PhD THESIS DECLARATION

The undersigned Lina Vitolo

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VITOLO LINA

Abstract

The European debate over the treatment of non-controlling minority shareholdings has been refueled by the 2014 Commission's White paper *Towards more efficient EU Merger Control*. After analyzing the investors' financial perspective, this work illustrates the antitrust theories of harms and how those have been applied in EU and US jurisdictions, with the aim of supporting the finding of an enforcement gap in the current EU regulation. This contribution then investigates possible solutions to leverage existing merger control regime and antitrust rules and supports the view that the most appropriate step to tackle anticompetitive non-controlling acquisitions would be extending the reach of the EU Merger Regulation. Through a critical analysis of the efficiency of the "targeted transparency" system proposed by the Commission *vis-á-vis* proportionality, regulatory burden, resource consumption and legal certainty, this work shows the need to further develop appropriate legal tools to solve the under-enforcement problem. As a conclusion, it is argued that a self-assessment regime allowing companies to notify on a voluntary basis without a mandatory standstill obligation and the Commission to control *ex-post* within defined limits and timelines, would allow to achieve the desired objectives.

I. INTRODUCTION

There are many forms of investment in the market made by firms which do not have purely financial activities as their main business objective. The acquisition of shares and the provision of loans provide examples of purely financial investments on one side. The appointment of common directors and the creation of joint ventures provide examples of business investments on the other side.

From a mere investor's perspective, a common objective of both financial and business investments is the enhancement of market performances possibly accompanied by economic returns. Depending on the financial expectations and the peculiar features of the business conducted, different ways to achieve such objectives exist. For example, through a share in the capital of a company regular dividends can be gained; by creating a joint venture with a competitor aimed at developing a common activity complementary to the parents' main business, the business results of the company may improve.

The gaining of financial returns and business improvement is not the only one side of the coin.

From an antitrust perspective, when confronted with financial interactions and personal links between independent firms in the market, antitrust agencies look suspiciously at the acquisition of an interest in another company's business. The possible anticompetitive effects of such 'sharing of interests on the market', deriving by the alignment of incentives or by the exchange of business information between independent companies, are indeed a crucial issue in the antitrust assessment.

However, depending on the set of rules that companies are required to comply with, some of the said investments on the market may be subject to antitrust scrutiny and some others may escape.

With specific reference to the acquisition of shares in another company, legal systems across the world present significant differences as regards treatment of shareholdings not conferring control over the target company.

The US antitrust system reveals to be more sensitive to the possible harmful effects of structural, personal and financial links in the market. Since its birth, any acquisition of stocks or share capital can be subject to the scrutiny of possible anticompetitive effects, irrespectively of the percentage of ownership held and of the ability to exercise control over the company in which the shares are held. Moreover, interlocking directorates in competing firms are prohibited under US law since more than 40 years.

On the other side of the world, however, a slower path is followed. The European legal framework evolved over the years. Before the adoption of the first Merger Regulation in 1989 the only legal basis to challenge minority shareholdings were the prohibitions of anticompetitive agreements and abuse of dominant position, respectively covered by the now Article 101 and Article 102 of the Treaty on the Functioning of the European Union.

Even at that stage, some controversies existed on the application of the said provisions. In the 1984 *Philip Morris* judgment the European Court of Justice outlined the limited circumstances in which the acquisition of minority shareholdings in a competitor may have given rise to a relevant infringement. At that time, an anticompetitive agreement might have been found, according to the Court, in case of influence of the commercial conduct of a competitor especially when the agreement provided commercial cooperation or when the minority shareholder was given the possibility to acquire control over the target at a later stage. Similarly, an abuse of dominance might have been found when the minority shareholding resulted in the acquisition of effective control or at least some influence on the target's behaviour on the market. However, no guidance was then given on when the level of influence should have been deemed problematic and how the assessment of such effects should have been conducted.

Following the first Merger Regulation, in 1982 the European Commission has been provided with the power to investigate both minority and majority acquisitions meeting the relevant jurisdictional thresholds subject to the condition that the acquisition enables the acquiring party to exert "control" over the target company.

Other legal systems around Europe (e.g. UK and Germany) and abroad (e.g. United States, Canada) have a broader 'antitrust net' and allow antitrust agencies instead to assess competitive concerns of acquisitions of shares independently from the achievement of the right to control the business activity of the company acquired.

A criticized effect of the current European set up is that problematic non-controlling minority shareholdings most likely escape antitrust scrutiny when they are not caught by the Merger Regulation or by the prohibitions of anticompetitive agreements and abuse of dominance. A further complication is the inconsistency with the European Commission's power to order divestment of minority shareholdings held in a third party by a company involved in a merger falling under the Merger Regulation when it reviews a notified merger.

Economic theories demonstrate that minority shareholdings that do not allow shareholders to control the commercial policy of the target firms may nevertheless give rise to specific anticompetitive concerns, some of which are common to the concerns raised by full mergers.

The existence of a regulatory gap and the confirmation of the economic doctrine contributed to increase the attention recently paid on the European legal framework dealing with non-controlling minority shareholdings and led the European Commission to further investigate on the economic importance of minority shareholdings and the scale of the problem at the European level.

A public consultation is currently ongoing to assess first the need to reform the European Merger Regulation in force and then the desirable set up of such reform. It is very interesting for companies to follow the outcome of such debate as the final structure of a reform, if any, will impact not only the Commission's organization and workload but also businesses and investments.

After a brief illustration of the main 'investments' that can lead to a 'sharing of the interest' on the market (joint ventures, interlocking directorates, other financial and non-financial instruments and minority shareholdings) and a description of the main drivers and benefits for the investors and for the market (Chapter I), Chapter II examines the main antitrust concerns raised by those investments with special attention on minority shareholdings and related antitrust theories of harm developed by the economic literature. As to provide a solid example of an experienced set of laws conceived to catch all acquisitions (including non-controlling shareholdings) raising anticompetitive concerns, Chapter III briefly examines the United States legal system, where the test of control has no role at all, and a selected US case-law in line with the traditional economic theories of harm. Chapter IV then illustrates the development of the European legal framework regarding the antitrust scrutiny of minority shareholdings from the pre-merger control *era* until today, with the aim of investigating whether regulatory or enforcement gaps exist that may allow undetected and unchallenged anticompetitive minority acquisitions. Chapter V critically examines the current proposal of the European Commission to extend its jurisdiction to allow screening of minority shareholdings that do not confer control over the target company, and comments on some of the relevant open issues. Concluding remarks are finally made in Chapter VI.

II. SHARING OF INTERESTS ON THE MARKET

Capital is crucial for doing business. It is a matter of fact that industrial companies, which do not have as their main object financial investments, do invest in the market through partial ownerships, debts and other financial means (such as extension of loans or contracts for differences), as well as by way of business alliances with other companies active on the market (for example joint ventures and cooperation agreements) or shared management (interlocked directors).

In general terms, all financial and non-financial business means to gain an interest on the market can be seen from two separate perspectives.

First the investors, who mainly regard all such 'investments' as instruments to gain economic return. The investors' perspective provides not only an interesting view of the economic drivers for such investments but also a better picture of the possible efficiencies that they may have on the companies involved and on the market.

The second perspective is related to the effects that such interests can have on the market. Considering that either by way of debt/equity of business alliance the investing company acquires an interest in the performance of another company, antitrust agencies look at possible anticompetitive concerns of such sharing of interest on the market.

In order to have a better view on the practical effects of those interests on competition, the general reasons why such investments exist and the main objectives pursued will be briefly examined.

Interlocking directorates, joint venture and other financial and non-financial means will be initially treated with a brief illustration of the main drivers and benefits, from one side, and the main antitrust concerns, on the other side. Particular attention will be then paid to minority shareholdings and cross-shareholdings, first with regard to economic rationale and beneficial effects and then with regard to the theories of harm developed by antitrust scholars and authorities.

Final conclusions will be then drawn on the economic theories.

A. Investors' Perspective

The main sources of capital on the market are equity and debt which are in turn represented by two corresponding typologies of investors, respectively shareholders and creditors. Other ways for sharing interests on the market are provided by several forms of investment in commercial cooperation and shared management.

In the investors' view such forms of 'investment' ensure an interest in another firm's performance, being it sufficient or insufficient to afford the holder the ability to influence policy of the firm on the marketplace[1], and provide the expectation of economic returns.

However, substantial differences exist between these types of financial interests gained through equity or debt or business alliances and the impact they can have *inter alia* on rates of return, risk aversion and level of intrusion of the investing company in the target firm's business. In general, the higher is the risk and the level of investment the higher would be the legitimate interest in the performance of the target and its management, at least to the extent necessary for assessing changes in the credit risk.

1. *Joint Ventures*

A general notion of joint venture defines it as an agreement whereby two or more parties pool their resources[2] in a separate entity apart from each participant's business interest in order to accomplish a specific business purpose in a definite time. The main characteristic is the creation of an *institutionally fixed form of cooperation*[3]. Compared to full-scale mergers, the parent companies of a separate entity joint venture remain economically independent undertakings on the market.

These type of cooperative arrangement are very common as firms look for commercial partners especially in rapidly developing or technology led markets.

[1] DotEcon Report for Office Of Fair Trading *Minority interests in competitors* (April 2010), page 16.
[2] Intellectual property rights, financial resources, human resources, know-how, technology, premises and equipment for example.
[3] European Commission *Notice on Cooperative Joint Ventures* (1993 OJ C 43/2, para 1).

Joint ventures can be horizontal, vertical or both. A horizontal joint venture *is a jointly owned entity whose parents compete with the venture and each other*[4]. The parent of a vertical joint venture are either suppliers of inputs to the jointly owned entity, or incorporate the joint venture products in their own products or manufacture complementary products to the joint venture's products. In the presence of both vertical and horizontal elements we can for example have the vertically integrated parent companies also active in the joint venture's market.

The main benefits attached to the creation of joint ventures are linked to the increase in functional integration of economic resources and the enhancement of economic efficiencies. First the cost of entering new businesses are often high and a joint venture allows to share the burden (as well as the potential profits). Second, by pooling financial resources and assets, scale and scope economies can be realized, as well as efficient risk allocation. Third, synergies may derive from combining complementary operations[5].

More importantly, joint ventures facilitate development of new products or entry in a new geographic market. In general, optimal research and development may not take place because part of the gains from innovation could accrue to other operators on the market; cooperative joint ventures can increase research and developments by firms and enhance consumer surplus.

One of the traditional concerns raised by merger analysis of joint ventures is the possible coordination of the behavior of independent undertakings on the business retained by the parents and not contributed by the joint venture. Such effect, so-called 'spillover effect', may be induced as a result of the increased scope for exchange of information between the parent companies, which indeed remain independent one from the other. Given the competitive relation of the parents on the market, the knowledge of commercial information such as the other's pricing policy or expansion plan, may give rise to collusion

[4] Salop S. C. and O'Brien D. P., *Competitive Effects of Partial Ownership: Financial Interest and Corporate Control*, 67 Antitrust L.J. 559-614 (2000), page 584.
[5] ABA Antitrust Section, *Antitrust Law Developments*, 1992, page 372.

outside the scope of the joint venture[6]. Similarly, a restriction of actual or potential competition between the parents or the parents and the joint venture may occur[7].

Vertically integrated joint ventures may also cause exclusionary conducts issues regarding access and exclusivity. For example, let's assume that two leading companies in the production of automobiles create a production joint venture having the commercial objective to produce and distribute a new generation automotive component which is considered to be the only one compliant with a safety regulation recently entered into force. The incentives of the parent companies to drive the joint venture's commercial relations with their direct competitors in the market for automobiles may naturally be influenced by the need for competitors to access to such new component produced and distributed by the joint venture (to remain competitive on the market).

All in all, in comparison with classic cartels or anticompetitive mergers joint ventures are deemed to create lower risks to restrict competition especially if they are of limited duration or regard partial common functions[8]. One reason for this is that a certain degree of competition between the parent companies jointly controlling the joint venture is maintained. Another reason is that joint ventures are generally temporary or may have greater likelihood to terminate at a later stage when the commercial goal is finally achieved[9].

2. *Interlocking directorates*

Interlocking directorates occur when an executive or non-executive director or officer of one company seats on the board of another or holds additional positions in such company.

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[6] This is the general approach adopted by the European Commission with regard to full-function joint venture, which are defined as *joint ventures performing on a lasting basis all the functions of an autonomous economic entity* (*Commission Consolidated Jurisdictional Notice under Council Regulation (EC) n. 139/2004 on the control of concentrations between undertakings*, 2008/C 95/01, OJ 16.4.2008, "Jurisdictional Notice", para 92). The Commission has indeed the power to investigate full-function joint ventures which fall under the European Merger Regulation (Council Regulation (EC) n. 139/2004 on the control of concentrations between undertakings, "EUMR").

[7] Jones A. and Sufrin B., *EU Competition Law, Text, Cases and Materials*, Oxford University Press, 2011, Fourth edition, page 986.

[8] It has been indeed suggested that the antitrust approach to be applied to joint ventures should be more lenient than the one applicable to full-fledged mergers (Brodley, *Joint Ventures and Antitrust Policy*, 95 Harv. L. Rev., page 1538).

[9] Hawk & Huser, *A Bright Line Shareholding Test to End the Nightmare Under the EEC Merger Regulation*, [1993] 30 C.M.L.R. 1155 (1993), page 1159.

There are several categories of interlocking directorships. Based on the participation of the director to the daily management of both companies, we can distinguish insider or outsider interlocks. In case of different companies with common directors we have so-called hubs and bridges. The representation in the board of another company can be direct ("primary interlock") or indirect. Depending on the competitive relation between the interlocked companies which can be active either in the same market or in a downstream/upstream market (producer/distributor), we can have horizontal and vertical interlocks[10].

A benefit for an investor to have interlocking directors, generally in connection with a significant shareholder, would be to implement some sort of influence or control by pushing managerial skills. Outside directors usually have special and extensive experience, information and skills that can improve performance and reputation of the interlocked firms.

Financial institutions may use interlocks to protect investments, acquire more and reliable information directly on the market. As the monitoring would be performed directly by the interlocked director, monitoring costs will decrease.

Interlocks would also strengthen the ongoing commercial relations, promote strategic alliances and reduce costs of uncertainty commonly borne when there is no direct eye on the counterpart. In particular, business decisions may be improved by the reduced uncertainty on market conditions caused by an exchange of information between the firms. For example, in a vertical interlock the commercial relationship with customers or suppliers may be improved by a deeper knowledge of the input or the output[11].

The most likely concerns are raised by the exchange of information (that would not have occurred absent the interlock) which can increase the potential for collusion between the interlocked companies, increase prices and reduce competition[12]. The privileged knowledge

[10] Wood D., Simon H., *Company structures Interlocking directorships - measuring the antitrust risks* Competition Policy International, 14 September 2004. Flath, D., *Vertical Integration by Shareholding Interlocks*, International Journal of Industrial Organization*,* 7 / 369, 1989.

[11] It is argued indeed that the scope for efficiencies arising from interlocking directorates is greater in relation to vertical interlocks rather than horizontal (DotEcon Report for Office Of Fair Trading *Minority interests in competitors* (April 2010), page 11).

[12] The effect of reduction of competition may be even stronger when the interlocked director is *remunerated through share options and the share prices respond strongly to reduced level of competition*. (See DotEcon Report for Office

of the business of the other company that the officer or director can obtain thanks to such roles, especially in case of horizontal overlaps between the activities performed by both companies, may confer an advantage on the market that the company might not otherwise achieve.

By facilitating communication and exchange of information between competitors, the interlocking may lead to coordinated effect by making it easier to develop a common understanding and reach a collusive agreement, and by eliminating uncertainty about market conditions[13].

Vertical interlocks may raise additional concerns as regards preferential terms and conditions that might be agreed or facilitated through the interlock.

As a matter of fact, the concrete assessment of the likelihood, existence and magnitude of anticompetitive effects of interlocking directorates should be based on the circumstances of the case. The market conditions (collusion would be more likely to occur in concentrated industries), the nature of the information exchanged (an exchange of non-commercially sensitive information would be irrelevant) and the role of directors (non-executive or independent directors may well capture sensitive information but not able or willing to use it), for example, can make the difference.

In addition, the fiduciary duties imposed to directors by means of corporate law or governance rules, such as avoiding conflict of interests, as well as criminal sanctions and disqualification provided by certain national laws may limit the extent to which the director can act in a way which is detrimental to the shareholders' interest and harmful for the company.

Unlike the US system[14], EU law does not contemplate express prohibition of interlocking directorates. Some national law made some attempts – such as Italian financial institutions

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Of Fair Trading Minority interests in competitors (April 2010), page 60).

[13] Green E. J. and Porter R. H., *Non-cooperative collusion under imperfect price information*, Econometrica 1984, 52(1), 87-100.

[14] A specific provision prohibiting interlocking directorates between competitors is Section 8 of the Clayton Act, which is applicable independently from the proof of likely or actual anticompetitive effects. *No persons shall at the same time, serve as 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 between them would constitute a violation of*

law entered into force in 2013[15]. However, the issue is not new for European Commission which has intervened in the past on personal links held by director or officers of companies involved in merger transaction to preserve competitive condition.

For example, in the Generali/INA[16] case, involving a concentration between two leading Italian insurance groups the Commission intervened on personal links and claimed that interlocking directorships between the combined entity and its competitors could have raised competitive concerns in the national life insurance market where the parties' shares were more than triple than competitors'[17]. The acquisition of INA by Assicurazioni Generali was indeed cleared in Phase I upon a number of commitments mainly aimed at reducing the market power of the combined entity ad avoiding risks of coordination on the insurance markets.

With a view of reducing the strength of the post-concentration entity on the life insurance market, the Commission accepted commitments by Generali to divest its controlling shareholdings in a number of national life insurance companies (and banks) and to sell the minority shareholding held in Fondiaria, a major Italian insurance group. Generali also committed to terminate all distribution arrangements of life insurance products with the companies acquiring its divested participations and not renew such agreements for at least 24 months. As regards personal links and anticompetitive related effects, the Commission pointed out that several members of the boards of Generali and INA held offices in other insurance companies (or in their holdings)[18]. In order to clear the Commission's concerns, Generali undertook the obligation not to appoint in its executive committee any officer, director or employee of any other insurance company or company belonging to group also active in the insurance sector.

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the antitrust laws.

[15] Section 36 of Law Decree of 6 December 2011, n. 201 *"Disposizioni urgenti per la crescita, l'equità e il consolidamento dei conti pubblici*" (so-called Save Italy Decree) and implementing Law of 22 December 2011, n. 214.

[16] Case M. 1712 *Generali/INA*, Commission decision of 12 January 2000.

[17] The market shares held by the combined entity on the different segments of the life insurance market ranged between 34 and 36%.

[18] Just to make an example, the President of the board of directors of Generali was part of the executive committee of an Italian (Banca Intesa) controlling an insurance company (Carivita).

3. Other financial and non-financial Instruments

Among other means to share the interest in the performance of another firm there are non-voting equity interests, acquisition of debts or extension of loans, contract for difference[19] and executive compensation packages. In general terms, such instruments are used to gain return on investment or interest rates, as well as to enhance diversification of investment risks.

Acquisition of debts and extension of loans

By way of bi-lateral agreement, a firm can advance a debt to a competitor. The loan agreement may include specific conditions depending on the circumstances of the case but would in principle contains indication of amount and duration of the loan, payment terms, interest rate and obligation to provide information (usually of financial nature) that may influence the repayment of the loan[20].

Compared to equity investments, debts are deemed to be less problematic form an antitrust standpoint. Given that debts do not provide the debtor with a continuous stream of profits on the target (which are instead gained by the equity investor) the creditor will not have the same benefits that equity investors would derive from a unilateral price increase by recapturing the profit by the diversion of sale to the competitor[21]. Nevertheless, there are three main arguments commonly put forward to support the finding of anticompetitive effects of acquisition of debts or extension of loans.

The first argument regards the influence effect on the debtor's business and competitive actions[22]. It is argued that the lender could exploit its contractual position to exercise

[19] Contracts for difference are derivative instruments that allow the buyer to gain on the difference between the price of the shares (*i.e.* economic performance) of a company at the opening date and the price at the closing date of the contract. Such derivatives are not traded on an exchange but sold by brokers). See Office of Fair Trade *Minority Interest in competitors* A research Report prepared by DotEcon Ltd March 2010.
[20] DotEcon Report for Office Of Fair Trading *Minority interests in competitors* (April 2010), page 27.
[21] For a practical example of how the profit sharing incentives of acquisition of debts differs from those linked to partial ownership, see Kaiser H.F., *Debt investment in competitors under the Federal Antitrust Laws*, in Fordham Journal of Corporate and Financial Law, Vol. 9, issue 3, 2004, page 622.
[22] Both European and US case-laws support the finding of anticompetitive effects by acquisition of debt in a competitor. For example of the European Commission decisional practice, see the Gillette case (illustrated in Chapter III) in which it has been stated that the firm holding a loan stock and debt in the competitor, although not having other rights such as board representation or voting rights, could "*not reasonably be expected to ignore the financial dependence*" on the competitor (para 25). For the US experience, see the Mr Frank Inc. v.

control over the borrower[23] or gain access to the borrower's confidential information. Control would derive from a *de facto* mechanism played by the ability/threat of the creditor to exercise its right to accelerate the loan (for example, because of the refusal of the debtor to provide information related to the credit risk) and cause the bankruptcy of the debtor. Access to confidential information would be granted through the obligation generally connected to the credit agreements to regularly provide the creditor with a set of (financial and non-financial) information that enables it to monitor the credit risk[24], such as financial statements, litigation and regulatory actions, strategic and marketing plans, customer pricing information, etc.

A second argument is that the theory of the debt used as a strategic commitment by the creditor to compete less aggressively. The effects of this theory are particularly likely in the event of acquisition of a competitor's debt. On the assumption that fierce competition by the creditor would increase the probability of bankruptcy by the (competitor) debtor, or at least reduce the possibility for the latter to repay the debt, the creditor would have conflicting interests in adopting an aggressive competitive behavior on the market. This may cause an overall reduction in the competition on the market: competing firms (which are aware of the acquisition of the debts, the changed incentive of the creditor and its implicit commitment) will be induced to compete less aggressively. From an opposite perspective, however, it has been noted that this "strategic commitment" theory would hold true only in the event that the debtor has a weak financial situation and few refinancing solutions. This will not be the case, for example, when collaterals exist to the guarantee of the loan so that the possibility to recover the debt are not affected by aggressive competition[25]. In addition, for the penalty mechanism to have an effect the brink of bankruptcy should be present until the expiration of the credit agreement; as soon as the debtor regain financial wealth the creditor's commitment would lose its credibility.

Waste management Inc., 591 F. Supp (N.D. 111 1984) in which the acquisition of debt has been recognized to be an "*asset*" for the purpose of Section 7 of the Clayton Act which prohibits anticompetitive acquisitions of, among others, assets.

[23] Pini G.D., *Passive – Aggressive Investments: Minority Shareholdings and Competition Law*, European Business Law Review, Vol. 23, No. 5, 2012, page 624.

[24] Kaiser H.F., *Debt investment in competitors under the Federal Antitrust Laws*, in Fordham Journal of Corporate and Financial Law, Vol. 9, issue 3, 2004.

[25] Gilo D., *The anticompetitive effect of passive investment*, Michigan Law Review October 2000, page 41.

Furthermore, outside events taking place on the market can also weaken the debtor's competitiveness that can accidentally trigger the acceleration of the loan or the latter's bankruptcy[26].

A third argument is that the acquisition of a debt in a competitor may also have the subtle objective of saving the company under financial distress as to avoid its exit from the market and the entry of a stronger and more aggressive firm that would increase competition on the market and reduce supra competitive profits.

