329] Krupp had, previous to the merger, sold its activity in the escalator sector to Kone.

decided to allow the merger, without asking to divest, not even partially, the minority shareholding, notwithstanding the very oligopolistic structure of the product market concerned.

4.1.2.2. *Generali/INA*

In *Generali/INA*,[330] the Commission was initially concerned by the fact that Generali held large stakes and interlocking directorates in its (and the merged entity's) direct competitors, potentially allowing it to exert significant influence over their behavior. These potential anticompetitive effects were very serious, considering that the market was characterized by a strict regulation, limited freedom to compete and barriers to entry (on the distribution, information and regulatory level).

To ease those concerns, the parties undertook not to establish new interlocking directorships with competitors in Italy and to sever some of the ones in place.

Generali and INA offered also to sell their shareholdings (not only to reduce them) in other insurance companies (such as Fondiaria and Aurora) and banks (Banco di Napoli and BNL) and to cancel all the distribution agreements regarding life insurance products, without signing new ones for a period of two years. This was considered enough, in the Commission's opinion, to remove the risk of competitively sensitive information flow, influence on the competitors' behavior and collusion.

However, as carefully analyzed by Ghezzi;[331] the chosen remedies, their strength and the overall review of the concentration has been based on the assumption that Generali was not under the control of other firms. This assumption is at least debatable since Generali's main shareholder is Mediobanca (holding 12% of the voting shares) and a consultation agreement with another important shareholder, Euralux (controlled by Lazard Frères), holding 4.76% of the voting shares, is in place. The Commission had already intervened in 1991, when Mediobanca held 12.88% of the shares and the agreement was already in place, but did not find it having a decisive influence on Generali's decisions since the past attendance at the shareholders' meetings had been between 28 and 34% of the voting shares.

Nevertheless the competition concerns arising from Mediobanca having participations and very close links with other firms operating, directly or indirectly, in Generali and INA's markets (the financial and insurance sectors), remains.

4.1.2.3. *Allianz/Dresdner Bank*

In *Allianz/Dresdner Bank*,[332] the Commission considered the existence of significant cross-shareholdings between the merged entity and its most important competitor in Germany, Munich Re/Ergo group.

The combined post-merger shareholding of Allianz/Dresdner in Munich Re would have been 30–35%. This, in view of the dispersed shares, would have given the merged

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[330] Case COMP/M.1712 *Generali/Ina*, Commission Decision of 12 January 2000, [2000] OJ C 058. For an analysis, Ghezzi, "Intrecci", cit., at 245.

[331] Ghezzi, "Intrecci" cit., at 245–256.

[332] COMP/M.2431 *Allianz/Dresdner Bank*, 2001/C 172/06.

entity the majority at Munich Re's general shareholders' meetings. The Commission was therefore concerned that the transaction would have significantly reduced competition between the two groups.

In order for the merger to be authorized, Allianz and Dresdner undertook to reduce to 20.5% their joint holdings in Munich Re within the end of 2003, and to refrain from exercising their voting rights in excess of 20.5%, starting already from the date of the Commission's decision.

4.1.2.4. *Nordbanken/Postgirot*

The *Nordbanken/Postgirot*[333] case concerned the acquisition by Nordbanken, a large Swedish bank, of Postgirot, a Swedish company owning and operating a giro payment system. The only competitor of Postgirot, in the Swedish market, was Bankgirot.

Nordbanken had a 27% shareholding in the latter entailing the right to be represented on the board of directors, to veto share issuances and amendments to the Articles of association and to have access to confidential business information. The Commission did not consider Nordbanken as having control over Bankgirot, but considered that it had a "strong influence" over it. This was enough to reduce competition between the only two providers of giro payment services in Sweden and to give rise to a serious risk of coordination between the parties, because of the highly concentrated nature of the market.

In order to remove the Commission's concerns, Nordbanken undertook to reduce its shareholding in Bankgirot to no more than 10% and to refrain from any shareholder rights going beyond minority protection rights.[334] In addition, Nordbanken severed the interlocking directorship in place, eliminating all of its representatives in Bankgirot's Board of Directors, working groups or other bodies, thus blocking the sensitive information flow.

4.1.2.5. *Siemens/Va Tech*

In *Siemens/VA Tech*,[335] VA Tech, one of the main players in the metal plant building market, was acquired by Siemens. The latter held a 28% shareholding in SMS Demag, VA Tech main competitor. The Commission's market investigation demonstrated that effective competition between VA Tech and SMS Demag would have been weakened after the merger between VA Tech and Siemens due to the latter's minority stake in SMS Demag.

The shareholding could give the merged entity less incentive to bid aggressively in tenders in which SMS Demag had a realistic prospect of winning, or to offer less competitive pricing, as Siemens would have participated financially in SMS Demag's

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[333] Case COMP/M.2567 *Nordbanken/Postgirot,* Commission Decision 08/11/2001.

[334] Rights exercised to safeguard the financial value of the stake.

[335] Case COMP/M.3653 *Siemens/VA Tech,* Commission Decision C(2005) 2676 of 13 July 2005, [2006] OJ L 353.

business success[336] (these are the concerns described above as the unilateral effects of minority share acquisitions). The shareholding gave also Siemens access to strategic knowledge about the company's business policy and seats on SMS Demag's supervisory board.

A commitment to divest the entire stake in question removed these concerns,[337] together with a commitment to replace Siemens's representatives on SMS Demag's shareholder bodies by trustees, thus ensuring the company's independence until the final sale of the minority shareholding.

4.1.2.6. Article 8(4) Cases – Deconcentrations

This chapter will consider cases in which the Commission, in the context of Article 8(4) EUMR (regarding deconcentrations), addressed the issue concerning the possibility for an acquiring company to keep a minority stake in the target, after the merger has been prohibited.[338] The Commission's view is that the "overriding principle" in Article 8(4) cases is to restore the status quo ante.[339] Accordingly, in an Article 8(4) case, the Commission may be more cautious, than it otherwise might be, in allowing the retention of a minority stake post-prohibition.[340] The main problem, as explained above, is to determine what constitute the implementation of a concentration and to what extent, instead, a minority share acquisition may be considered as part of the "status quo ante."[341]

Under the 1989 Merger Regulation,[342] in *Blokker/Toys 'R' Us* and *Kesko/Tuko*, the Commission was asked to review already completed mergers by the Dutch and Finnish authorities respectively.[343] In *Kesko/Tuko*,[344] the Commission required Kesko to undertake a full divestment of its interest in Tuko. When the former proposed to sell

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[336] Ibid., para. 327. "The Siemens group's 28% holding in SMS might in principle from a financial point of view give Siemens/VA Tech less of an incentive to bid aggressively in those tender procedures in which SMS has a realistic prospect of winning the order. The (partial) internalising of competition between VA Tech and SMS would prompt Siemens/VA Tech (assuming maximisation of profits) to offer higher prices on average or grant lower discounts than are normal in the negotiating process, if SMS is a competitor with a good chance of success. For in the event of the contract being awarded to SMS Siemens would also participate financially through its 28% holding in this business success of SMS".

[337] A similar commitment, including the complete divestiture of the minority shareholdings, has been submitted by E.ON (and accepted by the Commission) in the Case COMP/M.3696 *E.ON/MOL,* Commission Decision C(2005) 5593 of 21 December 2005.

[338] Under the EUMR it is allowed, in public bid situations, to transfer the shares prior to the Commission approval.

[339] Competition Policy Newsletter No. 1, Spring 2004, at 8.

[340] M Reynolds, "Acquisitions", cit., at 5.

[341] This has been analyzed in the *Ryanair/Aer Lingus* case, discussed below.

[342] The "original" merger regulation provided the Commission with the power to restore "conditions of effective competition". This was changed by the 2004 reform into "the situation prevailing prior to the implementation of the concentration".

[343] Neither was notifiable under the EUMR and neither country (at that time) had a merger control regime.

[344] Case IV/M.784 *Kesko/Tuko*, Commission Decision 97/409/EC of 20 November 1996, [1997] OJ L 174.

only part of Tuko's businesses, the Commission rejected the proposal and confirmed the full divestiture decision, saying that retaining some of Tuko business would leave Kesko with a dominant position.

In *Blokker/Toys 'R' Us*,[345] the Commission allowed the acquirer Blokker (dominant in the relevant toys market even before the merger attempt) to retain a 20% stake in the competitor Toys 'R' Us and even a representative on the target's board, stating that such a share would not hinder the existence of an "opportunity for an independent undertaking to acquire a substantial interest"[346] in the business of Toys 'R' Us. The reason given for allowing this was based on the Commission's opinion that finding a third party buyer for all the shares would have been difficult. Moreover, considering the specific circumstances of the case, "the continued presence of Blokker in the form of a 20% minority shareholding in combination with the active presence of Blokker on the management board can, at least for a certain period of time, serve both to demonstrate the confidence of Blokker in the future viability of the company and to guarantee the development of the company into a viable business."[347] Therefore both the shareholding and the interlocking directorship were meant to be temporary.

In two more recent (but still based on the old version of Article 8(4)) cases, *Tetra Laval/Sidel* and *Schneider/Légrand*, it appeared that the Commission is starting to consider the alteration of the unilateral incentives of the parties arising from the retention of a minority shareholding.

In *Tetra Laval/Sidel*[348] the parties had completed their merger pursuant to the public bid exception in the EUMR (allowing completion in advance of clearance)[349] and in accordance with the French stock exchange's rules.[350] The Commission found that the merger created a dominant position in the market for PET packaging equipment and ordered Tetra to divest all its shares in Sidel. Tetra requested to retain a minority shareholding on the basis of the assumption that since a non controlling shareholding would not normally have to be notified under the EUMR the Commission had no jurisdiction under Article 8(4) to order the divestiture of such a minority interest.

The Commission disagreed. It held that the purpose of (the old version of) Article 8(4) was to restore conditions of effective competition and in the present circumstances the retention of a minority shareholding at any level in the competitor would impede the restoration of such conditions. The Commission declared also that "the existence of any minority shareholding by Tetra could make Sidel less attractive as an acquisition target and may thus hinder the prospects of the divesture or of further

[345] Case IV/M.890 *Blokker/Toys 'R' Us (II)*, Commission Decision 98/663/EC of 26 June 1997, [1998] OJ L 316.

[346] Ibid., para. 130.

[347] Ibid., para. 132.

[348] Case COMP/M.2416, *Tetra Laval/Sidel,* Commission Decision C(2002) 359 of 30 January 2002 (2004/103/EC), [2004] OJ L 038.

[349] EUMR, Article 7(2).

[350] French stock exchange rules did not permit a bidder to make an offer conditional upon merger clearance.

resale."[351] It found that the particular rights granted to such an interest under French law coupled with the existing composition of shareholders in Sidel (where 5% was in the hands of others), would have made the divestment of Sidel less attractive to potential buyers because the operation of "minority squeeze-out"[352] under French law would have been impossible. The importance given to Sidel's saleability led to the decision that no holding in the competitor would have been appropriate.

Furthermore, and this is the most important part of the decision for the present work, the Commission argued that, from a horizontal perspective, Tetra would have fewer incentives to compete with Sidel since it would be likely to take into account the effect of competition on Sidel's revenues and thus its share of them.[353]

The unilateral incentives argument is not clarified in this case and is given secondary importance to the saleability argument. Nonetheless its presence means that the Commission is willing to consider the unilateral effects arising from the acquisition of minority shareholdings.

In *Schneider/Légrand*,[354] the Commission allowed the acquirer, Schneider, to retain a small minority interest in the company it was prohibited from acquiring.

The same argument presented in *Tetra Laval/Sidel*, that a significant minority interest could affect the acquirer's incentives to compete, was made also in this case,[355] but the inability of a purchaser to "squeeze out" the minority shareholder (Schneider), in case it was left with a shareholding of less than 5%,[356] was not an issue as there were no other shareholders.[357]

With this issue out of the way, the Commission proceeded to analyze the anticompetitive effects of a minority shareholding,[358] analysis that did not undertake in *Tetra Laval/Sidel*. In *Schneider/Légrand*, the parties were each other's closest competitors in a highly concentrated market. A minority shareholding would thus permit Schneider to raise its prices recapturing some of the lost sales through its share in the profits of Légrand.

The Commission used the Modified Herfindahl-Hirschman Index ("MHHI") to determine what level of shareholding could cause an increase of less than 100 points, considered acceptable. 4% was the result and Schneider was ultimately allowed to

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[351] *Tetra Laval/Sidel*, para. 35.

[352] The minority squeeze out gives the acquirer the right to force the sale of the shares of the remaining shareholders where less than 5% remained.

[353] *Tetra Laval/Sidel*, para. 37. See M Reynolds, "Acquisitions", cit., at 7: "Taking into account the revenue stream it would expect to derive from its minority holding in Sidel, Tetra would be likely to consider how its competitive actions would affect Sidel's profits. The Commission stated that it believed that the incentives of Tetra to compete would be "changed" as a result of the minority shareholding".

[354] Case COMP/M.2283 *Schneider Electric/Legrand,* Commission Decision C(2002) 360 final of 30 January 2002 (2004/276/EC), [2004] OJ L 101. The decision was later annulled: see Case T-310/01 *Schneider v. Commission* [2002], ECR II-4071; [2003] 4 CHLR 17.

[355] Ibid. para. 14–15.

[356] For a critic see T. Temple-Lang, "Two Important Merger Regulation Judgments. The Implications of *Schneider-Legrand and Tetra Laval-Sidel*" (2003) 28 ELR 259.

[357] The transaction was subject to the same French stock exchange rules.

[358] Schneider/Legrand, para. 29–33.

maintain a stake of less than 5%. The same percentage permitting the operation of "minority squeeze-out". The retention of such a shareholding did not therefore affect the saleability of Légrand, contrary to *Tetra Laval/Sidel*.

From this case it is also possible to infer that, in the Commission's opinion, the acquisition of a minority shareholding resulting in a MHHI increase of less than 100 points would not be considered cause of concern.

Under the reformed Merger Regulation is fundamental the Commission decision in the *Ryanair/Aer Lingus* case.[359] Ryanair, having already acquired a minority shareholding of just below 20% in a competing firm, Aer Lingus, launched a public bid for all the remaining shares, and notified it to the Commission for the merger control review.[360] Waiting for the decision Ryanair increased its shares to around 25%. In its review of the proposed takeover, the Commission acknowledged that the subsequent acquisitions (the first one of around 20% of Aer Lingus's shares and the second one leading to a 25% shareholding) were to be considered a single concentration with the public bid for the purposes of Article 3 of the EUMR.

In June 2007 the Commission blocked the concentration finding that it would have significantly impeded effective competition. After this decision Ryanair further increased its minority shareholding, bringing it to 29.4%.

Aer Lingus, on the basis of Article 8(4) of the EUMR, argued that since the Commission decided to prohibit the acquisition, it should order Ryanair to divest the minority shareholding it had already acquired, since this amounted to a partial implementation of the prohibited transaction, contrary to the restoration of "the situation prevailing prior to the implementation of the concentration."[361]

The Commission indicated that it did not have the power to order such a divestment, because there was no indication that Ryanair's shareholding gave it legal or de facto control over Aer Lingus, thus no concentration had been "implemented."[362] This decision was appealed by Aer Lingus to the General Court. The President of the General Court's order of 18 March 2008 deals specifically with the meaning of implementation of a concentration. The Commission had already stated that a series of subsequent steps taken with a view to acquiring control constitutes a single concentration.[363] The issue considered by the order is "whether 'partial implementation' or implementation of any of the elements which together constitute the single concentration notified can constitute 'implementation' of that concentration and trigger the Commission's powers under Article 8(4) and (5)."[364]

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[359] Case COMP/M.4439 – *Ryanair/Aer Lingus,* Commission Decision C(2007) 3104 of 27 June 2007, [2008] OJ C 047. For an analysis see H Leupold and J Haans, "Minority Shareholdings and Merger Control after *Ryanair/Aer Lingus* – "No Worries, Mate?"" (2008) 29(11) ECLR 624 and Fountoukakos, "Minority", cit.

[360] Prior notification of a concentration (COMP/M.4439-Ryanair/Aer Lingus) [2006] OJ C274/45.

[361] EUMR, Article 8(4).

[362] Commission Decision C(2007) 4600 final of 11 October 2007.

[363] EUMR, Recital 20 and Commission Consolidated Jurisdictional Notice, para. 48.

[364] Order of the President of the Court of First Instance of 18 March 2008, *Aer Lingus Group Plc v. Commission of the European Communities* (T-411/07 R) [2008] 5 CMLR 7, para. 85.

On the basis of the wording of the provisions, interpreted in light of the German, Italian and French versions of the EUMR,[365] the President of the General Court arrived at the conclusion that "implementation" means only full consummation, i.e. the conferral of control.

To sustain and clarify this interpretation the President (and before him the Commission) made a reference to the last cases considered, *Tetra Laval/Sidel* and *Schneider/Legrand*. In these cases the Commission had required a full divestiture (in the second case it permitted to retain only a 5% shareholding) in order to restore effective competition. The fundamental difference found by the Commission and justifying the different decision, was that "in those cases, by contrast to the present situation, an acquisition had already been successfully completed and the acquirer had acquired control of the target."[366] The President pointed out that these decisions are "consistent with the above conclusions that the Commission's powers in those cases had been triggered by the 'implementation' of the transaction, in other words, by a change of control."[367]

The General Court confirmed this interpretation and the Commission findings.[368] It affirmed that "the acquisition of a shareholding which does not, as such, confer control as defined in Article 3 of the merger regulation does not constitute a concentration"[369] and again "if control has not been acquired, the Commission does not have the power to dissolve the concentration."[370]

> "The General Court endorsed the Commission's view that transactions should not be split into different parts, but considered as a whole. Accordingly, Ryanair's minority shareholding cannot constitute a 'partial implementation'."[371]

Aer Lingus referred also to the inherent distortion of competition caused by the acquisition of a minority shareholding in a competitor in a duopoly which causes the acquiring company to lower its incentives to compete with the company in whose profitability it participates.

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[365] Ibid., para. 89–93. This interpretation however has been considered "problematic" on the basis that it seems to consider only the last share acquisition as a "concentration" instead of all the acquisitions made with a view of acquiring control, as established by recital 20 of the EUMR. See Leupold, "Minority", cit, at 626.

[366] Order of the President, para. 18.

[367] Ibid., para. 97.

[368] Case T-411/07 *Aer Lingus Group plc v. European Commission*, Judgment of the General Court (Third Chamber) of 6 July 2010, [2011] 4 CMLR 5, paras 64–76.

[369] Ibid., para. 64.

[370] Ibid., para. 66.

[371] O Koch, "Yes, We Can (Prohibit) – The *Ryanair/Aer Lingus* Merger before the Court", Forthcoming in Competition Policy Newsletter 2010–3 <http://ec.europa.eu/competition/publications/cpn/cpn_2010_3_10.pdf> accessed 23 August 2011. See Case T-411/07, Judgment of the General Court, para. 84.

The General Court considered the effect of minority shareholdings on the acquiring firm's incentives to compete, excluding them in the case at stake[372]

The theoretical argument alone, whose validity is not contradicted, would not have been sufficient to justify the divestment.[373]

> "The Court was evidently unwilling to accept that the Commission's powers under the ECMR could be widened to allow it to order divestment of a minority shareholding simply on the grounds that economic incentives could theoretically shift."[374]

Neither party appealed to the Court of Justice and the deadline expired on 17 September 2010. In January 2011 the Office of Fair Trading announced that it will consider Ryanair's minority shareholding under the Enterprise Act 2002.[375] This is perfectly in line with the interpretation provided by the President of the General Court, who left out the possibility for non controlling shareholdings to be reviewed by the national competition authorities.[376] Ryanair challenged the jurisdiction of the OFT, arguing the investigation was started when the four month after the acquisition deadline was already expired.

The UK's Competition Appeal Tribunal held that the duty of sincere cooperation required the competition authorities to avoid any potential conflicts. Thus Articles

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[372] Ibid., para. 74. "In response to the argument that a minority shareholding in a competitor undertaking in a duopoly inherently distorts competition because the company with such a shareholding has less incentive to compete with a company in whose profitability it is interested, it must be observed that this claim is disproved by the facts".

[373] Ibid. para. 76. "The bounds of the powers invested in the Commission for the purposes of merger control would be exceeded if it were accepted that the Commission may order the divestment of a minority shareholding on the sole ground that it represents a theoretical economic risk when there is a duopoly, or a disadvantage for the attractiveness of the shares of one of the undertakings making up that duopoly".

[374] Fountoukakos, "Minority", cit.

[375] OFT Press Release 01/11 "Ryanair Minority Stake in Aer Lingus: OFT Believes it is "In Time" to Consider Acquisition", 4 January 2011. The UK merger control system has a wider scope than the EUMR; it is, indeed, based on the concept of "material" instead of "decisive" influence. For an analysis see below, ch. 4.4.

[376] Order of the President, para. 101. "Where a concentration has been notified, declared incompatible with the common market by the Commission and on this basis the public bid was abandoned, no concentration with a Community dimension as defined in Article 3 is in existence. Nor can a concentration with a Community dimension be contemplated by the parties in these circumstances, since any such concentration would be in violation of an existing Commission decision. On this basis, as the Commission sets out in its written observations, Article 21(3) cannot be said, *prima facie*, to apply since there is no concentration in existence, or contemplated, to which the Regulation alone must apply. The remaining minority shareholding is, *prima facie*, no longer linked to an acquisition of control, ceases to be part of a 'concentration' and lies outside the scope of the Regulation. Accordingly, Article 21, which under recital 8 to the Regulation is aimed at ensuring that concentrations generating significant structural changes are reviewed exclusively by the Commission in application of the 'one-stop shop principle', does not in principle, under these circumstances, prevent the application by national competition authorities and national Courts of national legislation on competition".

21(3) of the EUMR constituted a legal obstacle to begin the investigation until the deadline for an appeal to the ECJ had expired.

Ryanair's appeal of this decision was later dismissed by the Court of Appeal and the OFT recently referred the minority share acquisition in Aer Lingus to the Competition Commission for further investigation.

It is important to note that the president of the General Court considered also the possibility to apply Articles 101 and 102 TFEU to the acquisition of minority shareholdings acknowledging, however, the shortcomings of relying on Article 101 TFEU, given the difficulty in establishing the necessary "meeting of minds" and Article 102 TFEU, which could be invoked only in case of an abuse of dominant position.[377]

4.1.3. Lessons from the Case Law

The acquisition of a minority shareholding can be reviewed, in itself, under the Merger Regulation (EUMR) only if it involves a change of "control" on a lasting basis, i.e., the ability to exercise decisive influence over the target.[378]

In order for the Commission to have jurisdiction to review the acquisition, it is also necessary the turnover thresholds, set out in the EUMR in order to qualify a concentration as having a "Community dimension", are met.[379]

The acquisition of a non-controlling minority shareholding does not fall within the Commission's jurisdiction under the EUMR and may be scrutinized only in the context of a wider concentration, either as a condition to allow it or as a remedy in case it was implemented and then prohibited.

Therefore, the Commission's jurisdictional limits may lead the same minority shareholding to be treated in completely different ways. Its acquisition alone is not notifiable nor analyzable by the Commission. However, if the acquiring company were to participate in a notifiable transaction, after the acquisition, the Commission would take the shareholding into account in its review. The same minority shareholding, acquired following a notifiable transaction, will be completely out of reach. This even though the resulting situation is exactly the same.

In most of the analyzed cases it is clear that the Commission (and the General Court) perfectly understands that also shareholdings not conferring control may have anti-competitive effects, but only in few cases it analyzed these concerns in depth.

In all the mergers cleared before 2001,[380] the Commission has been concerned mainly by the potential coordinated effects of active shareholdings, limiting its "request" to the withdrawal of voting, representation and information rights, without any consideration given to the anticompetitive effects potentially arising from passive investments.

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[377] E.g. "by interfering with a direct competitor's business strategy and/or by exploiting its minority shareholding in a direct competitor to weaken its position". Order of the President, para. 104.

[378] EUMR, Article 3(1) and (2).

[379] EUMR, Article 1(1) and 1(2).

[380] *Thyssen/Krupp, Generali/INA, Nordbanken/Postgirot*. In *Allianz/Dresdner* it accepts a reduction of the shareholding, without asking to make it passive.

There has been one very important exception, the *Exxon/Mobil* case.[381] In an obiter dictum, the Commission literally transposed into the case law the results of the economic analysis regarding both unilateral and coordinated effects arising from the acquisition of a non controlling minority shareholding in a competitor.[382] It states "[…] account should be taken of the relevant interest stake of one undertaking in the other. […] a link of this kind, regardless of its formal qualification, greatly reduces the incentives to compete between the undertakings concerned. It is indeed a well established principle under mainstream antitrust economics that, generally, the existence of links between two competing undertakings in the form of a significant interest stake of one in the other may change their incentives to compete. First, a link of this nature creates a strong financial interest of one firm in its competitor's welfare. This automatically can alter the dynamics of the competitive game as one firm is less interested in competing against the other than in finding a common commercial strategy profitable for both. In addition, such a link can secure access to commercially sensitive information. This in turn renders the competitive conduct of each undertaking vis-à-vis the other more transparent and thus susceptible to be easily anticipated and monitored. Also, and perhaps more importantly, a link of this nature may put one undertaking in a position that enables it to influence the strategic choices of its competitor towards decisions in line with the common interest. Finally, a link of this kind has a disciplinary effect as it can expose one firm to possible retaliations of the other in case of disagreement. All these factors may push the undertakings concerned towards a convergence of their commercial policies. It should be noted that the conduct described above is for each of the undertakings concerned absolutely rational as they are based on a profit-maximizing perspective."[383]

In 2001, with the Green Paper, the Commission considered whether it should expand the reach of the EUMR concluding that: it "appears that only a limited number of [minority shareholdings or interlocking directorates] would be liable to raise competition concerns that could not be satisfactorily addressed under Articles [10]1 and [10]2... Under this assumption, it would appear disproportionate to subject all acquisitions of minority shareholdings to the ex-ante control of the Merger Regulation."[384]

Even though it decided not to extend the reach of the EUMR, in the following years the Commission consolidated its view with regards to the coordinated effects of minority shareholdings in the EUMR guidelines, in which it considers the issue in depth, precisely tracing the steps of the economic theory.[385]

It also started to consider the effects of minority shareholdings on the unilateral incentives of the acquiring firm. In the Notice on remedies the Commission briefly transposes the idea that "financial gains derived from a minority shareholding in a competitor [c]ould in themselves raise competition concerns."[386]

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[381] Case IV/M.1383 *Exxon/Mobil*, 29 September 1999.
[382] Corradi, "Le partecipazioni", cit., at 408–409.
[383] *Exxon/Mobil* case, para. 452.
[384] Green Paper, cit., para. 109.
[385] Guidelines on the Assessment of Horizontal Mergers, paras 47–51.
[386] Notice on (merger) remedies, para. 59.