Executive compensation packages

Another instrument that may cause anticompetitive effects is the compensation of managers. Especially in cases in which compensation packages are linked to the aggregate performance of the industry in which the managed company is active or to the profits that will be raised by competitors on the market (and not the profit of the firms that they manage), the incentives of managers would be affected similarly to the acquisition of stocks in a competitor. Taking into account that a rewarding compensation is directly impacted by a negative result of the competitor, the manager would be less incentivized to compete vigorously with such competitor since an aggressive behavior of the managed firm on the market would reduce its benefits[27]. This kind of remuneration scheme could also function as a commitment device which can facilitate collusion thanks to the signaling of a less aggressive behavior on the market. However, to have a proper anticompetitive effect, information on the compensation packages should be available and observable by competitors[28].

4. *Minority Shareholdings and Cross-shareholdings*

Minority shareholdings are considered to arise when a party has an interest in the financial performance of a firm by holding a shareholding of less than 50% of the capital share or

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[26] Kaiser cit., page 625, who supports the view that, unless the investment has specific features from which probable competitive harms can be inferred, debt acquisitions are eligible to a more lenient treatment under antitrust rules.

[27] Intuitively, the smaller the interest of the manager in the profits of its firm, the larger is the anticompetitive effects.

[28] Pini cit., page 629.

voting rights[29]. In the case in which two firms hold a stake one in another or amongst many other firms on the market, we have reciprocal minority shareholdings or cross-shareholdings.

Clearly, those general definitions only take into account the financial aspects of the holding.

Investments by non-financial corporations can stem from a general desire to spread risk or to develop and strengthen ties between companies as part of strategic alliances. The investment generally allows a share in the rival's profit or loss, but not always grant (relevant) voice in the rival's decision making.

Having in mind also the ability of the shareholder to control the business decisions of the subsidiary, a further differentiation line can be drawn between controlling and non-controlling minority shareholdings. Among non-controlling shareholdings, a further distinction may exist between active minority shareholdings (active investment including both financial and influence/control aspects) and passive minority shareholdings (passive investment only including the financial aspect) depending on the possible exercise of influence on the target's competitive conduct.

The benefits from establishing partial ownership may be varied. In general, the society can benefit from the exchange of expertise or assets that would be otherwise not available and the overall industry profits increase in connection with the existence of interest in other products[30]. It has been argued for example that owing a stake in a separate company may increase the incentive in relation-specific investments (e.g. supplier which needs to customize its unique products to meet the specific needs of a customer), as it allows the owner to gain a stream of the target's profits, and may in turn reduce contracting and monitoring costs between the two companies[31] - especially where specialized assets are involved[32].

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[29] Depending on the national corporate law applicable, many variants of shares and voting right exist. The most common are ordinary shares giving right to earn company's dividends and to attend certain meetings.
[30] Reitman D., *Partial Ownership Arrangements and the Potential for Collusion*, 42 J. Indus. Econ. 313 (1994).
[31] Williamson O., *Transaction-cost economics: The governance of contractual relations*, Journal of Law and Economics 1979 n. 22, page 233-261.
[32] Klein B., Crawford R. G. & Alchian A., *Vertical Integration, appropriable rents, and the competitive contracting process*, Journal of Law and economics 1978 n. 21, page 297-326.

According to some authors, indeed the optimal solution in case of relationship-specific investments in a vertical business relationship would be the partial ownership of the research input by a downstream firm and an upstream firm[33].

Diversification[34] and risk spreading are other elements commonly cited as beneficial effects of partial investments[35] as they allow optimization of risk allocation and insure against the fluctuation of the firm portfolio's performances[36]. Investigating entry in a new market is often costly and can be likely impeded by information asymmetries; whereas the partial acquisition of an existing company can incentivize investments on such new market and avoid related difficulties and costs[37].

Others found benefits in the mitigation of information problems regarding the investment in the sector in which the target is active[38]. The superior industry knowledge or operating expertise held by the target may indeed increase the likelihood of positive returns in a market that the acquiring company does not know well. This possible efficiency is all the more likely if the stock acquisition involves a competitor of the investing firm which developed superior information based on the day to day activity of the competitor in the same market[39].

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[33] Aghion P. and Tirole J., *The management of innovation*, Quarterly Journal of Economics 1994 n.109, page 1185-1209. Oliver Hart, *Firms, Contracts and Financial Structure* Ch 2 (1995).

[34] Stock acquisitions are not the only available instruments for diversification, a diversified portfolio would not be harmful from a competition law perspective.

[35] Pini G.D., *Passive – Aggressive Investments: Minority Shareholdings and Competition La*w, European Business Law Review, Vol. 23, No. 5, 2012.

[36] The potential efficiency associated with the reduction in the fluctuation of the performance of the individual firms would be caused by the fact that (in case of a minority shareholding, *i.e.* the interest in the performance of the other firm) there will be no firm winning to the expense of the other as incentives are aligned and the competition war is softened. This in turn would reduce uncertainty and related costs for firms and thus render the minority shareholding profitable to the benefit of consumers (DotEcon Report for Office Of Fair Trading *Minority interests in competitors* (April 2010), page 56, where the study of Banal-Estanol A. and Ottaviani M. (*Mergers with Product Market Risk*, Journal of Economics and Managements Strategy 2006, 15(3), 577-608), are cited).

[37] Meadowcroft S. and Thompson D., *Minority Share acquisition: The impact Upon Competition*, Office of Official Publication of the European Communities, Luxembourg 1986.

[38] Allen J. W. and Phillips G.M., *Corporate equity ownership, strategic alliances and Products Market Relationships*, The Journal of Finance 2000, n.6.

[39] As noted by Gilo, however, *this point will have some merit only under the assumption that imperfect information on the part of other potential financiers makes financing by them less efficient* (Gilo, *The anticompetitive effect of passive investment*, cit. page 61).

A relevant reason for the target to raise its capital by way of equity sale may be because it is less expensive to sell the party better informed about the investments opportunities than to try to collect asymmetric information in other ways; this is deemed to possibly solve underinvestment problems[40].

In case of ongoing business relationship between two companies, the investment in the form of partial acquisitions in the target may be used to fund and implement cooperative agreements[41]. Minority shareholdings in such case may serve as to enhance alignment of incentives of the firms involved in joint ventures or other cooperation alliances (such as R&D) especially where those projects require *ex ante* relation-specific investments and the shareholding is planned for a long-term duration[42].

Minority shareholdings may even reduce the potential of breaching the business arrangements by increasing the credibility of the commitment taken by the investing company and reducing the fear of opportunism between the parties. On one hand, in fact the profit and loss sharing diminishes the risks of cheating on contractual arrangements as the cheating party will have to share the cost of cheating it will impose to the rival[43]. On the other hand, the costs of setting up agreements that are often incomplete and difficult to implement, as well as the costs of expanding or monitoring business alliances between firms and corporate shareholders are reduced through partial ownership[44]. Minority shareholdings can serve in fact to internalize part of the transaction costs that would otherwise constitute externalities.

The benefits stemming from minority shareholdings can be meaningfully exemplified through the case of licensing agreements. A company which licenses its technology to a competitor often finds it difficult to appropriate the return on its technology innovation because of incomplete contracts. By way of minority shareholdings in the licensee, the licensor may be facilitated in appropriating those returns as this would be a significantly

[40] Myers S., Majluf N., *Corporate financing and investment decisions when the firm has information that investors do not have*, Journal of Financial Economics, 1984 n.21, page 187-221.
[41] Pini, cit.
[42] DotEcon Report for Office Of Fair Trading *Minority interests in competitors* (April 2010), page 56.
[43] Pini, cit.
[44] Allen and Philip, cit.

lower price compared to the profits expected[45]. Such partial ownership arrangements are deemed to be beneficial for the society since they *encourage firms to exchange expertise or assets that otherwise would not be available*[46].

There are certain industries where the sharing of experience and knowledge that can be implemented by way of business links are fundamental and such knowledge can increase research and development capacity and distribution possibilities as well as contribute to the expansion of substitutable products portfolio.

In other cases, the investment relationship may have no strategic business significance to the parties but may still produce beneficial effects on the target or its stocks' return. For example, in case of restructuring of ailing companies by financial institutions or restructuring operations of target firms evidence of improvement in the targets' operating performances have been shown. Among the same lines, several authors reported an increase in the stock prices of target firms and stock returns following announcement of private equity placements[47]. In particular, for target firms that form joint ventures or alliances with the shareholders significant increase in investments expenditure is noted especially where the target is active in industries where high research and development and advertising costs exist[48]. More in general economic studies support the view that the formation of alliances reports superior operating performances nd increase the equity value of partnering firms[49].

An additional efficiency regards the allocation of production among firms. It is argued that minority acquisitions may incentivize more efficient and low cost firms to produce more

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[45] Wilson RW, *The Sale of Technology through Licensing*, (1975) PhD diss., Yale University. A counterargument put forward by Gilo is that this point would have some merit only if the share is acquired free of charge or for a price which is lower than the share's value. If the price paid corresponds to the expected profits of the shares, the acquisition would not reach the objective of appropriating the investor the returns from innovation (Gilo D., *The anticompetitive effect of passive investment*, cit. page 63).
[46] Reitman D., *Partial Ownership Arrangements and the Potential for Collusion*, 42 J. Indus. Econ. (1994), page 313.
[47] Wruck K., *Equity Ownership concentration and firm value: Evidence from private equity financing*, Journal of Financial Economics, 1989 n. 23, page 3-28.
[48] Allen and Philips, cit.
[49] As noted by Chan H., Kensinger J. W., Keown A. J., Martin J. D., *Do strategic alliances create value?* Journal of Financial Economics, Volume 46, Issue 2, page 217 (November 1997), both horizontal and non-horizontal alliances bring about increased equity value for the partnering firms. In particular, the authors note that larger wealth effects are more likely to be produced by horizontal alliances for transfer or pooling of technical knowledge rather than by marketing alliances.

and less efficient and high cost firms to produce less. This result will be more likely when the investor is the less efficient firm since it will be induced to act less aggressively on the market and thus reduce its output; in such a situation, the more efficient firm would react and increase the production[50]. It has been shown that the allocation of production would be more efficient even if the overall output of the market will be reduced[51].

When exploring in particular the effects that the existence of cross-participation in a Cournot duopoly may have on social welfare, an author found that, although decreasing competition through reduction of total output and consumers surplus, cross-ownerships may increase social welfare provided that the firm owned by the shareholder is less efficient than the cross-participated firm and the size of the market is not too large[52].

From a mere corporate perspective, it is argued that pre-merger holdings implemented as a first step before a bid is launched can avoid a rise in the share price that would instead occur when a controlling stock is purchased at one time. The reason for this is that by buying small amounts of shares without disclosing to the stock market that the take-over is actually going on, the price increase will be delayed to the advantage of the acquiring firm. More specifically, a delayed price increase would mean that the acquiring firm will not pay a higher price but would nevertheless benefit of the higher value of the target at a later stage[53].

In addition, as supported by the Japanese industry and *keiretsu* system the creation of the so-called blocking holdings can prevent the take-over by third parties, thus allowing managers to focus on long-term objectives[54]. A meaningful example of some beneficial effects produced by minority shareholdings is in fact provided by the Japanese financial

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[50] According to Gilo, *The anticompetitive effect of passive investment*, cit. (page 64) the opposite situation would arise when the investor is the more efficient and low cost firm. In this case, under the assumption that firms react to their competitor's reduction of output with an increase of their output, the shareholding in the high cost less efficient firm would result in a less efficient allocation of production.

[51] A formal model has been developed by Farrell J. & Shapiro C., *Asset Ownership and Market Structure in Oligopoly*, 21 RAND J. Econ. 275 (1990).

[52] Fanti L., *Cross-participated firms and welfare* Discussion Paper n. 127, November 2011.

[53] Pini, cit.

[54] Struijlaart R. A., *Minority Share Acquisitions Below the Control Threshold of the EC Merger Control Regulation: An Economic and Legal Analysis*, World Competition 25(2): 173–204, 2002.

and industrial market, where an extensive presence of inter-corporate reciprocal and cross-shareholdings is observed. Several studies focused on the mechanism created by Japanese systems of the so-called *keiretsu* and showed that those constitute effective means for corporate control and contractual governance[55]. In particular, it is argued that the parties associated with the implicit contracts inherent to cross-participation to the capital shares of other companies, are better off thanks to the mutual commitments and risk sharing that would resolve managerial problems mainly caused by the threat of external takeovers. More specifically, the pressure of external takeover is eliminated by way of the sanction mechanism created by corporate cross-shareholdings, whereby a cross-participated firm would be persuaded to reject tender offers for its holdings based on the risk of retaliation by the other cross-participated firms. This means that tender offers by third parties outside the system are generally refused although they would ensure an increase in temporary profits. In this way, it is shown that managers of Japanese firms usually concentrate on long term objectives more that on short-term profits[56].

The results of certain studies also suggests that inter corporate ownerships raise the stock prices of the member firms[57].

Another market on which effects of cross-ownership have been investigated is the Italian banks sector, where shares of banks are held directly or indirectly by the same subjects in more groups. Starting from the early 90ies, the process of privatization of the main banks by sale of state held shares and the following consolidation of the Italian credit sector[58] led to a situation where a limited number of shareholders held a relevant portion of shares in

[55] Kaplan, S., Minton, B., *Appointments of Outsiders to Japanese Boards: Determinants and Implications for Managers*, Journal of Financial Economics 1994 36, 225-258.
[56] Osano H., *Intercorporate Shareholdings and corporate control in the Japanese firm*, Journal of banking and finance, 1996 n. 20, page 1047-1068.
[57] See for example Chan H., Kensinger J. W., Keown A. J., Martin J. D., *Do strategic alliances create value?* Journal of Financial Economics, Volume 46, Issue 2, page 217 (November 1997).
[58] Inzerillo U., Messori M., *Le privatizzazioni bancarie in Italia* in S. De Nardis *Le privatizzazioni italiane*, Il Mulino Bologna (2000).

the majority of leading national banking group. The results of the main investigation however did not point to the same efficiencies shown by the Japanese example[59].

Behind all the above the reasons that drive investors to acquire minority shareholdings in related or unrelated firms and the potential beneficial effect for both the acquirer and the target, a number of competitive concerns can be raised under certain conditions. This is for example the case of an acquisition of an interest in a direct competitor.

59 Trivieri F., *Does cross-ownership affect competition? Evidence from the Italian banking Industry*, Journal of International Financial Markets, Institutions and Money 17 (2007) 79-101.

B. MINORITY SHAREHOLDING: ANTITRUST ECONOMIC PERSPECTIVE

1. *Theories of harm*

Intuitively the acquisition of non-controlling participation might be considered to raise less concerns than a full merger because the parties *can continue to compete one another after the transaction*[60].

Taking this view, in 1980 it has been argued that "*non-controlling acquisition has no intrinsic threat at all*"[61].

This approach has been then challenged by the economic literature. One of the fist and more impressive analysis of effects of partial ownership and joint ventures on competition dates back to a pre-merger regulation era in the European Union[62]. In 1986 Reynolds and Snapp[63] pointed out that an increase in the level of ownership held by a firm in a rival active on a concentrated market environment characterized by sufficient degree of transparency such to enable monitoring of production quantity[64], may have two results. First, a decline in the equilibrium market output (given the output of the target competing firm, the incentive to lower the output increases as the level of ownership becomes higher). Second, the facilitation of tacit or explicit collusion and exchange of information with the consequent effect of stabilizing an existing cartel and rendering cheating less attractive[65].

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[60] Salop and O'Brien*, cit.* page 562.
[61] Areeda P. and Turner D., *Antitrust Law*, 1203d, page 322 (1980).
[62] The first European Merger Regulation has been enacted in 1989 (Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings [Official Journal L 395 of 30 December 1989]).
[63] Reynolds R. J., Snapp B. R., *The competitive effects of partial equity interests and joint ventures,* International Journal of Industrial Organization Volume 4, Issue 2, June 1986, Pages 141–153. Similar studies have been conducted by Farrel and Shapiro in 1990 (Joseph Farrell & Carl Shapiro, *Asset Ownership and Market Structure in Oligopoly*, 21 RAND J. Econ. 275, 1990). In addition, the OECD study draws the same conclusions as regards the effects of minority shareholdings, and highlights that minority shareholdings might lead to a reduction of output and increase prices and coordination (stronger when all firms in the market invest at least in one firm), more likely in case of oligopolistic markets with high entry barriers independently from the active or passive nature of the minority shareholding. (Organization for Economic Co-operation and Development Competition Policy Roundtable, Directorate for Financial and Enterprise Affairs, Competition Committee, *Antitrust Issues involving Minority Shareholdings and Interlocking Directorates*, DAF/COMP (2008) 30, 23 June 2009).
[64] The knowledge of the production quantity of the competing firms allows the other firms to calculate their profit maximization accordingly.
[65] The theories of Reynolds and Snapp have been contradicted by Malueg who showed that under certain

At the same time, Meadowcroft and Thompson [66] argued that such effects may be produced not only in case of partial ownership in horizontally related firms abut also in case of companies having a vertical relation[67].

An interesting contribution has been later provided by Salop and O'Brien, who rehearsed the Berle and Means theory on the separation of ownership and control[68] to sustain that the real difference between full merger and partial ownership consists in the distinction between financial interest and corporate control. Financial interest refers to the right of the acquiring firm to share the profits gained by the target firm, whereas corporate control refers to the right of the acquiring company to influence business decisions of the target[69] (e.g. prices, output, product selection and other competition variables[70]).

A clear distinction between those two elements is not present in full mergers, where it is assumed that the owner of the shares controls the target, but can be clearly drawn in partial ownerships as financial interest can be often separated from control.

The authors state that the core analysis of anticompetitive effects of minority shareholdings should focus on *how partial ownership translates into control or influence, and how this influence translates into competitive effects*[71]. To fully catch the implication of such theory, the key understanding is that when a company acquires an interest in a competitor, its incentives to set pricing independently and unilaterally (unilateral pricing incentives) will be reduced. That is to say that a financial interest alone only impacts on the acquiring firm's incentives.

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conditions increasing the degree of ownership may decrease likelihood of collusion. The reason for this would be the ambiguous result of two effects that derive from the minority shareholding and namely (a) the reduction of the benefit that can be earned from cheating (reducing incentives to deviate) and (b) the lower losses in case of punishment (that instead strengthen the incentive to deviate). See Malueg D.A., *Collusive Behavior and Partial Ownership of Rivals*, 10 Int'l J. Indust. Org. 27 (1992). According to Malueg, the second effect can prevail and undermine collusion accordingly. However, it has been noted that if one should follow Malueg's conclusion it would not be rational to invest in rivals.

[66] Meadowcroft S. and Thompson D., *Minority Share acquisition: The impact Upon Competition*, Office of Official Publication of the European Communities, Luxembourg 1986.

[67] As explained below (Section *iv.*), in vertical settings minority shareholdings may increase market power and induce foreclosure effects.

[68] The theory is illustrated by Berle A. A. and Means G. C., *The modern Corporation and Private Property* (1932), in which the authors assess the impact of the separation between ownership and control on the individual performances of corporations and their managers.

[69] Salop, O' Brien, cit., page 568.

[70] European Commission Annex 1 to the Staff Working paper, *Towards more effective EU merger Control Economic Literature on Non-Controlling Minority Shareholdings* ("Structural links"), page 3.

[71] Salop, O' Brien, cit., page 563.

Having a look to the incentives of the acquired firm, one might note that in absence of any form of influence or control over the target the latter's incentive to compete may remain unchanged. On the contrary, the target's incentives to compete may be affected in case of influence or control by the acquirer.

The result is that existence of the 'special elements' of financial interest and corporate control and the various degree of intensity that each of them can present in partial acquisitions can result in different ways and *in greater or lower harm to competition than a complete merger*[72].

Having in mind that the level of influence or control is key for the assessment of real anticompetitive effects brought by partial ownership, we will now explore the nature of such effects.

The economic analysis mainly individuates two categories: unilateral anticompetitive effects, that materialize absent collusion and impact on the incentives of firms to compete less aggressive taking the behavior of competitors as given, and coordinated anticompetitive effects, arising from the improved potential for collusion[73]. The results of the economic analysis on both type effects has been clearly reported by the Commission in the 1994 Exxon/Mobil case[74]:

> "[…] *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*

[72] Salop, O' Brien, cit., page 562.
[73] Pini, cit. page 593.
[74] Case COMP IV/M.1383 *Exxon/Mobil*, Commission decision of 29 September 1999, where a production agreement between Exxon and Mobil, competing in the oil industry was notified to the Commission under the regime of Regulation No 4064/89.

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."[75]

In more concrete terms the following effects may cause antitrust concerns: (i) altering the incentives to compete of the parties to the transaction; (ii) creating or enhancing the ability to control or influence competitive decisions of the target; (iii) facilitating exchange of commercially sensitive information; (iv) discrimination; (v) entry barriers[76]. Such effects may occur both in vertical and horizontal transactions; however anticompetitive effects may be amplified when the parties to the transaction are direct competitors, active on the same market.

i. Incentives

A possible antitrust concern is based on the 'horizontal unilateral effects' theory[77].

The reasoning advanced by the European Commission in the Tetra Laval/Sidel case is meaningful in this respect "*by retaining a stake in Sidel, Tetra Laval would be likely to take into account its expected revenue stream generated by its financial interests in Sidel and would therefore be likely*

[75] Commission decision in the *Exxon/Mobil* case cit., para 452.

[76] Organization for Economic Co-operation and Development Competition Policy Roundtable *Antitrust issues involving minority shareholding and interlocking directorate* Working Party No. 3 on Co-operation and Enforcement, DAF/COMP(2008)30 23 June 2009.

[77] The unilateral effects of partial ownership have been studied both in a static oligopoly model (see Reynolds and Snapp cit., Bolle F. and Güth W., *Competition Among Mutually Dependent Sellers*, Journal of Institutional and Theoretical Economics (JITE) 148 (1992), 209-239, David Reitman, *Partial Ownership Arrangements and the Potential for Collusion*, 42 J. Indus. Econ. 313 (1994), Flath, D., *When is it rational for firms to acquire silent interests in rivals?*, International Journal of Industrial Organization, Volume 9, Issue 4, December 1991, pp. 573-583) and in a repeated Bertrand model (Gilo D., Mosche Y. and Spiegel Y., *Partial Cross Ownership and Tacit Collusion*, 37 RAND J. Econ. 81 (2006)). For an example of application by the European Commission, see the case *Abbott/Guidant* (M.4150, Commission decision of 11 April 2006).

to consider how its actions would affect Sidel's profit stream […] the incentives of Tetra to compete would therefore be changed as a result of the minority shareholding."[78]

The acquiring firm investing in a competitor may have economic incentives to drive the 'structurally linked' target company to compete less vigorously on the market and, for example, to increase prices or to reduce quantity and quality.

A first driver for a decrease in the level of competition is the consequence that an aggressive competition against the target would have on the value of the investment[79], which would be lowered by a fierce competitor. Passive investment or non-controlling minority shareholding *commits the investor to compete less aggressively with the firm in which the investment was made. The investor is deterred from competing aggressively, because such aggressive competition would lower the value of the investor's investment*[80].

Secondly, the financial interest obtained in the competing firm may allow the acquiring firm to internalize the negative effects of customers' deviation following price increase or output reduction, so-called 'internalizing the price-setting decision'. This consequence derives from the correlation between the individual profits of the companies linked by the minority shareholding. The profit maximization decision of the acquiring firm will take into account the effect of its move on the target's profits that suddenly become of relevance because of the financial interest and the (partial) rights that the acquirer holds on it.

Let us consider the scenario of a price increase. In general terms, a profit-maximizing firm will try to balance the benefits and costs of a price increase. In a competitive environment with homogeneous products, firms are generally deterred from increasing prices since this usually triggers a demand decrease and loss of customers to the benefit of competitors pricing at a competitive level. This would indeed constitute a cost on one side. On the other side, a benefit may however derive from the price increase thanks to the additional profits contributed by each sale at a higher price. The decision to raise prices generally depends on the net effect of the two described above that is likelihood to counterbalance

[78] Case COMP/M.2416 Tetra Laval/Sidel.
[79] Reed B. J., *Private equity partial acquisitions: towards a new antitrust paradigm* Virginia Law & Business Review Volume 5 Fall 2010 Number 2, page 310. Areeda P. E., Hovenkamp H., *Antitrust law: an analysis of antitrust principles and their application* 3rd ed. New York Wolters Kluwer law & business, c2006, page 320.
[80] Gilo D., *The anticompetitive effect of passive investment*, Michigan Law Review October 2000, page 4.

the costs incurred by the customers' loss and switch to another competitor thanks to the additional revenues that may flow from the price increase.

Minority investments in competitors may bring additional revenues and thus reduce the losses of a price increase. In the case of acquisition of financial interests in a rival, in fact, part of the lost sales from a price increase may be recouped since customers will be diverted to the 'structurally linked' rival firm[81]. Therefore, a price increase by the acquiring firm may prove to be profitable[82].

The same reasoning could in principle apply to competitive variables other than the price; the acquiring firm may be deterred from entry in a new geographical or product market in which the competitor is active, because of the investment in the competitor[83].

It is noted that such unilateral effects do not depend on the higher or lower ability of the acquiring firm to influence the target's market conduct nor on the possibility to exchange commercially sensitive information, but will materialize automatically just because of the alignment of incentives between the companies linked by the financial interest[84].

> "*Even if [firm] A's investment in [firm] B does not confer any control or information right, A will take into account the effect of its decisions on B in order to maximize the sum of its own profits plus the return on its investments in B.*"[85]

Further, based on the alignment of incentives effect it is assumed that the higher is the level of shareholding the lower is the interest to cheat (at least by the acquiring company, as

[81] An example of US case where it is stressed that the degree of substitutability between the target and the acquirer's products is relevant is the AT&T/TCI case (Competitive Impact Statement, United States v. AT&T Corp. and Tele-Communications, Inc., 64 Fed. Reg. 2506, 2511 (1999), where it is stated that the adverse effects of a price increase in case of minority shareholdings *are greater to the extent that the service offered by the acquired firm is a particularly close substitute for the services offered by the acquiring firm*. In this case in fact, the number of customers who will switch to the acquired firm as a result of a price increase will be higher. Under US law

[82] For an empirical example see Alley W. A., *Partial Ownership Arrangements and Collusion in the Automobile Industry*, 45 J. Indus. Econ. 191-205 (1997).

[83] Reynolds, cit. page 150.

[84] See Pini, cit. page 594 and 600.

[85] Kaiser H.F., *Debt investment in competitors under the Federal Antitrust Laws*, in Fordham Journal of Corporate and Financial Law, Vol. 9, issue 3, 2004, page 611.

it would suffer part of the costs of cheating inflicted to the rival target) and the higher would be the potential for collusion[86].

However, for this theory of harm to be correctly assessed and applied accurately, one should look first at the real impact on the target and the acquirer and then at the likelihood and magnitude of the described effects.

As acknowledged by the Commission[87], it should be taken into account that compared to full-fledged mergers, partial acquisitions may change incentives only with respect to the acquiring firm. Lacking the investing firm the ability to exert sufficient influence on the business decisions of the target, the target's choice of maximizing profits is neutrally unaffected by the fact that a rival holds its minority stake[88].

Also, it is important to look at the level of profitability of the price increase on the retained sales, which corresponds to the amount that will be recouped through the increased sales compared to the value of expected loss of the decreased sales of the rival.

More importantly, one should consider that the diversion *ratio* (which is the proportion of sales lost by one party to the transaction and diverted to the other party) caused by a price increase in the event of partial acquisition is diluted in direct proportion to the shareholding percentage at stake[89]. Therefore the "internalization" of losses between acquirer of a minority shareholder and target is proportionally weaker than it would be in case of full merger[90]. A concrete example may help picturing such effect, if the diversion *ratio* between company A and B is 20% and if A acquires 25% stake in B, and then if A increases prices, 20% of A's customers will switch to B and A would benefit only from ¼ of the profit generated by customers switching to B[91].

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86 Reynolds and Snapp, cit. page 149.
87 Commission's Staff Working Document, Annex I *Economic Literature on Non-Controlling Minority Shareholdings ("Structural Links")* para 5 and 41, which cites Ignjatovic B. & Ridyard D., *Minority Shareholdings, Material effect?* COI Antitrust Chronicle January 2012 (1).
88 See also Salop and O'Brien, cit. page 575, who notes that in principle *the incentive of the acquired firm to increase prices is smaller than it would be in a full merger* and it would very much depend on the degree of control exerted by the acquirer: no control (silent financial interest), partial control or total control.
89 Ignjatovic and Ridyard, cit. page 4.
90 Catalin S.R., *EU Merger Control and Acquisitions of (Non-Controlling) Minority Shareholdings – The State of Play*, CLASF Working Paper Number 10 February 2014, page 25.
91 A smaller portion of the competitor's profit may be thus internalized than in full mergers.

Based on some of the above arguments, some economists attach great importance to the magnitude of passive investments and maintain that the greater the financial stake held by the acquirer and the respective market shares held by the parties to the transaction, the greater are the incentives to compete less aggressively; others argue that the relevance of anticompetitive effects would also depend on the concentration level of the market, the closeness of competition between target and acquiring firm and their nature as key player on the market[92].

Therefore, it is held that a case for intervention would exist in cases of very high market shares and level of shareholding held in the target[93].

Nevertheless, other factors may influence the firm's incentives to compete, being those related to the structure of the market[94] or to the features of the transaction[95], on which antitrust agencies may lack adequate information. For example, the easiness of entry by rivals may disrupt any unilateral effects of raising prices or decreasing output given that the higher profits from reduced output may attract new entrants and block or at least mitigate anticompetitive behaviors.

A further element that may attenuate the impact on incentives is that the acquiring firm may not always (directly and immediately) benefit from the increase of the target's profit. This would be for example the case if the target decides to invest any additional profits (generated through a wider customer base) to enhance quality of its products or increase production rather that distributing dividends to shareholders. In this scenario, incentives are misaligned and rivalry between acquirer and target firm may well increase rather than being reduced.

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[92] Idot L., *Non-Controlling Minority shareholdings in European Merger Control and under Article 101 TFEU*, EU Competition Law Forum, Brussels, 9 March 2012.

[93] However, on the point of quantifying potential effect Areeda and Turner, cit. page 322, claimed that "*there is no reason to suppose that the effects of a lesser acquisition are in a way proportional to the shareholdings*".

[94] For example, the market concentration *ratio*, the nature of the products (differentiated or homogeneous), the conditions of entry and the number of firms linked by minority shareholdings on the same market.

[95] For example, the level of shareholding ant the nature of the attached rights, the acquirer and target's market shares as well as the respective costs and margins.

ii. Influence

Horizontal unilateral effects may also derive from 'corporate influence' exerted by the acquiring company when the latter gains the ability to control or influence the business decisions of the target firm. With the effect of reducing the rivalry that existed among the parties prior to the acquisition, the acquirer may use (for its own benefit) its shareholding rights to increase the prices, reduce the capacity or the service quality of the target, prevent or limit expansion or development of the acquired firm or adopt any other action that would degrade the target's offering[96]. An example may be the acquirer preventing the target from raising capital to build capacity or from engaging in acquisitions on the market.

A fact specific analysis focused on governance rights or other means of influence on business conduct is needed in order to assess whether concerns effectively exist in practice. Primary indications may be found in the composition of the board of directors, as for example the number of board seats that the acquirer is allowed to appoint compared to the total number of directors, independence of the directors, type of voting rights (such as veto rights on business plan)[97], etc. More subtle pressure could occur when the target firm's management compensation is effectively controlled by the acquirer[98]. In particular, the acquirer may drive managers' compensation arrangements and include components that are positively linked to target's profitability. Depending on circumstances, managers may be thus induced to "*manage the firm as a less vigorous competitor*" and rather avoid strong competition since it will reduce the relevant components in their compensation package[99]. As a consequence, executive compensation packages can be used to achieve an anticompetitive effect.

A crucial issue regards the test to be set up to define the relevant degree of influence. As shown by the number of elements that should be taken into consideration and the data to be collected, the assessment is very fact specific and time consuming.

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[96] See Ignjatovic, Ridyard cit., as also acknowledged by in the Commission's Staff Working Document, Annex I *Economic Literature on Non-Controlling Minority Shareholdings ("Structural Links")*, para 6 and 38.

[97] For an example under US law, where the mere possession of voting right in the board of directors has been deemed as constituting undue potential influence, see the case Chevron Corp. FTC file n. 011-0011 September 7, 2011.

[98] Krauss J. G. and Cronheim C. T., *Partial acquisition after Diary farmers: Got Answers?* Antitrust magazine Spring 2006 49-53, ABA Section of Antitrust law, page 49.

[99] Gilo D., *The anticompetitive effect of passive investment*, Michigan Law review October 2000, p. 2.

Once the ability of influence the business conduct of the target is ascertained to a sufficient degree of likelihood, one should look at the practical effects of such influence over competitive elements.

Based on the experience of those countries where a lower level of material influence is required for a merger to come to an existence and attract antitrust scrutiny (in Europe, for example Germany, United Kingdom and Austria), it has been remarked that more frequently corporate governance assets created by minority acquisitions impact on policy decisions (such as expansions plans or money raising from the market) rather than on directly competitive decisions such as price increase. With the consequence that the influence may not corresponds to the competitive aspects that would substantially cause the main concerns from an antitrust perspective[100].

By comparing with a complete merger, differently from the incentives effects theory seen above, the anticompetitive effects deriving from the ability to affect business decisions of the target of a minority acquisition are more likely than in full-fledged mergers the lower is the equity stake in the rival. Taking as an example the unilateral decision to increase prices of a target firm which is direct rival of the acquiring firm, the effects that the damages inflicted to the target (which will see its customer base reduced) will have on the acquiring firm will be diluted by the minority stakes on one side. In other words, the acquiring firm would feel the revenue loss of the target only in proportion to the level of shareholdings in the target.

On the other side, however, the acquiring firm would gain the full benefit of the customers' diversion to its advantage in the same way as it would occur in a complete merger transaction.

Based on this and assuming a high level of rivalry between the target and the acquiring firm, it seems arguable that the increase in price would be the more profitable for the investing firm the lower are the shares held in the target and the higher is the diversion ratio. This is also acknowledged by the Commission's Staff Working Document[101].

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[100] Ignjatovic, Ridyard, cit. page 5.
[101] Commission's Staff Working Document, Annex I *Economic Literature on Non-Controlling Minority Shareholdings*

Such conclusion would likely depend on relevant factors such as the degree/nature of the control/influence exercised over the target and the ability of majority shareholdings to prevent degradation of the target's offering. In addition, several countervailing factors could attenuate the effects of structural links as for example the lack of complete set of information, the inability to capture benefits and conflicting management interests[102].

A further counterargument to the rationality of the 'incentives theory' regards the conflicting interest of majority shareholdings. A minority investor below the level of control can be prevented from acting at its own advantage to the detriment of the target's interests by the remaining shareholders, which all the more likely will not have interest to damage the value of their investments and will oppose to the enforcement of the minority shareholder's anticompetitive policy. Therefore, even assuming the effective influence of the minority shareholding and of the incentives concern, it would seem logical to ask how many cases the intervention would be justified because of an improper function (*i.e.* failure) of the corporate governance set up so that the remaining shareholders interests to damage the target are aligned to the minority one?

iii. Information

More traditionally, partial acquisitions may lead to horizontal coordinated effects by facilitating collusion and enhancing the ability to monitor compliance with cartel's rules and deviations from collusive behavior[103]. As confirmed by the Commission[104], coordination and monitoring are more likely to occur in a sufficiently transparent market that renders deviations detectable in an easy way and on condition that the reactions from third parties on the market are not able to jeopardize the expected results of coordination.

Similarly, collusion is more likely on markets where few companies are active. Intuitively the profit that a firm may gain in case of deviation in such a market are smaller than those it can benefit when many firms are on the market. In this second case in fact the deviating

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("Structural Links"), para 44.

[102] Dubrow J. B., *Challenging the economic incentives analysis of competitive effects in acquisition of passive minority equity interest,* Antitrust Law Journal 2001, 69 Antitrust L.J. 113.

[103] See for example Case COMP/M.1673, *VEBA/VIAG*, Commission decision of 13 June 2000.

[104] Commission's Staff Working Document, Annex I *Economic Literature on Non-Controlling Minority Shareholdings ("Structural Links")*, para 8 and 46.

firm will get all the remaining market and accordingly increasing its market share[105]. Naturally, the larger and more profitable is the target, the stronger is the incentive to collude[106].

Exchange of information and Coordination

A first concern in this regard is the possibility to facilitate sharing, exchange or access to information among competing companies[107] and the consequent effect of collusion. Depending on the rights attached to the financial stake (e.g. appointment of a director in the target's board), the domestic applicable corporate law (e.g. right of the minority shareholder to be regularly provided with business data as to monitor the share's value) and the corporate governance set-up of the target, the acquirer may have access to a set of information, some of which can reveal business strategies or other competitive variables (such as the plan to expand or enter into significant investments)[108] even in case the minority shareholder has no active participation to the management of the target.

Based on this, it is argued that minority shareholdings (especially in case of cross-shareholdings) may increase the awareness and make it easier for companies to coordinate their strategies[109]. Coordination can take various forms such as maintaining prices above the competitive level, limiting production capacity and volumes and sharing geographic markets or customers[110].

The firm investing in a rival is generally discouraged to implement a price undercut, as this would entail suffering the short term losses incurred by the rival. As seen above, in fact, the price setting decision would very much depend on the ability to recoup the losses; naturally

105 Pini, cit. page 605.
106 Gilo D., *Passive Investment*, Issues in Competition Law and Policy 1637 (ABA Section of Antitrust law 2008), Chapter 67, page 1641.
107 The exchange of information may be a less significant concern on case of listed publicly traded companies, where much information is already available to the public.
108 See Organization for Economic Co-operation and Development Competition Policy Roundtable (OECD) Directorate for Financial and Enterprise Affairs, Competition Committee, *Antitrust Issues involving Minority Shareholdings and Interlocking Directorates*, DAF/COMP (2008) 30, 23 June 2009, page 30.
109 Theoretically competitively sensitive information may be also used unilaterally by the acquirer in order to impact the target company's strategies (e.g. intention to enter a new market, launch a new product or increase prices).
110 See para 40 of the Commission Notice on Horizontal Merger, Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (Official Journal C 31, 05.02.2004, p. 5-18).

a price cut will be rational in the event of greater short term profit than price war losses. In such situation, collusion is more likely than absent the passive investment[111].

Another form of tacit coordination can regard the identification of the collusive price through the means of stock acquisition. Assuming that a conflict of interest exists among firms which have asymmetric costs on the supra-competitive price, firms can either have direct contacts and agree on the desired collusive price (but are deterred to do so by the fear of antitrust intervention) or using the investment in the other firm (the low cost firm will partly identify with the high cost preferred collusive price[112]).

As regards the ability to coordinate business strategy through the exchange of information, whereas it is not deniable that knowing sensitive information of a rival can confer a competitive advantage, any anticompetitive effects should be carefully assessed by taking into account that the exchange would not be reciprocal. In other words, it will be the acquiring firm gaining knowledge on the target but not the contrary. Moreover, for such a theory to exert its effects over an entire sector and lead to an overall coordination between more than two firms, there should be a net of widespread structural links between competitors (as it is in the case of cross-ownerships)[113].

Additionally, it is important to note that explicit collusion should be considered that it may be less likely than tacit collusion because of the fear of the intervention of competition authorities. In any event a set of strict requirements (as set by the European Court of Justice in the Airtours judgment) should be met in order to maintain sustainability of tacit collusion: (a) ability to monitor adherence to the collusive behavior and detect deviation timely; (b) existence of credible retaliation means to discipline cheating and maintain stability of the collusion; (c) absence of constraints from outsiders[114].

[111] Gilo, *Passive Investment*, cit. page 1639.
[112] Gilo, *The Anticompetitive effect of passive investment* cit., page 34, in which the author explains that the low cost firm would have a preference for a lower collusive price and the high cost firm for a higher price. If the low cost firm invests in the high cost firm, the share of the latter's profits that the low cost firm would gain will incentivize it to settle for a compromise price between the preferred by the two.
[113] Ignjatovic, Ridyard, cit.
[114] Case T-342/99 *Airtours Plc v. Commission*, Judgment of the Court of First Instance of 6 June 2002 (ECR II-2585), 2002 (5) CMLR 317.

All in all, the rationale to extend the merger control to catch information exchange is not convincing as the application of the anticompetitive agreements[115] would be fully available in this case and probably better suited.

Monitoring collusion

In what concern the ability to monitor adherence to coordinated agreements (if any have been reached) and possible deviation therefrom, it is argued that this would be allowed thanks to the enhancement of transparency over the target's strategies. However, similarly to what explained above, the monitoring is generally asymmetric (no ability of the target to monitor the acquiring firm) and not covering other rivals (unless similar nets of minority shareholdings exist in the sector.

In this respect, it has been argued that independently from the existence of a collusive agreement, cash-flow rights owned by a firm can indirectly facilitate detection of deviation. In particular, the suspiciously high profits of the target may reveal that the competing target firm undercuts rivals and thus deviates from collusion[116].

Another important point made is that the collusive effects of structural links prove to be more concrete when the deterrent strategies that companies can use are aggressive and credible[117].

Cartel's sustainability

Furthermore, the financial interest held in the target company may alter the benefit-cost analysis of deviating from a potential cartel so as to increase the cartel's sustainability. More specifically, the minority shareholding conferring cash-flow rights affects the revenues

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[115] As regards Europe, the prohibition of agreements and concerted practice restricting competition, as set by Article 101 TFEU, has been expanded by case-law as to apply, under certain conditions, also to the exchange of sensitive information between competitors in itself (even if not supporting a price fixing or other cartel). See for example, case T-141, *Thyssen Stahl v. Commission* [1999] ECR II-347, para 379-92, Case C-8/08 *T-Mobile Netherlands BV v. Raad Van Beestuur van de Nederlandse Mededingingsautoriteit*, para 36-43, and Guidelines for the assessment of horizontal cooperation agreements (Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, Official Journal C11, 14.1.2011, p. 1.)

[116] Spector, D., *Some Economics of Minority Shareholdings, Merger Control and Minority Shareholdings: time for a change?* Concurrence – Revue des droits de la concurrence, 3/2011, page 18.

[117] Kuhn, K. and Rimler, M., *The Comparative Statics of Collusion Models*, CEPR Discussion paper n. 5742, 2006.

accrued by the acquirer thus changing the incentives to deviate from collusion[118]. In this regard, it has been pointed out that collusion becomes more sustainable in case of partial ownership when the firm in which the investment is made is more efficient, because the collusive profit will be correspondently higher and the possible losses for undercutting the price lower[119].

Commitment Strategy

A further concern is that the investment in a rival may signal the intention by the investing firm to change its incentives and compete less aggressively on the market[120]. This is called "commitment" strategy and could be aimed at inducing other firms to avoid vigorous competition and tend to a collusive equilibrium to the harm of consumers[121].

It has been noted that only in case the acquirer of the stake in a competitor is an industry "maverick"[122], the structural link created through the minority shareholding can represent a credible and convincing long-term commitment to maintain a collusive equilibrium. The reason for this is that the maverick firm is usually the most likely to cheat either because it has lower marginal costs and will thus earn more profit from a price war or because it has lower market share that will allow a greater increase of market shares in case of price cut[123].

The message intended to be passed through by the maverick firm is that any deviation from the collusive outcome may be punished by the internalization of the losses caused to

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[118] Commission's Staff Working Document, Annex I *Economic Literature on Non-Controlling Minority Shareholdings ("Structural Links")*, para 8-10.

[119] Gilo, Mosche and Spiegel, cit.

[120] See Gilo, *Passive Investment* cit. page 1638, where the author notes that the reduced aggressiveness is rationale and exacerbated in a Bertrand-type quantity-setting models in differentiated markets. On the contrary, in a Cournot-type quantity setting model, the benefit stemming from the recoupment of the price increase of the target, as driven by the investing firm raising its price, will be likely neutralized or offset by the output expansion of the target and the reduction of the investor's market shares. In this case, the unilateral effects of minority shareholding may prove to enhance competition.

[121] Kalbfleisch P., *Minority shareholdings in competing companies, Merger Control and Minority Shareholdings: time for a change?* Concurrence – Revue des droits de la concurrence, 3/2011 page 38-39.

[122] An industry maverick is defined as a *firm that has a history of preventing or disrupting coordination, for example by failing to follow price increases by its competitors, or has characteristics that gives it an incentive to favour different strategic choices than its coordinating competitors would prefer.* (Commission Notice on Horizontal Merger, para 43) or as "*firms that have a great incentive to deviate from the terms of coordination that do most of their rivals (e.g. firms that are usually disruptive and competitive influences in the market)"* (US Horizontal Merger Guidelines, para 2.12).

[123] Gilo, *Passive Investment* cit. page 1640.

the competitor[124]. Naturally a prerequisite for such a situation to materialize is the observability of the acquisition and sale of the stakes on the market.

Accordingly, when non-maverick firms are the only investors in rivals on the market, minority shareholdings are unlikely to have coordinated effects; this would not however exclude unilateral anticompetitive effects.

Mismanagement suits

Another way to facilitate collusion, also in case of passive investments, is through the right/threat to bring mismanagement suits against the target company's managers. Such suits can be used to exercise some influence over the target firm leading it to compete less aggressively[125].

All in all, even if is accepted that minority shareholdings may produce coordinated effects as illustrated above, the real settings would very much depend on several factors. First the concrete ability for the acquirer to take advantage of information flow regarding the target; and this is not always the case unless the market conditions are transparent by their own nature. Second, the credibility of the deterrent strategies as well as the absence of maverick or other powerful rivals able to undermine the collusive equilibrium can change the situation. Other factors that may have an influence are for example the limited spread of minority shareholding in the industry – which may make widespread coordination more difficult[126] – and the reputation of certain firms for preventing coordination[127], etc.

iv. Discrimination

Although vertical effects are recognized to have lower relevance than horizontal ones, as they are often counterbalanced by the potential efficiencies of the links between companies

[124] Gilo, *Passive Investment* cit.
[125] O'Brien and Salop cit., page 613, Pini cit., page 612.
[126] The reason for this is that the profit of each firm would depend on the whole net of minority shareholding in the industry and not only on the own stake held by one in the rival.
[127] Kalbfleisch cit., page 38-39.

in related markets (such as profit internalization, R&D efficiency, diversification, information transparency, etc.[128]), economic analysis identifies specific theories of harm.

In particular, structural links may cause non-horizontal unilateral effects when the acquiring firm gains the ability and incentive to discriminate, through either input or customer foreclosure. This would be clearly the case in a vertical acquisition by a supplier company of a minority shareholding in one of its buyer, so-called 'forward shareholding'.

Incentives for input foreclosure may arise, for example, because the acquirer may be less inclined to enter into business relations with a company rival to the target (e.g. granting access to a network or facility) or to apply low prices if that would enable the latter to compete vigorously with the firm in which it acquired a minority shareholding. Potential buyers competing with the target would be then denied access to business opportunities or be disadvantaged by higher costs imposed on them (or differential treatment), with the consequent strengthening of the target firm position in the downstream market and the likely increase of its market share and stake's value.