The unilateral effects are taken into consideration also in *Siemens/VA Tech*, *Tetra Laval/Sidel* and *Schneider/Legrand*.

In *Tetra Laval/Sidel* the Commission analyzed the possible impact of a minority shareholding and stated that "the incentive of Tetra as a minority shareholder would change as result of Tetra's financial interest in Sidel. Such financial interest would give Tetra the right to receive a proportion of the profit stream generated by Sidel [...]. In the absence of any shareholding in Sidel, Tetra would seek a profit maximizing outcome solely on the basis of the expected profit stream generated by its own operations. By retaining a stake in Sidel, Tetra would be likely to take into account its expected revenue stream generated by its financial interests in Sidel and would therefore be likely to consider how its actions would affect Sidel's profit stream. The incentive of Tetra to compete would therefore be changed as a result of the minority shareholding."[387]

The same reasoning (coupled with a quantification of the effects using the MHHI) was carried out in the *Schneider/Légrand* case. This last case is very important because it is here that the Commission establishes that an increase of less than 100 points of the MHHI would not be of concern.

The limitation of the Commission's jurisdiction, and all the inconsistencies related to it, were central in the *Ryanair/Aer Lingus* case.

In this case, even though the full merger has been considered harmful to competition and thus prohibited, Ryanair was given the possibility to keep a relevant active minority shareholding, because the Commission lacked the power to order its divestment.

This means that, carefully structuring an acquisition of control, it would be possible to prevent any obligation to divest. If the acquiring company limits the shareholding to a non controlling one, even in case the Commission decides that effective competition would be significantly impeded by the merger and prohibits it, the firm would still be able to keep its entire non controlling stake;[388] with the consequences on competition already analyzed (and perfectly acknowledged by the Commission).[389]

This last interpretation of the jurisdiction net of the EUMR and the powers of the Commission, sustained by both the Commission and the General Court, may be extremely helpful in pushing the issue of minority shareholdings forward in the political agenda in order to discuss the possibility for an extension of the reach of the EUMR.

This seems to be already the case. It was commissioner Almunia himself, in a speech of March 2011, to highlight that, with regards to non controlling minority shareholdings, "we are probably looking at an enforcement gap". Soon after, "for the purpose of launching a reflection on possible future policy development", the European Commission's Directorate-General for Competition announced its intention to conduct a

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[387] *Tetra Laval/Sidel*, para. 37.

[388] This is the exact opposite of what happened in *Tetra/Laval* and *Schneider/Legrand*.

[389] It is nonetheless possible to apply the national merger control rules to the acquisition. Indeed, in certain cases, the Member States' merger control regimes may be more adequate to address the concerns arising from minority share acquisitions than the EUMR.

study on the "economic importance of minority shareholdings in today's EU economy". This took the form of two invitations to tender: one expiring on 15 September 2011 (COMP/2011/016), the other on 17 November 2011 (COMP/2011/029. The study's focus will be on participations in the share capital "insufficient to attribute any sort of control in the sense of the Merger Regulation".

4.1.4. Article 101 TFEU

The Court of Justice, the General Court and the Commission[390] have recognized the applicability of Articles 101 and 102 TFEU to the acquisition of a minority shareholding by a firm in one of its competitors.

Article 101(1) prohibits: "all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market."[391]

Article 101(2) declares that "any agreements or decisions prohibited pursuant to this Article shall be automatically void".

Article 101(3) states that such prohibition "does not apply to any agreement, decision or concerted practice, which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question".

The Guidelines[392] explains that the scrutiny under Article 101 consists of two steps. First, it is necessary to determine whether an agreement, decision or concerted practice, capable of affecting trade between Member States, has an anticompetitive object[393] or an actual or potential restrictive effect on competition.[394]

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[390] See the case law discussed below, but also the Green Paper and the *Ryanair/Aer Lingus* case.

[391] As explained in M Siragusa, "Privatization and EC Competition Law" (1995) 19(3) Fordham International Law Journal 999, at 1045: Article 101(1) focuses on whether "the undertakings involved in the concerted action intend, or are led, to cease to determine independently their commercial policies in a manner that affects normal market conditions".

[392] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (2011/C 11/01), OJ C 11/1, paras 20.

[393] This is the case when the agreement have the potential to restrict competition by its very nature, on the basis of the content of the agreement and the objectives it seeks to attain in the economic and legal context in which it is to be applied. The Commission may also take into account the parties' intentions. See Article 101 Guidelines, para. 24–25. See also Case C-551/03 *General Motors BV v. Commission*, [2006] ECR II-3173, [2006] 5 CMLR 4491, paras 77–78.

[394] Article 101(1) prohibits both actual and potential anticompetitive effects. They must have, or be likely to have, "an appreciable adverse impact on at least one of the parameters of competition on the market, such as price, output, product quality, product variety or innovation". "This means that the agreement must reduce the parties' decision-making independence, either due to obligations contained in the agreement which regulate the market conduct of at least one of the parties or by influencing the market conduct of at least one of the parties by causing a change in its incentives".

The two terms, object and effect, have to be read disjunctively as alternative requirements. Only in case it is not clear that the object of an agreement is to harm competition it is necessary to consider whether it might have the effect of doing so.[395]

Any restriction of competition, both by object or effect, must be appreciable.[396] An agreement likely to have only a minimal impact on the market may fall outside Article 101. The same can be said, to establish jurisdiction, with regards to the effect on trade between Member States.[397] If the effect is not appreciable, the agreement will be reviewed under the Member States' national legislations (which are, however, usually similar to Article 101).

The second step of the assessment under Article 101, in case an agreement restricts competition, it is to determine whether the pro-competitive benefits produced outweigh the anticompetitive effects[398] within the framework laid down by Article 101(3).[399] If the pro-competitive effects do not outweigh the anticompetitive, Article 101(2) establishes that the agreement shall be automatically void.

In order to be subject to Article 101, the Share Transfer Agreement need not to be concluded by competing firms, i.e. the firms between which the anticompetitive effects occur. However, the application of Article 101 to minority share acquisitions from "third parties" may be controversial from a legal certainty perspective.

A more complex analysis may be conducted with regards to the cases in which it is the controlling shareholder to transfer to a competitor a minority stake in its company, while retaining control. The question arising is whether it is possible to hold the

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This is the case where "it can be expected with a reasonable degree of probability that, due to the agreement, the parties would be able to profitably raise prices or reduce output, product quality, product variety or innovation". The assessment of whether the agreement determines a restriction of competition "must be made in comparison to the actual legal and economic context in which competition would occur in the absence of the agreement with all of its alleged restrictions". Article 101 Guidelines, para. 26–29.

The Guidelines provides the example of Case C-7/95 *P John Deere. Ltd v. Commission of the European Communities*, [1998] ECR I-3111, 5 CMLR 311, para. 76–77 and 88; Case C-238/05 *Asnef-Equifax v. Asociación de Usuarios de Servicios Bancarios (Ausbanc)*, Judgment of the Court (Third Chamber) 23 November 2006, [2006] ECR I-11125, para. 50–51.

[395] Whish, *Competition*, cit., at 116. He cites Case 56/65 *Société Technique Minière v. Maschinenbau Ulm*, [1966] ECR 235, at 249, [1966] CMLR 357, at 375.

[396] De minimis doctrine. See Case 5/69 *Völk v. Ets Vervaecke Sprl*, [1969] ECR 295, [1969] CMLR 273. See also Commission Notice on Agreements of Minor Importance Which Do Not Appreciably Restrict Competition under Article 101(1) of the Treaty establishing the European Community (de minimis) (2001/C 368/07), OJ C 368/13 and Guidelines on the Effect on Trade Concept contained in Articles 101 and 102 of the Treaty (2004/C 101/07), OJ C 101/81, para. 14–15.

[397] Guidelines on the Effect on Trade Concept, para. 13.

[398] Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services Unlimited, formerly Glaxo Wellcome plc v. Commission of the European Communities*, Judgment of the Court (Third Chamber) 6 October 2009, [2009] ECR I-9291, para. 95.

[399] Case T-65/98 *Van den Bergh Foods Ltd v. Commission*, [2003] ECR II-4653, [2004] 4 CMLR 1, para. 107; Case T-112/99 *Métropole télévision (M6) and others v. Commission*, Judgment of the Court of First Instance (Third Chamber) of 18 September 2001, [2001] ECR II-2459, para. 74; Case T-328/03 O2 *(Germany) GmbH & Co. OHG v. Commission*, Judgment of the Court of First Instance of the European Communities (Fourth Chamber) of 2 May 2006, [2006] ECR II-1231, [2006] 5 CMLR 5, para 69.

controlling shareholder as performing the economic activity of the company under his control. In other words, does the mere holding of a controlling stake in a company suffices to constitute the individual as an undertaking for the purpose of Article 101? If the answer is affirmative then an agreement for the sale and purchase of shares between the acquiring company and the shareholder controlling the company whose shares are being acquired would qualify as an agreement between undertakings for the purpose of Article 101 and could therefore be analyzed under such provision.

Neither the Court of Justice nor the General Court have so far ever stated that the mere holding of a controlling stake in a company could be considered, in itself, sufficient to constitute the holder (of the controlling stake) as an undertaking for the purpose of Article 101. Different is the case when certain other conditions are met.

In *Reuter/BASF*[400] the Commission found that "Dr Reuter is also to be regarded as an undertaking for the purpose of Art. [101], since he engages in economic activity through those firms of the Elastomer group which remain under his control, by exploiting the results of his own research and as a commercial adviser to third parties."[401]

In *Vaessen/Moris*[402] the Commission held that Mr Moris was an undertaking for the purpose of Art. 101 since he "exploit[ed] his invention commercially via his company, ALMO and in this way he carrie[d] on the business of an undertaking."[403] What seems to have convinced the Commission was the fact that the economic activity performed by the controlled company represented the commercial exploitation of the controlling shareholder's personal activity. In case the "economic activity" consists in the "commercial exploitation of the results of the shareholder's activity" then the Commission attributed the activity, formally engaged by the controlled company, to the controlling shareholder qualifying him as an undertaking under Art. 101.[404] This enables the Commission to subject the agreements entered into by the controlling shareholder to the scrutiny of art. 101. Unclear is if there could be other exceptional circumstances in which the economic activity of the company may be attributable to the controlling shareholder.

The specific issue concerning the possibility to held the controlling shareholder to perform the economic activity of his company, i.e. if the mere fact of controlling a company can be considered as a sufficient economic activity to constitute an individual as an undertaking for the purpose of Art. 101, has been raised in *HFB Holding v. Commission*.[405] Unfortunately the General Court decided it was not necessary to rule on this issue, leaving unanswered the question regarding whether the controlling

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[400] Case IV/28.996 – *Reuter/BASF*, Commission Decision 76/743/EEC of 26 July 1976, [1976] OJ L 254/40.

[401] Ibid., pt. II, para. 1.

[402] Case IV/C-29.290 *Vaessen/Moris*, Commission Decision 79/86/EEC of 10 January 1979, [1979] OJ L 19.

[403] Ibid., para. 12.

[404] Caronna, "Article 81", cit., at 9.

[405] Case T-9/99, *HFB Holding and others v. Commission*, Judgment of 20 March 2002, [2002] [ECR] II-1487.

shareholder may be considered in himself as an undertaking for the purpose of Art. 101.[406]

4.1.4.1. Concerted Practices

> "The policy of Article 101 is to prohibit cooperation between independent undertakings which prevents, restricts or distorts competition."[407]

Art. 101 does not apply only to legally enforceable agreements, but also to decisions of trade associations and more informal understandings, the concerted practices. This last way of achieving cooperation is the most difficult to define and apply. Since the parties to a cartel tend to destroy any evidence of coordination, the competition authorities may be tempted to deduce the existence of an agreement or concerted practice from circumstantial evidence such as parallel conduct on the market. However, parallel conduct may be caused by market conditions. Price competition in an oligopoly may be limited and the oligopolists have to take into account rivals' likely response to their actions, leading firms to think that a failure to match a rival's strategy could be damaging or even disastrous. This, however, does not entitle oligopolists to actually coordinate their behavior.[408]

"Concerted practices" is defined by the Court of Justice as "a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition."[409] It continues "By its very nature, then, the concerted practice does not have all the elements of a contract but may inter alia arise out of coordination which becomes apparent from the behavior of the participants. Although parallel behavior may not itself be identified with a concerted practice, it may however amount to strong evidence of such a practice if it leads to conditions of competition which do not respond to the normal conditions of the market, having regard to the nature of the products, the size and number of the undertakings, and the

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[406] Ibid., para. 67 where the General Court held that "poiché la Commissione ha ritenuto il gruppo Henss/Isoplus come l'impresa che ha commesso l'infrazione di cui le società sono ritenute responsabili, non è rilevante sapere, nella fattispecie, se il sig. Henss possa essere considerato personalmente come un'impresa ai sensi dell'art. [101], n. 1, del Trattato ".

[407] Whish, *Competition*, cit., at 97.

[408] "Although every producer is free to change his prices, taking into account in so doing the present or foreseeable conduct of his competitors, nevertheless it is contrary to the rules on competition contained in the Treaty for a producer to cooperate with his competitors, in any way whatsoever, in order to determine a coordinated course of action relating to a price increase and to ensure its success by prior elimination of all uncertainty as to each other's conduct regarding the essential elements of that action, such as the amount, subject-matter, date and place of the increases". Case 48/69 *Imperial Chemical Industries Ltd. v. Commission of the European Communities*, Judgment of the Court of 14 July 1972, [1972] ECR 619, [1972] CMLR 557, para. 118.

[409] *Imperial Chemical Industries* case, para. 64–65. See also Case C-8/08, *T-Mobile Netherlands,* Judgment of the Court (Third Chamber) 2009/C 180/20 of 4 June 2009, OJ C 92, paragraph 26 and Article 101 Guidelines, para. 60.

volume of the said market. Such is the case especially where the parallel behavior is such as to permit the parties to seek price equilibrium at a different level from that which would have resulted from competition, and to crystallize the status quo to the detriment of effective freedom of movement of the products in the Common Market and free choice by consumers of their suppliers."[410]

It is precluded any "direct or indirect contact between competitors, the object or effect of which is to create conditions of competition which do not correspond to the normal competitive conditions of the market in question."[411]

In *Suiker Unie v. Commission*,[412] the Commission held that various sugar producers had taken part in concerted practices. The producers denied there was a plan to this effect, but the Court of Justice stated that an actual plan was not necessary. Article 101 "preclude any direct or indirect contact between such operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market",[413] thereby facilitating a collusive outcome on the market.

On the basis of these two decisions it is possible to say that, for a concerted practice to be present, there must be a "mental consensus"[414] between the parties which substitutes cooperation for competition. It is not necessary to achieve the "consensus" verbally, even direct and indirect contact with the object or effect of influencing the conduct of the parties or to disclose the course of conduct, may suffice.

In *Soda-ash/Solvay*[415] the Commission underlines that, "it is indeed extremely unlikely that, given the well-known legal risks, any written resolution would nowadays be made recording the details of such an understanding. There are many forms and degrees of collusion and it does not require the making of a formal agreement. An infringement of Article [101] may well exist where the parties have not even spelled out an agreement in terms but each infers commitment from the other on the basis of conduct."[416]

There can be a concerted practice even in case only one undertaking discloses strategic information to its competitor(s). In the Cement case the General Court considered Lafarge participating to a concerted practice just because it received information at a meeting about the future conduct of a competitor, even though it was a merely passive recipient of such information.[417] "It is then irrelevant whether only one

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[410] *Imperial Chemical Industries* case, para. 65–66.

[411] Article 101 Guidelines, para. 61.

[412] Joined Cases 40–48, 50, 54–56, 111, 113, 114/73 *Cooperative Vereniging Suiker Unie UA v. Commission*, [1975] ECR 1663, [1976] 1 CMLR 295.

[413] Ibid., para. 174.

[414] Whish, *Competition*, at 105.

[415] Case IV/33.133-A *Soda-ash/Solvay*, ICI Commission Decision 91/297/EEC of 19 December 1990, [1991] OJ L 152.

[416] Ibid., para. 59.

[417] Cases T-25/95 etc. *Cimenteries CBR SA v. Commission*, Judgment of the Court of First Instance (Fourth Chamber, extended composition) of 15 March 2000, [2000] ECR II-491, [2000] 5 CMLR 204, para. 1849. "The concept of a concerted practice does in fact imply the existence of reciprocal contacts

undertaking unilaterally informs its competitors of its intended market behaviour, or whether all participating undertakings inform each other of the respective deliberations and intentions. When one undertaking alone reveals to its competitors strategic information concerning its future commercial policy, that reduces strategic uncertainty as to the future operation of the market for all the competitors involved and increases the risk of limiting competition and of collusive behavior."[418]

It has been considered also whether a concerted practice must be put into effect in order to infringe Article 101. In case of affirmative response, if rival firms were merely to meet or to exchange information, without producing any effect on the market, this would not amount to a concerted practice. The Commission and the Courts, in their interpretation of Article 101, commit to avoid any differentiation between the treatment of agreements and concerted practices. The Court of Justice held in *Hills*, one of the Polypropylene cases, that "a concerted practice is caught by Article [101], even in the absence of anti-competitive effects on the market."[419]

In *Hills* the Court of Justice stated that, as established by its own case law,[420] Article 101 requires that each economic operator must determine its policy on the market independently. It acknowledged that the concept of "concerted practice" implies that there will be a common conduct on the market, but added that there must be a presumption that, by making contact with one another, such conduct will follow, making unnecessary a proof of those effects.[421] At paragraph 164 the Court of Justice specifically stated that a concerted practice may have an anticompetitive object, thus referring to the words of Article 101(1) itself (agreements and concerted practices which have as their object or effect...) in support of the proposition that the concerted practice does not need to have produced effects on the market. In British Sugar[422] the Commission specifically confirmed that there can be a concerted practice in the absence of an actual effect on the market.[423]

[…]. That condition is met where one competitor discloses its future intentions or conduct on the market to another when the latter requests it or, at the very least accepts".

[418] Article 101 Guidelines, para. 62. See also Opinion of Advocate General Kokott, Case C-8/08, *T-Mobile Netherlands*, paragraph 54.

[419] Case C-199/92 *P etc Hills AG v. Commission* [1999] ECR 1–4287, [1999] 5 CMLR 1016, para. 163; see similarly the General Court in T-141/94 *Thyssen Stahl AG v. Commission* [1999] ECR II-347, [1 999] 4 CMLR 810, paras 269–272.

[420] Case *Suiker Unie v. Commission*, para. 73; Case 172/80 *Gerhard Züchner v. Bayerische Vereinsbank AG.*, Judgment of the Court of 14 July 1981, [1981] ECR 2021, [1982] 1 CMLR 313, para. 13; Cases 89/85 etc *A. Ahlström Osakeyhtiö and others v. Commission of the European Communities*, Judgment of the Court (Fifth Chamber) of 31 March 1993, [1993] ECR I-1307, [1993] 4 CMLR 407, para. 63; Case C-7/95 P *John Deere v. Commission*, para. 86.

[421] Case C-199/92 *P etc Hills AG v. Commission*, para. 161. The Commission relied on this point in the Case COMP/E-1/37.027 Zinc phosphate Commission decision 2003/437/EC of 11 December 2001, OJ [2003] L 153/1, para 202.

[422] Case IV/F-3/33.708–711 *British Sugar plc, Tate & Lyle plc, Napier Brown & Co Ltd, James Budgett Sugars Ltd Commission Decision* C(1998) 3061 of 14 October 1998, [1999] OJ L 76, substantially upheld on appeal Cases T-202/98 *etc Tate & Lyle v. Commission* [2001] ECR 11–2035, [2001] 5 CMLR 859.

[423] Whish, *Competition,* cit., at 107.

The burden of proving the existence of a concerted practice and exclude any other alternative explanation advanced by the parties of parallel behavior on the market, relies on the Commission.[424] The Wood Pulp judgment acknowledges however that, in some cases, parallelism could be evidence of a concerted practice where there is no alternative plausible explanation.[425]

Notwithstanding all the difficulties to prove a concerted practice and exclude all other plausible explanations, it may be possible to consider the acquisition of a minority shareholding in a competitor (by a maverick firm) as a commitment device channeling information about the acquirer's incentives to compete and, thus, its future behavior.

As stated by the Commission in its Guidelines, in case a company makes a public "unilateral announcement" and the announcement is followed by announcements or other strategic responses of competitors to each other's "public announcements", it is possible to consider it a strategy for reaching a common understanding about the terms of coordination and thus the possibility of finding a concerted practice cannot be excluded.[426]

The acquisition of a shareholding in a competitor could be sufficient to find a concerted practice by firms competing in an oligopolistic market, in case of parallel conducts (or risk of future parallel conducts). It would then be possible to refer to Article 101 to prohibit the acquisition of a minority shareholding in a competitor when this may be used as a coordination facilitating device.

As explained by the Court of Justice in the cases outlined above, a concerted practice consists of a form of coordination, becoming apparent from the behavior of the participants, achieved by direct or indirect contact. This "contact" may include also the inference of commitments about future conducts from the acquisition of a minority shareholding in a competitor (and the subsequent "collusive" response of the competing firms).

As explained in *Suiker Unie*, Article 101 "preclude any direct or indirect contact [...] the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market."[427] In Soda-ash, the Commission considered possible an infringement of Article 101 when the parties infer "commitment from the other on the basis of conduct."[428]

These explanations of the concept of concerted practices seem perfectly fitting the anticompetitive effects (and motivations) of an acquisition of minority shareholdings between competitors, both active (in case of interlocking directorates is even clearer

[424] Case IV/29.725 – *Wood pulp*, Commission Decision 85/202/EEC of 19 December 1984, [1985] OJ L 85; Case IV/30.907 *Peroxygen Products,* Commission Decision 85/74/EEC of 23 November 1984, [1985] OJ L 35.

[425] Case IV/29.725 – *Wood pulp*, para. 71.

[426] Article 101 Guidelines, para. 63.

[427] *Suiker Unie v. Commission*, para. 174.

[428] *Soda-ash/Solvay*, para. 59.

the possible application of Article 101, considering the information flow and the influence excercisable by the target) and passive (used as commitment devices).

To this it has to be added that in the Cement case it was considered sufficient to accept the information unilaterally disclosed about the competitor's future conducts in order to determine the existence of "reciprocal contacts."[429]

When, with the acquisition of a minority stake, the competitor signals its intention to compete less aggressively, the following "tacitly collusive" (coordinated) behavior by the other firms in the market (above all by the firm in which the investment was made) may be considered as an implicit demonstration of the existence of the "mental consensus".

The reduction of competition in the market is most certainly (under certain market conditions) a way to signal the firm's competitive intentions. When the behavior consists in simple unilateral conducts, not "supported" by any other means, they may be considered outside the reach of the antitrust law, as simple parallel conducts caused by the market conditions. Nonetheless when there has been some kind of "indirect contact" (i.e. the acquisition of a minority stake), from which it is possible to infer a commitment, the following coordinated conduct of the other participants, may determine the finding of a "mental consensus" between the, now colluding, firms.

This finding would be obviously easier when the target firm acquires itself a participation in the investing competitor (cross-shareholdings) or each firm acquires a shareholding in a competitor (circular holding).[430]

However, on the basis of the *Hills* judgment, the sole acquisition of a minority shareholding, if considered a sufficient collusion-facilitating device,[431] may constitute an infringement of Article 101 even in case no anticompetitive effects are present.[432]

4.1.5. Article 102 TFEU

Article 102 states: "Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States. Such abuse may, particularly, consist in: (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production, markets or technical development to the prejudice of consumers […]".

Article 102 may assist in bridging part of the gap between the EUMR and Article 101 TFEU even though its practical application is rather limited. It is important to stress, in fact, that for an abuse of a dominant position to exist, first it must be established a dominant position, then that this dominant position has been abused. A dominant firm may be prevented from engaging in the same practices a non-dominant firms could. Aggressive competitive practices might be allowed to competitors, but not to

[429] *Cimenteries* case, para. 1849.

[430] Corradi, "Le partecipazioni", cit., at 418.

[431] It is sufficient a presumption that a common conduct will follow the "contact" between the parties.

[432] *Hills* case, para. 161.

a dominant firm, considered having a "special responsibility not to allow its conduct to impair genuine undistorted competition on the common market."[433]

In *Hoffmann-La Roche*,[434] the Court of Justice gave the definition of market dominance still used today: "The dominant position... relates to a position of economic strength enjoyed by an undertaking, which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers. Such a position does not preclude some competition, which it does where there is a monopoly or quasi-monopoly, but enables the undertaking, which profits by it, if not to determine, at least to have an appreciable influence on the conditions under which that competition will develop, and in any case to act largely in disregard of it so long as such conduct does not operate to its detriment."[435]

As for the concept of abuse of a dominant position, in *Hoffmann-La Roche* it was defined as: "[a] behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition."[436]

When the minority shareholding is active, thus conferring the right to influence the competitive conduct of a rival, the finding of an abuse may be relatively easy. More difficult is in case of a merely passive minority shareholding. In order to find an infringement of Article 102 TFEU it could be possible to refer to the purpose of the Article, which is to avoid the harm caused to consumers, either directly or indirectly, by a reduction of the effective competition in the market. In oligopolistic markets consumer's harm consists in the higher price level at equilibrium, caused by the natural transparency of oligopolistic markets which facilitates conducts' coordination, both by conscious and unconscious parallel conduct. When a dominant firm, acquiring a minority shareholding in a competitor, artificially enhances market transparency (e.g.

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[433] Guidance on the Commission's Enforcement Priorities in Applying Article 102 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings (2009/C 45/02), OJ C 045, paras 1 and 9; Case T-83/91 *Tetra Pak International SA v. Commission of the European Communities*, Judgment of the Court of First Instance (Second Chamber) of 6 October 1994, [1994] ECR II-755, [1997] 4 CMLR 726, paragraph 114; Case T-228/97, *Irish Sugar plc v. Commission* [1999] ECR II-2969, [1999] 5 CMLR 1300, paragraph 112; Case T-203/01 *Manufacture française des pneumatiques Michelin v. Commission of the European Communities*, Judgment of the Court of First Instance (Third Chamber) of 30 September 2003, [2003] ECR II-4071, [2004] 4 CMLR 923, paragraph 97; Motta, *Competition*, cit., at 36.

[434] Case 85/76 *Hoffmann-La Roche & Co. AG v. Commission of the European Communities,* Judgment of the Court of 13 February 1979; [1979] ECR 461, [1979] 3 CMLR 211.