In case of input price increase, the magnitude of the said effects should be measured in connection with the percentage of the total costs affected by the increase. A price increase that accounts for a minor part of the total costs borne by the rival would not significantly harm the latter's competitive position in the market[129].

The harmful effects of the 'discrimination theory' however can only be feasible when the upstream firm holds shares of a downstream firm (forward shareholder) but not also when the acquirer is downstream to the target (backward shareholder) and has no control on it. In such second scenario in fact due to the lack of control, the downstream firm cannot influence the upstream firm's decision to increase costs for certain customers or deny access and the upstream firm has no incentives to do so.

Customers' foreclosure may as well occur when the access to the target firm by rival suppliers is impeded. Assuming that the minority shareholding confers sufficient

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[128] For a detailed illustration, see the Commission Annex 1 to the *Staff Working paper Towards more effective EU merger Control Economic Literature on Non-Controlling Minority Shareholdings*, para 81-82.
[129] E.CA Economics, *Vertical Effects when assessing passive minority shareholdings*, January 2013.

controlling powers over the target, the supplier may be able to prevent the target from buying its inputs from competing suppliers and will most likely incentivized to do so.[130] The magnitude of customer foreclosure effects will mainly depend on the importance of the target firm in terms of customer base. Similarly to the argument made for the input foreclosure, customer foreclosure is unlikely with an upstream acquirer.

Based on the above considerations, the anticompetitive effects seem to be rational on the following condition. In case of input foreclosure, control rights in the upstream firm should be present as to enable the ability to foreclose and cash-flow rights in the upstream firm for the foreclosure incentives to materialize. In case of customer foreclosure, control rights in the downstream firm should be present as to enable the ability to foreclose and cash-flow rights in the downstream firm for the foreclosure incentives to materialize. [131]

All in all, given the lack of direct competitive relation and the substantial scope for efficiencies[132] non-horizontal transactions are less likely to produce a significant competitive harm than horizontal ones. Similarly to full non-horizontal mergers, there would seem to be legitimate rationale for partial vertical acquisition to be only scrutinized in special circumstances such as the existence of a net of cross-ownership among operators in the same market or the finding of concentration level and market shares over a certain problematic threshold.[133]

v. Entry Barriers

Structural links may be used as a tool to deviate the conduct of a company and prevent competitive moves on the market. For example, the influence exercised by a minority shareholding may induce potential entrants not to enter the market or to hinder a third

[130] Oxera Agenda, *Who calls the shot? Minority shareholdings in Merger Control*, March 2014.
[131] Spector, cit. page 17.
[132] Non-horizontal Merger Guidelines, para 11-13. An example of such efficiencies is the so-called 'internalisation of double mark-ups'. As a result of the complementary nature of the products of the companies involved in vertical mergers and certain conglomerate, according to the Commission, *a decrease in mark-ups downstream will lead to higher demand also upstream. A part of the benefit of this increase in demand will accrue to the upstream suppliers. An integrated firm will take this benefit into account. Vertical integration may thus provide an increased incentive to seek to decrease prices and increase output because the integrated firm can capture a larger fraction of the benefits.*
[133] In the Non-horizontal Merger Guidelines, the Commission states that it is *unlikely to find concern in non-horizontal mergers, be it of a coordinated or of a non-coordinated nature, where the market share post-merger of the new entity in each of the markets concerned is below 30 % and the post-merger HHI is below 2 000* (para 25).

companies' access to the target's offer.[134] A firm not active in the market where the company it invested in operates can indeed be induced not to enter this company's market because it would suffer the losses imposed on the acquired company in case of a new entrant in the market.

Another anticompetitive effects related to entry can arise when a firm inside the market acquires minority shares of a third firm interested in entering such market. When the target enters the market, as a means to signal its competitive intentions, the acquiring firm may sell the shares held in the new entrant or maintain its ownership. Whereas in the first case (sale of new entrant's shares) the signal given to the market is negative as the value of the entrant would fall, in the second case (participation is kept) the signal of the investing company is positive and corresponds to an invitation to collude[135].

A different instrument that can be used to impede or deter market entry could be the blocking of potential acquisitions of the target by a competitor[136] or the veto on the decision to raise capital, or expand the activities of the target in new markets where the acquiring firm is active[137].

2. *Efficiencies and Counterfactors*

The economic theories pointing at the anticompetitive effects illustrated above have been criticized under different perspectives. One of the doubts raised concerns the probabilistic nature of most of such effects and difficulty to demonstrate in a pre-emptive situation. More concretely, it is argued that the possible efficiencies of minority shareholdings should be taken into account as a counterbalance mean. And that a number of counter-factors

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134 European Commission Annex 1 to the *Staff Working paper Towards more effective EU merger Control Economic Literature on Non-Controlling Minority Shareholdings*, para 76-80.

135 Pini cit., page 613 quoting to Corradi, *Le partecipazioni societarie che non veicolano il controllo: riflessioni di economia e diritto antitrust,* in Rivista del Diritto Commerciale e del Diritto Generale delle Obbligazioni, 2007, page 388.

136 In this respect, see Idot, L. cit. A meaningful example of application of such theory is given by the case Ryanair/Aer Lingus (illustrated further below in Chapter IV) in which the main concern of the UK competition authority was the ability of Ryanair to hinder expansion of Aer Lingus by way of integration with competing airlines. Also in the BskyB/ITV case (illustrated further below in Chapter IV, *British Sky Broadcasting Group PLC/ITV PLC*, Competition Commission Report of 14 December 2007 and final decision of the Secretary of State for Business, Enterprise and Regulatory Reform, 29 January 2008, para 3.15-3.19), that UK Competition Commission observed that internal board documents showed that a possible rationale of the transaction was for BskyB to prevent a competing bid by Virgin Media over ITV.

137 See case M/4153 *Toshiba/Westinghouse* (Commission decision of 19 September 2006).

may impede or limit the materialization of such effects. Another issue worth mentioning is the significance of the anticompetitive effects and the way to measure their possible magnitude.

Efficiencies

An interesting question is whether there is any room for efficiency arguments to be considered in partial acquisition cases as to offset anticompetitive effects[138]. In general terms, it is to be acknowledged that the synergies and efficiencies that are traditionally attached to the merger of two previously independent firms in a single entity under common control are not replicable in case of partial ownership where a separate management of the involved firms will be maintained. However, the absence of efficiencies associated with joint control does not exclude the possibility of other efficiency enhancement by minority shareholdings.

It has been suggested that structural links may prevent double marginalization, allow diversification of risks and insuring *against the fluctuation in the performance of individual firms, which might lead to lower costs as firms face reduced uncertainty*[139]. Procompetitive business reasons may also include pooling capital as a way to allow submission of competitive bids by two companies that otherwise could not, and acquisition of attractive business investments[140].

Another possible efficiency could be the superior information that the investor that compete on the same market has (on the market, the product, the expansion trends, etc.) compared to an ordinary investor. In such a way, the minority investment may be used as an efficient way to raise capital for the target and benefit from the management expertise of the investor[141].

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138 The European Commission takes the view that the scope of efficiencies in a partial acquisition is typically more limited than in full mergers. See Annex 1 to the *Staff Working paper Towards more effective EU merger Control Economic Literature on Non-Controlling Minority Shareholdings*, page 6.

139 Cleary Gottlieb Steen and Hamilton *Observations On The European Commission's 2013 Consultation Paper, "Towards More Effective EU Merger Control"*, September 12, 2013 available at http://ec.europa.eu/competition/consultations/2013_merger_control/cleary_gottlieb_steen_hamilton_en.pdf

140 Gowdy J., *Antitrust Spotlight Focuses on Private Equity investors and their portfolio companies* M&A Lawyer 2006, page 6.

141 Gilo notes that the efficiency associated with the capital raise may be derived only in case of acquisition of new stocks and not in the event of purchase of existing stocks from an existing shareholder (Gilo, *Passive*

As detailed above[142] passive investments can also serve to solve problems of incomplete contracts and trust between the parties[143], to increase the incentive in relation-specific investments, to mitigate information problems and to enhance efficient allocation of production.

Although unlikely, an example of efficiency brought by horizontal minority shareholdings may be the efficient allocation of funds, and specifically the diversion of funds from the less to the more efficient firm[144].

More significant efficiencies could be triggered by vertical minority shareholdings where the price determination in the supply chain may be well affected by the presence of vertical related firms with the consequence of a greater incentive to set a lower price than absent the vertical link. In particular, the decision by an upstream firm to increase price for accessing to its input may take into account the potential effects that such an increase may have on the vertical related company. Such effects are higher input costs passed on to the subsequent level of the chain and reduction in sales; they would not have an impact on the input pricing decision in the absence of a minority shareholding in the downstream company[145]. The positive outcome of a decision to set lower prices not only to the advantage of other firms in the supply chain (higher sales and profit margins) but also to the benefit of consumers (lower prices).

The problem would be to predict likelihood and magnitude of such efficiency in a pre-acquisition scenario, when generally no sufficient elements are given but can only be presumed.

Based on US case-law, it has been remarked that an efficiency defense may have some degree of success when it is shown, through convincing evidence, that no other means less

Investment cit.)
142 Chapter I, Section A.
143 Hart, cit.
144 Reed, cit. page 338.
145 Oxera Agenda, *Who calls the shot? Minority shareholdings in Merger Control*, March 2014.

competitively harmful than the partial acquisition enable the same efficiencies to be achieved[146].

Counter-factors

A general consensus exists on the need to assess the so-called counter-factors that may hinder the effectiveness of the anticompetitive concerns.

An example of counter-factor that could undermine durable anticompetitive effects of a minority shareholding is the lack of barriers to entry higher enough to prevent entry of new competitors. Intuitively in a market where potential competitors can easily decide to enter on a short term notice, new entrants will be attracted by the higher profits and the firm investing in a competitor may lose its unilateral pricing incentives.

A possible constraint may derive from the fiduciary obligations set by legal rules that would prevent shareholders with a financial interest in a competitor from influencing the acquired firm to gain any competitive advantages. Although in theory such obligations can constraint the acquiring firm's ability to affect competitive moves by the target, the concrete compliance to such rules may be influenced by the unlikely detection and difficulty to prove the breach of related rules in certain circumstances[147]. Furthermore, the presence of independent directors (not appointed by interested shareholders) may act as a deterrent from infringing fiduciary duties by non-independent directors.

In a famous exchange of articles and replies, focus is put on the "real-world" factors that would affect the existence, likelihood and magnitude of competitive harms. Those are lack of information, personal incentives of the managers, inability to capture the alleged benefits and the aim to preserve reputation of the acquiring firm.[148]

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[146] Reed B. J., *Private equity partial acquisitions: towards a new antitrust paradigm* Virginia Law & Business Review Volume 5 Fall 2010 Number 2, page 334 where three US cases are quoted: Univ. Health, Inc., 938 F.2d 1206, 1222–23 n.30 (11th Cir. 1991) requiring "*proof that the efficiencies to be gained by the acquisition cannot be secured by means that inflict less damage to competition*"; Cardinal Health, Inc., 12 F. Supp. 2d 34, 61–62 (D.D.C. 1998) where the FTC stated that "*efficiencies, no matter how great, should not be considered if they could also be accomplished without a merger*"; 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.

[147] O' Brien and Salop, cit. page 580.

[148] O' Brien and Salop, cit., Dubrow, cit. and Salop S. C. and O'Brien D. P.*, The Competitive effects of passive minority equity interest: Reply*, Antitrust Law Journal 2001, 69 Antitrust L.J. 113.

As regards the lack information, it is claimed that very often information on the competitive dynamics of the market are not available or in any case incomplete. To make an example, the relevant data missing could regard how the profitability of the target would be affected and what the latter's reaction would be in case of a certain competitive action by the acquiring firm. The lack of those kind of information would limit the possibility by managers of the acquiring firm to take sufficiently informed business decisions. Such criticism does not however have the full power to impair the economic theories' conclusions on the anticompetitive effects of minority shareholdings, unless it is conceded that all economic theories should be defeated by such criticism. Indeed, it is a fact that the economic environments are characterized by incomplete and imperfect information and the assumption that managers are able to take their business decisions and gain from profitable investments notwithstanding the lack of information is at the heart of every economic analysis[149].

The actual incentives of the acquiring firms' managers would also play a role as a tempering factor. It has been held that the managers of the investing firm would not be keen to increase the prices of the firm they manage to the advantage of the (competing) target company. Although this move would reach the objective of an overall increase in profit of the managed firm (since its overall profits also include the results investment activities), it is doubtful that managers would have (strong) interest in harming their own business by losing sales, market shares and profits to the advantage of a competitor. On the contrary, it is intuitive that the managers of a company are willing to maximize the profits of the business that they directly carry out on a daily basis.

Two reasons would support such view. First, the 'employment' market judges the performance of managers based on the short-term profits of the business they operate, giving no importance to the overall results of the corporation in which such business is integrated[150]. Second, an action against the evident interests of the managed company would endanger this company and the future performance thereof. The relations with third

[149] O' Brien and Salop cit.
[150] Pini cit., page 617.

parties (such as suppliers or distributors) as well as the brand recognition of the managed firm and the ability to raise funds on the market may be negatively affected[151].

Some authors suggest to ignore the above considerations arguing that the fiduciary duties imposed by corporate and antitrust laws would require managers to maximize the corporate profits to the benefit of all shareholders; this would include the profits gained through investments and minority shareholdings[152]. As a mechanism to strengthen such duties, executives' compensation packages often provide a positive link between the managers' remuneration and the overall profits of the corporation (rather that the economic results of the specific business operated by the manager).

An additional critic focuses on the inability to capture the benefits that the economic theories predicts with regard to the result of the price increase by the acquiring company. An example of this situation is when the target firm operates in several markets other than the sector in which the company holding the share is active. Being the investment not linked to the specific business/market in which both acquiring and target firms are active, in such case, the profit gained in the "relevant" market may risk to be dispersed to offset the losses in the other business segments[153].

Another element that may influence the ability to benefit from the price increase is the possibility to realize the capital gains related to the profits of the managed firm. The financial interest in a firm does not allow a direct and immediate profit sharing; potential dividends (if any and if allocated between financers) do not usually correspond to the *pro quota* profits and can be realized only after the participation is sold. At that time, it is not certain that the remuneration for the sale of the ownership will include the potential capital gain from the increase in price of the acquiring firm; it can indeed be offset by future events affecting the value of the target firm.

As a response to such critic, it has been argued that the value of the acquiring firm will nevertheless increase both in case of a distribution of dividends and capital gains[154]. All in

151 Dubrow J., *Challenging* page 377.
152 O' Brien and Salop cit., page 619.
153 Dubrow J., *Challenging* page 134.
154 O' Brien and Salop cit., page 621.

all, however, it is acknowledged that a problem in recapturing the benefits still exists based on the fact that the minority shareholders are not able to influence the way in which the target may dispose of the profits gained on the market.

3. *Quantification of the effects*

A crucial problem is whether it is possible to quantify the anticompetitive effects of non-controlling minority shareholdings and if appropriate measurement systems exist.

Antitrust economists have proposed two tests for the measurement of the magnitude of anticompetitive effects of partial acquisitions, the Modified Herfindahl-Hirschman Index (MHHI)[155], which is based on market share and Price Pressure Index (PPI)[156], which is focused on the profit margin combined with the closeness of firms' products. The MHHI is a modification of the HHI and its delta corresponds to the partial ownership share multiplied for the product of the market shares of the acquirer and target. The MHHI combines market shares and level of ownership and shows that the effects of minority shareholding depend on the allocation of the rights to control or influence. In case of passive investments no effects on the acquired firm's incentives trigger the lowest MHHI delta. The PPI measures the effects on price due to an increase in the ownership level, taking into account the margins of the firms' products and the amount of sales lost by the acquiring and diverted to the rival (diversion ratio) in case of differentiated products. It is intuitive that the acquiring company may expect to recapture higher profits from the investment in case of higher margin of the target and closer substitutability between the two firms' products. In this case, incentives for raising prices will increase.

4. *Conclusions on Economic Theories*

Once described the theories of harm developed by economic literature, the logical question before passing to the next step and exploring the features and limits of current legislative set up in selected countries is whether sufficient anticompetitive effects can be derived with a certain degree of reasonability to non-controlling minority acquisitions.

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155. Bresnahan T. F & Salop S. C., *Quantifying the Competitive Effects of Production Joint Ventures*, 4 Int'l J. Indust. Org. 155 (1986).

156 O' Brien and Salop, cit. page 603, who cites Shapiro, cit.

Easier than predictable, there is no clear response. Theoretically it is shown that a high potential for harming competition, consumers and welfare exists. Nevertheless, in practice the materialization of such potential, although probabilistic, effects depends on such a number of factors and elements that render a predictive assessment, detection and proof of anticompetitive effects very difficult to achieve.

Among the key factors that need to be put in the 'assessment machine' to require the most reliable outcome, we can mention the level of shareholding, given that a higher investment increases the joint profit maximization incentives; the corporate governance and other rights attached to the shares, as they can enhance the ability to directly influence competitive moves of the target on the market (such as preventing expansion by way of merger with a competitor); the market conditions, among which entry barriers as well as homogeneity or differentiation of products play a crucial role; the involvement of a maverick firm in the acquisition, considering the peculiar incentive of such firm on the market; the widespread nature of minority shareholdings between companies active on the same market, as this will increase the likelihood of collusion.

By merely having in mind those elements, which as described above are not exhaustive, it is evident that a case by case analysis is needed in order to approach the question of anticompetitive effects. Not only, but also a certain degree of flexibility is highly desirable considering the needs to attach the right weight to each and any relevant factor in the case at issue, and taking into account both the presence of other elements that have similar effects – such as debts, executive compensation packages or interlocking directorates – and the possible efficiencies stemming from the investment.

Even assuming that a legal framework and a scrutiny system exist as to conduct such an analysis, the problem of lack of information may still remain. Some of the data needed may not be available at the time of the acquisition of the share either because they are confidential o difficult to retrieve or because they can be collected only *ex-post* (as for example the pattern of attendance and voting at shareholders' meetings that would confirm or exclude the ability of the minority shareholder to influence or control the target).

All those considerations prove that there is no balanced conclusion pending in a way or in another; as noted, it is not only difficult to demonstrate that anticompetitive effects are present but also to prove that they can be excluded[157].

[157] Pini, cit. page 631.

III. US MERGER CONTROL AND PARTIAL ACQUISITIONS

Before entering into a detailed discussion on the European legal framework and its current set-up for antitrust scrutiny of partial acquisitions, the US relevant law system and a selected case-law will be briefly examined with the aim of providing a simple example of a legal regime where anticompetitive (partial) acquisitions do not go undetected and the economic analysis always supports legal doctrines.

A. Overview

When assessing personal and financial links that may affect competition between companies, four main US law provisions are to be considered. First the prior mandatory notification requirements set for mergers and acquisitions by the Hart-Scott-Rodino Antitrust Improvements Act ("HSR Act")[158]. Second, the substantive assessment of the effects on competition of mergers and acquisitions, regulated by Section 7 of the Clayton Act[159] which prohibits anticompetitive acquisitions of stock or assets and by Sections 1 and 2 of the Shearman Act[160], which respectively challenge unreasonable restraints of trade and monopolizations or attempts of monopolization.

Third, the exemption from the notification/waiting requirements of the HSR Act and from the application of Section 7 of the Clayton Act set for transactions where the stocks are purchased "solely for investment" purpose[161]. Fourth, the prohibition of interlocking directorates between competitors, which is applicable independently from the proof of likely or actual anticompetitive effects, as set by Section 8 of the Clayton Act:

> "*No persons shall at the same time, serve as 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 between them would constitute a violation of the antitrust laws*."

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158 Clayton Act § 7A (Hart-Scott-Rodino Antitrust Improvements Act of 1976), 15 U.S.C. § 18a *Premerger notification and waiting period.*
159 Clayton Act § 7, 15 U.S.C. § 18 *Acquisition by one corporation of stock of another.*
160 Shearman Act, July 2, 1890, ch. 647, 26 Stat. 209, 15 U.S.C. 1–7.
161 Clayton Act § 7 "*This section shall not apply to persons purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition*."

With the aim of illustrating how minority shareholdings leading to partial acquisitions are assessed under the US antitrust regime, the first three provisions listed above will be further illustrated.

B. Mergers and Acquisitions

1. *Mandatory notification*

The HSR Act requires to file notification of certain proposed transactions to the Federal Trade Commission[162] ("FTC") and the Antitrust Division of the Department of Justice[163] ("DOJ") before implementation, and to wait until the expiration of a waiting period, usually 30 days[164], before consummating the acquisition. The reporting requirements under the HSR Act are set out by a two-part test based on the size of the transaction and the size of the parties. Under the 'size of the transaction' test, a value of above $75.9 million will trigger the HSR reporting requirements, regardless of the percentage of assets or voting securities to be acquired. The 'size of the person' test requires reporting of transactions exceeding $75.9 million but below $303.4 million if (1) total assets or net sales held by one party to the transaction equal to $151.7 million or more, and (2) total assets or net sales of the other party equal $15.2 million or more. All transactions exceeding $303.4 million value are reportable regardless of the 'size of person' test[165].

2. *Substantive assessment*

Section 7 of the Clayton Act addresses partial acquisitions and minority shareholdings[166], and prohibits any transaction involving direct or indirect acquisition, by a person engaged in an economic activity, of the whole or any part of the stock or other share capital of another person engaged in economic activity that may substantially lessen competition or create a monopoly in any line of commerce in any part of the US.

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[162] Section 13 (b) of the Federal Trade Commission Act provides the FTC with powers to address anticompetitive concerns of mergers.
[163] The competence of the DOJ is set by Section 15 of the Clayton Act.
[164] The waiting period is reduced to 15 days in case of a cash tender offer or a transfer in bankruptcy.
[165] The above values applies to transactions occurring in 2014.
[166] From 1996 until June 2011, the DOJ dealt with 18 cases involving minority acquisitions raising antitrust concerns. See European Commission Annex 1 to the Staff Working paper, *Towards more effective EU merger Control Economic Literature on Non-Controlling Minority Shareholdings*.

Unlike the European Union Merger Regulation which, as we will see in Chapter IV, only applies to transactions involving control, *i.e.* "*the possibility of exercising decisive influence on an undertaking*"[167], the application of Section 7 prohibition does not depend on change of control or acquisition of influence over the target company and/or its business decisions[168]. As stated by the Sixth Circuit in the Dairy Farmer case (see below)[169], "*even without control or influence, an acquisition may still lessen competition*" and thus infringe the Clayton Act[170].

On the side of the substantive test, acquisitions of shares are always prohibited when the effect is a substantial lessening of competition. No minimum ownership threshold triggering anticompetitive effects is established by statutory law. Accordingly, even if not reportable (*i.e.* not meeting the thresholds set by the HSR Act) consummated transactions leading to anticompetitive effects can subsequently be investigated by the US antitrust agencies.

Section 1 of the Shearman Act is also applicable to mergers in case it is envisaged *a 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*. Under Section 2 of the Shearman Act, a merger may be challenged as an acquisition that monopolizes or attempts to monopolize a particular market.

As illustrated by the case-law reported below, Section 7 of the Clayton Act applies to likely and probable problematic conducts in the future as its enforcement is based on the so-called incipiency doctrine according to which the prohibition of anticompetitive mergers is aimed at capturing "*monopolistic tendencies in their incipiency and well before they have attained such*

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[167] According to the EUMR (Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, which replaced Council Regulation (EC) No 4065/89 (as amended) for transactions after 1 May 2004), the European Commission obtains jurisdiction on mergers and acquisitions on a different basis and at a higher level, involving control *i.e.* "*the possibility of exercising decisive influence on an undertaking*" (art. 3(2) EUMR) – which may occur through (i) ownership of more than 50% of a company's capital or assets; (ii) power to exercise more than 50% of the voting rights; (iii) power to appoint more than 50% of the members of the supervisory/administrative bodies; (iv) right to manage the company's business activities including through negative control such as veto rights over strategic affairs.

[168] United States v. E.I. Pont De Nemours Co. 353 US 586, 592 (1957) "*any acquisition by one corporation of all or any part of the stock of another corporation… is within reach*".

[169] Para 860.

[170] A similar statement has been made by the Supreme Court in the Denver & Rio Grande Western R.R. v. United States case that a "*company needs not to acquire control of another company in order to violate the Clayton Act*" (387 U.S. 485 (1967).

effects"[171]. Unlike the enforcement of the Clayton Act, where the antitrust agencies are required to show with reasonable probability that negative effects on competition may occur through a *predictive judgment necessarily probabilistic ad judgmental rather that demonstrable*[172], the plaintiff carries the burden of proving that actual anticompetitive effects are produced by the transaction under the Shearman Act.

An indication of the evidence that the agencies may use in order to address the substantial lessening of competition test is provided by the 2012 US Horizontal Merger Guidelines[173]. Among the most informative evidence in predicting the likely competitive effects of mergers, we can mention the anticompetitive effects of consummated mergers, if already observable; the impact of historical events in the same market or similar markets competitiveness of the market where the merged entity is compared to analogous market. Market shares, market power and level of concentration observable and predictable *pre* and *post*-acquisition are also considered; the involvement of a maverick firm in the transaction given that the elimination of such a firm may cause actual harm to competition and consumers; structural changes in the market that can facilitate collusion and possibly change the incentive for firms to strongly compete on the market or to adopt unilateral problematic behaviors.

With specific reference to partial acquisitions, US antitrust agencies indicate three main potential anticompetitive effects, and namely the ability to influence on target's conducts, the reduction of incentives to compete and the coordination by way of exchange of competitively sensitive information.

First, the main concern linked to the ability to influence the target's conduct is that the target may be induced to compete less aggressively on the market or coordinate its conduct with the conduct of the acquiring firm. Second, as regards the impact on the incentives to compete, the fact that the minority shareholdings gives right to a share of profits and losses may be problematic as long as an aggressive competitive behavior by the target may induce losses that will be inflicted on the acquiring company as a rival and shareholder. According

171 Cargill, Inc. v, Monfort of Colo., Inc., 479 U.S. 104, 124 (1986).
172 Hosp. Corp. of America v. Federal Trade Commission 807 F.2d 1381, at 1389 (7th Circuit 1986).
173 DOJ and FTC, *Guidelines on the assessment of horizontal mergers*, 19 August 2010, para 2-4.

to the Horizontal Mergers Guidelines, such effects on the incentives to compete do not depend on the ability to exercise some influence on the target's conduct but have a lower magnitude compared to the same effects that a full merger can have, where the ownership is higher. Third, the transaction may facilitate a flow of information regarding business strategy and other competitive factors between the acquiring company and the target; this may lead to adverse unilateral and coordinate effects, by enhancing for example the ability to coordinate behaviors on the market.

Considering that the magnitude of the harm produced by partial acquisitions may vary greatly depending on the circumstances of the case, a case by case assessment is generally conducted by US antitrust agencies. Such assessment should in principle include evaluation of potential efficiencies, although the agencies acknowledge that many types of efficiencies associated with mergers are not usually connected to partial acquisitions[174].

3. *The "solely for the purpose of investment" exemption*

According to the Clayton Act, 'solely for investment transactions' are exempted from application of Section 7.

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

This exception includes a twofold test, covering first the assessment of the objective of the acquisition and then the intention of the investor to harm competition.

If the acquisition is made for investment purpose, it would not be examined under an antitrust standpoint and the substantial test set by Section 7 of the Clayton Act, *i.e.* substantial lessening of competition, will not apply. The second part of the test requires to assess whether the investor uses the stocks to bring about or attempting to bring about a substantial lessening of competition[175].

Accordingly, when the solely for investment exemption applies, specific evidence that the investor is actually acting to achieve the objective of lessening the competition is required

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[174] Id. para 13.
[175] *Anaconda Co.* v. *Crane* Co. 411 F. Supp. 1210 (S.D.N.Y. 1975).

to support a Section 7 violation[176]. In the opposite case, however (*i.e.* when the solely for investment exemption cannot be applied) a reasonable probability of lessening of competition would suffice to support a Section 7 violation - according to the incipiency doctrine explained above.

It can be thus argued that in principle the "solely for investment exemption" provides a more lenient test to be applied to passive investments, actual lessening of competition instead of the "probable tendency" standard applied to active investments. Nevertheless, such test has been interpreted by the FTC very narrowly as to be applied only to passive investors that do not have the "*intention of participating in the formulation, determination, or direction of the basic business decisions of the issuer*."[177]

Indicators of types of conduct that may provide evidence of inconsistency with a passive investment purpose and thus exclude exemption from premerger filing under HSR Act and prohibition under Section 7 of the Clayton Act include (i) nominating a candidate for the board of directors; (ii) proposing corporate actions requiring shareholders' approval; (iii) soliciting proxies; (iv) having a controlling shareholder, director, officer, or employee simultaneously serving as an officer or director of the issuer; (v) being a competitor of the issuer; and (vi) doing any of the above with respect to a parent or affiliate of the issuer[178].

At first sight, the solely for investment exemption as so interpreted might seem inconsistent with the part of the Horizontal Merger Guidelines acknowledging that a lessening of competition (even if of a lower magnitude) may be caused by passive investments[179], *i.e.* not conferring influence on the target firm. In other words, should the interpretation of the exemption exclude passive shareholdings not conferring influence from antitrust scrutiny a contrast with the agencies' guidelines would arise. A possible way to reconcile the two is to maintain that passive shareholdings should not be considered *per*

[176] Gilo D., *The anticompetitive effect of passive investment*, Michigan Law Review October 2000, page 7.
[177] Chapter I, Subchapter H - *Rules, Regulations, Statements And Interpretations Under The Hart-Scott-Rodino Antitrust Improvements Act* Of 1976, Part 801.1 (i) 1 Coverage Rules.
[178] *Statement of Basis and Purpose for the HSR Rules*, 43 Fed. Reg. 33450, 33465 (July 31, 1978).
[179] "*Partial acquisitions that do not result in effective control may nevertheless present significant competitive concerns and may require a somewhat distinct analysis from that applied to full mergers or to acquisitions involving effective control. The details of the post-acquisition relationship between the parties, and how those details are likely to affect competition, can be important.*" DOJ and FTC, *Guidelines on the assessment of horizontal mergers*, 19 August 2010, para 13.

se as acquired for investment purpose only but the actual purpose and effects should always be thoroughly assessed, along the same line of the scrutiny of active investments.

C. Theories of harm

Based on the theories of harms developed over the years by economists as illustrated above in Chapter II, Section 1, US antitrust enforcement agencies[180] recognize the possible anticompetitive effects of partial acquisitions as being qualitatively similar to complete mergers but quantitatively smaller[181]. Some commentators argue that it could be reasonable simply to prohibit a partial acquisition when a complete merger between the same parties would be prohibited[182].

However, this approach may be too simplistic with regard to a 'majority' acquisition, when typically only one entity results after the transaction and antitrust authorities assess whether the surviving single firm will have the power to harm consumers (unilateral effects) or whether the market structure deriving from the acquisition will allow coordinated actions among the firms remaining active on the market (coordinated effects). On the contrary, partial acquisitions generally do not affect the market structure and do not result in a change in the number of market participants as both entities remain active as separate companies on the market[183].

Intuitively partial ownerships may be thus argued to be less problematic than full mergers because the parties can continue to compete on the market against each other after the transaction. Nevertheless, commentators recognize potential unilateral[184] and coordinated effects of partial acquisitions, although those are less obvious and more complex to verify than in complete mergers.

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[180] DOJ and FTC.

[181] Organization for Economic Co-operation and Development Competition Policy Roundtable *Antitrust issues involving minority shareholding and interlocking directorate* Working Party No. 3 on Co-operation and Enforcement, DAF/COMP(2008)30 23 June 2009.

[182] Wilkinson L. and White J., *Private Equity: Antitrust concerns with Partial acquisition* Weil, Gotshal and Manges LLP Articles 2006, Antitrust, Vol. 21, No. 2, Spring 2007 by the American Bar Association, page 28.

[183] A partial acquisition may however reduce the number of non-affiliated competitors remaining active on the market. Gowdy J., *Antitrust Spotlight Focuses on Private Equity investors and their portfolio companies* M&A Lawyer 2006, page 7.

[184] As regards unilateral effects, Areeda and Hovenkamp's discussion points out that "*at a psychological level either company may lose some former zeal to compete with the other. And, quite apart from any such feelings, the acquired firm may have good reason to direct its competitive energies away from the acquiring firm*". Page 282 (2 ed. 2003)

It has been pointed out that the assessment of competitive effects of partial ownerships is mainly based on two elements, namely (i) financial interest and (ii) corporate control[185]. Financial interest refers to the right of the acquiring firm to share the profits gained by the target firm, whereas corporate control refers to the right of the acquiring company to influence business decisions of the target firm[186] (e.g. prices, output, product selection and other competition variables[187]). Based on this, it has been held that the existence of the 'special elements' of financial interest and corporate control and the various degree of intensity that each of them can present in partial acquisitions can result in different ways and *in greater or lower harm to competition than a complete merger*[188].

The distinction between those two elements is however absent in merger analysis, which always assumes control after the merger.

D. Lessons from Case-law

Among the several cases dealt with by US antitrust agencies over the years, the following cases provide meaningful examples of the application of Section 7 of the Clayton Act to partial acquisitions, as they clearly point out the policy approach of agencies pursuing all envisaged theories of harm, and the crucial elements that may influence the antitrust assessment.

1. E.I. du Pont de Nemours

The E.I. du Pont de Nemours litigation shows that the intention to achieve of anticompetitive effects is irrelevant for the finding of anticompetitive concerns whereas it is sufficient that those effects are to be expected with a "reasonable probability".

In 1949 the FTC brought a civil action for violations of Section 7 of Clayton Act against the acquisition by du Pont de Nemours ("Pont de Nemours") of a 23% stock interest in

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185 Among the first authors drawing the distinction between financial interest and corporate controls, Reynolds R.J. & Snapp B.R. analyzed the unilateral competitive effects of partial financial interests, in *The Competitive Effects of Partial Equity Interests and joint Ventures*, 4 INT'L J. INDUS. ORG. 141-53 (June 1986).
186 Salop S.C. and O'Brien D. P., *Competitive Effects of Partial Ownership: Financial Interest and Corporate Control*, 67 Antitrust L.J. 559-614 (2000), page 568.
187 European Commission Annex 1 to the Staff Working paper, *Towards more effective EU merger Control Economic Literature on Non-Controlling Minority Shareholdings* ("Structural links"), page 3.
188 Salop S.C. and O'Brien D.P., *Competitive Effects of Partial Ownership: Financial Interest and Corporate Control*, 67 Antitrust L.J. 559-614 (2000), page 562.

General Motors ("GM"), that occurred in 1917-1919. At the time of the allegation, Pont de Nemours was the largest supplier of automotive finishes and fabrics of GM and was considered to have a substantial share of the relevant market. The government claimed that, through the stock purchase, Pont de Nemours enhanced the close relationship between the companies and obtained an illegal preference over competitors in the sale of automotive finishes and fabrics to GM, thus preventing competitors from freely accessing to GM's market. In essence, the FTC concluded that at the time of transaction the partial vertical acquisition likely tended to create a monopoly over a line of commerce[189].

The District Court dismissed the action, stating that the FTC did not prove its case. On appeal, after having confirmed the application of Section 7 to vertical acquisitions (*i.e.* acquisitions by a supplier of assets of a customer), the Supreme Court assessed the position held by Pont de Nemours on the market in order to verify whether the strength acquired becoming, after the acquisition, GM's largest supplier was achieved on competitive merit alone, or because of the purchase of GM's stock.

The Supreme Court found a number of elements revealing that Pont de Nemours intentionally exploited its position as financer of GM to entrench itself as the latter's primary supplier of automotive finishes and fabrics. Among such elements, the Court referred to the exercise of control over voting rights of the board of directors and the existence of a line of intercompany communication and surveillance which allowed to know at all times what products of Pont de Nemours and its competitors were being used by GM.

The fact that both Pont de Nemours and GM's high level directors acted honorably with the honest intention to pursue actions in the best interests of the respective companies and without the intention of excluding Pont de Nemours's competitors was not considered relevant by the Court, which clearly stated that *it is not requisite to the proof of a violation of [Section] 7 to show that restraint or monopoly was intended*.

Reasoning that Pont de Nemours's commanding position was essentially fuelled by its stock interest and was not gained by competition on the merits, the Supreme Court

[189] United States v. E.I. Pont De Nemours Co. 353 US 586, 592 (1957).

reversed the District Court's decision. In doing so, the Supreme Court stated that the test whether a violation of Section 7 has occurred is based on the "reasonable probability" that at the time of transaction the acquisition "may" lead to a restraint of commerce or tend to create a monopoly of a line of commerce. The case was then remanded to the District Court to determine what equitable relief was necessary to eliminate the effects of the unlawful acquisition.

2. *Dairy Farmers*

The Dairy Farmer case provides a concrete example of the application of the unilateral effects and alignment of financial incentives theory to a partial acquisition irrespective of the ability to influence or control the target's company, and it meaningfully points that lack of control or influence does not preclude a Section 7 infringement.

At the time of the relevant facts, Dairy Farmers of America ("DFA") was the largest dairy cooperative in the US, marketing its members' raw milk to milk processors and investing in milk processors' plants. In 2001, DFA acquired a 50% ownership of National Dairy Holding LP ("NDH"), which operated a milk processor plant under the name of Flav-O-Rich, without involvement in NDH's daily operations. In 2002, DFA and others formed the company Southern Belle Dairy Co. LLC ("SBD") in order to acquire a milk processor plant operating under the name of Southern Belle. DFA's ownership of SBD accounted for 50% of SDB's equity without any direct control on operations.

The DOJ's complaints

Subsequent to the acquisition of Southern Belle, in 2003, the DOJ brought suit against DFA and SBD under Section 7 of the Clayton Act, claiming that, through the ownership interest, DFA acquired indirect control over SBD and that such situation would have eliminated the significant competition exercised by NDH, also indirectly and partially owned by DFA. More specifically, the DOJ alleged that SDB and NDH were the main alternatives in the supply of milk to school districts in Kentucky and Tennessee and that competition in those specific markets was restrained due to the holdings by DFA.

To provide evidence that DFA acquired "*control and influence over all significant business decisions of*" NDH and SBD, the DOJ relied on the following elements (i) DFA's rights to share in the two dairies' profits[190], (ii) DFA's rights to approve expenditures exceeding certain thresholds[191], (iii) DFA's rights to appoint new officers and determine their compensation, (iv) DFA's status of sole or 'contractually preferred' supplier to SBD and NDH dairies, and (v) the lack of independency from DFA of the managers operating SBD and NDH[192]. Furthermore, the DOJ noted that the markets where NDH and SBD operated was highly concentrated since they were the only two active diaries. Finally, in its complaint the DOJ underlined a number of other circumstances relating to the previous relations between SBD and NDH, such as past participation of both in rigging bids in school contracts, and the proposed merger between the two diaries which was then blocked for antitrust concerns.

According to the DOJ, the above elements created both unilateral and coordinated effects. Unilateral effects could occur because of the new alignment of financial incentives of DFA, NDH and SBD not to compete against each other: the three firms wanted to be all the more profitable and to benefit from reduced rivalry. Unilateral price increase would be profitable for DFA since it would have caused customers to switch to the other in response to an increase in price. Coordinated effects may occur, in the DOJ's opinion, based on the enhanced incentives to cooperate, the increased interest in sharing information and the improved "*grounds for trusting each other more than independent firms in a marketplace*"[193].

The District Court's Opinion

Further to the DOJ's complaint, the agreement between DFA and SBD was amended as to eliminate DFA's ability to control SBD[194]. When it assessed the agreement as so amended, the District Court rejected DOJ's arguments reasoning that the DOJ did not identify a

[190] 50-75% of NDH and SBD's profits.
[191] $50,000 for NDH and $150,000 for SBD.
[192] The DOJ alleged for example that the executive manager of SBD (Mr Robert Allen) had previous relationships with DFA and, therefore, "*a substantial incentive to keep DFA happy so that he can continue to receive future profitable business opportunities*."
[193] United States v. Dairy farmers of America, 2004 WL 2186215 citing DOJ summary judgment.
[194] DFA's governance rights included in the original amendment were changed by converting DFA's common voting stocks into non-voting stocks.

relevant mechanism (different from control) through which DFA would have influenced SBD's operation. The Court interestingly noted that even small investors may have a legitimate interest to achieve higher profits and to discuss financial issues with management, without this being necessarily seen as establishing anticompetitive effects of the partial acquisition. In particular, the District Court stated that the transaction did not increase the market share controlled by DFA and did not create an ability to influence the market since DFA was not involved in SBD's decision making process and lacked any power to control the latter's competitive decisions and business operations.

The Sixth Circuit's Opinion

The Sixth Circuit reversed District Court's decision and, although agreeing with the District Court's opinion that control or influence is one of the mechanism allowing the acquirer to harm competition, the Sixth Circuit stated that lack of control or influence does not preclude a Section 7 infringement. As regards the original agreement (providing DFA with voting rights that enabled exertion of some control over SBD), the Circuit found that the acquisition would have resulted in a significant increase of market concentration and was to be presumed illegal. However, when the amended agreement between DFA and SBD was considered, the Circuit remarked that control was not the only way to cause anticompetitive behaviors and lessen competition. More specifically, the close alignment of interest to "*maximize profits via anticompetitive behaviors*" and the remaining ability of DFA ability to leverage its position as financer of SBD to control or influence SBD's decisions would have created a "*reasonable probability that the revised agreement would substantially lessen competition*."[195] More specifically, irrespective of cooperation between the dairies, the profit sharing right conferred by the interest in the diaries enhanced the unilateral incentive to reduce competition and increase price as this would not cause an overall loss for DFA considering that customers would have switched to either diary in response to a price increase.

Following the Sixth Circuit's judgment, DFA agreed to divest the ownership of SBD to another firm.

[195] Dairy Farmers, 426 F.3d, page 862.

3. Kinder Morgan

The Kinder Morgan case exemplifies the attention paid by antitrust agencies to unilateral and coordinated effects stemming from an increased market concentration (due to cross-shareholdings) even without any direct acquisition of shares in a competitor.

Kinder Morgan Inc. ("KMI") is an energy firm active in transportation, storage and distribution. In 2007 two private equity funds managed by the Carlyle Group ("Carlyle") and Riverstone Holdings LLP ("Riverstone") intended to acquire a financial interest in KMI for a combined 22.6% stake. At the time of the proposed transaction, Carlyle and Riverstone held 50% share in a fund controlling one of KMI's competitors, Magellan Midstream Holdings LP ("Magellan").

The FTC took the view that the transaction would have infringed Section 7 of the Clayton Act. In particular, (a) the increase of the concentration level through partial common ownership, in combination with (b) the board representation of Carlyle and Riverstone on both competing firms in the energy sector, and (c) the veto powers granted to the funds over business decisions of Magellan, would have altogether lessened competition between KMI and Magellan. Unilateral effects could have been caused, according to FTC, by the exercise of market power by KMI or Magellan since they represented first and second customers' choice without significant ability by competitors to replace them. Therefore a unilateral price increase would not have damaged financial interests of Carlyle and Riverstone considered as a whole.

Moreover, the common partial ownership of the main independent operators and the possibility to access non-public information having competitive relevance for both the energy rivals would have facilitated coordinated effects such as collusion.

The case was closed with a consent decree[196] mainly requiring Riverstone to become a passive investor in Magellan by removing representatives from the boards of Magellan, transferring Riverstone's right to designate members to Magellan's board to the other

[196] A consent decree is for settlement purposes only and does not constitute admission of an infringement.

investor, and establishing safeguards and firewalls to prevent sharing of competitively sensitive information between Magellan and KMI[197].

4. *Analysis*

Although dating back to 1957, the decision in Pont de Nemours is still considered relevant as it is the first case in which the question of vertical acquisitions of minority shares was considered by a US Court and where the standard of the so-called "incipiency doctrine" was set. According to the "incipiency doctrine", Section 7 infringement occurs even without actual anticompetitive effects since it is designed *also to arrest in their incipiency restraints or monopolies in a relevant market which, as a reasonable probability, appear at the time of suit likely to result from the acquisition by one corporation of all or any part of the stock of any other corporation*[198].

Another interesting point made in Pont de Nemours is the application of the "entry barrier" theory of harm. The fact that the acquiring party was also the largest supplier of the target company prevented third parties from accessing a substantial portion of the relevant market, *i.e.* the target company's demand.

The Court's ruling in Dairy Farmers has been signaled by many commentators as interesting for several reasons. First, because it assesses the possible unilateral effects of minority acquisitions on the basis of the so-called 'incipiency doctrine', assuming that Section 7 only requires showing that an acquisition 'may' have substantial anticompetitive effect[199]; and secondly because it openly deals with the questions of changed incentives irrespective of control. Unfortunately, the Court failed to identify with an adequate level of clarity the specific mechanisms (other than control) through which a partial acquisition may hinder competition, but only referred to a 'general' alignment of incentives.

Similar to the Dairy Farmers case, in Kinder Morgan the Court stressed the importance of enhanced market power when it comes to assess profitability of price increases and the

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[197] An independent monitor was required to ensure that the order to restrict information flow was respected until the parties established adequate procedures.
[198] U.S. Supreme Court *United States v. Du Pont & co.*, 353 U.S. 586 (1957) 353 U.S. 586.
[199] The incipiency doctrine is well explained in *Cargill. Inc. v. Monfort of Colo. Inc.* 479 US 104, 124 (1986) as Section 7 "*was designed to cope with monopolistic tendencies in their incipiency and well before they have attained such effect as would justify a Sherman Act proceeding*".

incentives to do so. Unlike Dairy Farmers, the control or influence consideration was crucial and the specific mechanism for the anticompetitive effects was in fact identified in the form of governance rights. In addition, the possible coordinated effects deriving from exchange of commercially sensitive information was considered as problematic and required *ad hoc* safeguards in the final consent order.

The case in Kinder Morgan is also remarkable since it is one of the first cases dealing with private equity in which no direct acquisition of ownership in a rival and no direct control of competitors were at stake. In addition, the relatively small level of cross-ownership (11.3%) highlighted a number of questions for private equity investors and raised the level of attention on Section 7 scrutiny. One point to be discussed in such a scenario, where two distinct equity funds act as minority investors in two companies operating on the same market, concerns the possible reaction of the other (majority) investors in the target companies. It is likely that those investors have no incentives to cause the respective companies to compete less vigorously on the market, as this would damage their financial interests. Such investors would rather be more interested in protecting their reputation to ensure they can raise more capital on the market. This approach would evidently contradict the relevant theory of harm.

Another interesting element common to Kinder Morgan and Dairy Farmers is the argument of the Courts that the market concentration would have increased following the partial acquisition. This suggests that concentration can also be measured with respect to lack of independency between the firms active on the market and is not a prerogative of the review of (full) mergers. The question of how to measure the degree of increase/decrease in concentration is however still open to debate[200].