[435] Ibid., para. 38–39. See also Case 27/76 *United Brands Company and United Brands Continentaal BV v. Commission of the European Communities,* Judgment of the Court of 14 February 1978, [1978] ECR 207, [1978] 1 CMLR 429, para. 65, in which the Commission used this formulation for the first time.

[436] Ibid., para. 91.

through the establishment of interlocking directorships) and the ease of collusion (both due to the information flow and the unilateral commitment to change its competitive behavior) thus raising the likelihood of consumers' harm; in view of the "special responsibility" of the dominant firm, the acquisition may be prohibited under Article 102 TFEU.

This possibility has been considered by the Commission in the *Gillette* case[437] where it concluded that *Gillette*'s non-voting equity interest in Eemland infringed Article 102. In that occasion the Commission emphasized that entities enjoying a dominant position have a "special responsibility not to allow [their] conduct to impair genuine undistorted competition."[438]

With regards to active minority shareholdings (the Court refers to instruments resulting in "some influence" over the commercial policy of the rival firm)[439], the Philip Morris case specifically considered the possibility that their acquisition by a dominant firm may constitute an abuse when used to influence "the commercial conduct of companies or to distort competition."[440]

> "A dominant firm's strengthening of its market position through conduct that affects the structure of competition in the relevant market, reducing the opportunities for effective residual competition by making it more difficult for rivals to compete and for potential competitors to enter the market […] may constitute an abuse."[441]

> "[Article 102] is not only aimed at practices which may cause damage to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure, such as is mentioned in Article 3 (f) of the treaty. Abuse may therefore occur if an undertaking in a dominant position strengthens such position […]."[442]

4.1.5.1. Collective Dominance

One of the most complex and controversial issues in Community competition law has been the application – or non-application – of Article 102 TFEU to the so-called "collective dominance."[443] Article 102 applies to any abuse by one or more undertakings

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[437] The *EU Gillette* Case, paras 25–28, 12–24.

[438] Ibid., para. 23.

[439] *British-American Tobacco and R. J. Reynolds v. Commission*, para. 65.

[440] Ibid., para. 37.

[441] Siragusa, "Privatization", cit., at 1048–9, referring to the *Continental Can* doctrine on the strengthening of dominant position constituting an abuse.

[442] Case 6/72 *Europemballage Corporation and Continental Can Co. Inc. v. Commission*, 21 February 1973, [1973] ECR 215, [1973] CMLR 199, para. 26.

[443] The expressions "collective dominance", "joint dominance" and "oligopolistic dominance" have been used interchangeably. In the Joined Cases C-395/96P and 396/96P *Compagnie Maritime Belge Transports SA and others v. Commission*, Judgment of 16 March 2000, [2000] ECR. 1–1365, [2000] 4 CMLR 1076, Advocate General Fennelly indicated that he saw no meaningful distinction between

of a dominant position. This may mean that it is applicable also in cases where the dominance is held by more than one legally and economically separate undertaking.[444]

The Court of Justice appeared to have rejected the notion of collective dominance in *Hoffmann-La Roche* where it seemed to suggest that tacit coordination could not be controlled under Article 102. "A dominant position must also be distinguished from parallel courses of conduct which are peculiar to oligopolies in that in an oligopoly the courses of conduct interact, whilst in the case of an undertaking occupying a dominant position the conduct of the undertaking which derives profits from that position is to a great extent determined unilaterally."[445]

The exclusion of the applicability of Article 102 to control oligopolistic behavior was understandable in light of the fact that oligopolists participating in agreements or concerted practices could be caught by Article 101. As explained by Whish, "the ECJ appears to have taken the view that where oligopolists behave in an identical fashion because of the structure of the market on which they operate, rather than because of active participation in an agreement or concerted practice, they should not be condemned for abusing their position if their conduct is rational – even inevitable – behavior."[446]

However, in *Italian Flat Glass*[447] the Commission decided that three producers of flat glass, a tight oligopolistic market, held a collective dominant position and abused it.

The conduct held to fall within Article 102 had already been condemned earlier in the decision as a concerted practice under Article 101. On appeal the General Court overturned the Commission's decision, but confirmed the principle of collective dominance at paragraph 358 of its judgment: "There is nothing, in principle, to prevent two or more independent economic entities from being, on a specific market, united by such economic links that, by virtue of that fact, together they hold a dominant position vis-à-vis the other operators on the same market. This could be the case, for example, where two or more independent undertakings jointly have, through agreements or licenses, a technological lead affording them the power to behave to an appreciable extent independently of their competitors, their customers and ultimately of their consumers."[448]

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these terms, but used the expression "collective dominance" as this was the one that the Court itself usually employed. See also Case T-342/99 *Airtours PLC v. Commission*, [2002] E.C.R. II-2585, [2002] 5 CMLR 317.

[444] A narrow reading would consider all the undertakings to be necessarily part of the same corporate group. This reading is to be rejected because in that case they would be regarded as one undertaking, failing to explain the "or more" reference of Article 102.

[445] Case 85/76 *Hoffmann-La Roche*, para. 39.

[446] Whish, *Competition*, cit., at 559.

[447] Case IV/31.906 *Italian Flat Glass*, Commission Decision of 7 December 1988 (89/93/EEC) OJ [1989] L 33/44, [1990] 4 CMLR 535.

[448] Joined cases T-68/89, T-77/89 and T-78/89 *Società Italiana Vetro SpA, Fabbrica Pisana SpA and PPG Vernante Pennitalia SpA v. Commission of the European Communities,* Judgment of the Court of First Instance of 10 March 1992, [1992] ECR II-01403, [1992] 5 CMLR 302, para. 358.

On the basis of this judgment fundamental questions arise: Did the judgment require an economical link for a finding of collective dominance, or simply considered those links as an example of collective dominance? Could minority shareholdings amount to an economic link? Or interlocking directorships?[449] More radically, could firms be economically linked simply by being players in an oligopolistic market?

The meaning of collective dominance was considered again by the Court of Justice in *Compagnie Maritime Belge v. Commission* which answered some of the questions above. Paragraph 36 confirms that dominance may be held by two or more economic entities legally independent from each other. The Court of Justice then states that, in order to establish collective dominance, it is necessary to examine "the economic links or factors which give rise to a connection between the undertakings concerned."[450] More importantly, the Court of Justice went on saying: "the existence of an agreement or of other links in law is not indispensable to a finding of a collective dominant position; such a finding may be based on other connecting factors and would depend on an economic assessment and, in particular, on an assessment of the structure of the market in question."[451]

Legally independent undertakings may be held to be collectively dominant where "they present themselves or act together on a particular market as a collective entity."[452] The judgment of the General Court in *Airtours v. Commission* is consistent with this interpretation: the essence of collective dominance is parallel behavior within an oligopoly.

In *Laurent Piau v. Commission* the General Court listed three cumulative conditions that must be met for a finding of collective dominance: "first, each member of the dominant oligopoly must have the ability to know how the other members are behaving in order to monitor whether or not they are adopting the common policy; second, the situation of tacit coordination must be sustainable over time, that is to say, there must be an incentive not to depart from the common policy on the market; thirdly, the foreseeable reaction of current and future competitors, as well as of consumers, must not jeopardize the results expected from the common policy."[453] As explained by the economic theory, these conditions are usually present in a tight oligopolistic market and are enhanced by the acquisition of a minority shareholding.

In the *Irish Sugar* appeal the General Court considered the possibility of an abuse of a collective dominant position committed by only one of the collectively dominant undertakings. It stated: "undertakings occupying a joint dominant position may engage in joint or individual abusive conduct."[454]

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[449] AG Fennelly thought that each of these links could give rise to collective dominance: see para 28 of his opinion in *Compagnie Maritime Belge v. Commission*.

[450] *Compagnie Maritime Belge v. Commission*, para. 41. Implicitly confirming throught the reference to two EUMR cases that collective dominance has the same meaning within the two provisions.

[451] Ibid., para 45.

[452] Case T-193/02, *Laurent Piau v. Commissio*,n Judgment of the Court of First Instance of 26 January 2005, [2005] ECR II-209, [2005] 5 CMLR 42, para. 110.

[453] Ibid., para. 111. These are the same requirements necessary for a finding of tacit collusion.

[454] Case T-228/97, *Irish Sugar plc v. Commission*, Judgment of the Court of First Instance (Third Chamber) of 7 October 1999, [1999] ECR II-2969, [1999] 5 CMLR 1300, para. 66.

Being applicable art. 102 TFEU to collective dominant positions, it is necessary to determine whether the acquisition of a minority shareholding may constitute an abuse (the simple holding of a dominant position is not, in fact, unlawful).

First of all, tacit coordination by collectively dominant undertakings cannot be considered abusive if the supracompetitive price charged are caused by the rational reaction to the conditions of the market in which they operate. This would mean condemning the parallel behavior as abusive in itself.[455] The excessively high prices caused by tacit coordination, however, may be caught under Article 102(2)(a) condemning unfairly high prices.[456] This way it is not the parallelism of prices to be held abusive of collective dominance, but their level. Also limitations of quantities may be caught under Article 102(2)(b), since they leave a very substantial share of the demand unsatisfied.[457]

With specific regards to the acquisition of a minority shareholding, it is important to consider (i) the special responsibility of the dominant firm(s) not to influence the structure of the relevant market and hinder competition;[458] (ii) that anticompetitive concerns arise mainly in tight oligopolistic markets, where competing firms may be considered holding a collectively dominant position[459] and (iii) that a minority shareholding, irrespective of its active or passive nature, due to its coordinated effects, increases the likelihood and the sustainability of tacit collusion. A minority shareholding (especially if active) may also be found to have the effect of changing the structure of the market (making it more transparent and concentrated), of influencing the conduct of the target competitor and of strengthening the (collective) dominant position.

It is possible to sustain that the acquisition of a minority shareholding, in a tight oligopolistic market, may be considered falling within the scope of Article 102.

It is also very important to point out that the Commission affirmed that "where there is no residual competition and no foreseeable threat of entry, the protection of rivalry and the competitive process outweighs possible efficiency gains. In the Commission's view, exclusionary conduct which maintains, creates or strengthens a market position approaching that of a monopoly can normally not be justified on the grounds that it also creates efficiency gains."[460]

Even without considering the change in the structure of the market, the strengthening of the dominant position or the restriction of competition, caused by the acquisition of a minority shareholding in a competitor, a share acquisition may be considered

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[455] The prospect of tacit coordination may be condemned under the EUMR in order to prevent a change in the market structure that will be conducive to collusion, but once it is actual it cannot be condemned, by itself, under Article 102.

[456] Whish, *Competition*, cit., at 566.

[457] Cases IV/D-1/30.373 and 37.143 *P & I Clubs*, Commission Decision of 12 April 1999 (1999/329/EC), OJ [1999] L 125/12, [1999] 5 CMLR 646.

[458] See Cases *Michelin v. Commission*, para. 57; *Hoffmann-La Roche*, para.91; *Continental Can*, para. 26; *Philip Morris*, para. 65 and the *EU Gillette*, para. 23–24.

[459] For an analysis of collective dominance see above cases *Italian Flat Glass*, *Compagnie Maritime Belge, Airtours and Laurent Piau*.

[460] Guidance in Applying Article 102, para. 30.

infringing Article 102(2)(a) and (b) when it results in unfairly high prices and/or insufficient quantities.

4.1.6. Antitrust Case Law

4.1.6.1. *Philip Morris*

The *Philip Morris* judgment[461] started with a complaint by BAT and Reynolds alleging that the Commission had incorrectly applied Article 101 (and 102) of the TFEU to agreements entered into between Philip Morris and Rembrandt. Parties and complainants were among the six largest firms in the Community market for cigarettes.

In 1981 Philip Morris entered into an agreement with Rembrandt to acquire a stake of 50% in Rothmans International (with proportional board representation), granting it joint control. In 1984, as a result of the objections raised by the Commission, the parties replaced this agreement lowering the shares acquired by Philip Morris to 30.8%, representing only 24.9% of the votes, without any representation in the management of Rothmans.

Rembrandt also held 30.8% of the shares, but 43.6% of the votes. Rights of first refusal were retained but the parties abandoned the initial project of cooperating within the Community while continuing to cooperate outside.

In addition, Philip Morris undertook the obligation to inform the Commission in case either the shareholding or the voting rights should increase and both Philip Morris and Rothmans undertook not to exchange information which might influence their competitive behavior.

The Commission concluded that this arrangement no longer allowed Philip Morris and Rothmans to coordinate their activities and did not enable Philip Morris to influence Rothmans.[462]

The complainants disagreed with the Commission decision that the new agreement was sufficient to avoid an infringement of Article 101. They argued that in a highly oligopolistic market, as is the one for cigarettes, the creation of structural links between competitors using minority shareholdings, further restricts competition.

In its judgment the Court stated that Article 101(1) applies to minority shareholdings in a competitor if they may "serve as an instrument for influencing the commercial conduct of the companies in question so as to restrict or distort competition on the market in which they carry on business."[463]

This test would be satisfied in case: (i) the shareholding results in legal or de facto control; (ii) the agreement gives the acquiring firm the possibility of taking effective control at a later time; (iii) the agreement provides for or creates a structure likely to be used for commercial cooperation between the parties or (iv) the minority sharehold-

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[461] *British-American Tobacco and R. J. Reynolds v. Commission* (Joined cases 142 and 156/84).

[462] The remaining voting rights were widely dispersed. Given the relevant corporate governance provisions, the Commission, and later the Court of Justice, viewed this as giving Rembrandt sole control over Rothmans International, whereas Philip Morris was considered having "no influence".

[463] *British-American Tobacco and R. J. Reynolds v. Commission*, para. 37.

ing requires the firms to take into consideration each other's interests when determining commercial policy.[464]

The Court went on noting that, "account must be taken not only of the immediate effects of the agreement but also of its potential effects and of the possibility that the agreement may be part of a long-term plan. Finally, every agreement must be assessed in its economic context and particularly in the light of the situation on the relevant market. Moreover, where the companies concerned are multinational corporations which carry on business on a world-wide scale, their relationships outside the community cannot be ignored. It is necessary specifically to consider the possibility that the agreement in question may be part of a policy of global cooperation between the companies which are party to it."[465]

The Court referred then to the Commission analysis of the market, not disputed by the parties, which found the market for cigarettes to be "stagnant and oligopolistic [...] on which there is no real competition on prices or in research, advertising and corporate acquisition are the principal means of increasing market share. Furthermore [...] barriers to entry are very high."[466] "In such circumstances, any attempted takeover and any agreement likely to promote commercial cooperation between two or more of those dominant companies is liable to result in restriction of competition. In such a market situation the Commission must display particular vigilance."[467]

With regards to the case at stake, the Court decided however there were not sufficient grounds to overrule the Commission decision. The new agreement was considered not allowing Philip Morris to influence Rothmans[468] nor were the parties required to take into account the interests of the other to determine their commercial strategy.

The Court admitted however that Philip Morris, because of its share in the profits of Rothmans international, had an interest in the success of the competitor (Rothmans).[469] Nonetheless, it accepted the Commission's argument that Philip Morris's "first preoccupation must [...] remain that of increasing the market share and turnover of its own companies. Philip Morris thus retains a considerable interest in limiting any increase in Rothmans International's market share by its own industrial and commercial efforts."[470]

The Court excluded also that the preemption rights might be considered indicative of the existence of a plan, on the part of Philip Morris, to acquire control of Rothmans at a later stage.

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[464] Ibid., para. 38–40 and 48.

[465] Ibid., para. 39–40.

[466] Ibid., para. 43.

[467] Ibid., para. 44–5.

[468] "Although Philip Morris has sufficient votes to block certain special resolutions, that possibility is too hypothetical to amount to a real threat which might have an influence on Rembrandt in the management of Rothmans international. There is no reason to suppose that the management and employees of Rothmans international do not have an interest in making that company as profitable as possible". Ibid., para. 49.

[469] Ibid. para. 50.

[470] Ibid., para. 50.

The Court considered also Article 102 TFEU and acknowledged that an acquisition of a minority interest in a competitor by a dominant undertaking may constitute an abuse only if the shareholding "results in effective control of the other company or at least in some influence on its commercial policy."[471]

In the *Philip Morris* case, the Commission and the Court of Justice acknowledged, for the first time, that Articles 101 and 102 could be used to control the acquisition of a minority shareholding.

It is necessary, however, to remember that this decision has been taken in the pre-Merger Regulation era were no legal provision was dealing with the anticompetitive effects of acquisitions potentially leading to control. Some of the situations considered falling under Article 101 and 102 are now included within the scope of the EUMR.

The decision remains relevant with regards to the recognition that also a non controlling minority shareholding, in oligopolistic and stagnant markets with high entry barriers, may have anticompetitive effects. This particularly when it is used as an "instrument for influencing the commercial conduct of companies or to distort competition."[472]

The exclusion of any unilateral anticompetitive incentives on the parts of Philip Morris was not substantiated and was substantially contrary to the results of the economic theory and to the very findings of the Court, that stated "[…] Philip Morris, because of its share in the profits of Rothmans international, has an interest in the success of that company […]."[473]The main reason why the Court of Justice rejected the complaint was in the end that the Commission's analysis did not contain any manifest error.

4.1.6.2. *Gillette*

The Court of Justice already in *Philip Morris* considered the possibility to infringe Article 102 TFEU in case a dominant undertaking acquires a minority shareholding in a competitor which confers some influence on its commercial policy.

In *Gillette*,[474] the Commission seems to carry forward the interpretative analysis of Article 102 formulated by the Court of Justice, making its application more likely in circumstances dealing with the acquisition of minority shareholdings and the strengthening of an existing dominant position. Referring to *Michelin*[475] and *Hoffmann-La Roche*,[476] but remarkably not to *Continental Can* (where the Court of Justice ruled that the strengthening of a dominant position can amount to its abuse),[477] the Commission

[471] Ibid., para. 65.

[472] Ibid., para. 37.

[473] Ibid., para. 50.

[474] The *EU Gillette* Case (Cases No IV/33.440 *Warner-Lambert/Gillette and Others and No IV/33.486 BIC/Gillette and Others*).

[475] Case 322/81 *NV Nederlandsche Banden Industrie Michelin v. Commission of the European Communities*, Judgment of the Court of 9 November 1983, [1983] ECR 3369.

[476] The *EU Gillette* Case, para. 23.

[477] "[Article 102] is not only aimed at practices which may cause damage to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure,

found that Gillette abused its dominant position influencing the structure of the wet shaving market with the creation of a link between the dominant undertaking and its leading competitor, having an adverse effect on competition.[478] The transaction did not involve voting rights nor influence; the decision was therefore based on an economic reasoning.[479]

In 1989 Gillette, the world leader in the wet shaving market, a highly oligopolistic industry with only four players and considerable barriers to entry, considered acquiring the Wilkinson Sword wet shaving products business from Stora. First Eemland, a management-led investor group partially financed by Gillette, acquired the whole of Stora's consumer products division, including Wilkinson Sword. Subsequently, Gillette would have acquired Wilkinson's operations in North America and the rest-of-the-world outside the EU, while Eemland would have retained the EU operations. After objections by the U.S. Department of Justice, Wilkinson's operations in the United States were included among the operations to be left to Eemland.

In 1990 BIC and Warner Lambert, Gillette competitors, filed a complaint against this operation and the Commission opened an investigation.

The Commission's conclusions were that Gillette's participation in the Eemland leveraged buy-out violated Article 102 and that the 100% acquisition of the Wilkinson's operations outside the EU, thus a transaction constituting a concentration, violated Article 101.[480]

This even though Gillette carefully structured its participation in Eemland's buy-out to fall below the influence threshold into the no influence or passive investment "safe harbor", outlined by the Court of Justice in *Philip Morris*.[481] Gillette acquired nonvoting stock, had no board, management or shareholders' meetings representation nor any access to Eemland competitively sensitive information. It (i) acquired a 22% nonvoting "loan stock" equity interest that was convertible to voting stock only under limited conditions; (ii) loaned about 13.6% of Eemland's total debt financing at favorable non-market terms; (iii) acquired certain preemption rights that gave Gillette an option to acquire (or force to be sold to a selected third party) any voting stock in Eemland that a shareholder eventually might seek to sell and a right of first refusal, should Eemland wish to sell the whole or a substantial part of its wet shaving business; (iv) entered into a two-year supply agreement, whereby it purchased Wilkinson products manufactured by Eemland for resale by Gillette outside the EU and North America; and (v) entered into a "non-Community sale agreement" and an intellectual

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such as is mentioned in Article 3 (f) of the treaty. Abuse may therefore occur if an undertaking in a dominant position strengthens such position […]". *Continental Can* Case, para. 26.

[478] Case 85/76, *Hofmann-La Roche*, para. 91.

[479] Ezrachi, "EC", cit., at 342.

[480] The Commission found it to result in an artificial break-up of the business subject to the change in control and an inevitable post-closing coordination between Gillette and Eemland. See the *EU Gillette* Case, para. 35.

[481] Hawk, "Controlling", cit., at 8.

property agreement, pursuant to which the "rest-of-the-world" Wilkinson operations and trademarks were assigned to Gillette.[482]

In its consent decree with the U.S. Department of Justice, in order to eliminate the concerns that the transaction violated section 7 of the Clayton Act and section 1 of the Sherman Act, Gillette also accepted a variety of Chinese wall and standstill provisions. Gillette agreed, for as long as it held any interest in Eemland, not to exchange information regarding prices and other terms of sale in the United States, not to exercise any influence over Eemland and not to do anything to cause Eemland to become insolvent.[483] Gillette further agreed, for a period of ten years, not to acquire any additional debt or share in Eemland, other than via its limited preemption rights, without the Department of Justice's prior written consent.[484] Should it exercise those preemption rights, Gillette agreed to give an automatic proxy to Eemland to cast Gillette's votes in the same proportion as the votes cast by the other shareholders, thereby effectively negating any ability by Gillette to use these voting powers to affect Eemland's activities.[485]

All these expedients permitted Gillette to be certainly below the influence threshold prescribed in the *Philip Morris* decision where the latter was not considered as able to influence the commercial activities of the target company even with a 24.9% of voting interests (30.8 nonvoting), preemption rights and 50% of convertible bonds. This because Philip Morris had no board representation, agreed on various Chinese walls and the cooperation between the two involved companies affected only their non-EC operations.

Likewise Gillette had no board representation, limited preemption rights and implemented Chinese wall provisions. It also did not have any voting right and the nonvoting shares amounted to 22% against the 30.8% of Philip Morris (representing 24.9% of the votes). Gillette held 13.6% of Eemland's total debt and Philip Morris held 50% of Rothmans convertible bonds.

The only factors potentially giving more influence to Gillette vis-a-vis Philip Morris were the non-EC cooperation agreements, definitely more extensive and more likely to have effects within the Community. Under the Philip Morris influence standard it was nonetheless improbable the transaction would have been considered an infringement of Article 101 or 102.[486]

The Commission did not feel this way and concluded that the transaction would have enabled Gillette to exercise "some influence" over Eemland's commercial activities, in violation of Article 102, but not Article 101.[487]

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[482] See Hawk, "Controlling", cit., at 8–9 and Struijlaart, "Minority", cit., at 193–195.

[483] *United States v. Gillette Co.*, para. 64,273.

[484] Ibid., para. 64,272–64,273.

[485] Ibid., para. 64,273–76; see also the EU Gillette case, para. 21.

[486] Hawk, "Controlling", cit., at 397–400.

[487] The *EU Gillette* case, para. 12–20. See Ibid., para. 26–27 for the means by which Gillette could exercise "some influence", within which preemption and conversion rights and options on the basis that Gillette could prevent third parties from acquiring and possibly invigorating the competitive viability and the financial dependence of Eemland.

The decision was based on paragraph 65 of the *Philip Morris* Judgment,[488] where the Court of Justice used the term "some influence", with regards to Article 102, instead of the term "influence", used when speaking about Article 101. The Commission interpreted it as a lower control threshold for the purpose of applying Article 102 to acquisitions of passive minority shareholdings.[489]

It stated, "[t]he position of Gillette is a matter which the management of Eemland will be obliged to take into account and consequently it is a factor which will influence the commercial conduct of Eemland. It follows that Gillette will have at least some influence on Eemland's commercial policy."[490]

This may be considered an attempt by the Commission to "cloak its Gillette decision under the mantle of the Court's judgment in *Philip Morris*" while it "expanded the Philip Morris influence standard to create a new, lower control threshold for application of Article [102] to acquisitions of minority interests."[491] Apparently, the Commission quotes the Court of Justice's wording, but not its intentions.

The Commission emphasized also that firms enjoying a dominant position have a "special responsibility not to allow [their] conduct to impair genuine undistorted competition."[492] "By participating in the buy-out of the Wilkinson Sword business, Gillette has failed to discharge that special responsibility and has abused its dominant position. […] [T]he structure of the wet-shaving market in the Community has been changed by the creation of a link between Gillette and its leading competitor […] [which] will have an adverse effect on competition and therefore Gillette's involvement constitutes an abuse of its dominant position."[493]

The Commission substantiated this finding on the conclusion by the Court of Justice that an abuse exists in relation "to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition."[494]

Finally, Gillette's acquisition of the Wilkinson Sword brand with regards to neighboring markets in Europe would probably lead to a transformation of this brand from competing to strategic. Gillette was expected to use the brand Wilkinson Sword for the lower market sections, while using the Gillette trademark for the higher segments, which might lead Eemland to concentrate on the lower market sections also within the Community. The Commission thus concluded, in a situation very similar to the

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[488] "An abuse of such a position can only arise where the shareholding in question results in effective control of the other company or at least in some influence on its commercial policy".

[489] The *EU Gillette* case, para. 24.

[490] Ibid.

[491] Hawk, "Controlling", cit., at 9.

[492] The *EU Gillette* case, para. 23, referring to Case 322/81, *Michelin v. Commission*, para. 57.

[493] The *EU Gillette* case, para. 23.

[494] Case 85/76, *Hofmann-La Roche*, para. 91.

one in *Philip Morris*, that the *Gillette/Eemland* agreements constituted also an infringement of Article 101 because the geographical separation of the Wilkinson Sword trademark would result in cooperation between the two trademark owners.[495]

The Commission ordered therefore Gillette to dispose of its equity interest and its interest as a creditor and to re-assign to Eemland the Wilkinson Sword businesses including trade marks in the neighboring markets in Europe.[496]

4.1.6.3. *BT/MCI*

In *BT/MCI*,[497] British Telecom ("BT") acquired 20% of the equity, with proportional board representation, in its competitor MCI.

The Commission, referring to the Philip Morris judgment, stated that "as a general rule, both the Commission and the Court of Justice have taken the view in the past that Article [101](1) does not apply to agreements for the sale or purchase of shares as such. However, it might do so, given the specific contractual and market contexts of each case, if the competitive behavior of the parties is to be coordinated or influenced."[498] The Commission had thus to assess whether, as a result of the agreement for the sale and purchase of the shares, the competitive behavior of the parties was coordinated or influenced.