E. Concluding remarks

The set of laws illustrated above and the examples of its concrete application by US antitrust agencies all in all show the existence of a wide legal net to detect problematic transactions and a great flexibility for addressing anticompetitive concerns. The same

[200] Among the method proposed by economists and scholars, the Modified HHI analysis (MHHI) and the Price Pressure Index (PPI) based on the closeness of the products, Timothy F. Bresnahan & Steven C. Salop, *Quantifying The Competitive Effects Of Production Joint Ventures*, 4 INT'L J. INDUS. ORG. 155 (1986).

prohibition of interlocking directorates between competitors provides further evidence of the level of attention paid to the whole contest in which interests on the market (being them personal, financial or structural) may affect competition.

The application of the Clayton Act prohibition is indeed independent from the control or influence requirement, so that passive investments are not excluded *a priori* and a substantive assessment of the likely anticompetitive effects should in principle prevail over the formal evaluation. One hand there is in fact a general acceptance by US antitrust agencies of the anticompetitive effects of active investments, where board representation, access to competitively sensitive information and voting rights are conferred. On the other hand, although passive investments are not *per se* anticompetitive and do not always produce anticompetitive effects, it is acknowledged by US agencies and Courts that partial acquisitions that do not result in effective control may nevertheless present significant competitive concerns[201].

As regards the concrete assessment of the anticompetitive effects, two principles reveal great flexibility. First the "incipiency doctrine" allows to catch any future concerns without the need to show evidence of likelihood and magnitude of such effects; second, as confirmed by the case law the legality of the transaction can be determined at *any time the acquisition threatens to ripen into prohibited effects*[202], meaning that the assessment of the anticompetitive effects can be done at a later stage than the moment in which the transaction takes place.

Accordingly, the margin of *manoeuvre* and discretional powers of the antitrust agencies in terms of building the case seem to be quite extensive on one side, and the burden of proof to be satisfied fairly reasonable, on the other side.

[201] DOJ and FTC, *Guidelines on the assessment of horizontal mergers*.
[202] DuPont de Nemours, para 352.

IV. ANTITRUST SCRUTINY OF ACQUISITIONS IN THE EU

The antitrust scrutiny of acquisitions in the European Union dates back to the 80ies when the Commission first enforced the "antitrust rules" prohibiting anticompetitive agreements and abuse of dominance in case of mergers and acquisition. It then developed by the entry into force of the EU Merger control regime which was followed by national merger control rules. The so-called one-stop-shop prevented the same transaction to be assessed more times by different competition authorities by setting the sole jurisdiction of the Commission in case of a concentration with Community dimension.

The competitive assessment of minority shareholdings evolved in the years as to catch more substantially problematic transactions and is currently under discussion for a further extension.

A. Pre-EU Merger Control Era

1. *The Philip Morris doctrine*

In the era preceding the first EU Merger Regulation[203] some guidance on the application of the European Treaty[204] to minority shareholdings was provided by the European Court of Justice ("ECJ") in the Philip Morris judgment[205]. At that time, on occasion of an agreement between Philip Morris and Rothmans which were then competing on the market for cigarettes, the ECJ first set the differentiation between possible levels of influence exercised by a company acquiring an interest in a rival.

In 1981, Philip Morris was the main producer of tobacco and intended to acquire 50% of Rothmans, its primary rival, which would have been then jointly controlled by Philip Morris and its competitor Rembrandts. Taking into account the objections raised by the Commission, in 1984 the parties amended the initial agreement so to reduce Philip Morris' stake to 30.8% with only a 24.9% corresponding to voting rights; Rembrandt still held a 30.8% share but 43.6% of votes.

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203 Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (Official Journal L 395, 30/12/1989 P. 0001 – 0012).

204 At that time, Treaty establishing the European Economic Community.

205 *British Am. Tobacco Co. Ltd. and RJ. Reynolds Indus. Inc. v. Commission*, Joined Cases 142/84 & 156/84, [1987] E.C.R. 4487, [1988] 4 C.M.L.R. 24.

The agreement was notified to the Commission which issued a clearance decision based on the following conditions[206]: (i) the parties eliminated post-acquisition cooperation agreements having an impact within the EU; (ii) Philip Morris renounced to be represented at Rothmans' board of directors; (iii) Chinese Walls were put in place between the competitors to avoid disclosure of sensitive information that might influence the strategic behavior of Philip Morris.

The ECJ confirmed that in itself the acquisition of a minority shareholding in a competitor is not a conduct restricting competition and the fact that a competitor is able to block the passage of special resolutions is not in itself problematic. However, as long as such acquisition and attached rights serve as an instrument to influence commercial conducts and restrict or distort competition[207], an anticompetitive concern can be raised.

As recognized by many authors[208], the Philip Morris judgment evidenced that several schemes of minority acquisition may reach the "influence" standard necessary to satisfy the prohibition of anticompetitive agreement (then Article 85 of the Treaty establishing the European Economic Community, now Article 101 of the Treaty on the Functioning of the European Union "TFEU") and of abuse of dominance (then Article 86 of the Treaty establishing the European Economic Community, now Article 102 TFEU).

In particular the ECJ pointed out three situations in which Article 85 can be applied: (i) the acquiring company acquires *de facto* or *de jure* control; (ii) commercial cooperation is agreed between the acquiring firm and target company; (iii) a structure allowing commercial cooperation is agreed; (iv) the acquisition agreement provides the party acquiring an interest with the possibility to acquire effective control of the target at a later stage.[209]

Although legal presumption of anticompetitive effects are to be excluded in general in those cases, the Court suggests to take into account specific market conditions with

[206] At the time of the Philip Morris judgment (1988) Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty (Official Journal 013, 21/02/1962 P. 0204 – 0211) was in force and required all *agreements, decisions and concerted practices of the kind described in Article 85(1) of the Treaty [...] in respect of which the parties seek application of Article 85(3) must be notified to the Commission* (Article 4).
[207] Philip Morris cit., para 37.
[208] See for example, Hawk B. E. and Huser H. L., *"Controlling" the Shifting Sands: Minority Shareholdings Under EEC Competition Law*, Fordham International Law Journal Volume 17, Issue 2 1993 Article 2.
[209] Philip Morris cit., para 37-39.

particular attention to oligopolistic and stagnant market with high entry barriers. In such situations, where competition on prices or research lacks, anticompetitive effects are more likely to be produced by corporate acquisitions.

> "*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*."[210]

What seems that can be learned from the Philip Morris ruling is that various forms of commercial cooperation deriving from an equity acquisition may trigger antitrust scrutiny even if no control is acquired. Another important point is that not only the immediate effects of the agreement matter, but also the long term plans. What remains uncovered by the judgment is the situation in which the influence is not 'decisive'.

As regards the application of Article 86 to the acquisition of minority shareholdings, the ECJ in Philip Morris stated that an infringement can be found if the acquiring company is enabled to exert "some influence on the commercial policy" of the competitor[211]. Giving this wording, such statement led many authors to wonder whether it was in the ECJ's intention to create a lower influence standard for the application of Article 102 TFEU than the test applied for Article 101 TFEU. It has been argued that intervention at lower thresholds may be justified when dominant undertakings are involved since in general competitive harms are presumptively greater[212].

2. *III.I.II Commission practice*

Few years later, the principles set by the Court in the Philip Morris ruling have been applied by the Commission in the Gillette case in a situation not involving voting rights nor boarding representation, nor access to competitively sensitive information.

The Commission found that Gillette abused its dominance position through the acquisition of a non-voting indirect minority shareholding in the competitor Wilkinson Sword which enabled Gillette to create a link between a dominant undertaking and its leading competitor

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[210] Philip Morris cit., para 44.
[211] Philip Morris cit., para 24.
[212] Hawk cit., page 323.

and thus influence the structure of the wet shaving market and reduce competition[213]. According to the Commission the fact that Gillette did not have voting rights and board representation, nor access to commercial information was not relevant. On the contrary, its loan stock of 22% of the equity capital in Eemland (a Dutch investment company especially established for the purpose of the transaction as retaining the European business of Wilkinson Word) in connection with its pre-emption rights in case other shareholders wished to sell their voting stocks in Eemland and the cooperation agreements outside EU with a likely impact within EU would have conferred Gillette the "some influence" on the competitor's commercial policy, as required by the ECJ in Philip Morris.

With particular reference to the market structure, it is to be noted that at the time of the decision the market for wet shaving products was oligopolistic with considerable barriers to entry and four major operators active and Gillette was a clear price leader. Although the circumstances of the case were very different from the Philip Morris case, what seemed to be relevant for the Commission in this case is that Gillette was the dominant company acquiring an interest in a competitor and that a substantial financial dependence was exerted on the latter by Gillette by way of the loan capital – comparable to the effects of a normal shareholding.

Subsequent cases demonstrates that the Philip Morris doctrine is still considered good law[214]

B. EU Merger Control

1. The Jurisdictional requirements

As showed in the ECJ case law and Commission decisional practice, acquisitions of shares or other financial interests in companies located in the European Union may be affected by the EU competition law. They can fall within the scope of the prohibitions of anticompetitive agreements and abuse of dominance as well as be caught, in a post-merger regulation era, by the Merger Control regime.

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213 Philip Morris cit., para 23.

214 See for example, Olivetti/Digital (COMP IV/34.410, Commission decision of 11 November 1994), where Digital acquired an 8% shareholding in Olivetti and a proportional representation on the board, and BT/MCI (COMP IV/34.857, Commission Decision of 27 July 1994).

The first EU Merger Regulation was enacted in 1989 (Council regulation 4064/1989)[215]. The substantive test applied at that time was the *creation or strengthening of a dominant position*, in which case the merger would have been blocked. The most substantial reform occurred in 2004, with the second merger regulation (Council Regulation n. 139/2004, hereinafter also "EUMR")[216] which switched from the "strengthening dominance" test to assessment of a *significant impediment to effective competition*. The main objective of such change was to ensure detection and prevention of non-coordinated effects in oligopolistic situations in which the merged entity would not become dominant. Having in mind that in oligopoly with only few firms none of them individually dominant, although collusion is unlikely, the merged entity is incentivized to increase price unilaterally. This would allow the remaining firm to benefit from the unilateral conduct and increased prices, with a result of overall price increase in the market.

The jurisdictional requirement for the application of EUMR is the existence of a concentration with a Community Dimension. A concentration is defined as a transaction involving the acquisition of "control" over a company or a part of it or the change in the nature of "control"[217] on a lasting basis, regardless of the level of ownership acquired over the target. A change in control can either occur when two previously independent companies merge or where one or more undertakings acquire control over the whole or part of a previously independent company. The Community dimension is established when the transaction meets certain world-wide and EU-wide turnover thresholds[218].

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[215] Regulation 4064/89 cit.

[216] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (Official Journal L 024, 29/01/2004 P. 0001 – 0022).

[217] A relevant change in the nature of control would be from joint to sole control, from sole to joint control and in case of increase in the number of the jointly controlling parties or change of the identity of the jointly controlling parties (Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ C95 of 16.04.2008), para 83). On the contrary, a change from negative to positive control does not trigger a mere investigation. See Jones, A. and Sufrin B., *EU Competition law. Text, Cases and Materials* 4th edition Oxford University Press, 2011.

[218] According to Article 1 EUMR, a concentration has a Community dimension where: (*a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5000 million; and (b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State. A concentration that does not meet the thresholds laid down in paragraph 2 has a Community dimension where: (a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2500 million; (b) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million; (c) in each of*

The notion of control has been set in 1989 as the possibility to exercise "decisive influence" and then evolved through case law and further guidance by the Commission. Article 3 of Council Regulation 4064/89 included all acquisitions of sole control and transactions involving acquisition of joint control with a concentrative rather than a cooperative nature as concentrations under the merger regulation scope.

2. *Notion of Control*

The EUMR provides that a concentration may arise in case of a lasting change in the control of the undertaking concerned through "*rights, contracts or any other mean which either separately or in combination confer the possibility of exercising decisive influence on an undertaking*"[219]. In particular, control may be acquired through the *acquisition of property rights, shareholders agreements of economic relationship leading to control on a factual basis*. According to the Notice on the notion of concentration/ Consolidated Jurisdictional Notice of the Commission[220], a qualified minority can confer control as long as it enables to exert decisive influence over the target.

The change of control may arise from three relevant situations, namely (i) the merger of two previously independent undertakings, (ii) the acquisition of sole control over a previously independent undertaking and (iii) the acquisition of joint control by two or more undertakings over another firm, *i.e.* joint ventures on condition that they are full-function joint ventures able to perform "*on a lasting basis all the functions of an autonomous economic entity*"[221].

In order to assess the possibility to exercise joint and sole control, the Commission looks at the rights attached to the minority shareholdings, such as the right to manage the business of the company[222] (*de jure* or legal control) or the specific situation of the case that can lead

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at least three Member States included for the purpose of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million; and (d) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

219 EUMR Article 3.

220 Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ C95 of 16.04.2008).

221 EUMR Article 3(4).

222 Or the right to appoint more than half of the members of the supervisory or administrative board (Commission Consolidated jurisdictional Notice, cit. para 57).

to the so-called *de facto* or factual control (for example when the remaining shareholdings are small and dispersed[223]).

The most likely situation in case of minority shareholdings is joint control; this could be found in case of deadlock situations in which the minority shareholder can block proposed strategic actions thanks to specific veto rights, or in case the minority and other shareholders will be legally bound to act jointly in voting strategic resolutions or, *de facto*, when there are strong common interests that link minority and other shareholders in such a way that they are prevented from voting against each other[224]. More specifically the content of the voting rights and the importance of these rights in relation to the relevant business[225] are assessed by the Commission as to establish existence of joint control. The company's business plan as well as the investments policies, the power to appoint senior management and the determination of the budget and/or business plan will be taken into account[226]. On the contrary, veto rights which are seen as a normal protection of the financial interests of minority (such as change in the by-laws and liquidation) are not considered relevant for the purpose of control[227].

Although less likely, minority shareholdings can even achieve the sole control level; by way of legal rights allowing veto of strategic decisions (e.g. preferential shares) or on a factual basis, as for example in the case of a minority shareholder in a position to reach the majority at shareholders' meetings (because of lower attendance and dispersed remaining shareholdings)[228]. An additional situation is the case of shareholders agreement or purely

[223] For example in the case *Arjomari/Wiggins* (case no IV/M.25 Commission decision of 31 July 1995), the Commission found that a 39% shareholding gave rise to a controlling interest based on the fact that on 107,000 shareholders no other shareholders held more than 4%.
[224] According to the Commission Consolidated jurisdictional Notice (cit. para 59) "*[t]his is in particular the case where the shareholder is highly likely to achieve a majority at the shareholders' meetings, given the level of its shareholding and the evidence resulting from the presence of shareholders in the shareholders' meetings in previous years*".
[225] As an example, veto rights relating to research and development expenses can be much more relevant for the business of a pharmaceutical company than for the business of dairy producer.
[226] See the Consolidated Jurisdictional Notice cit., para 68-73.
[227] See the Consolidated Jurisdictional Notice cit., para 66.
[228] Consolidated Jurisdictional Notice cit. para 59. See also cases *Societe' Generale de Belgique/ Generale de Banque* (case IV/M.343 Commission decision of 3 August 1993), *RTL/M6* (case COMP/M.3330 Commission decision of 12 March 2004) and *Mediobanca/Generali* (case IV/M.159 Commission decision of 19 December 1991).

economic agreements such as supply agreements or financing arrangements creating a status of economic dependence.

The set of rules illustrated above clearly exclude application of the EUMR in case of a passive investment falling short of joint or sole control. Therefore, there is no possibility to address anticompetitive effects of acquisitions not leading to control under the EU merger regime. The possibility to apply Article 101 and Article 102 still remains but it's limited to certain cases.

It is interesting to note how the scope for revision of minority shareholdings evolved throughout the years. At the time the first ECMR entered into force, although recognizing the differentiation among levels of influence (decisive influence, influence and no influence), in its newly issued 1990 Joint Venture Notice[229] the Commission just focused on the differences between sole and joint control. Being the standard set at a level of decisive influence, the mere possibility to influence the commercial activities of the acquired company was not subject to merger control regime but rather to Article 101 and 102, as clarified by the ECJ in the Philip Morris judgment[230].

After implementation of the first merger regulation, it was clear that minority acquisitions can create a situation of sole control in two cases. First corporate governance provisions and shareholders agreements can give the right to determine strategic, commercial and competitive activities of the entity in which the share is held; as opposed to the general corporate rights protecting minorities, according to the Commission such situation may lead to sole control. Second, when the remaining shareholdings are widely dispersed among several other investors rather than one or more significant shareholder or a lower participation or voting occurs at shareholders meetings the minority is able to represent the majority of votes during the meetings and thus exercise sole control.

Joint control by minority shareholders may be triggered in two circumstances, namely the case of unilateral rights and the situation of so-called 'shifting alliances'. Unilateral rights can be conferred through corporate governance provisions, shareholders agreements or

[229] Commission Notice O.J. C 203/10 (1990), "Joint Venture Notice".
[230] Philip Morris [1987] E.C.R. at 4577, para 37.

otherwise positive control or negative control such as veto or approval rights over strategic commercial and competitive activities. The shifting alliances test looks at the presence of instruments such as block voting agreements or other pooling arrangements that may enable the minority shareholder to group its interest with one or more other shareholders, on condition that there is no possibility of shifting alliances within the same group of interest and in the aggregate the grouped interest have the right to exercise either positive or negative control over strategic, commercial and competitive activities.

What remains to be seen is whether further evolvements will be implemented in this regard as to extend the scope of antitrust scrutiny to minority shareholdings not leading to the *de facto* joint or sole control scenarios currently envisaged under EUMR.

C. Scrutiny of Minority shareholdings under Merger Regimes

1. *The EU*

Anticompetitive effects of acquisitions not leading to control cannot be addressed under the European merger regimes. This limit is not new to the Commission and has been already addressed in the public consultation of 2001 Green Paper[231], in which the Commission explored the possibility to expand revision over minority acquisition not conferring control. Although acknowledging that minority shareholdings potentially coupled with interlocking directorates could have anticompetitive effects and alter the incentives of the firms on the market, in 2001 the Commission maintained the 'control test' as the main criterion for establishing its jurisdiction under Merger Regulation. In particular, two main reasons supported such conclusion. First, only a limited number of such transactions could raise concerns not satisfactorily addressable under Article 101 and Article 102. Second, considering the uncertain likelihood and magnitude of competitive concerns related to minority shareholdings, the mandatory prior notification required under EUMR was too burdensome for the companies and the Commission.

[231] Green Paper on the Review of Council Regulation (EEC) No 4064/89, 11 December 2001, COM (2001)745 final. Available at: http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001_0745en01.pdf, para 106-110.

Furthermore, the Commission reckoned doubts on the possibility to individuate a viable definition to determine which minority acquisition would be required to be scrutinized under EUMR.

Although it was then decided not to extend the power of control over non-controlling shareholdings, the current practice of the Commission while reviewing mergers involving pre-existing minority shareholdings as well as the Commission's statements in both the Horizontal Merger Guidelines[232] and Notice on Remedies[233] demonstrate that the Commission has been since then well aware of the potential anticompetitive effects of minority shareholdings and the need to take such effects in to consideration in the context of antitrust scrutiny of concentrations.

In the Horizontal Merger Guidelines, the Commission specifically considers interlocking directorates and minority shareholdings[234]. In particular, it is stated that significant cross-shareholdings between competitors should be taken into account as to measure the level of concentration on the market. The Commission calls for special attention to the flow of information received through cross shareholdings and the related collusion facilitating effects as well as to the possible alignment of incentives among the coordinating firms that may be supported by structural links, cross-shareholdings and participation in joint ventures. With specific reference to the evaluation of the level of transparency of the market in connection with the possibility to monitor deviation and the credibility of the threat of retaliation in case of deviation, the Commission points to cross-directorships, joint ventures and other similar arrangements as measures that facilitate the monitoring of competitors' move on the market and thus coordination of competitive conducts.

In the Notice on Remedies, the Commission envisages the need to divest shareholdings held in competing companies as a preferred measure to severe structural links that can endanger competition in case of passive investments raising competition concerns. It also acknowledges that financial gains derived from a minority shareholding in a competitor

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[232] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (Official Journal C 31, 05.02.2004, p. 5-18).
[233] Commission Notice on remedies acceptable under the Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (Official Journal C 267, 22.10.2008, p. 1-27).
[234] Horizontal Merger Guidelines cit., para 51.

could in themselves raise competition concerns[235]. This is in line with the economic theories illustrated in Chapter II.

Another element showing the Commission's interest for an overall and comprehensive assessment of the structural links as to determine potential anticompetitive effects of mergers is that an undertaking that notifies a concentration to the Commission is required to include in the Form CO[236] details of other undertakings active in affected markets in which the undertaking concerned have shareholdings of 10% or more are required.

Although the Commission is not enabled to a systematic *ex-ante* review of non-controlling minority acquisitions, it has the power to review existing minority shareholdings in a competitor or a company active in a downstream or upstream market when a separate merger meeting the "control" requirements is notified under EUMR. Such power may be exercised before or after the Phase I administrative proceeding to facilitate obtaining of unconditional clearance[237] or at a later stage with the value of a formal commitment by the merging parties for obtaining a conditional clearance[238]. Many examples of the exercise of such power show that the Commission is keen to assess overall anticompetitive effects and support the view that consistency with such decisional practice would require extension of the current EUMR as to catch minority shareholdings which do not reach the level of control even in the absence of a notifiable concentration.

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235 Notice on remedies cit., para 58 and 59.

236 See Form CO relating to the notification of a concentration pursuant to Regulation (EC) No 139/2004, Section 3.5 (Annex I - Consolidated version of the Commission Regulation (EC) No 802/2004 of 21 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings and its annexes: Form CO, Short Form CO, Form RS and Form RM. (Official Journal L 133, 30.04.2004, p. 1-39), which requires "[f]*or the parties to the concentration (other than the seller) provide a list of all other undertakings which are active in affected markets in which the undertakings, or persons, of the group hold individually or collectively 10% or more of the voting rights, issued share capital or other securities, identifying the holder and stating the percentage held*".

237 According to Article 6(2) EUMR, in Phase I when the concentration is notified but a proceeding has not been initiated "*where the Commission finds that, following modification by the undertakings concerned, a notified concentration no longer raises serious doubts […], it shall declare the concentration compatible with the common market*".

238 According to Article 8(2) EUMR, when the Commission finds that the concentration raises serious doubts as to its compatibility with the common market, and initiates proceedings (Phase II) "*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*."

Based on the ECJ case-law confirming the scope of the EUMR to cover transactions bringing about a concentration in their entirety including minority shareholdings[239], the Commission had often requested divestiture or reduction of minority shareholdings and severance of personal links as a condition to allow implementation of the merger within the context of bigger transactions[240]. According to data analyzed for the recent reform of the EUMR, the Commission dealt with at least 53 cases of mergers where pre-existing minority shareholdings were considered relevant for the assessment of the transaction; in 20 of those cases the Commission found competition concerns due to the non-controlling shareholding held by the parties in a third competitor[241].

In the Glencore/Xstrata case[242], the Commission reviewed the acquisition of control by the world leading metal and thermal coal leader (Glencore) over the 5th largest metals and mining group in the world (Xstrata). According to the Commission, the 7.9% shareholding that Glencore had in the world largest zinc producer (Nyrstar) in combination with an exclusive agreement with Nyrstar conferred to Glencore the position of large supplier of zinc metal in the EEA. Those elements increased the ability and incentives of the merged entity to control the level of zinc supply in the EEA; therefore the merger was cleared through commitments impacting the minority shareholdings. In particular, Glencore had to divest the minority shareholding in Nyrstar and terminate the supply agreement as to ensure that Nyrstar would have remained an independent supplier of zinc.

Vertical foreclosure effects of minority shareholdings were found in case IPIC/MAN Ferrostaal[243] and remedied by way of divestiture of stakes in a downstream supplier. The Commission found that a 30% ownership in Eurotecna (supplier of technology for production of melamine, where IPIC's subsidiary (AMI) was a major producer of melamine) allowed MAN Ferrostaal (industrial plants manufacturer) to exercise decisive

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239 This principle is recalled by the Commission in the *Newscorp/Telepiu'* case (COMP/M.2876, Commission decision of 2 April 2003), with reference to the ECJ case-law in Kali und Saltz (C-68/94 *France and others v. Commission*, ECR I-1375 1998, 4 CMLR 829) and *Gencor v. Commission* (C-102/96, ECR II-753, 1999)

240 According to the EUMR (article 6.2 in Phase I and 8.2 in Phase II), the Commission has the power to authorize a merger imposing remedies that would address competition concerns.

241 Annex II to Commission's Staff Working Document *Non-controlling minority shareholdings and EU merger control.*, para 13

242 Case COMP M.6541, *Glencore/Xstrata*, Commission decision of 22 November 2012.

243 Case COMP/M.5406, *IPIC/MAN Ferrostaal*, Commission decision of 13 March 2009.

influence over Eurotecna and reinforced the incentives to foreclose other non-vertically integrated competitors of AMI (Eurotecna customers) which were previously supplied by Eurotecna. In particular, the Commission was concerned by the fact that the minority stake would have allowed MAN to determine the distribution of technology licenses by Eurotecna with the consequence of excluding competitors. The decision does not address the question on whether such strategy would have been sustainable. However, the Commission cleared the merger conditional to the divestiture of the stake in the downstream supplier.

In the VEBA/VIAG case[244], the Commission found that horizontal minority shareholdings led to anticompetitive coordinated effects which would have increased market participant's ability and incentives to tacitly an explicitly collude as to achieve supra competitive profits. In particular, the minority shareholdings allowed a privileged view over competitor's business and increased collusion's incentive by increasing the risk of retaliation in case of deviation.

In the acquisition by Siemens of the engineering group VA Tech active in the metal plant building market[245], the Commission requested Siemens to divest its stakes in the main competitor of the target company. At the time of the transaction, Siemens had a 28% minority shareholding in SMS Demag, a company active in business overlapping with VA tech. Access to information due to seats on SMS Deemag's supervisory body as well as consultation and voting rights were attached to such shares. The Commission held that financial incentives and exchange of information on the business of competitor would have harmed competition. In addition, the financial participation in the profit and loss of SMS Demag would have lowered the incentives of the merger entity to bid aggressively (that is offering competitive prices) in tenders that SMS Demag would have had substantial chance of winning.

In the acquisition by Toshiba of Westinghouse[246], which led to overlapping activities in the markets for design and construction of nuclear power plants and provision related

[244] Case COMP/M.1673, *VEBA/VIAG*, Commission decision of 13 June 2000.
[245] Case COMP/M.3653, *Siemens/VA Tech*, Commission decision of 13 July 2005.
[246] Case COMP/M.4153, *Toshiba/Westinghouse*, Commission decision of 19 September 2006.

equipment and services, the Commission found non-coordinated effects arising on a market in which Toshiba was not directly active (fuel assembly) but Westinghouse was. According to the Commission, the minority share held by Toshiba in GNF, one the world's leading supplier of fuel assembly, provided Toshiba with veto and information rights that might have enabled Toshiba to hinder GNF, being it a competitor of the post-merger entity, from expansion in the market to the detriment of customers. In order to obtain clearance, Toshiba proposed to modify the by-laws of GNF as to limit board representation in GNF, relinquish the veto rights and avoid Toshiba's access to GNF non-public information. The Commission then cleared the transaction.

As it is shown by the merger decisional practice illustrated above, several mergers have raised competition concerns relating to the structural and personal links that would have been retained by the merged entity to a key competitor. Clearly in the absence of a later concentration with a Community dimension involving a minority shareholder, such links would have been undetected and unchallenged.

2. *National Experiences*

In this section, the merger regimes currently in place in UK and Germany are briefly examined, as those are frequently referred as examples of a different set up for merger control that covers a wider array of minority shareholdings. The Italian banking sector is also considered as an example of net of minority and reciprocal and cross-shareholdings which raised interesting antitrust concerns.

United Kingdom

The jurisdictional test set by UK competition law regulating mergers[247] includes different levels of ownership interest that may trigger merger control investigations: controlling interest through *de iure* instruments, the ability to control the target's policy by way of *de facto* rights and the ability to materially influence the target's policy.

Differently from EUMR, the UK merger system is voluntary meaning that it is not mandatory for companies to notify the transaction covered by the regime[248]; however the

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[247] Enterprise Act 2002.
[248] R. Whish and D. Bailey, *Competition Law* 919, (7th edition, Oxford U. Press 2012).

Competition Market Authority ("CMA")[249] has the power to investigate over a completed acquisition within certain time limits[250] and order to unwind the transaction.

As evidenced by the Ryainair saga described below, in the UK merger system the lowest level of control that may give rise to a relevant merger transaction is the so called 'material influence' whereby it is required to assess the acquirer's material ability to influence the target's business policy on the market. Importantly the CMA specifies that the meaning of 'policy' in such context should not only include the strategic direction of the target company and the ability to define commercial objectives but also the ability to achieve its commercial objectives. Consistently with the declared focus on substance, therefore not only the right to block special resolution or to exert material influence over the target's policy but also the ability to do so is relevant to establish jurisdiction, rather than the intent or the actual exercise.

Therefore when assessing the potential source of material influence, one should look at the size of the voting shareholding in itself the overall distribution of remaining shares, the pattern of attendance and voting at recent shareholders' meetings, veto rights, the level of representation in the board of directors and other sources (as for example financial arrangements by which one party becomes dependent on the other allowing influence on the target's policy). Special voting rights attached to the shares, ability to block special resolution, industry knowledge and standing of the acquirer are also important elements. Even in the absence of powers to block resolutions, attention should be paid to the status and expertise of the acquiring company which may enhance its reputation and influence with other shareholders, and to strategies of the acquirer potentially conflicting with the target's ones (e.g. consultancy contracts, financing agreements)[251].

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[249] On 1 April 2014, the competition enforcement agencies in the UK (the Office of Fair Trading and the Competition Commission) have been abolished and their functions have been transferred to the new Competition and Markets Authority (CMA) - established under the Enterprise and Regulatory Reform Act 2013 (ERRA13).

[250] More specifically, the CMA has four months from when the shareholding was publicly known (Mergers: Guidance on the CMA's jurisdiction and procedure, January 2014, para 4.3).

[251] The consolidated practice of the Office of Fair Trading and the Competition Commission shows that a qualitative case-by-case analysis should be conducted (Freeman P., *'Creeping Mergers': The UK perspective, Merger Control and Minority Shareholdings: Time for a Change?* Concurrence – Revue des droits de la concurrence, 3/2011).

Based on the corporate UK law provision enabling the blocking of special resolutions by a 25% shareholder (even if all other shares are held by one other party)[252], the CMA presumes that a stake of 25% conveys "material influence". In addition, the CMA decided to set the threshold at the lower level of 15% to assess the material influence.

As an exception, shareholdings below 15% might attract scrutiny in presence of additional factors.

The material influence test is exemplified in the 2006 BskyB/ITV case[253], where BSkyB a company active in leading UK pay-tv broadcaster acquired a 17.9% in ITV. As notification is not mandatory under UK merger control regime, the acquisition was detected after implementation. Based on the records of voting in past resolutions, the Office of Fair Trading ("OFT")[254] found that the BskyB's position as the largest shareholder of ITV and its superior industry knowledge would have conferred the ability to block ITV's special resolutions and influence other shareholdings, with the likely effect to affect ITV's competitive conduct, policy and planning (even without voting) as well as its ability to achieve medium-term objectives. While focusing on potential coordinated effects, the OFT excluded major unilateral effects on the basis of the low level of shareholding which would not have rendered profitable an increase in price because the recoupment of the sales lost to ITV would have been small, indirect and uncertain[255]. The case was the referred to the Competition Commission that found a likely substantial lessening of competition arising from the loss of rivalry between the two firms which would result in a decrease in innovation and quality and in an increase in price. Accordingly, BskyB was required to dilute its shares to 7.5% and not to seek representation on the board of ITV. After years of litigation, the shares were sold in 2010.

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[252] UK Company Act 2006, s 283 "*(1) A special resolution of the members (or of a class of members) of a company means a resolution passed by a majority of not less than 75%*)."

[253] *British Sky Broadcasting Group PLC/ITV PLC*, Competition Commission Report of 14 December 2007 and final decision of the Secretary of State for Business, Enterprise and Regulatory Reform, 29 January 2008.

[254] The Office of fair Trading was at the time the name of the administrative authority in charge of first phase antitrust investigations on mergers. After the reform entered into force in 2014, the Competition Market Authority has replaced both OFT and Competition Commission by regrouping both functions under the same authority. The OFT then converged in the CMA.

[255] See Organization for Economic Co-operation and Development Competition, *Policy Roundtable Antitrust issues involving minority shareholding and interlocking directorate*, Working Party No. 3 on Co-operation and Enforcement, DAF/COMP(2008)30 23 June 2009.

Germany

Since 1974 non-controlling minority shareholdings are caught by German merger control rules under a mandatory notification regime.[256] In particular, the Bundeskartellamt's jurisdiction is determined either by acquisition of a 25% shareholding or by any other combination enabling one or several companies to directly or indirectly exercise a "competitively significant influence" even through a stake lower than 25%. The main objective of the German legislator was to catch all corporate links from which one could expect a restriction of competition between two companies which would no longer act independently on the market, regardless of whether the acquisition entails control or influence over the target[257]. In case of competitive horizontal or vertical relation between acquirer and target[258], such influence is presumed to exist with a 25% shareholding.

Whereas the 25% threshold sets a clear test, the 'competitively significant influence' requirement remains vague without specifics to be considered. A competitive relation should exist between the parties to transactions, which should then be active on the same market or on a vertical related market (upstream or downstream from each other). Rather than the ability to influence the entire target's business resource, the jurisdictional rule requires the possibility of the acquirer to influence policy on specific service or products competitively related to the acquiring party's business[259] by means of "plus factors" related to the status of the minority shareholders granted by corporate law. Information and co-determination rights as well as rights to appoint board members, veto rights, agreements on pre-emption rights, sales strategies, financial structure, personal interlock, call option that may lead to a majority share if exercised and ongoing business relations between acquirer and target are example of relevant plus factors.

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[256] Section 37 (1) n. 3 lit b German Competition Act (Act Against Restraints of Competition in the version published on 15 July 2005 (Bundesgesetzblatt (Federal Law Gazette) I, page 2114; 2009 I page 3850), as last amended by Article 3 of the Act of 26 July 2011 (Federal Law Gazette I, page 1554). A concentration shall arise in case of acquisition of shares accounting for "*25 percent of the capital or the voting rights of the other undertaking [or] any other combination of undertakings enabling one or several undertakings to directly or indirectly exercise a competitively significant influence on another undertaking*".

[257] Draft Law of 30 may 1898, Parliament's paper n. 11/4610, page 20.

[258] Conglomerate cases are out of scope.

[259] OLG Dusseldorf, Kart 5/08 (V), WuW/E DE-R 2462 *A-Tec Industries/Norddeutsche Affinerie*, 12 November 2008.

Although there is no minimum level of shareholding by the acquirer, the lower the share the more important the additional factors that should accompany the shareholdings as to establish a "competitively significant influence"[260].

A good example of the German concept of competitively significant influence is given by the A-Tec case. In 2008 A-Tec held a 13.8% share in its competitor copper producer (Norddeutsche Affinerie) and the right to appoint three out of twelve members of the supervisory body of Norddeutsche Affinerie. Due to the close competitive relation of target and investing company on the market for copper shapes and the low presence at shareholders meetings of the target competitor, the Bundeskartellamt found that the 13.8% enabled A-Tec to exert the *de facto* rights of a 25% shareholder and amounted to a blocking minority. As an additional factor of relevance, A-Tec was the only shareholder having a strong knowledge of the relevant sector (A-Tec knew the business of the target and was strategically interested in it) and the appointment of a quarter of the supervisory board allowed acquisition of competitively significant influence. The main concern was the tacit collusion in an oligopolistic market and the possibility to create a dominant position which would have negatively affected competition. The transaction was prohibited on the basis that the two competitors would not have acted independently on the market and A-Tec was ordered to divest its shares in Norddeutsche Affinerie.

Italy

The Italian antitrust legislation regarding minority acquisitions does not substantially differs from a jurisdictional perspective from the EUMR. In a case dating back to 1992, the Italian competition authority made it clear that the only exception to the application of antitrust rules to minority acquisitions would be the case of a purely passive investment; otherwise an infringement of competition law cannot be excluded if the acquisition is found to influence the commercial behavior of the involved companies and restrict or distort competition[261].

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[260] In the period 2005-2012, the Bundeskartellamt prohibited 32 minority shareholdings transactions accounting for the 12.5% of the overall prohibition decisions in the same period.
[261] Decision of the Italian Competition Authority (AGCM) of 17 June 1992, *Cementir/Merone* in Boll. 12/1992.

The sector of Italian banks provides a significant example of net of structural links, cross-shareholdings and block holdings by few banking companies. The Italian Competition Authority intervened in several mergers in the banking sector, by imposing clearance conditions related to minority shareholdings and interlocking directorates. Within the antitrust scrutiny of the 2007 merger between Unicredito Italiano and Capitalia, the Italian Competition Authority had the occasion to examine such links and corrected the anticompetitive effects by way of remedies[262]. The merging companies were found to have participation in a competitor investment bank (Mediobanca) which in turn held a *de facto* control over a leader insurance group (Assicurazioni Generali). In addition, one of the main competitor of the merged entity (Intesa San Paolo) had an indirect holding in the post-merger bank. Considering the existence of those links, the authority decided to clear the merger on conditions that the following remedies were implemented: (i) the merged entity would have sold the shares held in Mediobanca up to a maximum participation of 8,6%; (ii) the veto powers on the governance of Mediobanca would have been eliminated; (iii) the board members of the merged entity who also covered a role in Mediobanca would have avoided participation in the board's discussion related to the investment banking sector and insurance market; (iv) Chinese wall would have been put in place to avoid exchange of information on investment banking and insurance.

The same year the Unicredito/Capitalia merger occurred, the Italian Competition Authority launched a market investigation on the corporate governance of banks and insurance companies in Italy, which was concluded in 2008 with a publication of a detailed Report[263]. Such report shows that a substantial net of financial and personal links between competitors characterizes the sector; in particular in 60% of the listed companies there are competitors holding shares and almost 80% of the corporate bodies of the financial and banking groups examined have interlocked directors. After several recommendations by the Italian Competition Authority to Parliament and Government[264], the Italian legislator

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[262] Decision of the Italian Competition Authority (AGCM) of 18 September 2007, *Unicredito/Capitalia* in Boll. 33/2007.

[263]Italian Competition Authority (AGCM), IC 36 - *La corporate governance di banche e compagnie di assicurazioni*, 23 September 2009.

[264] Italian Competition Authority (AGCM) AS 496 *Interventi di regolazione sulla governance di banche e assicurazioni*, 2 February 2009 (Boll. 3/2009) and AS 659 *Proposte di riforma concorrenziale ai fini della legge annuale per il mercato e*

intervened by regulating interlocking directorates in the financial, banking and insurance markets[265]. The legislative framework entered into force in 2012 and prevents officers and executives[266] of companies active in such markets from seating in managerial, control and supervisory bodies of competitors. The interlocking is considered as a concerns for competition only if certain dimensional thresholds are met. Offices held in companies belonging to the same group or to foreign firms and their branches in Italy are excluded from the prohibition.

3. *Ryanair/Aer Lingus*

A meaningful example that shows the limits of the Commission's jurisdiction *vis-a'-vis* more flexible national merger control regimes and gives clear evidence of anticompetitive effects of minority shareholdings is provided by the Ryanair saga. The case started in 2007 with a notification under EUMR, continued with litigation before the ECJ and further investigations by the OFT and the Competition Commission and finally ended in 2014 with litigation in UK Courts.

Following the 2006 IPO, Ryanair acquired a 19.1% share of Aer Lingus through stock exchange purchase and then launched a public offer for all the remaining shares. The proposed acquisition was notified under EUMR and while waiting for the Commission's decision Ryanair increased its shares up to 25%. The Commission assessed both the initial minority stakes (19.1 and 25%) and the subsequent public offer by treating them as a single concentrations for the purpose of Article 3 EUMR.

In June 2007, the Commission prohibited the attempt by Ryanair to takeover Aer Lingus[267]. However the Commission's decision did not address separately the minority shareholdings which then remained in place. Notwithstanding the remedies put forward by Ryanair, the Commission held that on a relevant number of routes the acquisition would have created a

la concorrenza, 9 February 2010 (Boll. 659/2010).

265 Legislative Decree of 6 December 2011, article 36 (so-called Decreto Salva Italia), which has been then converted into law n.214 of 22 December 2012.

266 General managers are included in such category as well as other managers responsible for the financial report or any other role that, in consideration of the tasks and responsibilities and the apical position may allow influencing the strategic decisions of the "interlocked" company or acquire sensitive information on the competitor's business apt to interfere with the competitive relation of the firms.

267 Case COMP/M.4439 *Ryanair/Aer Lingus*, Commission decision of 27 June 2007.

significant impediment to competition and in many case the creation of a full monopoly. The prohibition decision was appealed by both Ryanair[268], which contested the merits and grounds, and Aer Lingus[269]. Aer Lingus was especially unsatisfied with the Commission's refusal to examine the minority shareholding of 19.1% gained by Ryanair as part of the notified concentration. In particular, Aer Lingus maintained that the minority shareholding already acquired by Ryanair amounted to a partial implementation of the prohibited transaction and should have been thus addressed, in its view, in the prohibition decision by way of a divestiture order or measures to restore the *status quo ante*, *i.e. the situation prevailing prior to the implementation of the concentration* according to Article 8.4 EUMR. The Commission rejected such request stating that the minority shareholding did not confer control over Aer Lingus and therefore was outside the Commission's jurisdiction as no concentration had been implemented[270].

In July 2010, the General Court upheld the Commission on both appeals[271] and confirmed that *if control had not been acquired the Commission has not the power to dissolve a concentration*.[272] While the appeals were pending Ryanair continued to amass Aer Lingus shares on the open market acquiring by July 2008, an ownership of 29.82%, and launched a second hostile takeover which was then abandoned before the end of Phase I[273].

As confirmed by the General Court in the appeal brought by Aer Lingus[274] in case of concentrations which do not have a Community dimension "*the member states remain free to apply their national competition law to Ryanair's shareholdings in Aer Lingus in accordance to the rules in place to that effect*". Therefore, once the Commission rejected jurisdiction over the minority

[268] Case T-342/07.
[269] Case T-411/07.
[270] The Order of the President of the Court of First Instance of 18 March 2008 (*Aer Lingus Group Plc v. Commission* T-411/07) by which the parallel application made by Aer Lingus for interim measures to prevent Ryanair from exercising its voting rights was rejected, gives useful suggestions on the concept of implementation of a concentration and states that only a full consummation including conferral of control or change in control can be seen as 'implementation'.
[271] Case T-411/07 *Aer Lingus Group Plc v. Commission*, Judgment of the General Court of 6 July 2010, [2011] 4 CMLR 5 and Case T-342/07, *Ryanair v. Commission*, 2010 Judgment of the General Court of 6 July 2010, ECR II-3457.
[272] T-411/07 cit., para 66.
[273] Case COMP/M.5434, Decision of the Commission of 23 January 2009.
[274] T-411/07 cit.

shareholding, the one-stop-shop principle set by Article 21(3) EUMR[275] ceased to apply and EU national authorities were again competent to take actions to enforce the national merger control regime.

In October 2010, following the General Court's judgment and after the expiration of deadline for further appeals to the European Court of Justice, the OFT initiated its own investigation of the completed acquisition by Ryanair of the minority stake in Aer Lingus under UK Merger Control rules[276]. The first obstacle that the OFT had to go through was the 4-month deadline set for launching an investigation under the voluntary merger notification scheme and referring the case to the Competition Commission. Although at that time 4 years had passed after the transaction, the OFT claimed its competence under section 122(4) of the Enterprise Act which enables suspension of the 4-month period in situations where the OFT has not been able to act. More specifically, the OFT referred to the duty of "sincere cooperation" under section 4(3) of the Treaty on the European Union[277] as to justify its inability to act while the appeal was pending before the General Court, arguing that this could have given rise to conflicting decisions on the same subject. Such position was then confirmed by the UK Competition Appeal Tribunal and the UK Court of Appeal.

In June 2012, the OFT referred the case to the Competition Commission finding that the 28.9% shareholding linking the two competing companies led to a substantial lessening of competition as it enabled Ryanair to block Aer Lingus' special resolutions (which Ryanair repeatedly did).

At the same time Ryanair launched the third bid on Aer Lingus which was again prohibited by the Commission in February 2013[278]. Overlaps, market concentration and high entry barriers in fact remained. For the second time the Commission concluded that the

[275] According to the so-called "one-stop-shop" principle, when a merger has a Community dimension the Commission has the sole jurisdiction in relation to its antitrust clearance.
[276] Enterprise Act 2002.
[277] *Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.*
[278] Case COMP/M.6663, decision of the Commission of 27 February 2013.

remedies proposed were insufficient. In the meanwhile, the Competition Commission pursued its case notwithstanding the request by Ryanair to suspend the proceeding and wait the outcome of the new notification to the Commission. This time it was Ryanair that invoked the sincere cooperation principle which was previously recalled by the OFT in order to support its merger investigation after the expiration of the deadline set by the UK merger control regime.

The Competition Commission decided to keep on its path arguing that the duty of sincere cooperation in this case did not prevent continuation of the investigations but only required it to not take a definitive decision that could undermine the EU investigation on the bid. This position was upheld by UK courts[279]. By the time the Competition Commission took a decision (extended deadline due to Ryanair's refusal to provide requested information), the Commission's proceeding got to an end.

As to establish the jurisdiction of the UK competition authorities, the Competition Commission noted that the 29.8% shareholdings met the "material influence threshold" as it enabled Ryanair to block the adoption of special resolutions (and this was actually what Ryanair did several times). As regards the substance of the case, the Competition Commission determined that although no obvious unilateral or coordinated effects may arise, the minority shareholding could undermine the effectiveness of Aer Lingus competitiveness on the market[280].

In particular, such effects could result from three special situations. First, Ryanair could impede Aer Lingus' ability to engage in mergers and acquisitions. Not only the Competition Commission considered relevant the fact that Ryanair shareholding deterred potentially interested operators on the market to enter in the Aer Lingus share register, but it also determined that Ryanair had the power of blocking special resolutions relating to the issue of shares (thus impeding capital raising from the market) and, more importantly, to possible M&A deals that would have rendered Aer Lingus a stronger competitor of Ryanair (which required approval by at least 75% of shareholders at a general meeting).

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[279] Competition Appeal Tribunal, *Ryanair Holdings PLS v. Competition Commission* [2014] CAT 3.
[280] Competition Commission (2013), *Ryanair Holding Plc and Aer Lingus Group Plc. A report on the completed acquisition by Ryanair Holding Plc of a minority shareholding in Aer Lingus Group Plc*, 28 August 2013.

The Competition Commission attached great weight to the impediment to mergers and acquisitions, because of the importance of scales to remain competitive in the airline sector and the significant synergies deriving from consolidation between airlines.

Second, Ryanair had the power to affect the optimal management of Aer Lingus' slots in Heathrow (requiring a 70% shareholders' consensus). This would have impacted on competitive factors relating to Aer Lingus performance, such as flexibility of the offer, costs of the service and timetable across London Airports, due to the strategic importance and values of such slots for the Aer Lingus network.

Third, the minority shareholding by a competitor such as Ryanair made Aer Lingus less attractive to potential acquirers and could serve as a mean to launch disruptive takeover bids, with the similar likely effects of deterring potential bidder partners and disrupt commercial strategy.