In excluding the possibility that the acquisition of the minority shareholding could lead to an anticompetitive coordination of the commercial conduct or to influence over the competitor's behavior, the Commission acted on the basis of the content of the agreement.

The agreement included an obligation not to increase the shareholding and not to seek control of or influence the company. In addition, US antitrust law was considered sufficient to prevent any misuse of confidential information.[499]

The Commission endorsed a more relaxed approach towards this transaction, in comparison with the *Gillette* decision, permitting the acquirer to be represented in the management.

A fundamental difference between the *BT/MCI* decision and the previous two is represented by the characteristics of the market. When the market is oligopolistic with very high entry barriers, the economic theory, the Commission and the Court of Justice, have agreed that the acquisition of a minority shareholding in a competitor may reduce competition.In the *BT/MCI* case the relevant market was characterized by "a high degree of uncertainty, significant growth potential, highly sophisticated customers and the presence of many significant competitors."[500]

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[495] Ibid., para. 43.

[496] Ibid., Article 4 and 5 of the decision.

[497] Case IV/34857 *BT-MCI Commission*, Decision of 27 July 1994 (94/579/EC), [1994] OJ L 223/36.

[498] Ibid., para. 44.

[499] Ibid.

[500] Caronna, "Article 81", cit., at 4.

4.1.6.4. *Olivetti/Digital*

In *Olivetti/Digital*,[501] the Commission found the acquisition by Digital of an 8% non voting shareholding in Olivetti (with the prohibition to increase its stake above 10% and to enter into voting agreements with third parties) and the proportional representation in Olivetti's board of directors[502] not to infringe Article 101 TFEU.

Considering that the remaining share capital of Olivetti was very concentrated the minority participation was not conferring control over Olivetti and at the same time, considering the 10% limitation, could not be considered as part of a long-term strategy to acquire control over the target company.

The Commission concluded that this transaction would not lead to a coordination of the competitive behavior nor to an exchange of competitive information.[503]

Even though no infringement was found, the *BT/MCI* and *Olivetti/Digital* decisions implicitly confirmed that the Commission considers possible an anticompetitive effect deriving from a minority share acquisition below the control threshold and without any controlling intentions.

> "The Decision proved that the Philip Morris doctrine is still "applicable law" and that minority shareholdings can thus raise serious competitive concerns even in the absence of acquisition of control."[504]

This reconstruction was confirmed in the Commission's Green Paper on the Review of the Merger Regulation, in which the Commission recognized that acquisitions of minority shareholdings not covered by the Merger Regulation are scrutinized under Art. 101 and Art. 102 in so far as they may reduce the companies' incentives to compete.[505]

4.1.6.5. *Dresser/Ingersoll*

Dresser-Rand, a joint venture between Dresser and Ingersoll-Rand, was prohibited from acquiring a 24% stake in Nuovo Pignone ("NP"), Dresser and Ingersoll main competitor.[506] A consortium, including Dresser-Rand, was supposed to acquire a 69.3% shareholding in NP. The transaction was later restructured to exclude any participation in NP by Dresser-Rand in order to obtain approval from the Commission.[507]

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[501] Case IV/34.410 *Olivetti/Digital*, Commission Decision of 11 November 1994 (94/771/EC), [1994] OJ L 309/24.

[502] Not involved in decisions on the development of new products or their pricing since it had delegated all executive powers to its chairman.

[503] *Olivetti/Digital* case, para. 26.

[504] Russo, "Abuse", cit., at 13.

[505] Green Paper, paras 106–110.

[506] *GE/ENI/Nuovo Pignone (II),* Commission Notice No. 94/C162/04, OJ C 162/7 (1994).

[507] 25th Annual Report on Competition Policy (1995), COM(96)126 final, <http://ec.europa.eu/competition/publications/annual_report/1995/en.pdf> accessed 9 July 2011, at 116. See also Siragusa, "Privatization", cit., at 1033.

After the merger had been cleared, the consortium asked the Commission to clear the transfer of a minority shareholding to Dresser-Rand, as provided by the original plan. There are no formal decisions or press releases, but according to the press reports, the Commission decided to block the transfer "taking the view that any cooperation between the two largest players in the market for gas compressors would contravene the EC Treaty's competition rules."[508]

4.1.6.6. *Aker Maritime/Kvaerner*

A proof that an intervention by the Commission is needed in case of acquisition of non controlling minority shareholdings having anticompetitive effects may be found in the *Aker Maritime/Kvaerner* case.[509]

Aker Maritime ASA (AMA) wanted to acquire a 27.6% of the voting rights in its competitor Kvaerner, which would have given the former a controlling interest. As a result of the Commission's concerns, AMA committed to cancel its option agreements with regards to 8.9% of the Kvaerner shares, thereby limiting it to 17.8% its shareholding.

Since the operation was no longer a concentration, the Merger Regulation did not apply and the Commission permitted the establishment of a structural link between two oligopolists and the internalization of competitive externalities.[510]

Considering the events following the acquisition, it could have been treated also as part of a long-term plan to acquire control, in the sense of paragraph 39 of the *Philip Morris* judgment.

Kvaerner's poor economic performance brought it to the verge of bankruptcy leading it to reach an agreement with AMA (which, in the meanwhile, had further increased its shareholding to 25%) on the execution of the latter's rescue plan (instead of the one presented by a non competing shareholder), which included the acquisition of Kvaerner's operations by AMA. Using a "failing company defense", AMA had been then able to merge with Kvaerner, since a prohibition would have led to the bankruptcy of the latter. The Commission's inaction helped the market to be changed into a monopoly.[511]

4.1.7. Lessons from the Case Law

Pursuant to the *Philip Morris* and *Gillette* cases (but also to the decisions in *BT/MCI* and *Olivetti/Digital*), share acquisitions that do not confer, to the acquirer of the shares, either sole or joint control over the target company, may still be subject to review under Article 101 or Article 102 of the TFEU.

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[508] Siragusa, "Privatization", cit., at 1034 and Brussels Blocks Pignone Plan, INT'L GAS REP., Apr. 28, 1995; Antitrust Authority Blocks Acquisition of Nuovo Pignone Stock by Dresser and Ingersoll, Il Sole-24 Ore, 22 Apr 1995, at 28.

[509] Case COMP/M.2117 *Aker Maritime/Kvaerner*. For an analysis see Struijlaart, "Minority", cit., at 199, 200.

[510] The market was a Cournot oligopoly, the undertakings involved were competitors and the acquiring company was also a creditor of the target making the internalization reciprocal.

[511] Struijlaart, "Minority", cit., at 200.

The basic principle on which the economic theory, the Courts and the Commission agree, is that "the acquisition by one company of an equity interest in a competitor does not in itself constitute conduct restricting competition."[512]

Under certain circumstances,[513] however, minority shareholdings may "serve as an instrument for influencing the commercial conduct of the companies in question so as to restrict or distort competition."[514] This is the case when the shareholding creates a structure likely to be used for commercial cooperation or requires the firms to take into account each other's interest when determining their commercial policy.[515] In these cases Article 101 TFEU applies.

In *BT/MCI* the Commission considered prohibited by Article 101, agreements for the sale and purchase of shares in case the "competitive behavior of the parties is to be coordinated or influence."[516] In *Olivetti/Digital* also the possibility of exchange of competitive information was considered.[517]

With regards to Article 102 TFEU, the Philip Morris case identified an abuse in case the shareholding "results in effective control of the other company or at least in some influence on its commercial policy."[518] In *Gillette*, the Commission concluded that the requirement of "some influence" is fulfilled in case the minority share acquisition leads the target to take into account the dominant firm's interests when deciding its own commercial conduct (even if the investing firm does not have any direct influence over it).[519]

The Commission found abusive also the modification of the structure of an oligopolistic market caused by the creation of a link between the dominant firm and one of its competitors, considered having an adverse effect on competition. This in light of the special responsibility of the dominant undertaking not to allow its conduct to impair genuine undistorted competition on the common market.[520]

In the Philip Morris judgment, the Court of Justice considered also the potential unilateral effects of minority shareholdings noting that "Philip Morris, because of its share in the profits of Rothmans International, has an interest in the success of that company."[521] This finding, however, was not further developed nor considered in any other case.

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[512] *British-American Tobacco and R. J. Reynolds v. Commission*, para. 37. See also BT/MCI, para. 44.

[513] As stated in *British-American Tobacco and R. J. Reynolds v. Commission*, para. 43–45, when the relevant market is oligopolistic and stagnant and there are high barriers to entry. It has also to be considered the potentially symmetrical or circular nature of the links, the nature of the companies involved and any other economic relation between them. For other factors see chapter 3.3.

[514] *British-American Tobacco and R. J. Reynolds v. Commission*, para. 37.

[515] Ibid., para. 34–40.

[516] *BT/MCI* case, para. 44.

[517] *Olivetti/Digital* case, para. 26.

[518] *British-American Tobacco and R. J. Reynolds v. Commission*, para. 65.

[519] The *EU Gillette* case, para. 24.

[520] The *EU Gillette* case, para. 23. It refers to *Michelin*, para. 57 and *Hofmann-La Roche*, para. 91.

[521] *British-American Tobacco and R. J. Reynolds v. Commission*, para. 50.

4.1.8. Conclusions

On the basis of the economic theory, under certain market conditions, minority shareholdings among competitors result in anticompetitive effects, which should be addressed regardless of the instrument used to acquire them. This is not always the case. In circumstances in which they: (a) fall short of establishing control,[522] (b) are acquired without any agreement or concerted practice between the acquirer and the target (or at least its controlling shareholder)[523] or (c) are not acquired by a dominant undertaking or do not amount to an abuse;[524] a gap in the EU competition law is present and minority share acquisitions may remain unchallenged.

It is very interesting to note that, even though, by unanimous admission, non controlling minority shareholdings are not covered by the EUMR, and Article 101 and 102 of the TFEU are the provisions to be applied; it is in the merger case law and guidelines that it is possible to find a wider and deeper analysis of this phenomenon.

With this in mind, one of the most interesting proposals to close the gap has been thus the extension of the reach of the EUMR, including within its jurisdiction also the anticompetitive effects of non controlling minority shareholdings.[525] In their proposal, the authors took into account the concerns of overregulation and excessive burden, expressed by the European Parliament Committee on Economic and Monetary Affairs when discussing this topic in the framework of the Green Paper on the review of the EUMR.[526]

They base their proposal on the fact that "the type of economic analysis required for the investigation of passive investments among competitors is similar to that required for the investigation of horizontal mergers."[527] This because passive investments and mergers raise very similar unilateral (leading to a less vigorous competition and price increase) and coordinated (facilitating collusion and its stability) concerns.

In both cases, the assessment of the anticompetitive effects involves an examination of the market structure[528] and of the market share of the firms involved.[529] Both raise

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[522] Where the EU Merger Regulation would apply (as long as the Concentration has a Community Dimension).

[523] Where Art 101 TFEU would apply. In an economy based on financial markets and transactions operated without any "personal" contact between the purchaser and the seller, it would be contrary to the legal certainty if the seller could see the sales agreement declared void and even be fined, simply because it has sold a shareholding to a competitor of the target. See Russo, "Abuse", cit., at 16,17

[524] Where Art 102 TFEU would apply.

[525] Ezrachi, "EC", cit., at 344–348. Critical, Corradi, "Le partecipazioni", cit., at 428, 430. He notes that market structure and market shares are considered in the context of Articles 101/102 as much as in the EUMR and that the MHHI is an instrument sufficiently easy to be used also in cases pursued under Articles 101/102. He adds that even in case of an extension of reach, it would be quite difficult to decide the thresholds and cases of application.

[526] European Parliament Committee on Economic and Monetary Affairs Hearing on the Green Paper on the Review of Council Regulation 4064/89, 15 April, 2002.

[527] Ezrachi, "EC", cit., at 345.

[528] Guidelines on the Assessment of Horizontal Mergers, paras 17–18, 27. The more significant (and numerous) the rival firms in the market are, the smaller the anticompetitive concerns.

[529] Ibid., paras 42–57.

more serious concerns in oligopolistic markets, even when a dominant firm is not involved or does not evolve from the transaction.[530]

In the assessment of the market structure before and after a horizontal merger, the Commission often uses the Herfindahl-Hirschman Index (HHI).[531] A "modified" HHI has been developed to assess the impact of passive investments.[532]

Furthermore, in both cases, competition authorities should seek to identify whether the transaction under investigation involves the industry maverick. The EU Horizontal Merger Guidelines stress that mergers with a maverick firm are especially harmful to competition.[533] The same has been demonstrated with regards to the acquisition of a minority shareholding in a competitor by a maverick firm, as opposed to an investment in the maverick, which usually has no coordinated effects.

Additionally, in both kinds of transactions, countervailing buyer power[534] and low barriers to entry[535] may reduce or even eliminate the anticompetitive concerns.

> "In addition to the similarities in analysis, the substantive test in Article 2 EUMR provides for the regulation of both unilateral and coordinated effects and could extend to cover passive investment. This would enable the use of the EUMR for monitoring the complete range of effects stemming from [non controlling] investment."[536]

The EUMR provides also the Commission with a wider range of remedies if compared with the automatic invalidity provided by Article 101(2) in case of infringement. This permits to protect the seller of the shares who may well be an innocent bystander not linked to the anticompetitive conduct.

In order to apply the EUMR, the authors exclude the appropriateness of a wider interpretation of "decisive influence" in order to include non controlling minority shareholdings. This would, in their opinion, "blur the criteria for prior notification of the transaction under the EUMR and would affect the legal certainty for undertakings. Additionally, it would result in superfluous, unnecessary prior notifications, adding burden to the Commission and the undertakings involved". They suggest thus to "widen the scope of the EUMR to cover [only] the more problematic cases of passive investments."[537] In order to avoid an excessive burden on both the undertakings and

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[530] Ibid., para. 25 and Recital 25 of EU Merger Regulation.

[531] Guidelines on the Assessment of Horizontal Mergers, paras 19–21.

[532] See *Exxon/Mobil*, para. 256 and *Schneider/Legrand*, para. 30, in which the modified HHI index has been used and para. 20 of the Guidelines on the Assessment of Horizontal Mergers. See also Bresnahan, "Quantifying", cit., who developed such a modified HHI.

[533] Guidelines on the Assessment of Horizontal Mergers, paras 20(d) and 42.

[534] Ibid., paras 64–67.

[535] Ibid., para. 68.

[536] Ezrachi, "EC", cit., at 346.

[537] Ibid., cit., at 348. The more problematic cases may be identified on the basis, e.g., of the market shares of the firms, the degree of concentration of the market, the delta in the MHHI, the existence of significant barriers to entry, the reciprocity of the investment, the involvement of a maverick firm and all the other factors listed in ch. 3.3.

the Commission, passive investments should be subject to an ex-post review (instead of ex-ante, as is the case of mergers)[538], prompted by the Commission only in cases where the market is highly concentrated.[539] Another benefit of the ex-post assessment regards the possibility for the Commission to use clearer, wider and potentially even empirical evidence of the anticompetitive effects arising from the acquisition of a minority shareholding in a competitor.[540]

It is, however, important to note that some of the effects of the active minority shareholdings (particularly the establishment of interlocking directorates, above all if reciprocal) should be avoided ex ante, in light of the potential long-term effects on the interlocked firms' perception of their relationship.

It would thus seem more appropriate to provide the Commission with the possibility to review the more problematic active investments ex ante, without however having to subject the undertakings and the Commission to the burden of mandatory prior notification and clearance in all the other cases of minority share acquisitions.[541]

The possibility of an extension of the jurisdiction and powers of the Commission under the EUMR, in order for it to be able to address also competition concerns arising from minority share acquisitions, is a concrete possibility after the speech of March 2011 by commissioner Almunia and the invitations to tender that followed it.

A different proposal to catch the anticompetitive effects of minority shareholdings (above all if passive) is based on the interpretation of Article 102.[542]

The *Philip Morris* and *Gillette* decisions seem to indicate that Article 102 can apply to a wider range of acquisitions of minority shareholdings than Article 101 and without the need of an agreement or a concerted practice.

In *Philip Morris* the Commission identified an abuse in case the shareholding "results in effective control of the other company or at least in some influence on its commercial policy."[543] In *Gillette* it has been considered abusive the modification of the structure of an oligopolistic market caused by the creation of a link between the dominant firm and one of its competitors, considered having an adverse effect on competition.[544]

The *Gillette* doctrine may be combined with the recent developments in the field of collective dominance. On the basis of the decisions in *Compagnie Maritime Belge*, *Airtours* and *Laurent Piau*, it is possible to conclude that tight oligopolistic market

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[538] The ex-ante review in case of full mergers tries to avoid the difficulties linked to an eventual "de-merging" process.

[539] The UK merger control system may be particularly useful to shape the EU regime with regards to non controlling minority shareholdings. This both because it is a voluntary system (notification and prior clearance are not mandatory) and has a wider jurisdictional net than the EUMR.

[540] Ibid., at 348–349.

[541] Implementing therefore a voluntary merger control system for all the other minority share acquisitions falling short of control.

[542] Struijlaart, "Minority", cit., at 202–204.

[543] *British-American Tobacco and R. J. Reynolds v. Commission*, para. 65.

[544] The *EU Gillette* case, para. 23. It refers to *Michelin*, para. 57 and *Hofmann-La Roche*, para. 91.

structures may constitute a sufficient “link” for a finding of collective dominance on the part of the undertakings behaving in a parallel manner.

As explained by the economic theory, in oligopolistic markets, with high entry barriers, minority shareholdings are more likely to cause harm to competition. In *Irish Sugar*, the General Court ruled that the abusive exploitation of a collective dominant position can occur by all oligopoly members jointly, but also individually.[545]

The acquisition of a non controlling minority shareholding in a competitor may be considered, in light of the special responsibility of the dominant firm(s) not to influence the structure of the relevant market and hinder competition,[546] to constitute an abuse of the collective dominant position.

This because a minority shareholding, irrespective of its active or passive nature, may have the effect of changing the structure of the market (making it more transparent and concentrated), strengthening its oligopolistic structure and thus the (collective) dominant position and increasing the likelihood and sustainability of tacit collusion.

The collective dominance doctrine could be used, therefore, to close part of the gap existing with regards to the treatment of minority shareholdings in competitors. This is in line with the assertion, by the Commission in the Green Paper on the review of the Merger Regulation,[547] that Articles 101 and 102 can (and should) apply to most of the acquisitions of non controlling minority shareholdings between competitors.

As for Article 101 TFEU, it is noteworthy that the acquisition of a minority shareholding in a competing firm is a definitely more serious commitment than most of the agreements or concerted practices. The acquiring firm does not only communicate to the market its intention to collude, it also auto-imposes on itself a penalty in case of cheating. This penalty is definitely more reassuring to the other colluding firms than most of the (unenforceable) anticompetitive agreements could be.

The possibility to apply Article 101 to minority share acquisitions has been discussed in the Philip Morris, *BT/MCI* and *Olivetti/Digital* cases. The analysis however focused only on active non controlling minority shareholdings[548] and on the presence of an agreement for the sale or purchase of shares.

The concept of “concerted practice” could be used to overcome the usual lack of an agreement involving the acquirer and the target in case of acquisitions of minority shareholdings in competitors. A concerted practice is “a form of coordination between undertakings which [...] knowingly substitutes practical cooperation between them for the risks of competition.”[549] “The concerted practice [...] may inter alia arise out of coordination which becomes apparent from the behavior of the participants.”[550]

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[545] Para. 66.

[546] See Cases *Michelin v. Commission*, para. 57; *Hoffmann-La Roche*, para.91; *Continental Can*, para. 26; *Philip Morris*, para. 65 and the *EU Gillette*, para. 23–24.

[547] Green Paper paras 101 and 106–110. See especially para. 109.

[548] Instruments enabling the acquirer to influence the commercial conduct of the target or exchange competitive information. See *British-American Tobacco and R. J. Reynolds v. Commission*, para. 37, *BT/MCI* case, para. 44 and *Olivetti/Digital* case, para. 26.

[549] *Imperial Chemical Industries* case, para. 64–65 and Article 101 Guidelines, para. 60.

[550] *Imperial Chemical Industries* case, para. 65–66.

Article 101 applies in case a concerted practice "influenc[e] the market conduct of at least one of the parties by causing a change in its incentives."[551] The stake acquisition may be prohibited in case it is "capable of altering the incentives of the investing and/or target firm to such an extent as to have an appreciable adverse impact on competition". "This might be the case, for example, if the market characteristics" makes it likely that "the stake would render it more profitable for the two firms and/or their competitors to compete less vigorously than in the absence of the stake."[552]

It is precluded any "direct or indirect contact between competitors, the object or effect of which is to create conditions of competition which do not correspond to the normal competitive conditions of the market in question."[553]

As explained in Suiker Unie, Article 101 "preclude[s] any direct or indirect contact [...] the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market."[554] Also, in Soda-ash, the Commission stated "An infringement of Article [10]1 may well exist where the parties have not even spelled out an agreement in terms but each infers commitment from the other on the basis of conduct."[555]

The acquisition (by a maverick firm) of a minority shareholding may act as a commitment device channeling information about the acquirer's incentives to compete and, thus, its future behavior.

In case the competitor(s) respond to this commitment competing less aggressively themselves (e.g., by increasing prices) or there is the risk of future parallel conducts,[556] it is possible to consider the acquisition a strategy for reaching a common understanding about the terms of coordination. If the shareholding is used as a coordination facilitating device it can be prohibited under Article 101.[557]

When, with the acquisition of a minority stake, the competitor signals its intention to compete less aggressively, the following actual or potential "tacitly collusive" (coordinated) behavior by the other firms in the market (above all by the firm in which the investment was made) may be considered an implicit demonstration of the existence of the "mental consensus" required by Article 101.

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551 Article 101 Guidelines, para. 27.

552 European Commission, "Antitrust Issues Involving Minority Shareholding and Interlocking Directorates", DAF/COMP/WP3/WD(2008)13 Working Party No. 3 on Co-operation and Enforcement <http://ec.europa.eu/competition/international/multilateral/2008_feb_antitrust_issues.pdf> accessed 27/08/2011, para. 20.

553 Article 101 Guidelines, para. 61.

554 *Suiker Unie v. Commission*, para. 174.

555 *Soda-ash/Solvay*, para. 59.

556 Article 101 applies to both actual and potential effects on competition. See Article 101 Guidelines, para. 26. On the basis of the *Hills* judgment, in case the acquisition of a minority shareholding is considered a sufficient collusion-facilitating device, there must be a presumption that the common conduct will follow, making unnecessary a proof of the anticompetitive effects. A concerted practice may thus have an anticompetitive object. *Hills* case, para. 161 and 164.

557 Article 101 Guidelines, para. 63.

While the extension of the EUMR applicability would be most certainly the best solution, the possibility to apply Articles 101 and 102 is an interesting "pro tempore" arrangement. In case of minority shareholdings having (or potentially having) coordinated effects it is, in fact, possible to refer to the concerted practice and collective dominance case law in order to eliminate the competition concerns. If the anticompetitive effects are only unilateral (e.g., in case the maverick firm does not invest in a rival), the minority shareholdings may nonetheless be caught under Article 102, which applies to every case in which a collective dominant position is strengthen or the market structure is changed, thus to any acquisition of a minority shareholding in a tight oligopolistic market.[558]

4.2. Italy

As far as Italy goes, Article 5 of law 287/1990 contains the exact transposition of Article 3 of the EUMR. The same is for Articles 101 and 102 TFEU, "translated" into Article 2 and 3 of the same law. To complete the picture Article 1(4) of this law states that its provisions have to be interpreted according to the principles of the European Union competition law. The Italian competition authority gave, on the basis of the Commission guidelines and communications, a uniform definition of concentration as "any operation causing a lasting structural change of the undertakings involved."[559] This permitted, also at the national level, to identify a concentration where a firm acquires control over another undertaking, regardless of the operation leading to it.[560]

The substantive test remained however the one of the "old" merger regulation (the "dominance" test). According to Article 6(1) of law 287/1990 the Italian Competition Authority, in appraising concentrations subject to notification under Article 16, shall determine whether the concentration creates or strengthens a dominant position on the domestic market with the effect of eliminating or restricting competition appreciably and on a lasting basis.

4.2.1. Italian Case Law

Already in 1992 the Italian competition authority (AGCM)[561] stated that the acquisition of a minority shareholding in a competitor is prohibited in case it is ascertained that it directly influences the competitive behavior of the companies involved, reducing or restricting competition.[562]

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[558] This is perfectly in line with the aim of the two Articles. While Article 101 is directed towards conducts regarding more than one undertaking, Article 102 is designed to address (mainly) unilateral conducts.

[559] "Modalità per la comunicazione di un'operazione di concentrazione tra imprese", 1 July 1996, Boll., 19/1996, Section A.

[560] Cons. Stato, 1 October 2002, n. 5156, *Enel France Telecom/New Wind*.

[561] Autorità Garante della Concorrenza e del Mercato.

[562] AGCM, 14 March 1995, *Titanus Distribuzione*, Cinema 5, in Boll. 11/1995; AGCM, 17 June 1992, *Cementir/Merone*, in Boll. 12/1992. "L'acquisto, da parte di un'impresa, di una partecipazione di minoranza in una società concorrente non rientra nell'ambito di applicazione della normativa a tutela

A very important case in these regards is represented by the *Parmalat/Granarolo Felsinea* case.[563] In may 1995 Parmalat and Granarolo concluded an agreement by which: the two companies were to cooperate in various sectors, Parmalat acquired 10% of Granarolo (with the possibility to increase it at a later time) and was given the right to appoint a director, to veto important decisions and a preemption right on Granarolo's shares.

The AGCM refers to *Philip Morris* and to its influence/no influence threshold[564] concluding that the agreement created a structure likely to be used for commercial cooperation between the parties. On the basis of these findings it declared void the agreement considered infringing the "Italian transposition" of Article 101 TFEU.

The AGCM analyzed also three significant mergers between banks, severing some of the existing structural links. Table 1 below enlists the key links among competitors observed by the authority.[565]

Table 2 summarizes the conditions imposed by the Italian competition Authority to tackle the most relevant instances of minority shareholdings and interlocking directorates emerged in these cases.[566]

The most interesting of these cases is the merger between Unicredito Italiano (Unicredit) and Capitalia, into the post-merger entity, "UCI."[567] On September 18, 2007, the Italian Antitrust Authority (AGCM) decided to authorize the merger, subject to a number of structural and behavioral remedies.

In consideration of the non-Italian turnover generated by Unicredit, the transaction originally fell within the jurisdiction of the European Commission, which however accepted the request of Unicredit to refer the case to the AGCM under Article 4(4) of the EUMR.

In its analysis, the AGCM highlighted the direct and indirect cross-shareholdings between the post-merger entity UCI, Mediobanca (the main Italian investment bank) and Assicurazioni Generali (the largest insurance company in Italy). Unicredit and Capitalia were amongst the largest (minority) shareholders of Mediobanca, and Assicurazioni Generali was considered de facto controlled by Mediobanca.

Considering that also one of the main competitors of the post-merger entity, Intesa SanPaolo, would have had an indirect holding in UCI; the latter accepted to irrevocably sell all of its shares in Generali and to sell 9.39% of its shares in Mediobanca, capping its participation to 8.6%, thus eliminating its veto power in relation to the

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della concorrenza solo ove tale acquisto risponda ad una mera finalità di investimento finanziario passivo. La fattispecie risulta invece vietata ogni qualvolta si accerti che essa costituisce un mezzo idoneo ad influire sul comportamento commerciale delle imprese in questione, in modo da restringere o falsare il gioco della concorrenza sul mercato".

[563] AGCM, 8 June 1995, Provvedimento n. 3086 (I114) *Parmalat/Granarolo Felsinea*, in Boll. 23/1995, at 4–5.

[564] Ibid., para. 14.

[565] OECD, "Antitrust Issues", cit., at 125.

[566] OECD, "Antitrust Issues", cit., at 130.

[567] AGCM, 18 September 2007, *Unicredito Italiano/Capitalia*, in Boll. n° 33/2007. See Zampa, "The Italian", cit., for an analysis.

Table 1: Key links among competitors observed in the latest work by the Italian Competition Authority in the financial sector.

Cases	Minority shareholdings	Interlocking directorates
Intesa/Sanpaolo	– Assicurazioni Generali has a 5% stake in Intesa Sanpaolo – Intesa San Paolo has a 2.2% share in Assicurazioni Generali	– Two of Assicurazioni Generali's top executives in the governance bodies of Intesa Sanpaolo (1 in the surveillance board, 1 in the management board)
BPU/Banca Lombarda (UBI Banca)	– 1,22% stake in Intesa Sanpaolo – Two relevant shareholders in common with Intesa Sanpaolo (a major competitor)	– One of Intesa Sanpaolo's top executives in UBI Banca's governance bodies
Unicredit/Capitalia	– 4,7% stake in Assicurazioni Generali – 18% stake in Mediobanca	– Three of Unicredit's top executives in Mediobanca's surveillance board

Table 2: Conditions imposed for approval of mergers.

Cases	Conditions	Issue tackled	Markets affected by the Authority conditions
Intesa/Sanpaolo	– Procedures to control information flows and voting on selected matters	– Interlocking directorates	– Life insurance
Unicredit/Capitalia	– Procedures to control information flows and voting on selected matters – Divestment of stakes in Assicurazioni Generali (pre-merger 4.7% post-merger 0) and Mediobanca (pre-merger 18%, post-merger 9%)	– Interlocking directorates – Minority shareholdings	– Life insurance – Investment banking
BPU/Banca Lombarda (UBI Banca)	– Undertakings not to have management roles in rivals	– Interlocking directorates	– All markets in which the involved firms operate

governance of Mediobanca. The AGCM obtained also that UCI's board members, holding positions in Mediobanca, could not participate in any discussion or express their vote in relation to resolutions of UCI's board relating to the investment banking and the insurance market in Italy. These members were also "Chinese-walled" from any information concerning such sectors.[568]

4.2.2. AGCM Financial Market Investigation

The banking and financial market is definitely the more of concern for the AGCM with regards to minority shareholdings and interlocking directorships. This market is characterized by an inherent less competitive nature, due to regulatory and economic barriers to entry and to compete, making the effect of these links particularly serious.[569] On this basis the Authority conducted a market investigation, started in the middle of 2007 and concluded in the end of 2008,[570] to determine the corporate governance of banks and insurance companies and verify the competitiveness of the market, specifically considering the structural links (both financial and personal) existing between competitors.[571] The results of this investigation have been that over 60% of listed companies have competing firms between their shareholders (see Table 22 of the investigation) and almost 90% are interested by interlocking directorates (Table 27). The AGCM, focusing on interlocking directorships,[572] concluded that efficient and transparent corporate governance, not involving people with conflicts of interest, may be used as a device to increase both the individual and collective reputation of the single bank and the trust in the overall financial system. The AGCM proposed to address the competition concerns related to the interlocking directorates through a wider use of "recommendations" and self/collective-regulations. A more transparent and independent governance would be, in the authority's opinion, supported and prized by the customers.

The main problem connected with this idea is that the average investor is often more interested in the profits and stability of the company in which the investment is held (increased in case of collusion and interlocked directorships), than in its virtues.

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[568] Ibid.

[569] Ghezzi, "Intrecci", cit., at 246.

[570] AGCM, "La corporate governance", cit.

[571] Ibid., at 7: "(…) i legami esistenti tra i principali operatori del settore poss(o)no contribuire ad allentare le dinamiche competitive all'interno del mercato". See also AGCM, "Relazione annuale dell'Autorità Garante della Concorrenza e del Mercato, Presentazione del Presidente Antonio Catricalà" (21 June 2010), <http://www.agcm.it/trasp-statistiche/doc_download/2865-presentazione11.html> accessed 9 July 2011.

[572] The interest of the authority for interlocking directorates has been confirmed recently by its President, stating that: "non è la nozione di amministratore indipendente che consente di superare le problematiche connesse agli interlocking directorates, è il fenomeno in sé dei legami che determina le criticità antitrust e che richiede un intervento normativo/regolatorio": A Catricalà, Audizione del Presidente dell'Autorità garante della concorrenza e del mercato Pres. Antonio Catricalà, Intervento sul settore bancario finanziario: i rapporti tra banche e imprese con particolare riferimento agli strumenti di finanziamento, Commissione Finanze e Tesoro Senato della Repubblica, 10 febbraio 2009.

The severity of the concerns for competition in the banking and insurance market, caused by a thick web of cross-ownership and interlocked directors determined the Italian legislator to intervene.

4.2.3. The Legal Treatment of Interlocking Directorates in Italy

Article 2390 of the Italian civil code specifically deals with the governance of competing public companies providing that directors may not act as partners with unlimited liability in rival firms nor exercise competing activities on their own or on behalf of third parties nor be directors or general managers of competing firms, unless authorized by the shareholders meeting. In concrete, this article has been largely waived by the shareholders, sometimes even in advance through statutory provisions[573].

Lately the AGCM intervened more than once on the risks for competition arising from interlocking directorates. The widespread of personal links in the Italian financial market was first highlighted in the 2008 investigation on the corporate governance of banks and insurances[574]. In 2009[575] and then again in 2010[576], the Italian authority signalled to the Parliament and to the Government the necessity to intervene and regulate the interlocking directorates.

Article 36, legislative decree 6 December 2011[577], intervenes on this issue preventing executives from holding a seat in the managerial, supervisory and control bodies as well as being top executives charged with managerial duties in more than one competing company or group of companies operating in the banking, insurance and financial markets[578].

[573] Borsa Italiana's corporate governance code, indicating the best practices in corporate governance for listed companies (applied according to the "comply or explain" principle), intervenes on this issue. In paragraph 1.C.4., it provides that: "If the shareholders' meeting, when dealing with organisational needs, authorises, on a general, preventive basis, derogations from the rule prohibiting competition, as per Article 2390 of the Italian Civil Code, then the Board of Directors shall evaluate each such issue, reporting, at the next shareholders' meeting, the critical ones if any. To this end, each director shall inform the Board, upon accepting his/her appointment, of any activities exercised in competition with the issuer and of any effective modifications that ensue".

[574] The investigation demonstrates how the major banks, insurance companies and SGR operating in Italy are characterized by the existence of numerous links between competitors. With specific regards to interlocking directorates, the analysis indicates that in the 80% of the corporate bodies of the groups examined there are individuals who sits also in the bodies of competing groups.

[575] AS 496 (2009), Bollettino AGCM n. 3. See also "audizione del Presidente dell'Autorità garante della concorrenza e del mercato nell'ambito dell'Indagine conoscitiva della 6a Commissione del Senato sui rapporti tra banche e imprese con particolare riferimento agli strumenti di finanziamento", 10 February 2009.

[576] "Proposte di riforma concorrenziale ai fini della legge annuale per il mercato e la concorrenza", AS 659 (2010), Bollettino AGCM n. 4.

[577] Converted into law 22 December 2011, n. 214 "Disposizioni urgenti per la crescita, l'equità e il consolidamento dei conti pubblici". For an analytical analysis see Assonime, Circolare n. 2, 8 February 2012, "Attività di impresa e concorrenza. Mercato dei capitali e società quotate. Divieto del cumulo di incarichi nel settore finanziario"; Banca d'Italia, Consob, Isvap, "Criteri per l'applicazione dell'art. 36 del d.l. "Salva Italia" (c.d. "Divieto di interlocking")"; Id., "Frequently Asked Questions".

[578] It is important to note that the last version of Borsa Italiana's corporate governance code (issued on 5 December 2011), at paragraph 2.C.5., considers the issue of cross-directorship stating that: "The

The provision aims at improving competition between firms active in the banking, insurance and financial markets[579], this is further demonstrated by the provision of minimum dimensional thresholds for the involved companies below which the interlock is not considered to be of concern for competition in the market[580].

The prohibition applies to the appointment of any of the abovementioned executives to any of the abovementioned offices in a competing firm (e.g. director and director, but also director and statutory auditor)[581].

The category of top executives includes general managers and, for listed companies, managers responsible for the preparation of the financial reports, but also, in general, executives who, given their apical position and the tasks performed, can affect the strategic decisions of the company and/or acquire sensitive information on the business that can determine an alteration of the competitive relationship of the firms involved (e.g. top-level managers with strategic responsibilities).

The companies or group of companies included within the scope of application of article 36 are only the ones active in the banking, insurance and financial markets and thus the ones whose activity is subject to the authorization and supervision of Bankitalia, Consob and Isvap; i.e. banks, insurance and reinsurance companies (excluding those referred to in art. 109 let. a, b , c and e of the Insurance Code), SIM, SGR, SICAV, financial intermediaries that grant funding, authorized and supervised by Bankitalia and registered under art. 106 and 107 TUB, payment institutions, electronic money institutions, Poste Italiane S.p.A. for the activity of Bancoposta and Cassa Depositi e Prestiti.

To conclude, the interlocks prohibited are the ones involving:

i) competing companies, operating in the banking, insurance or financial market;
ii) a parent company operating in the abovementioned markets (or the financial holding controlling the parent company) and a firm competing with one of its affiliates active in these same markets;
iii) companies, active in the banking, insurance and financial markets, not individually competing but part of groups in competition on these markets, whose national turnover is higher than the 3% of the national turnover of the group,

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chief executive officer of [an Italian company listed on a regulated market] issuer (A) shall not be appointed director of another issuer (B) not belonging to the same corporate group, in the event that the chief executive officer of issuer (B) is a director of issuer (A)".

[579] See the Technical report accompanying the legislative decree.

[580] At least one of the companies (or group of companies) involved has to have an annual national turnover of at least 47 million of Euro (the threshold is provided by art. 16 c.1-2 of law 287/1990, which regulates the scrutiny of concentrations, and is periodically adjourned).

[581] This is also the interpretation of the AGCM as noted, on 5 January 2012, in its "Segnalazione ai sensi degli artt. 21 e 22 della legge 10 ottobre 1990, n. 287 in merito a proposte di riforma concorrenziale ai fini della legge annuale per il mercato e la concorrenza – anno 2012" (sent to the President of the Senate, the President of the Chamber of Deputies, the President of the Council of Ministers and the Minister for Economic Development, Infrastructure and Transport), p. 59-60.

are excluded from the prohibition the offices held in companies within a group, thus in controlled or controlling firm, including joint venture companies, and to foreign firms and their branches operating in Italy (provided they are not Italian companies).

4.3. Germany

A few Member States' regimes do not use the EUMR "concentration" concept to establish jurisdiction, potentially including, within the merger review rules, also minority interests falling short of legal or de facto control. Between these Member States are Germany and the United Kingdom.

Under the German Act Against Restraints of Competition (the "ARC")[582] the acquisition of 25% or more of the capital or voting rights in a company, regardless of whether the acquisition entails control or influence over the target, will qualify as a merger and subject to prior notification[583] (provided that the thresholds are met and no exception applies)[584].

In addition, the ARC provides that a transaction may be notifiable in case it enables "one or several undertakings to directly or indirectly exercise a competitively significant influence on another undertaking."[585] This provision may be used to catch shareholdings having anticompetitive effects, below the 25% level. Its aim is to prevent the circumvention of the requirement to notify by acquiring a shareholding of just below 25%.

The provision applies in case the acquiring firm has the possibility to exert influence on the competitive behavior of the target in such a way that it is likely to reduce competition between them; it may also suffice if the target itself adapts its competitive behavior to the interests of the acquirer. A competitively significant influence may also arise from agreements on pre-emption rights, sales strategies and financial structures, as well as from rights to be consulted, to receive sensitive information and to appoint representatives to the management bodies of the target (interlocking directorates).[586]

Competitively significant influence generally arises if the minority shareholding confers the possibility to influence the decision-making process and the market behavior of the target, allowing the acquiring firm to bring into effect its own commercial interests.[587] In other words, the acquisition of a minority shareholding below 25% will fall within the competitively significant influence threshold if it entails de facto similar rights to a 25% shareholding.[588]

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[582] Act against Restraints of Competition, <http://www.bundeskartellamt.de/wEnglisch/download/pdf/GWB/0911_GWB_7_Novelle_E.pdf> accessed 9 July 2011.

[583] Act against Restraints of Competition (ARC), section 37 (1) No. 3.

[584] ARC, section 35.

[585] ARC, Section 37 (1) No. 4.

[586] OECD, "Antitrust Issues", cit., at 112. See also M Reynolds, "Acquisition", cit., at 7.

[587] Leupold, "Minority", cit., at 629.

[588] Case B5–27442–Fa-198/07 *A-TEC/Norddeutsche Affinerie*, Decision of the Bundeskartellamt of 27 February 2008, para. 27. This is the case when, due to the low attendance, at the shareholders' meetings the acquiring firm represents the 25% of the shareholders present.

It is thus very difficult for a purely passive investment (i.e. without any voting right, board representation or even access to sensitive information) to meet this test.

The Bundeskartellamt's assessment can be divided into two main parts:

- first it has to assess whether the transaction constitutes a concentration, and, consequently, triggers the Bundeskartellamt's competence to review the case under the merger control regime;
- second, it is necessary to determine whether the concentration gives rise to a dominant position – which requires the Bundeskartellamt to block the proposed concentration.[589]

In addition Section 40 (3) ARC excludes the possibility to subject the clearance of an acquisition to conditions and obligations requiring continued supervision (behavioral commitments). Only structural remedies may be employed, particularly, the divestiture of participations, operations or assets to third parties not associated with the merging companies.

4.3.1. German Case Law

A case concerning minority shareholdings was assessed under Section 1 ARC and Article 101 TFEU by the German authority in 2006. It concerned a 17.5% minority shareholding, coupled with board representation, of Xella in the competing joint venture, Nord-KS.[590]

Thanks to the interlocking directorate, Xella could gain knowledge of all the business strategic decisions of its competitor Nord-KS and influence them to its own benefit. The Bundeskartellamt concluded that it was to be assumed that thanks to this information flow, secret competition had been eliminated and no price competition was to be expected from Nord-KS vis-à-vis its parent companies. In 2006, the authority decided that the implementation of the partnership agreement violated Section 1 ARC and Article 101 TFEU and ordered Xella to withdraw from the joint venture.

The Düsseldorf Higher Regional Court confirmed this decision except for the effect on trade between member states, excluding therefore the contradiction with Article 101 TFEU and with regards to the remedy left Xella to decide how to react to the finding that the joint venture agreement was in violation of Section 1 of the German Competition Act.[591]

In a more recent case, the Bundeskartellamt reviewed the acquisition by A-TEC of a 13.75% of the shares in its rival Norddeutsche Affinerie (NA), coupled with the possibility to appoint three of the 12 members of NA's supervisory board.[592]

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[589] ARC, section 36. The German substantive test is in fact a "dominance test".

[590] Case B1–116/04 *Nord-KS/Xella*, <http://www.bundeskartellamt.de/wDeutsch/download/pdf/Kartell/Kartell06/B1–116–04.pdf> accessed 9 July 2010. For an analysis see OECD, "Antitrust Issues", cit., at 116.

[591] OECD, "Antitrust Issues", cit., at 252.

[592] For an analysis see Leupold, "Minority", cit., at 628–631.

The Bundeskartellamt found that the minority shareholding acquisition and the interlocking directorate amounted to an acquisition of competitively significant influence over NA. This finding was based on the fact that A-TEC's 13.75% shareholding in NA was tantamount to a blocking minority, as the past attendance at the annual general meetings (AGMs) has been only between 33 and 37%, de facto giving A-TEK more than 25% of the votes at the AGM.

In addition A-TEK was NA's biggest shareholder, the only one with industry-specific knowledge and was going to appoint three members of NA's supervisory board. This reinforced the competitively significant influence exercisable by A-TEC on NA's decision-making process.[593]

The Bundeskartellamt concluded that competition between the two companies would be reduced to such an extent that both companies would no longer act independently of each other on the market. A-TEC would be able to influence the competitive conduct of NA, and NA would passively adapt its conduct on the market to A-TEC's interests.[594] The main argument used by the Bundeskartellamt in their assessment of the concentration was that A-TEC and NA would have the ability and incentive to coordinate their market conduct should the transaction not be blocked.

The main concern of the Bundeskartellamt was therefore tacit collusion between A-TEC and NA in an oligopolistic market. This would have led to the creation of a dominant position on the European Economic Area (EEA)-wide market for oxygen-free copper billets.

On 27 February 2008, the Bundeskartellamt prohibited A-TEC's acquisition of a 13.75% shareholding in its rival Norddeutsche Affinerie (NA) as well as the proposed appointment of three members of NA's supervisory board requiring A-TEC to divest entirely its shareholding in NA.

4.4. United Kingdom

Before starting the analysis of the United Kingdom merger control it is important to note that this is a voluntary merger review regime thus, anything it catches in its jurisdiction net, is not subject to compulsory notification and prior clearance.

The UK's Enterprise Act 2002 gives the Office of Fair Trading (OFT) a more flexible and wider jurisdictional net than the EUMR.[595]

The jurisdictional test is premised on two or more enterprises "ceasing to be distinct" – namely, either being brought under common ownership or control, or a change in the level of control that one enterprise exercises over the other.[596]

This test embraces three levels of ownership interest that may trigger a merger control investigation: (i) a "controlling interest", de jure control conferred by a great-

[593] *A-TEC/Norddeutsche Affinerie*, paras 28, 37 and 39.

[594] Ibid., para. 43. As cited by Leupold, "Minority", cit., at 629.

[595] Under the Enterprise Act 2002 (EA02), the Office of Fair Trading (OFT) and the Competition Commission (CC) conduct Phase I and Phase II of the merger control, respectively.

[596] Enterprise Act 2002, Royal Assent on 7 November 2002, section 26 (1).

er than 50% share of the voting rights; (ii) the "ability to control policy", amounting to de facto control conferred by shareholdings below 50% (similar to the EUMR's "decisive influence" test); and (iii) the "ability materially to influence the policy" of the target firm (which distinguishes the UK test from the EUMR one).

Thus, in addition to the acquisition of control, the OFT has jurisdiction to review also transactions where one party acquires the ability to "materially influence the policy" of another party. There is no minimum shareholding threshold that confers material influence. The Office of Fair Trading has however stated that a shareholding of 25% or more, in most cases, gives rise to "material influence", as it enables the holder to block special resolutions at shareholder meetings. The OFT may examine any case where the minority shareholding is as low as or even lower than 15% to check whether the minority shareholder can materially influence the target's policy.[597]

It is the mere ability to exert material influence, rather than the intent or the actual exercise of such that establishes jurisdiction.[598]

The object of the material influence is the "policy" of another company, interpreted recently by the Competition Commission as "the management of [the target's] business, particularly in relation to its competitive conduct [...] includ[ing] the strategic direction of a company and its ability to define and achieve its objectives."[599]

The OFT, when assessing if an acquisition permits to exert "material influence", looks at the cumulative impact of all the interests and links between the parties. Specifically it takes into account: (i) the distribution and holders of the remaining shares; (ii) patterns of attendance and voting at recent shareholders' meetings; (iii) the existence of any special voting or veto rights attached to the shareholding under consideration; (iv) any other special provision conferring an ability to materially influence the policy; (iv) whether the acquiring entity has or will have board representation; and (v) whether there are any additional agreements with the company which would enable the holder to influence the policy.[600]

The "material influence" test is very flexible and "has the advantage, obviously from an agency perspective, that one can analyze some scenarios that may raise com-

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[597] Enterprise Act 2002, section 26. See also Office of Fair Trading (OFT), Mergers – Substantive Assessments Guidance (May 2003), <http://www.oft.gov.uk/shared_oft/business_leaflets/enterprise_act/oft516.pdf> accessed 9 July 2011, at 9. As for the case law see ME/4540/10 *Completed Acquisition by Sports Direct International plc of a Minority Shareholding in Blacks Leisure Group plc*, OFT decision of 3 June 2010 and the Thomas Cook's acquisition of 10.3 per cent of Owners Abroad in 1993, considered sufficient to confer material influence, in D Livingston, *Competition Law and Practice* (FT Law & Tax, 1995), para. 33.26.

[598] Competition Commission,, 18 April 2000, *Vivendi SA and British Sky Broadcasting Group Plc* <http://www.competition-commission.org.uk/rep_pub/reports/2000/440vivendi.htm#summary> accessed 9 July 2011, at para 2.19 <http://www.competition-commission.org.uk/rep_pub/reports/2000/fulltext/440c2.pdf> accessed 9 July 2011.

[599] Competition Commission, *Acquisition by British Sky Broadcasting Group plc of 17.9 per cent of the Shares in ITV plc*, report sent to the Secretary of State (Berr) 14 December 2007 (2007), <http://www.competition-commission.org.uk/rep_pub/reports/2007/fulltext/535.pdf> accessed 9 July 2011, para. 3.33.

[600] OFT, *Mergers – Substantive Assessments Guidance*, para. 2.10.

petitive concerns that a bright line test might not capture other than in the context of an ancillary issue, which arise when the main transaction is one of control; the UK has those scenarios as well."[601]

As a general policy matter, if the OFT becomes aware of any acquired structural link between close competitors or oligopolists, it will, on a case-by-case basis, apply close scrutiny and assert merger jurisdiction in order to review the transaction.[602]

Under EA02 agency guidance, the UK merger authorities have an explicit preference for structural remedies in merger control, in particular the OFT favors a complete divestiture – or "clean break" – approach in case of problematic minority shareholdings.[603] Due in part to the importance given to proportionality considerations, CC merger guidance states that "if the [CC] is choosing between two remedies that are equally effective, it will choose the remedy that imposes the least cost or is least restrictive" and that the acquired shareholding in a target company "will usually need to be reduced to a specified maximum level below which the [CC] judges there could be no possibility of material influence."[604]

It is therefore clear that the UK regime can catch acquisitions that the EUMR cannot. This has been demonstrated by the *Microsoft/Media Liberty/Telewest* case, in which Microsoft's stake in Telewest was reduced below the "decisive influence" level, but not below the "material influence" one, leaving the UK authorities the possibility to review the transaction.[605]

The same happened in the *Ryanair/Aer Lingus* case discussed above. While the Commission decided not to review the 29.4% stake acquisition of Ryanair in Aer Lingus because it did not confer "decisive influence", the OFT announced it will consider it under the Enterprise Act 2002.[606]

With regards to the substantive test, unlike Italy and Germany (which uses the dominance test), the one provided by the Enterprise Act 2002 is whether the transaction results or may be expected to result in a substantial lessening of competition ("SLC") within any market in the UK.[607]

4.4.1. UK Case Law

Under the EA02, *BSkyB/ITV* is the only example of a finding of material influence where the principal transaction is the acquisition of a non controlling shareholding.

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[601] OECD, "Antitrust Issues", cit., at 248.

[602] Ibid., cit., at 43.

[603] Ibid., at 170.

[604] Competition Commission, *Merger References: Competition Commission Guidelines* (June 2003), <http://www.competition-commission.org.uk/rep_pub/rules_and_guide/pdf/cc2.pdf> accessed 9 July 2011, paras 4.9 and 4.24.

[605] Report under Section 125(4) of the Fair Trading Act 1973 of the Director General's advice to the Secretary of State for Trade and Industry under Section 76 of the Act, 2 November 2000: "The Completed Acquisition by Microsoft Corporation of 23.6 per cent interest in Telewest Communication plc".

[606] OFT Press Release 01/11 "Ryanair Minority Stake in Aer Lingus: OFT believes it is "In Time" to Consider Acquisition", 4 January 2011.

[607] Enterprise Act 2002, Sections 22 and 35 for completed mergers and Sections 33 and 36 for anticipated mergers.

BSkyB acquired a 17.9% ownership stake in ITV, a rival firm. The CC determined that the material influence that BSkyB could exercise over ITV, blocking or influencing its strategic moves, given historic ITV shareholders' attendance levels and voting patterns, would substantially lessen competition in the market

BSkyB's position as the largest shareholder and importance as an industry player were considered to give additional weight to its views, increasing its ability to influence other shareholders.[608]

The unilateral effects were, instead, excluded on the basis of the relatively low level of BSkyB's shareholding. The recoupment of the sales lost to ITV, in case of an increase in prices, has been considered small and – by way of dividends or share price appreciation – indirect and uncertain.[609]

Nevertheless the OFT, on the basis of the potential coordinated effects, submitted to the CC that its preferred remedy would be complete divestiture (or alternatively divestment to a de minimis cap, proposed at 3%). The CC agreed that total divestiture would be an effective remedy, but concluded that equally effective and more proportionate would be a divestiture down to a level of below 7.5%. At this level, it concluded, there would be no realistic prospect of BSkyB being able to exercise material influence in relation to ITV's strategy and that "ITV would therefore be able to design and implement its strategy unfettered by a competitor."[610] The CC observed that "if BSkyB did in fact obtain board representation, this might give rise to concerns regarding BSkyB's influence over ITV" and therefore recommended that "BSkyB should give undertakings that it will neither seek nor accept board representation."[611]

4.5. United States of America

This chapter analyzes the last key antitrust system, the American one. This system differs substantially from the European ones for what concerns the treatment of minority shareholdings and interlocking directorships. Indeed it can be applied in a more flexible way, capable of addressing most, if not all, the anticompetitive effects arising from the acquisition of a non controlling stake in a competitor. In the United States the competitive effects of mergers and acquisitions are governed mainly by Section 7 of the Clayton Act.[612] This section establishes that: "no person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the

[608] Fountoukakos, "Minority", cit., at 2.

[609] OECD, "Antitrust Issues", cit., at 168.

[610] Competition Commission, *Acquisition by British Sky Broadcasting Group plc of 17.9 per cent of the shares in ITV plc*, para. 47.

[611] Ibid., para. 6.58.

[612] 15 U.S.C. Section 18.

country, the effect of such acquisition may be substantially to lessen competition or to tend to create a monopoly."[613]

Preliminarily it is very important to note that the jurisdiction provided by Section 7 of the Clayton Act is not completely unrestrained. Indeed this section does not apply in case the acquisition is "solely for investment."[614]

The acquisition of a minority shareholding may be challenged also as an unreasonable restraint of trade or as a monopolization or attempted monopolization under Sections 1 and 2 of the Sherman Act.[615]

Section 1 of the Sherman Act prohibits contracts, combinations, or conspiracies in restraint of trade.[616] Unlike Section 7 of the Clayton Act, the Sherman Act is not an incipiency statute prohibiting likely or probable conduct in the future. A plaintiff challenging an acquisition under Section 1 carries the burden of proving an actual anticompetitive effect through a restraint of trade, as well as a concerted action.[617] Plaintiffs often include Section 1 claims in their complaints,[618] but the only decision focusing on Section 1 regarding the acquisition of minority shareholdings is *Texas Gulf, Inc. v. Canada Dev. Corp*. In this case the Court rejected the claim of anticompetitiveness with regards to a tender offer of 35% of the stock of the claimant, based on lack of actual anticompetitive effects.

The acquisition of a minority shareholding may be challenged by the Federal Trade Commission (FTC) also as a violation of Section 5 of the Federal Trade Commission Act (FTC Act) which prohibits "unfair methods of competition."[619]

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[613] This text is the result of the 1950 and 1980 amendments to the original 1914 language. It is interesting to note that the substantive test (substantial lessening of competition, "SLC") is the same provided for in the UK merger control system. The two systems differ however with regards to the notification requirements (voluntary under the UK regime, mandatory under the Hart–Scott–Rodino Act) and the jurisdiction test (shareholdings giving rise to "material influence" under the Enterprise Act 2002, "any part" of the stock, not acquired "solely for investment", under Section 7 of the Clayton Act).

[614] For the definition of this exemption see below.

[615] 15 U.S.C. Sections 1, 2. Acquisitions subject to Section 1 are prohibited if they constitute a "contract, combination... or conspiracy in restraint of trade". Section 2 prohibits any acquisition that monopolizes or attempts to monopolize a particular market.

[616] 15 U.S.C. Section 1: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal". See also *U.S. v. First Nat'l Bank* ("Where, as here, merging companies are major competitive factors in a relevant market, the elimination of significant competition between them, by merger or consolidation, itself constitutes a violation of Section 1 of the Sherman Act").

[617] *Texas Gulf, Inc. v. Canada Dev. Corp*., 366 F. Supp. 374, at 406–07 & n.49 (SD Tex. 1973). See O'Brien, "Competitive", cit., at 565.

[618] See, e.g., the U.S. *Gillette* case below.

[619] 15 U.S.C. Section 45. *In FTC v. Brown Shoe Co*., 384 U.S. 316 (1966), at 321, the Supreme Court declared that the FTC's power under Section 5 was a "broad power...[that] is particularly well established with regard to trade practices which conflict with the basic policies of the Sherman and Clayton Acts even though such practices may not actually violate these laws".

In the American system, two agencies are competent in addressing competition concerns, the DOJ under Section 15 of the Clayton Act, the FTC under Section 13 (b) of the Federal Trade Commission Act. This concurrent jurisdiction may lead similar cases to be decided in different ways.

Interlocking directorates are instead governed specifically by Section 8 of the Clayton Act[620] which prohibits a person from serving as a director or a board-elected or board-appointed officer of two competing nonbanking corporations whose size and amount of competing revenues exceed certain statutory thresholds.

4.5.1. Clayton Act Section 7

Under the US antitrust laws, the control of partial stock acquisitions is carried out under Section 7 of the Clayton Act. Section 7 applies to acquisitions of "any part" of the stock of a company, regardless of the possibility to exercise control.[621] Share acquisitions are prohibited whenever their effect may be "substantially to lessen competition". The mere existence of links, or the mere acquisition of an ownership interest, does not mean there has been a substantial lessening of competition. In some of the decisions dealing with partial acquisitions, the Courts found an infringement of Section 7 in case the acquiring company had sufficient holdings to obtain representation on the board of directors, and thereby influence the acquired company,[622] or it was interested in gaining control eventually.[623] These acquisitions have generally been of at least 15% of the outstanding stock.[624]

The agencies acknowledged however that, even in the absence of any possibility to influence the target, competition may be lessened by the acquisition of a minority shareholding, due to the reduction of the unilateral incentive of the acquiring firm to compete with the firm in which it holds an economic interest. For example, in *United States v. Dairy Farmers of America*,[625] the Sixth Circuit held that "even without control or influence, an acquisition may still lessen competition" in violation of the Clayton Act.

By its express terms, Section 7 applies to all those transactions whereby a person engaged in an economic activity acquires, directly or indirectly, the whole or any part of the stock or shares of another person also engaged in an economic activity. The

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[620] 15 U.S.C. Section 19.

[621] *United States v. E.I. duPont de Nemours & Co.*, 353 U.S. 586, at 592 (1957) ("any acquisition by one corporation of all or any part of the stock of another corporation... is within the reach" of Section 7); *Crane Co. v. Harsco Corp.*, 509 F. Supp. 115, at 122 (D. Del. 1981) ("Section 7 prohibits acquisition by one corporation of part or all of another corporation's stock, 'where... the effect of such acquisition may be substantially to lessen competition".) (citation omitted). In *Denver & Rio Grande Western Railroad v. United States*, 387 U.S. 485, at 501 (1967), the Supreme Court held that "[a] company need not [to] acquire control of another company in order to violate the Clayton Act". The Second Circuit similarly stated that it is "not aware of any decision that requires numerical control in order to establish an antitrust violation".

[622] See, e.g., *Hamilton Watch Co. v. Benrus Watch Co.*, 114 F. Supp. 307, at 317 (D. Conn.), aff'd, 206 F.2d 738 (2d Cir. 1953).

[623] See, e.g., *Gulf & W. Indus. v. Great Atl. & Pac. Tea Co.*, 476 F.2d 687, at 694 (2d Cir. 1973).

[624] See, e.g., *Denver & Rio Grande Western Railroad v. U.S.*, at 504 (20% interest); *U.S. v. duPont*, at 588 (23% interest); *F. & M. Schaefer Corp. v. C. Schmidt & Sons, Inc.*, 597 F.2d 814 (2d Cir. 1979) (notes convertible into 29% of the outstanding stock); *Crane Co. v. Harsco Corp.*, at 123 (5% interest and a proposed tender offer for an additional 15%); *Metro-Goldwyn-Mayer, Inc. v. Transamerica Corp.*, 303 F. Supp. 1344, at 1354 (S.D.N.Y. 1969) (slightly less than 17% interest).

[625] *U.S. v. Dairy Farmers of America, Inc.*, 426 F.3d 850, at 860 (6th Cir. 25 Oct. 2005).

wording of the provision makes clear that Section 7 is applicable to minority shareholdings, regardless of the way these acquisitions come about.[626] This permits it to be applied also in case the acquisition is not the result of an agreement between the acquiring and the acquired company or it does not result in the acquisition of control. The lack of both the requirements of a change in "control", necessary to apply the EUMR, and of an "agreement or concerted practice", required by Article 101 TFEU, ensures the applicability of Section 7 of the Clayton Act to virtually all the acquisitions of minority shareholdings having anticompetitive effects (the only exception being the shareholdings falling within the "solely for investment" exemption). The substantive test identifies the minority shareholdings prohibited as the ones whose effect "may be substantially to lessen competition".

The merger analysis has evolved from a formalistic, structural approach, based on the degree to which the acquisition would have increased concentration, to an assessment of its actual or potential anticompetitive effects.

The 2010 Horizontal Merger Guidelines states: "the Agencies consider any reasonably available and reliable evidence to address the central question of whether a merger may substantially lessen competition."[627] The Agencies go on listing several categories of evidence considered to be the "most informative in predicting the likely competitive effects of mergers."[628]

The first type of evidence is provided in paragraph 2.1.1. with regards to consummated mergers. In this case both the actual effects and the likely future effects have to be taken into account. In case the anticompetitive effects are already observable they "can be dispositive".

A second type of evidence is represented by the "direct comparison based on experience". The Agencies in order to assess the likely impact of a merger, may analyze the impact of historical events in the same or similar markets, considered informative of the competitive effects of the merger. They may also compare the competitiveness of the markets in which the merged firm competes with the one of analogous markets in which it does not operate.

Market shares, level of concentration and changes caused by the merger are considered as well by the Agencies. It is nonetheless important to note how this formalistic approach is not the first nor the most important for the authorities when assessing the anticompetitive effects of a merger. It is even expressly provided that the presumption of an enhancement of market power deriving from a significant increase in concentration can be rebutted by "persuasive evidence showing that the merger is unlikely to enhance market power."[629]

The importance of the involvement of the maverick firm is acknowledged in paragraph 2.1.5. The elimination of a firm "that plays a disruptive role in the market to the benefit of customers [...] can involve the loss of actual or potential competition".

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[626] Caronna, "Article 81", cit., at 7.

[627] DOJ and FTC, "Guidelines on the Assessment of Horizontal Mergers", at 2.

[628] Ibid., at 2–4.

[629] Ibid. at 3.

When the agencies are analyzing an acquisition, to assess whether its effect is "substantially to lessen competition", they will specifically consider if it renders the marketplace more prone to collusion and if it changes the unilateral incentives of the acquiring firm to raise prices or otherwise exercise market power. This is explained in paragraph 6 and 7 of the Guidelines.[630] In paragraph 13[631] the Agencies specifically acknowledge the effects of the acquisition of minority shareholdings on competition, dividing them into three main categories.

First, competition may be "lessened" in case the shareholding gives the acquirer the ability to influence the target's competitive conduct. This permits the acquiring firm to induce the target to compete less vigorously or coordinate its conduct with the one of the acquirer. In this category are the active minority shareholdings, i.e. the ones entailing voting or governance rights.

Second, a partial acquisition may lessen competition by reducing the incentive of the acquiring firm to compete. This is the unilateral effect, present both in case of active and passive investments, which causes the acquiring firm not to "compete aggressively because it shares in the losses thereby inflicted on that rival."[632] This unilateral effect is acknowledged to be qualitatively similar to the one of a full merger, but quantitatively attenuated.

The third anticompetitive effect of minority shareholdings arises from the possibility to access non-public, competitively sensitive information of the target firm. This "enhance[s] the ability of the two firms to coordinate their behavior. […] The risk of coordinated effects is greater if the transaction also facilitates the flow of competitively sensitive information from the acquiring firm to the target firm."[633]

The Agencies' guidelines state specifically that a case by case analysis is necessary in order to assess the likelihood of harm to competition of a share acquisition.[634] Furthermore, even though they acknowledge that minority shareholdings usually do not entail many of the efficiencies associated with mergers, the scrutiny of a minority share acquisition will obviously regard also the likelihood of creation of any cognizable efficiency.

The effects of a minority share acquisition have to be analyzed in light of the incipiency doctrine. Section 7 of the Clayton Act is intended to stop one company from purchasing all or part of a competitor's stock or assets where the acquisition's effect may be substantially to lessen competition. On the basis of the incipiency doctrine, Section 7 "was designed to cope with monopolistic tendencies in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding."[635] The DOJ and the FTC must show with reasonable probability only that an anticom-

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[630] Ibid., at 20–27.

[631] Ibid., at 33–34.

[632] Ibid., at 34.

[633] Ibid., at 34.

[634] "Partial acquisitions, like mergers, 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". Ibid., at 34.

[635] *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 124 (1986).

petitive effect "may" occur, not that it already has nor that it certainly will occur.[636] As stated in Procter and Gamble, "[Section 7 of the Clayton Act] can deal only with probabilities, not with certainties."[637]

Also the Horizontal Merger Guidelines acknowledge the incipiency standard for the application of Section 7. It can be read that "these Guidelines reflect the congressional intent that merger enforcement should interdict competitive problems in their incipiency and that certainty about anticompetitive effect is seldom possible and not required for a merger to be illegal."[638] "Pursuant to the Clayton Act's incipiency standard, the Agencies may challenge mergers that in their judgment pose a real danger of harm through coordinated effects, even without specific evidence showing precisely how the coordination likely would take place."[639]

The potential effects of a particular transaction are usually determined at the time it occurs, but they may be determined also at the time of the suit challenging it. As the Court stated in *United States v. E.I. DuPont de Nemours & Co.*,[640] the legality of an acquisition under Section 7 can be determined at "any time when the acquisition threatens to ripen into a prohibited effect."[641] In DuPont, the suit was brought approximately 30 years after the acquisition by DuPont of a stake in General Motors. The Court held that "the Government may proceed at any time that an acquisition may be said with reasonable probability to contain a threat that it may lead to a restraint of commerce or tend to create a monopoly of a line of commerce."[642]

4.5.2. The Hart–Scott–Rodino Premerger Notification Act

Section 7 pre-merger notification process is regulated by Section 7(a),[643] the Hart–Scott–Rodino Act,[644] allowing the Department of Justice (DOJ) and the Federal Trade Commission (FTC) to be informed of any share acquisition subject to mandatory prior notification.

This Act generally requires that any acquisition of voting securities that meets the thresholds (adjusted for inflation) must be reported, by the acquiring and acquired

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[636] E.g., *FTC v. Procter & Gamble Co.*, 386 U.S. 568, at 577 (1967); *U.S. v. du Pont de Nemours* at 589 and 597–98; *Hosp. Corp. of Am. v. Fed. Trade Comm'n*, 807 F.2d 1381, at 1389 (7th Cir.1986) ("All that is necessary is that the merger create an appreciable danger of [higher prices] in the future. A predictive judgment, necessarily probabilistic and judgmental rather than demonstrable […] is called for").

[637] *FTC v. Procter & Gamble*, at 577. ("[Section 7 of the Clayton Act] can deal only with probabilities, not with certainties. And there is certainly no requirement that the anticompetitive power manifest itself in anticompetitive action before [section] 7 can be called into play. If enforcement of [section] 7 turned on the existence of actual anticompetitive practices, the congressional policy of thwarting such practices in their incipiency would be frustrated")(citations omitted).

[638] DOJ and FTC, "Guidelines on the Assessment of Horizontal Mergers", at 1.

[639] DOJ and FTC, "Guidelines on the Assessment of Horizontal Mergers", at 25.

[640] *U.S. v. du Pont.*

[641] Ibid., at 352.

[642] Ibid., at 352.

[643] 15 U.S.C. Section 18a.

[644] Hart–Scott–Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94–435, Section 201, 90 Stat. 1390 (codified as amended at 15 U.S.C. Section 18a).

parties, to the antitrust agencies – and a waiting period must be observed – prior to consummation. The notice and the waiting period give the FTC and the DOJ the opportunity to review the proposed transaction for potential anticompetitive effects, prior to its consummation.

While the Clayton Act applies to acquisitions of any part of the "stock" of another company, the HSR Act applies more narrowly to acquisitions of "voting securities." The Act defines voting securities as any security entitling the holder to vote for the election of directors.[645] The agencies' enforcement powers, however, extend to any transaction within the scope of Section 7, and the agencies have challenged transactions not requiring notification.[646]

Section (c)(9) of the HSR Act exempts from mandatory notification any acquisition of 10% or less of an issuer's outstanding voting securities if such acquisition is made "solely for the purpose of investment". HSR Rule 801.1(i)(1) provides that voting securities are acquired "solely for the purpose of investment" if the acquirer "has no intention of participating in the formulation, determination or direction of the basic business decisions of the issuer."[647]

The FTC's Statement of Basis and Purpose for the Hart–Scott–Rodino Regulations, provides six enumerated factors that could be considered inconsistent with the investment-only purpose. Between these factors are the typical characteristics of an active non controlling shareholding, but also the fact that the acquirer is "a competitor of the issuer."[648]

4.5.3. The 'Solely For Investment' Exemption

Section 7 includes an exemption for stock purchased "solely for investment".

According to the statutory language, Section 7 of the Clayton Act "shall not apply to persons purchasing such stock [1] solely for investment and [2] not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition".

The Courts have read this "solely for investment" exemption as a two pronged test.[649] The first prong consists of a demonstration by the defendant that it made the stock acquisition solely for "investment."[650] If the first prong is satisfied, and it is de-

[645] The HSR regulations exempt acquisitions of convertible voting securities, but require reporting in advance of the conversion (§Section 801.32 & 802.31).

[646] This may have been because the acquisition was not of voting securities, was exempted by the 10% (or 15%) "solely for investment" exemption (or other exemption) or was below the "in commerce", "size of the parties" or "size of the transaction" threshold.

[647] Rule 802.64 (16 CFR 802.64) exempts certain acquisitions of 15% or less of an issuer's voting securities by institutional investors, such as banks, insurance companies and investment companies, "made solely for the purpose of investment". The acquisition must be made directly by an institutional investor, in the ordinary course of its business, solely for the purposes of investment.

[648] FTC Statement of Basis and Purpose, at 33465, n.5.

[649] *United States v. Tracinda Inv. Corp.*, 477 F. Supp. 1093, 1098 (CD Cal. 1979); *Anaconda Co. v. Crane Co.*, 411 F. Supp. 1210,1219 (S.D.N.Y. 1975). See Gilo, "The Anticompetitive", cit., at 29–33.

[650] The term "investment" is undefined. The interpretation of this ambiguous term is the main issue with regards to the enforcement of Section 7 in case of minority share acquisitions.

termined that the acquisition was made "solely for investment," the acquisition will not be examined according to the main effects clause of section 7 of the Clayton Act (which asks whether the acquisition "may substantially lessen competition"). Instead, it will be examined according to the second prong. As the Anaconda Court put it: "In cases where the "solely for investment" exemption does not apply, a plaintiff need only to show a reasonable probability of a lessening of competition [...] Thus, the anticompetitive effects may be attacked in their incipiency. The statutory exemption, however, conspicuously omits this language. Once it is established to the satisfaction of the Court that the acquisition is "solely for investment," the statute requires a showing that the defendant is "using the [stock] by voting or otherwise to bring about or in attempting to bring about, the substantial lessening of competition."[651]

Although the meaning of the second prong is vague it is nonetheless clear that it involves a more lenient test, from the defendant's perspective, than section 7 main-effects clause.[652] Otherwise, this exemption would be completely superfluous.[653]

> "In the substantive provisions of the first two paragraphs of Section 7, Congress showed concern for the probable future consequences of the acquisition by utilizing the language 'may be substantially to lessen competition'. On the other hand, with the investment exemption, Congress exhibited a concern for the past and present effect of the acquisition by utilizing the language 'and not using the same [...] to bring about [...] the substantial lessening of competition'."[654]

The second prong, therefore, deals only with actual effects and intentions, not with probabilities.

For what regards the first prong of the exemption, requiring a determination as to whether the acquisition is "solely for investment", in some cases it has been interpreted equaling its being "passive" (i.e., the acquirer of the stock does not gain influence over the actions of the firm in which the shareholding was acquired or access to the firm's sensitive information). In the *Gillette* case, for example, the Department of Justice decided not to attack Gillette's passive investment in Wilkinson Sword, implying that the investment, due to its passive nature, enjoys the "solely for investment" exemption.[655] Conversely, an acquisition of stock will not be considered "solely for investment" if the acquisition has the intent or confers the capacity to obtain active control or at least gain some influence over the actions of the firm in which the investment was made. In evaluating the intent to influence the behavior of the target, the

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[651] *Anaconda Co. v. Crane Co.*, at 1219. See also *United States v. Tracinda*. The Courts have observed that the present-tense language of the exemption ("to bring about") differs from the incipiency language of Section 7's general prohibition ("may be substantially to lessen competition"), and should therefore be read to require a factual determination of whether the stock ownership is being used to lessen competition. See O'Brien, "Competitive", cit., at 566.

[652] See *duPont*, at 589 and *Anaconda*, at 1219.

[653] The Court acknowledged this in *Tracinda*, at 1099 n.5.

[654] *Tracinda*, at 1102 n.10.

[655] *United States v. Gillette Co.*, at 28,322–23.

Courts have looked at direct evidence from the particular transaction,[656] the historical behavior of the acquiring company,[657] and the commercial circumstances surrounding the transaction.[658] With regards to the ability to influence the actions of the target firm, the Courts have considered representation rights, allowing the acquirer to appoint a member of the target's board,[659] and access to sensitive information regarding the activities of the target company.[660] Where direct influence over the operations of the acquired company are prevented by a consent order[661] or a shareholders' agreement,[662] the "solely for investment" defense may succeed.

Nonetheless this interpretation of the "solely for investment" exemption as excluding all passive investments from the full-blown examination provided by the main effects clause of section 7 (dealing with probabilities) thus leading to the constant application of the more lenient second prong test (dealing with actual effects or intentions).

Under the second prong test the only issues examined are the past and present effects (or attempted effects) of passive stock acquisitions ("bring about or attempt to bring about"), rather than the potential ones. Being the anticompetitive effects of passive shareholdings probabilistic in nature, and very difficult to detect or prove,[663] in practical terms, the constant application of this test to passive stock acquisitions would result in a de facto exemption from scrutiny.[664]

To best interpret the meaning of "solely for investment", it is fundamental to consider the Horizontal Merger Guidelines, redacted by the FTC and the DOJ in 2010. In paragraph 13, the second anticompetitive effect considered arising from the acquisition of a minority shareholding expressly acknowledges the potential lessening of competition caused by passive investments, i.e. not conferring any influence on the conduct of the target firm or access to competitively sensitive information.

As explained by the Guidelines "[A] partial acquisition can lessen competition by reducing the incentive of the acquiring firm to compete [...] aggressively because it

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[656] *duPont*, at 602.

[657] E.g., *Gulf & W. Indus*., at 696; *Texasgulf v. Canada Dev. Corp*., at 407.

[658] E.g., *Golden Grain Macaroni Co*. Among the more significant indicators that an acquisition is not solely for investment are excessive haste in purchases, payment of a substantial premium over the market price, and borrowing to finance the purchase. As cited in ABA, *Antitrust Law Developments*, cit, Chapter 3.

[659] *duPont*, at 592.

[660] *F. & M. Schaefer Corp. v. C. Schmidt & Sons, Inc.*, at 818.

[661] *Anaconda Co. v. Crane Co.* at 1216–19.

[662] *Tracinda*, at 1100.

[663] This is because the same unilateral effects potentially arising from minority share acquisitions might be caused by a multitude of other factors, such as variation in costs or demand trends. The same difficulty regards the coordinated effects, mainly because tacit collusion consists of a unilateral behavior not accompanied by any form of agreement between the parties.

[664] The anticompetitive effects of passive investment are similar to those of a full-blown merger. It was precisely the probabilistic nature of these effects that caused Courts to rule that section 7 of the Clayton Act "can deal only with probabilities, not with certainties"; *FTC v. Procter & Gamble Co*., at 577. See Gilo, "Passive", cit., at 1649.

shares in the losses thereby inflicted on that rival. This reduction in the incentive of the acquiring firm to compete arises even if cannot influence the conduct of the target firm".

In light of the Guidelines, it would be difficult to reconcile the acknowledgment of the potential anticompetitive effects of passive shareholdings and an interpretation of the solely for investment exemption de facto excluding these shareholdings from scrutiny. At the time of the acquisition the lessening of competition caused by a passive investment would not be actual nor the acquirer needs to attempt to bring about the lessening of competition in order for the anticompetitive effects to present themselves. In case the passive shareholding determines an actual lessening of competition after the acquisition, it would be extremely difficult to prove it since it would be based on unilateral behaviors (whose cause may be the most various). This means that, if the Agencies want to "focus" on the effects of both active and passive investments, as it is specified in the Guidelines, passive shareholdings cannot be considered "per se" purchased "solely for investment". Especially the ones acquired in a competitor, when the market is oligopolistic.

It is important to mention that some commentators[665] proposed to interpret the "solely for investment" exemption in light of the Hart–Scott–Rodino Act (HSR) and the implementing regulation adopted by the FTC.[666]

The Hart–Scott–Rodino Act includes indeed a provision exempting from the notification requirements shareholdings up to 10%, acquired "solely for the purpose of investment."[667] The HSR implementing regulation provides that acquisitions are made "solely for purposes of investment" when the acquirer has no intention of participating in the formulation, determination, or direction of the basic business decisions of the issuer.[668]

This interpretation seems to exclude passive investments as well, but the FTC's Statement of Basis and Purpose for the Hart–Scott–Rodino Regulations, provides six factors that could be considered inconsistent with the investment-only purpose. Between these factors is the fact that the acquirer is "a competitor of the issuer."[669] This excludes the possibility to consider the acquisition of a passive minority shareholding in a competitor consistent with the subjective intention to purchase it solely for the purpose of investment.

4.5.4. Section 7 Case Law

What remains to be seen is the interpretation given to Section 7 and to the solely for investment exemption by Courts and Agencies through the years.

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[665] E.g., O'Brien, "Competitive", cit., at 566–67.

[666] FTC Statement of Basis and Purpose for the Hart–Scott–Rodino Regulations, 43 Federal Register 33450, at 33465 (Fed. Trade Comm'n July 31, 1978).

[667] 15 U.S.C. Section 18a(c)(9); 16 C.F.R. Section 802.9.

[668] 16 C.F.R. Section 801(1)(i).

[669] FTC Statement of Basis and Purpose, at 33465, n.5.

4.5.4.1. *Golden Grain Macaroni*

In *Golden Grain Macaroni*,[670] the FTC charged Golden Grain with violating Section 5 of the Federal Trade Commission Act, claiming it attempted to monopolize and maintain a monopoly in the manufacture and sale of macaroni and other dry paste products acquiring interests in four other macaroni companies. The standard applied in this case was however more correspondent to Section 7 of the Clayton Act than Section 2 of the Sherman Act.

In finding that Golden Grain had violated Section 5, the FTC observed that: "Given the relationship of the firms involved here [(i.e., major competitors in an oligopolistically structured market)] and [Golden Grain's] percentage of ownership in Porter-Scarpelli [(49%)], the acquisition was bound to affect the operations of [Golden Grain] in a way that an acquisition made "solely" for investment would not. [Golden Grain] can reasonably be expected to hesitate in engaging in vigorous competition with Porter Scarpelli as it might jeopardize [its] investment. These facts make respondents more than just investors. In other words, when an acquisition will necessarily affect the competitive behavior of the two involved firms, it cannot be said that the sole purpose of the acquisition was for investment. Purpose cannot be divorced so completely from effect."[671]

This decision, 40 years old and mostly ignored by Courts and antitrust agencies, acknowledges that when a firm holds a minority shareholding in a competitor, in an oligopolistic market, it may be induced to compete less vigorously, thus qualifying the acquisition outside the "solely for investment" exemption. Nonetheless, the FTC did not explain the motivation driving the firms to compete less vigorously and the finding was partly founded on the consideration that Golden Grain could easily acquire control in the future, being its shareholding already substantial (49%).

4.5.4.2. *Anaconda v. Crane*

In the *Anaconda Co. v. Crane Co.* case,[672] Crane tried to acquire a 22.6% shareholding in Anaconda. In order to prevent it, Anaconda strategically created a horizontal overlap with Crane acquiring Walworth Co., a major competitor of Crane, thus becoming Crane's competitor itself.[673] Because of this, Crane was acquiring a shareholding in a rival firm, but it relied upon the investment-only exemption stipulating to the Court that it: (1) would not acquire more than 22.6% of the common stock of Anaconda; (2) would not seek representation on Anaconda's board; and (3) would comply with Section 7 exemption not voting its shares to bring about or attempting to bring about substantial lessening of competition.[674]

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[670] *Golden Grain Macaroni Co*., 78 F.T.C. 63 (1971), enforced as modified, 472 F.2d 882, 1973–1 Trade Cas. (CCH) P74300 (9th Cir. 1972).

[671] Ibid., at 172 (citations omitted).

[672] *Anaconda Co. v. Crane Co*., 411 F. Supp. 1210 (S.D.N.Y. 1975).

[673] Ibid., at 1217.

[674] Dubrow, "Challenging", cit., at 116–118.

On the basis of these stipulations, the Court analysis led to a finding of "investment intent" on Crane's part, thus excluding a possible reduction of competition and qualifying the transaction as falling within the investment-only exemption.

4.5.4.3. *Tracinda*

In the *Tracinda* case,[675] Tracinda's controlling shareholder and Tracinda itself controlled MGM with a 48% shareholding. The controlling shareholder held also a 5% stake in Columbia Picture, a competitor of MGM. When Tracinda announced an offer for a 19% stock in Columbia, the DOJ challenged the transaction.

The Court analyzed the proposed acquisition and determined that the investment-only exemption applied, rejecting the government's view that the partial ownership interest was reasonably likely to result in a substantial lessening of competition. The basis of this finding is mainly a shareholders' agreement preventing Tracinda's controlling shareholder to exercise control over Columbia and influence the composition of the board of directors.[676]

4.5.4.4. *Gillette*

The *Gillette* case,[677] already analyzed on the European point of view, has been reviewed also by the American agencies.

Stora sold its worldwide wet shaving business (operated under the Wilkinson Sword trademark) to Eemland. As part of the transaction, Gillette, leader in the wet shaving market, purchased 22.9% of the nonvoting stock and approximately 13.6% of the debt of Eemland and contracted to acquire from Eemland the Wilkinson Sword business outside of the European Union.

The Department of Justice (DOJ) challenged the transaction seeking the rescission of Gillette's acquisition of the non-European Union Wilkinson Sword business from Eemland. This was voluntarily rescinded, so that Eemland owned and operated the Wilkinson Sword business also in the United States.

The consent decree barred Gillette from acquiring any asset of Wilkinson Sword business in the United States without the DOJ's permission.[678] It also prohibited Gillette from using its shareholding in Eemland "to exert any influence over Eemland in the conduct of Eemland's wet shaving razor blade business",[679] it prohibited Gillette and Eemland from agreeing or communicating as to future prices or other competitive variables for razor blades sold in the United States,[680] it prohibited Gillette from acquiring any additional interest in Eemland[681] and required Gillette to provide Eemland

[675] *United States v. Tracinda Inv. Corp.*, 477 F. Supp. 1093 (CD Cal. 1979).

[676] Dubrow, "Challenging", cit., at 116, 118.

[677] *United States v. Gillette Co.,* 55 Fed. Reg. 28,312 (1990). The facts come from the DOJ's response to comments in the Tunney Act proceeding approving the consent decree.

[678] *United States v. Gillette Co*., 1990–2 Trade Cas. (CCH) 69142 (D.D.C.. 1990) (consent decree). For an analysis see Gilo, "Passive", cit., at 1649–1650.

[679] Ibid., at 64,275 (para. VI.2).

[680] Ibid., (para. VI.1).

[681] Ibid., at 64,273 (para. IV.1), 64,274 (para. V.1).

a proxy to all Gillette votes in the exact proportion as the votes cast by other Eemland securities holders.[682]

The consent decree, however, did not require Gillette to divest its existing minority interest in Eemland since "both Gillette and Eemland professed that Gillette's investment in Eemland was passive and since both companies were willing to agree to substantial limitations on Gillette's investment to ensure that passivity."[683]

Nonetheless, all the requirements for probable anticompetitive effects arising from the acquisition of a passive shareholding were present: a large stake was acquired, the industry included only few firms, and the parties to the transaction were the industry leader and one of its largest competitors. The transaction would have therefore needed an in-depth investigation that the DOJ failed to carry out.[684]

4.5.4.5. *Time Warner/Turner*

As a result of the merger between Time Warner and Turner,[685] TCI, one of Time Warner's competitors, would have traded its approximately 24% interest in Turner to obtain approximately 9% (with the possibility to increase it to 18%) of the outstanding voting securities of Time Warner.[686]

The FTC contended that this shareholding would permit TCI to influence Time Warner's competitive decisions and would also affect TCI's own competitive behavior. The FTC apparently felt that TCI's financial interest in Time Warner would reduce the incentives of the two firms to compete vigorously in the market for cable programming.

It is important to point out that the actual competitors were the subsidiaries, and, in the case of TCI's, it held a controlling shareholding of less than 100%. As explained above, in case it is the controlling shareholder to invest in a competitor, the anticompetitive effects may be exacerbated by the dilution of the controlling shareholding, thus placing more weight on the minority shareholding in the competitor.

The FTC was also concerned that TCI's ownership interest in Time Warner could facilitate coordinated vertical foreclosure by the two firms. The passive investment may indeed cause TCI to refrain from entering a new market in which Time Warner had a strong position since this would lower the value of its shareholding.[687]

The FTC asserted that "TCI, as a significant shareholder of Time Warner, will have significant financial incentives to protect all of Time Warner's Cable Television Programming Services."[688]

The case was settled by a consent order limiting TCI ownership stake in Time Warner.[689] As a result of the consent decree, TCI's ownership interest in Time Warner,

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682 Ibid., at 64,275 (para. VI.3).
683 United States Response, 55 Fed. Reg. at 28,322.
684 Gilo, "Passive", cit., at 1649, 1650.
685 *Time Warner, Inc.*, FTC Docket No. C-3709 (D.D.C. filed 3 Feb. 1997).
686 Besen, "Vertical", cit.
687 Gilo, "The Anticompetitive", cit., at 34,35.
688 *Time Warner, Inc.*, Complaint at 7.
689 *Time Warner Inc.*, 61 Fed. Reg. 5,0301 (25 Sept. 1996).

including the interests of TCI's major shareholders, was capped at approximately 9% of the fully diluted nonvoting shares. By limiting the number of additional shares that TCI could acquire, the FTC sought to ensure that TCI's financial interest in Time Warner remained too small to affect its incentives and ability to significantly influence Time Warner's behavior after the merger.[690]

> "Thus, although the transaction would give TCI a significant ownership position in Time Warner, TCI would have no control, or even influence, over the competitive decisions of Time Warner because of the way in which the merger was structured. Of course, Time Warner would have no ownership interest in, or ability to control, TCI."[691]

The passivity of the investment however does not exclude, as explained above, the unilateral effects on TCI's incentives in case TCI decides to dilute its controlling stake in the subsidiaries competing with Time Warner.

4.5.4.6. *US West/Continental*

In the US West acquisition of Continental,[692] the latter owned a 20% equity stake in TCG, US West competitor, had the right to appoint two directors and had access to competitively sensitive business information. By the time the consent order was issued, Continental's ownership interest in TCG had declined to 11% and it had relinquished both of its board seats. The consent order required US West to divest its entire interest in TCG over a two-year period in which it had to treat the investment as passive and was thus prohibited from appointing board members, participating in TCG's board meetings or otherwise gaining access to TCG's sensitive business information. In this case the DOJ's view, reflected in the divestiture requirement, was that the mere existence of a passive minority interest violated Section 7.[693]

In its competitive impact statement supporting its application for the consent decree, the DOJ stated: "US West's competitive strategy, including its pricing and output decisions, will be influenced by its partial ownership of a significant direct competitor. Because of its partial ownership of TCG, losses of customers to TCG would not be as detrimental to US West, and it would have less incentive to lower prices or increase quality to meet with the emerging competition from CAPs [competitive access providers] in these areas."[694]

The DOJ expressed two distinct concerns on how the minority shareholding in TCG could be anticompetitive. First, US West would have the incentive to act anticompetitively (e.g., raising its prices), given that it could recapture at least some of the

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[690] Besen, "Vertical", cit., at 468.

[691] Ibid., at 464. He also realizes an analysis of the possible effects on the market, on the basis of the MHH Index.

[692] *United States v. U S West, Inc.*, Vol. 61 No. 223, Fed. Reg. 58,703 (18 Nov. 1996).

[693] Dubrow, "Challenging", cit., at 120.

[694] *United States v. U S West, Inc.*, at 58708.

sales lost to TCG through its minority stake. Second, US West could obtain TCG proprietary information. However, the DOJ did not consider the possibility to use the minority investment as a commitment by US West to behave less aggressively, thus encouraging its competitors to do the same.

4.5.4.7. *Medtronic/Physio-Control*

The FTC neglected the anticompetitive effects of passive investments in the acquisition by Medtronic, Inc. of Physio-Control International Corporation.[695] Medtronic had an ownership interest slightly below 10% in SurVivaLink, one of Physio's only two competitors. The FTC explained it was an extremely concentrated market, with very high barriers to entry and prone to collusive behaviors. It nonetheless agreed to a consent decree allowing the merger, provided that Medtronic's stake in SurVivaLink becomes completely passive[696] by delegating its voting rights and agreeing not to nominate members of the board, participate in business decisions or obtain confidential information from SurVivaLink.

After the merger, Medtronic will be the controlling shareholder of Physio and will hold a 10% stake in SurVivaLink, making it a passive investment by the controlling shareholder. Medtronic could dilute its stake in Physio in order to place more weight on the passive investment, thus exacerbating the anticompetitive effects even without an increase of the stake in SurVivaLink. The FTC should have at least established, in the consent decree, any dilution of Medtronic's stake in Physio to be subject to prior notification.[697]

4.5.4.8. *AT&T/TCI*

In *AT&T/TCI*[698] the DOJ addressed the anticompetitive effects of a passive investment, deciding for its complete divestiture.

TCI owned approximately 24% of Sprint, a close competitor of AT&T.

The DOJ's theory of competitive harm was based on the fear that, after the merger with TCI, AT&T would have had the unilateral incentive, even without any control of Sprint or information flow between AT&T and Sprint, to alter its competitive behavior in a manner that would reduce competition, to the detriment of consumers.

The settlement consisted in the handling by a trustee of the passive investment in Sprint which had to be reduced to 10% in three years and completely divested in five.

The Competitive Impact Statement closely tracks the results of the economic theory.

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[695] *Medtronic, Inc*. Docket No. C-3879 (issued June 3, 1999), File No. 981–0324.

[696] *Medtronic, Inc*.; Analysis of Proposed Consent Order to Aid Public Comment, Federal Register/ Vol. 63 No. 194 (7 October 1998), at 53, 920 ("The proposed Consent Order remedies the acquisition's anticompetitive effects in the market for automated external defibrillators by making Medtronic a passive investor in SurVivaLink […]").

[697] While the FTC demanded prior notification of any increase in Medtronic's stake in SurVivaLink, it did not demand similar notification with regards to the dilution of Medtronic's stake in Physio. See Gilo, "The Anticompetitive", cit., at 35–37.

[698] *United States v. AT&T Corp*., D.D.C. No. 98–3170 (proposed consent decree filed 30 Dec1998).

> "The proposed merger may affect the incentives that govern AT&T's competitive behavior (relating to either pricing or service quality) in these markets. When a firm makes pricing decisions (or decisions on potential investments to improve service quality) it weighs two effects that its decision may produce. A higher price (or reduced investment in service quality) will generate greater revenues from those customers who continue to purchase services from the firm. But a higher price (or reduced service quality) also is likely to cause some portion of current or potential new customers to purchase services from a competitor, thereby reducing the firm's revenues. Weighing these two countervailing factors, firms attempt to choose the price (or service quality) level that will maximize their profits.
>
> A firm that acquires a full or partial equity interest in a competitor – as AT&T proposes to do here – will face a different calculation of its profit-maximizing price (or service quality) after such an acquisition. After the acquisition, some portion of the customers who would turn to a competitor in response to a price increase (or decline in service quality) would likely purchase services from the firm being acquired; thus, the revenue generated by those customers' purchases will continue to be earned indirectly (through the competitor that has been acquired) by the firm raising its price (or lowering its service quality). Thus an acquisition can cause an individual firm, acting unilaterally, to raise its price more than it would have otherwise (or invest less in service quality than it would have otherwise) because its profit-maximizing price will be higher (or service quality lower) as a result of the acquisition. These adverse effects are greater to the extent that the service offered by the acquired firm is a particularly close substitute for the service offered by the acquiring firm. Under those conditions, a larger share of the customers who switch service providers as a result of a price increase (or reduction in quality) will switch to the acquired firm."[699]

4.5.4.9. *AT&T/MediaOne*

The same conclusion has been reached one year later in the merger between AT&T and MediaOne.[700]

AT&T held a majority of the voting securities and controlled the management of Excite@Home, competitor of Road Runner, in whose parent MediaOne held 34% of the stock. The DOJ alleged that AT&T's control over Excite@Home and access to competitively sensitive information of Road Runner "could facilitate collusion and coordination between Excite@Home and Road Runner in ways that would result in a substantial lessening of competition."[701]

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[699] Competitive Impact Statement, *United States v. AT&T Corp. and Tele-Communications, Inc.*, 64 Fed, Reg. 2506, 2511 (1999) (citations omitted).

[700] *United States v. AT&T Corp.*, Civil No. 00-CV-1176 (D.D.C. filed 25 May, 2000).

[701] Ibid. at 7.

As a result, the settlement agreement provided for the complete divestiture of AT&T's post-merger acquired interest in Road Runner and limitations to its participation in the management and in the flow of information during the period of divestment.

4.5.4.10. *Univision/HBC*

In June 2002, Univision proposed to acquire HBC, competitor of Entravision, in which Univision held a 30% equity interest, the right to veto strategic business decisions and the right to appoint two representatives in the board of directors.

The DOJ expressed concerns that after the transaction, a combined Univision-HBC would have the unilateral incentive to raise HBC's prices due to the likely diversion of customers from HBC to Entravision.

Univision agreed to reduce its ownership interest in Entravision from 30 to 10% over the course of six years. Univision also agreed to relinquish its right to place directors on Entravision's board and eliminate certain rights it had to veto actions taken by Entravision.[702] Under these conditions the DOJ allowed the merger.

4.5.4.11. *Dairy Farmers of America*

The unilateral effects theory was one of the primary concerns in *United States v. Dairy Farmers of America*.[703]

Dairy Farmers of America (DFA) held a 50% stake in National Dairy Holding (NDH)[704] and acquired 50% of the voting stock of NDH's biggest competitor, the Southern Belle Dairy. For many school districts, Southern Belle and NDH were the only two school milk competitors. For others, only one other dairy competed.

The acquisition created no efficiencies; DFA even argued that the two dairies would have been operated independently. The antitrust concern regarded the possibility for a greater coordination and unilateral anticompetitive incentives.

DFA's 50% interest in each dairy's profits gave it a strong unilateral incentive to reduce competition and increase prices, irrespective of coordination between the dairies since it would not matter to DFA if customers of either dairy switched to the other dairy in response to a price increase.[705]

The DOJ alleged that DFA's partial acquisition of the Southern Belle dairy gave it both the economic incentive and the ability to reduce competition between the dairies, the only two competitors for a significant number of customers, while yielded no efficiencies to outweigh the likely competitive harm.

In the course of the litigation, the parties restructured DFA's ownership interest in Southern Belle, to a completely passive shareholding, entailing no voting nor representation rights that might confer some kind of influence over the target.

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[702] *United States of America v. Univision Communications Inc. and Hispanic Broadcasting Corporation*, Civil Action No. 1:03CV00758, Final Judgment, filed 3/26/03, at pp. 4–5.

[703] *United States v. Dairy Farmers of Am., Inc.*, 426 F.3d 850 (6th Cir. 2005), No. Civ.A. 03–206KSF, 2004 WL 2186215 (ED Ky. 2004).

[704] The other 50% equity stake was held by the Allen Family Limited Partnership (AFLP), a long-time business partner of DFA that maintained the day-to-day responsibilities for operating NDH.

[705] OECD, "Antitrust Issues", cit., at 177–179.

The DOJ argued that "[by] giving the [DFA, National Dairy and Southern Belle] plenty of legitimate reasons to talk to one another, greater incentives for cooperating, and grounds for trusting each other more than independent firms in the marketplace", the partial acquisition made it easier for the firms involved to substantially lessen competition "either through tacit means or otherwise."[706]

The DOJ argued that the fact that DFA's could not exercise any influence was irrelevant, because it failed to negate a reasonable probability of anticompetitive harm, both in term of unilateral and coordinated effects, as all three companies had an incentive to reduce competition. The DOJ's argument relied on the so-called "incipiency" doctrine and observed that the market was especially concentrated and there had been a history of collusion between the two competing diaries in the form of bid rigging.[707] The DOJ continued therefore to challenge the acquisition seeking a declaration that DFA's acquisition of the nonvoting stake in Southern Belle violated Section 7 of the Clayton Act.

The District Court considered the theories in light of the amended partial acquisition agreement that removed DFA's ability to control Southern Belle. It found that the partial acquisition did not "increase the percentage of the market that DFA "controls" or even enhance DFA's ability to influence the market because DFA's non-voting interest in Southern Belle does not give it any control over the business decisions made by Southern Belle"[708] and that the anticompetitive effects are "less likely when the company who has acquired stock in both subject companies does not have the ability to be at all involved in the decision-making that forms the basis of the alleged anticompetitive effects."[709]

The District Court reasoned that, without operational control, the DOJ's theoretical incentives argument did not hold and denied the DOJ's unilateral effects theory, reasoning that "there must be some mechanism by which the alleged adverse effects in the sale of milk are likely to be brought about by DFA's acquisition of a non-operational interest in Southern Belle"[710] because "[e]very investor, however small, has an incentive to achieve higher profits and perhaps even to communicate with management on these issues … [b]ut this obvious point does not establish the probability of anticompetitive effects that would render the investment illegal under section 7."[711]

In the case at stake, DFA's 50% voting stake in NDH, although the day to day management was conducted independently, could have permitted it to remove the

[706] *United States v. Dairy Farmers of Am.*, at 6.

[707] See Plaintiff's Memorandum in Support of its Motion for Partial Summary Judgment on DFA's "Control" Affirmative Defense at 12, *United States v. Dairy Farmers of Am.*, <http://www.justice.gov/atr/cases/f204500/204561.pdf> accessed 9 July 2011.

[708] *United States v. Dairy Farmers of Am.*, at 3.

[709] Ibid. at 4. See *United States v. Tracinda Inv. Corp.* (finding there was not even the "slightest intent" to control as evidenced by Stockholder's agreement when it found the partial acquisition not anticompetitive) and Anaconda Co. v. Crane Co. (holding that the "solely for investment" exception sheltered a partial equity acquisition by a competitor). As cited in Reed, "Private", cit., at 313–318.

[710] *United States v. Dairy Farmers of Am.*, at 7.

[711] Ibid. at 6.

current management team in case it did not act in DFA's global profit-maximizing interest. Indeed, DFA's limited share in NDH's profit stream exacerbated this concern since the former placed the same weight on its 50% nonvoting stake in the competitor (Southern Belle), leading NDH to be managed less competitively.

NDH other shareholder would not impede DFA to take into account its shares in Southern Bell when deciding NDH competitive behavior as this would credibly commit NDH to become a less aggressive competitor, and, in turn, could induce NDH's rivals to compete less vigorously themselves, thereby raising the profits of all firms (and shareholders) in the industry.[712]

On appeal, the Sixth Circuit agreed with the District Court that control or influence may be used to cause anticompetitive effects, but rejected the conclusion "that lack of control or influence precludes a Section 7 violation."[713]

The Court of Appeal held that "because control was not present in DFA's relationship with Southern Belle, the District Court reasoned that the effect of a lessening of competition was also not present. This logic ignores the possibility that there may be a mechanism that causes anticompetitive behavior other than control. For example, in du Pont, the Supreme Court found that even though du Pont did not have control or influence over General Motors because it no longer had voting rights, anticompetitive effects could still occur, because a group with similar interests as du Pont – its shareholders – held the voting rights…. Likewise, in this case, DFA purportedly cured any potential antitrust problems in the agreement with Southern Belle by giving all of its voting rights to AFLP. This cure, however, ignores the fact that AFLP and DFA have closely aligned interests to maximize profits via anticompetitive behavior."[714]

The Sixth Circuit's reasoning does not fully acknowledge the anticompetitive effect of passive investment as explained above, focusing instead on the possibility of a less competitive behavior on the part of the firm in which the investment was made.

It is indeed important to note that, although DFA's shareholding in Southern Belle was a merely passive one, Southern Belle depended financially on DFA, which could be considered exerting de facto control: "[T]he district Court erred in its decision because the government presented evidence that DFA did indeed have control or influence over Southern Belle. While DFA does not have a voting interest under the revised agreement, it may leverage its position as Southern Belle's financier to control or influence Southern Belle's decisions.... In short, a genuine issue of material fact exists as to whether there is a reasonable probability that the revised agreement would substantially lessen competition, through DFA's control or otherwise."[715]

The Court should have probably considered more of concern the 50% voting stock in NDH and the connected joint control over the appointment of the management,

[712] Gilo, "The Anticompetitive", cit., at 23–27.
[713] *United States v. Dairy Farmers of Am.*, at 859.
[714] Ibid., at 862.
[715] Ibid., at 862.

which could have been used to make NDH compete less aggressively in view of the unilateral effects arising from the passive investment in Southern Belle.[716]

In the end however, the Sixth Circuit quoted the DOJ's expert stating that "[t]o think that the nature of the interaction between the two dairies will not change is naive, because that would be contrary to the economic incentive of all parties."[717]

The appellate Court concluded that the appropriate remedy for DFA's overlapping partial ownership interests was DFA's complete divestiture of its interests in one of the two dairy plants, which has been carried out with regards to Southern Belle.

4.5.4.12. *Kinder Morgan*

In *Kinder Morgan*,[718] a group of investors, including Carlyle and Riverstone, planned to acquire all outstanding shares of Kinder Morgan, Inc. (KMI).

Carlyle and Riverstone would jointly hold 11.3% of KMI, the right to appoint a board member and to receive competitively sensitive information. In addition, Carlyle would own another 11.3% of the equity of KMI with the same rights.

Carlyle/Riverstone also held a 50% interest with board representation, access to competitively sensitive information and veto power in the general partner that controlled Magellan, a competitor of KMI.

The FTC challenged the acquisition stating that it violated Section 7 of the Clayton Act and Section 5 of the FTC Act substantially lessening competition by: "(1) eliminating competition between Kinder Morgan and Magellan; (2) increasing the likelihood of, or facilitating, collusion or coordinated interaction between Kinder Morgan and Magellan; and (3) increasing the likelihood that Kinder Morgan or Magellan, or the combination thereof, would unilaterally exercise market power."[719]

The FTC alleged that these anticompetitive effects were likely due to Carlyle and Riverstone "holding significant interests in both [Kinder Morgan and Magellan], by having the right to board representation at both firms, by having the right to exercise veto power over actions by Magellan, and by receiving, using or sharing non-public competitively sensitive information from or about [Kinder Morgan] or Magellan."[720]

Under the consent agreement, Carlyle and Riverstone were required to (1) remove their representatives, managers and directors, from Magellan, (2) cede control of Magellan, (3) not influence or attempt to influence the management or operation of Magellan, and (4) establish safeguards against the sharing of competitively sensitive information between KMI and Magellan.[721]

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[716] Gilo, "Passive", cit., at 1652–1654.

[717] *United States v. Dairy Farmers of Am.,* at 862.

[718] *In the Matter of TC Group, L.L.C., Riverstone Holdings LLC, Carlyle/Riverstone Global Energy and Power Fund II, L.P., and Carlyle/Riverstone Global Energy and Power Fund III, L.P.*, FTC File No. 061 0197; Docket No. C-4183 (25 Jan. 2007).

[719] LA Wilkinson and JL White, "Private Equity: Antitrust Concerns With Partial Acquisitions" (2007) 21(2) Antitrust 28, at 31; referring to *Kinder Morgan*, para. 35 of the Complaint.

[720] *Kinder Morgan*, para. 34 of the Complaint.

[721] OECD, "Antitrust Issues", cit., at 177.

The consent decree allowed current and future passive investments in Magellan, but no elements of control as long as Carlyle/Riverstone held any interest in KMI.

4.5.4.13. *CommScope/Andrew*

In June 2007 CommScope entered into an agreement to acquire Andrew. Andrew held 30% of Andes's equity, CommScope competitor in a highly concentrated market, a warrant to acquire more, several credits and numerous governance rights, including rights to designate members of Andes's board of directors.[722]

The DOJ concluded that: "CommScope's substantial ownership in Andes would reduce its incentive to compete with Andes. In addition, [...] CommScope would obtain substantial governance rights over Andes. Once CommScope completes its acquisition of Andrew, Andes's board of directors will have seven members. CommScope will then have rights to appoint two members of that board, and jointly with another Andes's shareholder, to appoint two more. In addition, CommScope's consent will be required [...] for a range of corporate actions by Andes, and CommScope will hold extensive rights to access Andes's confidential business information. These governance rights, combined with its 30 percent ownership stake and other interests in Andes, would give CommScope both the incentive and the ability to coordinate its activities with those of Andes, and/or to undermine Andes's ability to compete on price and innovation."[723]

The DOJ required the parties to divest Andrew's entire ownership interest in Andes, all notes of Andes's indebtedness, warrants to acquire additional Andes stock and contractual governance rights.

4.5.4.14. *Clear Channel*

In *Clear Channel*,[724] Bain and THL wanted to acquire 70% of Clear Channel. They held each a 25% shareholding and the right to appoint 2 out of 8 directors in CMP. THL held also a 20% stake, a 14% voting interest, and the right to appoint 3 of 17 board members in Univision. CMP and Univision are two of Clear Channel main competitors

The DOJ alleged that the acquisition of Clear Channel would have caused both unilateral and coordinated effects on the part of Bain/THL and the companies in which they held a shareholding; caused by governance rights/influence, profit participation and access to competitively sensitive information. Because of this with the consent decree the DOJ forced the divestiture of either Clear Channel's competing sectors or Univision and CMP entire stake. Simply divesting control elements was not considered enough.

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[722] *United States v. CommScope, Inc. and Andrew Corporation*, No. 1:07-CV-02200 (D.D.C. filed 6 December 2007).

[723] Competitive Impact Statement, *United States v. CommScope, Inc.*, at 7, <http://www.usdoj.gov/atr/cases/f228300/228364.htm> accessed 9 July 2011.

[724] *U.S. v. Bain Capital and Thomas H. Lee Partners and Clear Channel Communications* (2008).

4.5.5. Lessons from the Case Law

An interesting suggestion in analysing the case law has been to distinguish between the FTC's and the DOJ's decisions.[725] A distinction based on the different approach that the two authorities seem having with regards to passive investments.

The FTC has allowed passive minority shareholdings between competitors to continue indefinitely, subject to conditions ensuring the shareholding to remain passive and below an acceptable level. It imposed restrictions to an increase of the shareholding beyond certain levels and prohibitions to influence or facilitate collusion through interlocking directorates, voting rights and sensitive information flow.[726]

The DOJ instead required usually complete divestiture of the minority shareholding, thus eliminating also the potential anticompetitive effects arising from passive investments.[727] The influence over the unilateral incentives of the acquiring firm, notwithstanding control or influence over the target, was taken into consideration in most of the cases. In *Dairy Farmers* also the coordinated effects of passive investments were specifically considered. In *AT&T/TCI*, the DOJ carefully transposed into the case law the exact results of the economic theory regarding the unilateral effects of passive shareholdings.[728] This however did not regard all cases,[729] maybe because of the litigation risk presented by Crane and Tracinda and the actual impact of the minority shareholding on the overall transaction.[730]

Every time the acquiring firm is left with a passive shareholding it is possible to see in the background the "solely for investment" exemption and its ambiguous interpretation.

There is a general acceptance by both Agencies and Courts of the anticompetitive effects of active minority shareholdings in competitors. The possibility to appoint members of the board, to vote and to have access to competitively sensitive information, has been unilaterally considered substantially "lessening competition".

Indeed, in every case in which divestment was not considered necessary, the shareholdings has always been passive or rendered passive and restrictions to increase the shareholding have been imposed.[731] Although not every passive investment has anti-

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[725] Dubrow, "Challenging", cit., at 118, 124–127.

[726] E.g., in the recent *Time Warner/Turner and Medtronic/Physio-Control*. With the, for the most part ignored, exception of Golden Gran Macaroni, in which the FTC recognized the potential unilateral (and partially even the coordinated) effects of passive investments in oligopolistic markets.

[727] E.g., *US West/Continental, AT&T/TCI, AT&T/MediaOne, Dairy Farmers, Commscope/Andrew and Clear Channel*. See also *Anaconda v. Crane* and *Tracinda*, reverted by the Courts.

[728] Competitive Impact Statement, *United States v. AT&T Corp. and Tele-Communications, Inc*., at 2511.

[729] E.g., *Gillette, Univision/HBC*.

[730] Where the minority equity interest was the only competitive issue in dispute the DOJ had less leverage, than in case of a bigger overall transaction, to impose complete divestiture. See Dubrow, "Challenging", cit., at 127.

[731] See *Anaconda v. Crane, Tracinda, Gillette, Time Warner/Turner, Medtronic/Physio-Control, Univision/HBC*.

competitive effects,[732] it is quite difficult to claim that in all of these cases the presence of unilateral and coordinated effects could be excluded so easily.

In addition, the Courts' acceptance of the anticompetitive effects of passive minority shareholdings has been even lower than the one demonstrated by the agencies.[733] In every case they had to decide, they "seem[ed] to be concerned only with the active influence the acquirer of the stock might gain over the behavior of the firm in which the investment was made. The leading cases neglect the effect stock acquisitions have on the stock acquirer itself, namely, making the stock acquirer a less vigorous competitor."[734]

The scope of the "solely for investment" exemption may be considered the key issue. As long as the minority shareholding acquired is active, it seems Agencies and Courts have no problems finding the substantial lessening of competition requirement fulfilled. With the same ease the anticompetitive effects of passive investments are ignored.

The last Court decision analyzed concerns the *Dairy Farmers* case. The District Court demonstrated to have no knowledge of the potential anticompetitive effects of passive investments stating that "lack of control or influence precludes a Section 7 violation" and that "there must be a mechanism by which the alleged adverse effects are likely to be brought about". On appeal, the Sixth Circuit seems to accept the economic incentives theory (quoting the words of the DOJ expert), but does not fully acknowledge the anticompetitive effects of passive investments, focusing instead on the less vigorous competition by the target firm.

If considered alongside the FTC and the DOJ's Horizontal Merger Guidelines,[735] the results of the case law seems pointing in one direction: the necessity for a change in the way Courts interpret the "solely for investment" exemption.

Despite the effort of the Agencies (in particular the DOJ) and of the (economic and legal) doctrine to interpret this exception in line with the results of the economic theory (and the aim of the Congress), it appears that the Courts still prefer an interpretation substantially excluding from scrutiny passive investments and their effects on competition.

Even though the American System seems to have all the most appropriate tools to address the potential anticompetitive effects of passive investments,[736] a broad interpretation of the investment exemption may be an impediment in the scrutiny of minority acquisitions.

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[732] The acquisition of a passive shareholding is not "per se" anticompetitive.

[733] See *Anaconda v. Crane, Tracinda and Dairy Farmers*.

[734] Gilo, "The Anticompetitive", cit., at 30–31.

[735] In which the anticompetitive effects of passive investments are acknowledged.

[736] It is important to note the difference with the European system. Most of the cases analyzed (*Golden Grain Macaroni, Anaconda v. Crane, Tracinda, Gillette, Dairy Farmers, Kinder Morgan* and *Clear Channel*) are not full mergers involving also the acquisition of a minority shareholding nor wider agreements (the merger control regime was sufficient to address all the issues connected with minority share acquisitions).

Remembering that: it has been demonstrated that passive shareholdings in competitors "may substantially lessen competition" and the Horizontal Merger Guidelines and the case law expressly acknowledged it; the effects of these investments are probabilistic in nature, very hard to detect or prove and an exclusion from the full-blown examination provided by the main effects clause of section 7 would amount to a de facto exemption from scrutiny. It is to be hoped an increase in the Courts' acknowledgement of the anticompetitive effects of passive investments and the definitive rejection of any interpretation identifying "stocks purchased solely for investment" with "passive shareholdings".

It would also be desirable an increase in the consideration given to the coordinated effects of passive investments, often forgotten by Courts and Agencies.

4.5.6. Clayton Act Section 8

In the American antitrust system it is also present a specific provision dealing with interlocking directorate, Section 8 of the Clayton Act.[737] This provision "per se" prohibits interlocking directorships between competitors; no anticompetitive effect needs to be shown.

This practice may confer various benefits to the firms involved such as expertise, legitimacy and cooptation of risk, but, at the same time, raises serious antitrust concerns due to its collusion facilitating effect and long-term development of a quiet life regime.

Section 8 prohibits a person from serving as a director or an officer, elected or chosen by the board, of two or more corporations if the corporations are "by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the antitrust laws."[738]

The first judicial interpretation of Section 8 occurred in *United States v. Sears, Roebuck & Co*. The District Court "adopted a per se rule requiring only a showing that two firms are or have been competitors."[739] In other words no anticompetitive effect needs to be shown for the interlocking directorate to be deemed illegal. The Court affirmed: "a fair reading of the legislative debates leaves little room for doubt that, in its efforts to strengthen the antitrust laws, what Congress intended by Section 8 was to nip in the bud incipient violations of the antitrust laws by removing the opportunity or temptation to such violations through interlocking directorates."[740]

4.5.6.1. The Definition of Competitor

The main interpretative issue regarding Article 8 is the definition of "competitor".

The statute simply states that "[n]o person shall, at the same time, serve as a director or officer in any two corporations […] that are […] by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement

[737] 15 U.S.C. Section 19.

[738] 15 U.S.C. Section 19(a)(1)(B).

[739] *United States v. Sears, Roebuck & Co*., 111 F. Supp. 614 (S.D.N.Y. 1953), at 617.

[740] *Sears*, at 616.

between them would constitute a violation of any of the antitrust laws."[741] In determining whether corporations compete within the meaning of Section 8, the Courts historically have not applied quantitative market definition analysis, such as cross-elasticity of demand, the SSNIP test, and simulation models commonly employed in defining markets for the purpose of the Sherman Act and Section 7 of the Clayton Act; relying instead on an intuitive qualitative analysis.[742]

Remembering the purpose behind Section 8,[743] the Court in *TRW, Inc. v. Federal Trade Commission* held that the "statutory language should be construed in accordance with its underlying purpose". It continued, "the [FTC] is right in asserting that this purpose would not be well served by requiring proof of high cross-elasticity of demand between competing products or low-friction interchangeability of use."[744] Instead of a cross-elasticity analysis, the Court focused on three qualitative factors in holding that the defendants were competitors within the meaning of Section 8: "(1) the industry and its customers recognize the products as separate or competing; (2) production techniques for the products are similar; and (3) the products can be said to have distinctive customers."[745]

F.T.C. v. Staples, Inc.,[746] a Section 7 merger case, demonstrated, however, how using a qualitative analysis to determine whether two firms are competitors may be overbroad. In Staples, the Court found that office supplies sold by office supply superstores constituted a product market separate from identical products sold in other types of stores.[747] This was based on a finding of low cross-elasticity of demand between consumable office supplies sold by superstores and those sold by other retailers.[748] "Despite the high degree of functional interchangeability between consumable office supplies sold by the office superstores and other retailers of office supplies", the Court found that "even where Staples and Office Depot charge higher prices, certain consumers do not go elsewhere for their supplies."[749] The Staples Court further noted that "office superstore prices are affected primarily by other office superstores and not by non-superstore competitors."[750]

Applying a qualitative standard, focused on, e.g., consumer perception and production techniques, office supply superstores would have wrongly appeared to be

[741] 15 U.S.C. Section 19 (a)(1)(B).

[742] Gerber, "Enabling", cit., at 118–119.

[743] "To nip in the bud incipient violations of the antitrust laws by removing the opportunity or temptation to such violations through interlocking directorates". See *United States v. Sears, Roebuck & Co.*, at 616.

[744] *TRW, Inc. v. FTC*,. 647 F.2d 942, (9th Cir. 1981), at 946–7, para 10.

[745] Ibid. at 947, para. 11–12.

[746] *Federal Trade Commission v. Staples, Inc.*, 970 F. Supp. 1066 (D.D.C. 1997). For an analysis see Gerber, "Enabling", cit., at 125–126.

[747] Ibid. at 1076–78.

[748] Ibid. at 1078.

[749] Ibid. (noting that consumers would be unlikely to switch from Staples to alternatives such as Best Buy).

[750] Ibid. at 1077.

competitors of other office supply retailers.[751] Qualitative factors – even perfect functional interchangeability – do not necessarily imply that products compete meaningfully; a high cross-elasticity must be shown to establish that consumers are indeed willing to substitute one product for the other.

As the Court noted in *U.S. v. Oracle Corp.*, "[j]udicial experience cautions against the use of qualitative factors to define narrow markets."[752]

As stated by Gerber, "the greater precision that generally accompanies quantitative analysis makes this approach a theoretically preferable method for defining competitors under Section 8. At minimum, parties should be given an opportunity to rebut qualitative analysis with quantitative analysis."[753]

Section 8 of the Clayton Act has been criticized by economists and jurists because of its per se structure. These scholars are of the opinion that there is no proof the mere presence of an interlocking directorate has anticompetitive effects and an ex post evaluation, on a case-by-case basis, would allow a more accurate and efficient result.[754] This also taking into consideration that the presence of independent directors and the enlargement of the boards have made it more difficult for the interlocked director to significantly influence the behavior of the competing companies.[755]

Sears made it clear that anticompetitive effect analysis has no place in Section 8 cases.[756] The definition of "competitor" may however help avoiding the exclusion of the benefits of interlocking directorates, as industry-specific expertise and legitimacy in cases where anticompetitive effect are not likely. At the same time, a narrow interpretation would impede the provision to achieve its purpose of preventing the facilitation of collusion between interlocked competitors.

The appropriate definition of competitor under Section 8 needs to balance harms and benefits of interlocking directorates. The higher the cross-elasticity, the higher the potential anticompetitive effects,[757] but at the same time legitimacy and expertise increase too.

When interpreting Section 8, Agencies and Courts have however to take into account its main purpose,[758] to remove "the opportunity or temptation to [violate antitrust

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[751] The Court recognizes that it is difficult to overcome the first blush or initial gut reaction of many people to define the relevant product market as the one of consumable office supplies. The products in question are undeniably the same no matter who sells them, and no one denies that many different types of retailers sell these products. Ibid. at 1075.

[752] *Oracle Corp.*, 331 F. Supp. 2d 1098 (ND Cal. 2004), at 1118–19 (noting that a "laundry list of factors... creates the danger of narrowing the market by factors that have little economic basis").

[753] Gerber, "Enabling", cit., at 136–137.

[754] For an analysis of the different positions, see Ghezzi, "Legami", cit., at 1009–1011.

[755] ABA "Section of Antitrust Law – Monograph No.10, Interlocking Directorates under Section 8 of the Clayton Act" (1984). As cited in Ghezzi, "Legami", cit., at 1009–1011.

[756] *United States v. Sears, Roebuck & Co.*, 111 F. Supp. 614 (S.D.N.Y. 1953).

[757] Firms are less likely to fix prices of products between which consumers do not substitute meaningfully. See Gerber, Enabling", cit., at 136–137.

[758] Based on the legislative debates.

laws] through interlocking directorates."[759] The potential efficiencies of interlocking directorates are thus overshadowed.

In these respects, it has been the same application of Section 8, however limited,[760] to demonstrate its efficiency in inhibiting explicit cartels and collusion-enhancing agreements.[761]

5. Remedies

In cases of potential anticompetitive effects, the most effective remedy is obviously complete divestiture of the minority shareholding. In some occasions, however, authorities have demonstrated disregard for anticompetitive effects arising from passive investments, focusing on remedies aimed only at excluding control or influence over the target company through interlocking directorates, voting rights and sensitive information flow.

> "Generally, the main concerns of antitrust enforcers are related to the risk of coordination between firms linked by shareholding and the effect that these structural links can have on the likelihood of collusion in the market. There is often less emphasis on the risks of unilateral effects, particularly if triggered by a merely passive minority shareholding."[762]

In some circumstances competition authorities have also accepted behavioral remedies, i.e. the shareholder's commitment not to seek or exercise control or influence or gain access to sensitive information.[763] This although, due to the costs involved in monitoring behavioral remedies and the little effectiveness in addressing structural problems, they are generally disfavored.[764] Behavioral remedies are thus considered "sub-optimal" at addressing anticompetitive conducts causing a change in the market structure, as is for minority share acquisitions, "both in terms of their effectiveness and in terms of the difficulties associated with monitoring their implementation."[765] As stated by Gilo, "it would be very difficult to enforce a decree according to which the firms would refrain from anticompetitive conduct, such as tacit collusion. Since tacit collusion is hard to detect or prevent, such a decree would tend to be ineffective."[766]

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[759] *Sears*, at 616.

[760] Probably more related to its clear content and its easily identifiable violation (inducing firms to directly avoid the establishment of interlocking directorates), than to its limited relevance.

[761] Ghezzi, "Legami", cit., at 1009–1014.

[762] OECD, "Antitrust Issues", cit., at 46.

[763] Confidentiality agreements or "Chinese Walls", providing for the non-disclosure of confidential information amongst the firms involved, are the most common.

[764] OECD, "Antitrust Issues", cit., at 11.

[765] Ibid., at 188.

[766] Gilo, "The Anticompetitive", cit., at 45.

It is possible to divide the remedies employed by antitrust agencies in four categories:[767] (i) complete divestiture of the minority shareholding and severance of the personal link between the competing firms;[768] (ii) dilution into a passive shareholding through the withdrawal of representation, veto and information rights;[769] (iii) elevation of Chinese Walls between the competing firms and confidentiality or nondisclosure agreements to prevent the flow of competitively sensitive information and the coordination of the conduct of the firms involved;[770] (iv) severance of interlocking directorates to prevent the common board member from having access to sensitive information facilitating collusion.[771]

The European Commission considered concretely the remedies to apply in case of a minority shareholding in its Notice on (merger) remedies.[772] As already pointed out, most of the cases in which the Commission addressed the anticompetitive effects of minority shareholdings have been within the context of a wider concentration, either as a condition to allow it or in case it was implemented and then prohibited. The notice contemplates specifically the first case stating that: "[d]ivestiture commitments may also be used for removing links between the parties and competitors in cases where these links contribute to the competition concerns raised by the merger. The divestiture of a minority shareholding in a joint venture may be necessary in order to sever a structural link with a major competitor,[773] or, similarly, the divestiture of a minority shareholding in a competitor.[774]

Although the divestiture of such stakes is the preferable solution, the Commission may exceptionally accept the waiving of rights linked to minority stakes in a competitor where it can be excluded, given the specific circumstances of the case, that the financial gains derived from a minority shareholding in a competitor would in themselves raise competition concerns.[775] In such circumstances, the parties have to waive all the rights linked to such a shareholding which were relevant for behaviour in terms of competition, such as representations on the board, veto rights and also information

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[767] OECD, "Antitrust Issues", cit., at 46–48.

[768] This has been the case in *Siemens/VA Tech, Kesko/Tuko, Tetra Laval/Sidel, EU Gillette, Parmalat/Granarolo Felsinea, Nord-KS/Xella, A-TEC/NA, Golden Grain Macaroni, US West/Continental, AT&T/TCI, AT&T/MediaOne, Dairy Farmers of America, CommScope/Andrew* and *Clear Channel*.

[769] E.g. in *Nordbanken/Postgirot, Time Warner/Turner, Medtronic/Physio-Control, Univision/HBC* and *Kinder Morgan*.

[770] Examples are provided by *Generali/Ina, Philip Morris, BT/MCI, Unicredit/Capitalia, Anaconda v. Crane, US Gillette* and *Kinder Morgan*.

[771] This was the case in *Thyssen/Krupp* and *BskyB/ITV*.

[772] Commission Notice on Remedies Acceptable Under the Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (2008/C 267/01), OJ C 267, paras 58–59.

[773] Case IV/M.942–*VEBA/Degussa* of 3 December 1997.

[774] Case COMP/M.3653–*Siemens/VATech* of 13 July 2005, paragraphs 491, 493 ff.

[775] Case COMP/M.3653–*Siemens/VA Tech* of 13 July 2005, paragraphs 327 ff., where effects from the minority stake in financial respect could be excluded as a put option for the sale of this stake had already been exercised.

rights.[776] The Commission may only be able to accept such a severing of the link with a competitor if those rights are waived comprehensively and in a permanent way."[777,778]

These paragraphs confirm what stated above: complete divestiture is the preferable solution with regards to minority shareholdings, but the Commission may accept the waiving of all the rights linked to minority stakes, such as representations on the board, veto rights and also information rights in cases in which the investment would have no unilateral effects. The direct reference to the unilateral effects of passive investments also in the context of merger remedies is definitely a step forward towards their full acknowledgement.

With regards to cases decided under Articles 101 and 102 TFEU, Article 7 of Regulation 1/2003[779] enables the European Commission to "impose any behavioral or structural remed[y] which [is] proportionate to the infringement committed and necessary to bring the infringement effectively to an end. Structural remedies can only be imposed either where there is no equally effective behavioral remedy or where an equally effective behavioral remedy would be more burdensome for the undertaking concerned than the structural remedy". Recital 12 adds that "[c]hanges to the structure of an undertaking as it existed before the infringement was committed would only be proportionate where there is a substantial risk of a lasting or repeated infringement that derives from the very structure of the undertaking".

On the basis of the peculiarities of partial acquisitions explained above and (partially) recognized in the Notice, the most appropriate remedy, in case of a minority share acquisition having anticompetitive effects, is often structural.

This has been fully acknowledged in Germany, where Section 40(3) of the ARC specifically excludes behavioral remedies from the conditions on the basis of which clearance may be granted.

6. Conclusions

To conclude it is necessary to answer to the second research question.

It is especially fundamental to determine whether the provisions at the antitrust authorities disposal, used or usable to scrutinize minority shareholdings, are adequate to address and eliminate all the competition concerns arising from these acquisitions.

In light of the results of the analysis of the antitrust systems and of the relevant case law, the relevant provisions can be said to be (temporarily) adequate.[780]

Clearly they have limitations and an intervention in order to clarify and put in order the entire system(s) with regards to the treatment of minority share acquisitions is to

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[776] Case COMP/M.4153–*Toshiba/Westinghouse* of 19 September 2006.

[777] Case COMP/M.3440–*ENI/EDP/GDP* of 9 December 2004, paragraphs 648 f., 672.

[778] Notice on (Merger) Remedies, paras 58–59.

[779] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1.

[780] Provided that the basic requirements outlined below are fulfilled.

be hoped for.[781] Nonetheless the present situation does not prevent antitrust authorities and Courts from addressing all the anticompetitive concerns arising from minority shareholdings. This, obviously, if they have the intention to do so.

What is, indeed, inadequate is not a specific provision, but the attitude of authorities and Courts towards the analysis of minority share acquisitions.

The provisions under which it would be possible to address the competition concerns are present in all antitrust systems and have been extensively discussed above, but only some of them have been (correctly) applied by authorities and Courts.

Most times it would be sufficient a "broader" interpretation of the relevant provisions of the European system (in line with the case law not directly related to minority share acquisitions)[782] and a "narrower" reading of the exemption provided for in the American one (in line with the guidelines and the legislative purpose),[783] in order to address all the anticompetitive effects of active and passive investments not conferring control.

While it seems that for active investments this is already the case (all the relevant provisions are considered applicable to minority share acquisitions allowing the acquirer to "influence" the target), the anticompetitive effects potentially arising from passive investments have been the object of a lot of uncertainties.

This seems to be changing. At the European level, for example, in *Tetra Laval/Sidel*, *Schneider/Legrand* and *Siemens/VA Tech*, the Commission demonstrated to be perfectly aware of the potential anticompetitive effects of passive investments.[784]

At the American level, *AT&T/TCI*, *Dairy Farmers of America*, *CommScope/Andrew* and *Clear Channel*, but also the Horizontal Merger Guidelines, are the confirmation that also the FTC and the DOJ acknowledge these effects.

Everything considered, it is possible to identify two fundamental requirements in order for the relevant provisions to be genuinely adequate to address the competition concerns raised by minority share acquisitions. These requirements are valid for both the European and the American system:

1) First of all it is necessary that both authorities and Courts fully acknowledge the potential anticompetitive effects of minority shareholdings.

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[781] This may be realized either formulating "ad hoc" provisions or providing specific guidelines for the application of the relevant legislation to minority share acquisitions.

[782] E.g., it would be sufficient to consider the possibility of partial implementation within the EUMR, excluded in *Ryanair/Aer Lingus*; apply Article 102 TFEU to minority shareholding potentially having anticompetitive effects (as considered possible in *Philip Morris* and *Gillette*) acquired by the dominant firm or one of the collectively dominant firms; apply Article 101 TFEU (considered applicable in *Philip Morris, BT/MCI* and *Olivetti/Digital*) to cases in which a parallel conduct may be considered arising from a minority share acquisition.

[783] It would be sufficient to exclude the application of the "solely for investment" exemption in case a passive interest is acquired in a competitor, in a oligopolistic market.

[784] This can be seen also in the Guidelines on the assessment of horizontal mergers with regards to coordinated effect, in the Notice on remedies and in the *Philip Morris* decision for what concerns the unilateral effects.

The clear and uniform acknowledgement of the results of the economic theory is an obvious requirement in order to effectively address all the concerns arising from minority share acquisitions.

Even though this is already the case with regards to active investments, passive interests seem to be difficult to digest, above all for the American Courts, which are often tempted to apply the "solely for investment" exemption. In addition to this, the coordinated effects of passive investments and the specific concerns arising from the acquisitions by the controlling shareholder, are often forgotten. When scrutinizing a merely passive investment, no authority or Court have directly acknowledged the possibility to use the acquisition of a shareholding by the maverick firm as a commitment device, in order to induce the competitors to collude tacitly, nor the risks connected to the dilution of the controlling stake, in case it is the parent company to invest in a rival of the controlled firm.

2) The second requirement directly refers to the interpretation of the provisions applicable to minority share acquisitions. The adequacy of these provisions cannot be measured only "literally", they also have to be interpreted adequately and uniformly. As explained above, the interpretation given to the relevant provisions by the case law makes them perfectly adequate to address all the competition concerns arising from minority shareholdings. This, however, only if authorities and Courts apply them uniformly.

With regards to the sole European system, a gap in the merger regulation has been however identified. Even though Articles 101 and 102 TFEU may be used to (temporarily) fill it, an extension of the reach of the EUMR would be certainly welcomed. This seems to be nowadays more plausible in light of the will expressed by the competition commissioner Almunia.

In line with the concerns expressed in the Green Paper and by various authors,[785] any revision of the EUMR in order to widen its scope to cover also non controlling investments, should carefully consider the other countries' (above all the UK and the US) experiences. To avoid overburdening the Commission and the undertakings with a system based only on prior notification,[786] the review of non controlling shareholdings could be based on an ex-ante notification, only for those acquisitions more likely to cause competition concern (e.g., above certain thresholds or entailing board representation rights), juxtaposed to a voluntary ex-post notification for all the other share acquisitions.[787] This, obviously, without excluding the possibility for the Commission to scrutinize any share acquisition, irrespective of the percentage of ownership or change in control, opening an ex officio investigation.

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785 See, e.g., Ezrachi, "EC", cit., at 344–348, OECD, "Antitrust Issues", cit., at 40 and Corradi, "Le partecipazioni", cit., at 435, 438.

786 Which could have, on the other hand, the evident advantage of creating certainty and predicability for companies.

787 This may represent the perfect balance between unnecessary notifications and effectiveness of the Commission's discovery.