All in all, the Competition Commission considered that given the closeness of competition between Ryanair and Aer Lingus, Ryanair had strong incentives to exercise its corporate governance rights to influence the competitor's behavior on the market.

It is interesting to note how the attempt by Ryanair to rely on the Commission's finding that competition had remained intense between Ryanair and Aer Lingus failed. The Competition Commission rejected indeed such claim by arguing that the competition would have developed differently (and probably more fiercely) in the absence of a minority shareholding by Ryanair and that substantial entry capable of offsetting anticompetitive effects was unlikely to occur on UK-Irish routes. The Competition Commission noted that it is required not only to consider if the transaction has led to a substantial lessening of competition but also if a substantial lessening of competition might be expected in the future.

On August 2013, the Competition Commission required Ryanair to sell down to 5%[281], prevented Ryainar from having representation on Aer Lingus board and prohibited to re-acquire any additional shares unless EU clearance for full control. Based on a detailed

281 The divestiture remedy was accompanied by a Divestiture Trustee in charge of selling the remaining shares held by Ryanair in Aer Lingus to suitable purchasers.

analysis of the various ranges of potential outcome at the shareholders' meetings and historical voting turnout, the 5% shareholding would have avoided blocking special resolutions (such as disposal of slots) and would in any event not be sufficient as a platform to rebid or deter mergers and acquisitions.

The Ryanair case shows that the Commission prohibition on 2007 was absolutely not effective to ensure Aer Lingus full independence on the market and that a differentiated level of protection is available at domestic level. Once the case was brought to the UK authorities, it was the application of national law that avoided anticompetitive effects even if with limited coverage to the UK/Irish territory.

The Competition Commission's report is very interesting as it has the scope of a 6 year saga on which the effect of the minority shareholding have been tested. The advantage of an *ex post* review reveals in the fact that the authorities had the opportunity to check and assess substantial data regarding the businesses involved over the years and base their decisions on sound factual elements and not only on predictions. This is of course a special situation which is unlikely to be reproduced for the most of the minority shareholdings acquired on the market.

In any event, as regards the theory of harm used by the UK authority it is interesting to note that the possibility of any coordinated effect has been ruled out and that no mention of the traditional unilateral theories is made. The focus finding is on the competition harm created in case a competitor is limited in its strategic decisions and conducts even in the absence of effects on short term commercial behaviors.

D. Scrutiny of Minority shareholdings under Antitrust Rules (Article 101 and 102 TFEU)

All the cases illustrated above and especially the Ryanair attempt to acquire control over Aer Lingus show that at certain conditions minority shareholdings not reaching the control threshold may negatively affect competition on the market and that such effects could go undetected in case the EUMR is not applicable.

The issue is even exacerbated by the weak remedial powers under the EUMR[282], according to which the Commission is enabled to order remedies exclusively for fully implemented mergers. The unwinding of a non-controlling shareholding acquired in the context of a failed takeover attempt is not contemplated in such powers if the remaining shareholdings co not confer control and the proposed concentration has not been implemented due to specific prohibition.

The question that therefore arises is whether the concerns raised by minority shareholdings can be addressed by existing antitrust rules and under which conditions[283]. As confirmed by case-law Article 101 and Article 102 TFEU can apply in principle to acquisitions by a firm in its competitor. However, although the enforcement of such rules could cover some problematic cases it has been argued that a gap would still remain.

Article 101 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 internal market*[284]. The evaluation of an infringement of Article 101 is to be conducted in two phases[285]. First there is the determination of the anticompetitive object or actual or potential restrictive effect of the agreement or concerted practice on competition; second in case a restrictive agreement is found, an assessment of the efficiencies that may outweigh the anticompetitive effects under 101(3) needs to be conducted. If the requirements set by 101(3) are not met, the agreement would be void and unenforceable[286].

[282] Article 8.4.
[283] Some authors suggest that even domestic corporate laws may work as a constraint to anticompetitive effects of partial acquisitions. See Tóth A., *TEU Competition Law Aspects of Minority Shareholdings*, World Competition (2012) 35, Issue 4, page 617, in which the author recalls Gonzales-Diaz F.E., *Minority Shareholdings and Interlocking Directorships: the European Union approach*, CPI Antitrust Chronicle, (1) 3 January 2012, page 11, and the BT/MCI Commission decision, cit.
[284] Article 101 lists some example of prohibited agreements which: (a) directly or indirectly fix purchase or selling prices or any other trading conditions; (b) limit or control production, markets, technical development, or investment; (c) share markets or sources of supply; (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
[285] See Guidelines on the application of Article 81(3) of the Treaty [Official Journal No C 101 of 27.4.2004].
[286] Article 101(2).

According to Article 102, any *abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States*. In particular, such abuse may 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; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Why Articles 101 and 102 are not enough to catch problematic minority shareholdings? The intrinsic limits are naturally set by the specific requirements of both rules.

As regards Article 101, it is worth mentioning one of the statements of the General Court in the Ryanair case. When confronted with the argument of Aer Lingus according to which Ryanair could use its shareholdings to gain access to confidential information (e.g. business plan), the Court considered that any exchange of competitively sensitive information would be subject to review under Article 101 rather than EUMR[287].

Starting from the above principle, the question then is whether Article 101 would cover potential effects of minority shareholdings other than coordinated effects. The response is no, Article 101 is not applicable to passive investments that give rise to unilateral anticompetitive effects (unless coordinated effects are present too). Unfortunately, the economic analysis illustrates many cases in which minority shareholdings not conferring control may have weak or insignificant coordinated effects but instead produce problematic unilateral effects. As indicated in Chapter II this is for example the case when the company that invest in the rival is not the industry maverick[288].

[287] Case T-411/07 Aer Lingus Group Plc v. Commission, Judgment of the General Court of 6 July 2010, [2011] 4 CMLR 5, para 70 "[t]*he application does not contain any evidence that confidential information was actually exchanged during such a meeting. In any event, such an exchange of information would not be a direct consequence of the minority shareholding, but would constitute subsequent conduct on the part of the two companies which could potentially be examined under Article 81 EC.*"

[288] See Ezrachi A. and Gilo D., *EC Competition Law and the Regulation of Passive Investments Among Competitors*,

In such a case, the non-coordinated effects would go undetected and unchallenged with a clear regulatory and enforcement gap.

In any event, a crucial condition required by Article 101 is the existence of an agreement (or concerted practice) between undertakings. Arguably, the acquisition of shares through the stock exchange (as shown in the Ryanair case) may escape antitrust scrutiny as it does not entail an agreement[289]. The same holds true in case of articles of association of a company which may in fact be the means through which corporate governance and relationship between shareholders are determined[290].

Another issue regards the possibility to hold a mere sale and purchase of shares contract to be sufficient without any further agreement. It seems to be a general rule confirmed by case-law[291] that share purchase agreements do not fall under the scope of Article 101.

Furthermore, in a situation in which the minority share is held and sold by a controlling shareholder to the third firm, the question arises on whether such controlling shareholding could be considered an undertaking for the purpose of Article 101 and thus performing economic activity of the controlled company[292]. In the Jurisdictional Notice, the Commission states that natural persons are not considered to be undertaking for the purpose of establishing control unless "*those natural persons carry out further economic activities on*

Oxford Journal of Legal Studies, Vol. 26 n. 2 (2006), page 332. Other cases in which coordinated effects may be absent but unilateral effects will appear reveal in multilateral passive investments when the industry maverick has no direct or indirect stake in the investing firm and when a rival company increases its investment in the industry maverick (Gilo D., Mosche Y. and Spiegel Y., *Partial Cross Ownership and Tacit Collusion*, 37 RAND J. Econ. 81 (2006).

289 This principle has been set in the BT/MCI case, cit. (para 44) where the Commission confirmed that Article 101 does not apply to agreements for the sale of shares. See also Rusu C. S., *(Non-Controlling) Minority Shareholdings as Self-Standings Transactions under EU Merger Control Analysis: Prospective Solutions*, World Competition, Vol. 37, Issue 4 (December 2014), page 491.

290 The same concerns are expressed by the Commission in the White Paper "*Regarding Article 101 TFEU, it is not clear whether acquiring a minority shareholding would constitute an 'agreement' having the object or effect of restricting competition in all cases. For example, in the case of a series of acquisitions of shares via the stock exchange, it may be difficult to argue that the different purchase agreements meet the criteria of Article 101 TFEU. The same is probably true for the articles of association of a company, the purpose of which is generally to determine the corporate governance of the company and the relationship between it and its shareholders*" (para 40).

291 Case IV/34.857, Commission decision of 27 July 1994.

292 In the case *Vassen/Moris* (CASE IV/C-29.290 Commission decision of 10 January 1979), the Commission maintained that a physical person (Mr Moris) owning the controlled company whose minority shareholdings were then conferred to a competitor, was an undertaking for the purpose of Article 101 because it exploited the commercial activity and results of the controlled company.

their own account or if they control at least one other undertaking"[293]. In many cases it could be hard to regard individual investors as undertakings[294].

With specific reference to the finding of a concerted practice, one may wonder whether the acquisition of a minority shareholding can constitute a collusion-facilitating device. It has been argued on this point that a minority shareholding may function as a *kind of 'indirect contact' between competitors from which it is possible to infer a commitment* [295] so that the following coordinated conduct of the other participants may determine the mental consensus requested by case-law for the finding of a concerted practice. Although convincing, this theory may be very difficult to prove.

Additional critiques regards the conditions set by Article 101(3), which seem too restrictive for merger and acquisitions. It does not seem reasonable to require a partial acquisition to lead to an improvement in the production or distribution of goods or the promotion of technical or economic progress, to allow a fair share of the benefit to consumers, to be indispensable to the achievement of the alleged efficiencies and not afford the parties the possibility of eliminating competition[296].

Another objection to the application of Article 101 may be that the object/effect distinction does not fit the assessment of partial acquisitions; even, if the purpose of the acquisition is clearly detected as impeding competition by the target firm, a possible 101(3) defense is to be excluded with the result of the very harsh application of cartel rules[297].

Finally the slow decision making process for the enforcement of Article 101 clearly clashes with the time constraints of business transactions[298].

With reference to Article 102, a preexisting dominance is required for an abusive conduct to be found and the acquisition should in any case constitute an abuse by at least enabling

[293] Consolidated Jurisdictional Notice cit., 12.para
[294] See Bellamy C., *Mergers Outside the Scope pf the New Merger Regulation – Implication of the Philip Morris Judgment*, in Barry Hawk (ed), *Mergers & Acquisitions and Joint Ventures*, 102-103.
[295] Pini cit., page 659-663.
[296] Those are indeed the four criteria set by Article 101 (3) for obtaining an individual exemption from the prohibition of anticompetitive agreements and concerted practices.
[297] Bas K., *Reforming the Treatment of Minority Shareholdings in the EU: Making the Problem Worse Instead of Better?*, World Competition (2015) 38, Issue 1, page 99.
[298] Rusu C.S., *EU Merger Control and Acquisitions of (Non-Controlling) Minority Shareholdings – The State of Play*, CLASF Working Paper Number 10 February 2014, page 9.

the dominant firm to influence the target's conduct on the market. The notion of dominance has been set by case-law and specifically refers to the economic strength of an undertaking and its ability to (a) prevent effective competition and (b) act on the market independently of its customers, competitors and consumers[299].

As regards the finding of an abuse, although the term is not defined, some of the conducts that may constitute abuse are listed by Article 102 and are traditionally described as exploitative or exclusionary abuse. Exploitative abuses encompass those conducts through which the dominant company takes advantage of its market power to exploit consumers (for example, the imposition of unfair and excessive prices). Exclusionary abuses are conducts whereby the dominant company hinder competition on the market (for example, refusal to access to an essential facility).

The finding of an abuse may not be problematic in case of a minority shareholding in connection with active rights to influence the competitive conduct of the target. Indeed, in the Philip Morris case illustrated above[300], the Court acknowledged that any instrument that may result in "some influence" on the commercial policy of the rival may constitute an abuse when used to influence the competitive conduct or distort competition on the market. In particular the 'abusive' effect of a minority shareholding held by a dominant firm in the rival on the structure of competition on the market may be the strengthening of a dominant position and the consequent reduction of residual competition by deterring entry and preventing fierce competition by rivals.

On the contrary, when it comes to mere passive minority shareholdings, an Article 102 case may be more difficult to prove because of the lack of some sort of influence. Such issue was considered in the Gillette case illustrated above (non-voting equity interest held by a dominant firm in a competitor), where the Commission supported the finding of abuse of dominant position on the general principle whereby dominant firms have a special responsibility not to impair genuine competition. In particular, minority shareholdings may facilitate collusion as they can increase information flow and commitment to collude.

[299] Case 26/76 *United Brands v. Commission* [1978] ECR 207, para 65.
[300] Chapter IV. Section A. 1.

A possible application of Article 102 to minority shareholdings would be in case of collective dominant positions. According to case-law the establishment of a collective dominance depends on the existence of 'economic links' between two or more companies which enable them to present themselves as a collective entity and adopt the same conduct on the market[301]. Economic links may be structural or contractual[302]. Minority shareholdings and cross-shareholdings may amount to structural economic links. In this case, the structure of the market could be affected by such shareholding as it would enhance the conditions of a tight oligopoly[303] making the market more transparent and concentrated. This in turn facilitates the monitoring other members' behavior and increases the incentives not to depart from common understandings.

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[301] Cases C-395 and 396/96 P, *Compagnie Maritime Belge Transports SA v. Commission* [2000] ECR I-1365, para 35-45.
[302] See Faull J. and Nikpay A., *The EC Law of Competition* (2nd edition Oxford University Press 2007), para 4109.
[303] See for example, Russo F., *Abuse of Protected Position? Minority Shareholdings and Restriction of Markets' Competitiveness in the European Union*, World Competition 29(4): 607-633, 2006.

V. MINORITY SHAREHOLDINGS: GAPS AND POSSIBLE SOLUTIONS

A. Gaps and Possible solutions

As discussed above (Chapter IV, Section D), in several situations partial acquisitions may remain unchallenged under the EUMR, Article 101 and Article 102.

First when by means of the transaction there is no establishment of control. Second when the minority acquisition is not part of an agreement or a concerted practice. Third when it does not facilitate coordination or some influence on the target's behavior. Fourth when the minority acquisition does not form part of a wider scheme of abuse by a dominant firm through indirect influence[304].

Economic theories have shed light on the potential anticompetitive effects that certain minority shareholdings not conferring control may have, under certain conditions, on the market.

The Commission's decisional practice of enforcement of Article 101 and 102 as well as its intervention under the EUMR to request divestiture or reduction on a number of mergers involving minority shareholdings demonstrate that the Commission is aware of the economics behind the evaluation of minority shareholdings and that, although having some instruments to scrutinize them, it wants to expand its reach[305].

Before going into details of the Commission's analysis and its subsequent proposal, three possible alternative options envisaged to overcome possible gaps that may leave problematic minority acquisition unchallenged will be briefly commented on.

1) Collective dominance

A first possibility is the application of the collective dominance theories as to include minority shareholdings among the relevant links for the finding of a collective dominant

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[304] Ezrachi A. and Gilo D., *EC Competition Law and the Regulation of Passive Investments Among Competitors*, Oxford Journal of Legal Studies, Vol. 26 n. 2 (2006), page 327-349.

[305] the Commission reiterates such position in the White Paper *Towards More Effective EU Merger Control* COM(2014) 449 final, para 39 and 40, and Commission Working Staff Document Accompanying White Paper Towards More Effective EU Merger Control, SWD(2014) 221 final.

position. In the light of the special responsibility of the dominant firms not to impair genuine undistorted competition on the market, and thus not to influence the structure of the market, minority shareholdings could constitute an abuse[306].

Although having the merit to give the right relevance to the alteration of the market structure that can be brought about by minority shareholdings, such proposal seems to be appropriate only in situations in which the minority shareholdings actually increase transparency and concentration of an already oligopolistic market. The collective dominance theory should be thus carefully applied exclusively in case of evidence of such circumstances.

2) *Expanding the reach of Article 101 TFEU*

The second alternative would be expanding the reach of Article 101 through an "effect-oriented" interpretation[307]. By stretching the notion of concerted practice one could consider the acquisition as a strategy for reaching a common understanding about the terms of coordination or an evidence of the mutual consensus[308]. This could be implemented through a clarification of the enforcement priorities related to minority shareholdings by way of *ad hoc* guidelines. Such guidelines should be aimed at clarifying the interpretation of agreement or concerted practice in a consistent manner as to catch expansively additional forms of collusion that differs in intensity and practical manifestation[309].

The proposal to extend the application of Article 101 would catch coordinated effects but would nevertheless leave aside the unilateral effects of minority shareholders, which again would remain undetected if the requirements for an abuse of dominant position are not met. Furthermore, just as in case of Article 102 antitrust procedures for the enforcement of

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306 Struijlaart R.A., *Minority Share Acquisitions Below the Control Threshold of the EC Merger Control Regulation: An Economic and Legal Analysis*, World Competition 25(2) 2002, page 202-204 and Russo, cit.
307 See Bailey D., *Single Overall Agreement in EU Competition law*, CMLRev 47, at 473 (2010).
308 This solution is supported by Pini cit., page 683, and Bas K., *Reforming the Treatment of Minority Shareholdings in the EU: Making the Problem Worse Instead of Better?*, World Competition (2015) 38, Issue 1, p. 95, who advocate for a *more active enforcement of the current competition rules*.
309 Rusu C. S., *(Non-Controlling) Minority Shareholdings as Self-Standings Transactions under EU Merger Control Analysis: Prospective Solutions*, World Competition, Vol. 37, Issue 4 (December 2014), page 504. The teleological interpretation of the concept of agreement and concerted practice is not new to the EU case-law. See for example the case T-305/94 where the concept of concerted practice was extensively interpreted.

Article 101 provide for an *ex-post factum* assessment which in not ideal for a realistic approach to market reality as characterized by length and rigid process[310].

3) *Extending the reach of the EUMR*

The third alternative would be the extension of the scope of the EUMR as to cover anticompetitive acquisitions of minority shareholdings falling short of control. Passive investments involving only unilateral effects would thus not remain undetected. As seen Article 101 ignores unilateral effects, which generally arise in case of passive investments between major companies in oligopolistic markets. On the contrary, the test for concentrations addresses both coordinated and unilateral effects.

The economic assessment proposed by the Guidelines for Horizontal mergers is indeed similar as required for minority investments[311].

More specifically, unilateral and coordinated concerns are raised by both horizontal mergers and passive investments. The merged entity has an increased incentive to raise prices due to the fact that the previously independent companies ceased to compete each other. Similarly, as seen above in Chapter II the investing firm raising its price can offset the loss caused by a diversion of its customers to the advantage of the target thanks to the latter profits from higher sales. Accordingly, the increase in price by the investing firm or the merged entity would benefit the other players who will be then incentivized to an overall increase in the market. In turn collusion becomes more stable and price-cutting less profitable. In both cases the existing market conditions (number of firms on the market, market shares, barriers to entry, capacity, etc.) may render collusion more or less likely[312].

As confirmed by the Commission, the EUMR covers unilateral behaviors of undertakings even if they do not have a dominant position of the market concerned. The substantive test of the "significant impediment to effective competition" "*should be interpreted as extending,*

[310] Rusu C.S., *EU Merger Control and Acquisitions of (Non-Controlling) Minority Shareholdings – The State of Play*, CLASF Working Paper Number 10 February 2014, page 9.
[311] However it has been argued that being equity the kind of interest typically involved in mergers, debts or other hybrid financial interests are not the object of EUMR. See Corradi M.C., *Bridging the gap in the 'Shifting sands' of Non-Controlling Financial Holdings?* (Notes in the recent Commission's White paper 'Towards a more efficient Merger Control') (2015) page 19 - Bergen Competition Law Policy Conference – Bergen 23 and 24 April 2015.
[312] Horizontal Merger Guidelines, para 42-57.

beyond the concept of dominance, only to the anticompetitive effects of a concentration resulting from the non-coordinated behavior of undertakings which would not have a dominant position on the market concerned[313]".

Other similarities between the analysis of partial ownerships and horizontal mergers are the need to examine the significance and the market power of remaining firms on the market, the involvement of an industry maverick, as well as the need to examine consumers' switching costs and countervailing buyer power.

Another reason supporting the conclusion that the test for mergers is more appropriate is because it targets structural (rather than behavioral) changes which often occur in case of partial investments.

Furthermore, the EUMR allows more flexibility and different ways to remedy to the anticompetitive effects, whereas under Article 101 and 102 the only consequence is that the transaction would be void. With reference to the possibility to remedy the anticompetitive 'conduct' the only alternative available is a behavioral obligation – e.g. offer of commitments aimed at closing the investigation without ascertaining the infringement[314]; however unilateral pricing and output decisions cannot be easily detected or monitored.

Finally, the self-assessment required to firms for the application of Article 101 and 102 is not appropriate as it would endanger legal certainty in case of mergers which most of the time represent long lasting acquisitions, i.e. change in the market structure.

4) *Prohibition of Minority Shareholdings*

An extreme (and isolated) view argues that should the ultimate goal of competition authorities be to eliminate any possibility for a company to influence (even indirectly) the behavior of a competitor in the market, then the acquisition of minority shareholdings in

[313] See recital 25 of the Horizontal Merger Guidelines, which reflects the 2004 reform to the Merger regulation when the 'dominance' test was replaced by the significant impediment to competition test (SIEC) in order to capture likely anticompetitive effects resulting from a merger of 2 firms in an oligopolistic market where the merged entity would not have become dominant.

[314] Article 9 Regulation 1/2003 (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, Official Journal L 001 , 04/01/2003 P. 0001 - 0025.)

competitors should be prohibited *tout court*.[315] Commenting to this position, one could highlight the disproportion of the proposal compared to the scale of the problem and the excessive intrusion in the private business freedom rights.

B. EU Consultation Paper on Minority Shareholdings

Through the document published on June 20, 2013 "Towards a more effective EU Merger Control", the European Commission launched a public consultation on a possible reform of the current EUMR. Based on a first analysis of the comments received to the consultation paper, a White Paper[316] has been published together with a staff working document[317] and an impact assessment report[318].

By leveraging on the highly appreciated objective of preventing harm to consumers and competition that may result from non-controlling shareholdings, the Commission proposed (among other amendments)[319] to extend its jurisdiction under the EUMR to allow screening of minority shareholdings that do not confer control over the target company.

The issue is not new to the Commission which had already stimulated a similar discussion in 2001. However at that time, the proposal was dropped based on the conclusion that only a very limited number of cases would have not been satisfactorily addressed under the *ex-post* antitrust enforcement of anticompetitive agreements and abuse of dominance prohibitions.

In the official documents of 2001, the Commission stated that "…*it would appear disproportionate to subject all the acquisitions of minority shareholdings to the ex-ante control of Merger regulation*";"… *with regard to minority shareholdings and strategic alliances, while acknowledging the*

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[315] Olivieri G., *Minority Shareholdings e controllo delle concentrazioni: Nihil sub sole novi?*, Rivista Italiana di Antitrust, 2014 No 1, page 69.
[316] COM(2014) 449 final.
[317] Commission Working Staff Document Accompanying White Paper Towards More Effective EU Merger Control, SWD(2014) 221 final.
[318] Impact Assessment Accompanying White Paper Towards More Effective EU Merger Control, SWD(2014) 217 final.
[319] Other proposal for amendment regards the referrals of merger cases.

potential structural effects of such transactions, the paper describes the difficulties in drawing borderlines with sufficient legal certainty" [320].

Taking back from the discussion left open in 2001, the Commission re-puts the issue on the table supported by the theories of harm developed by economic researchers, the member states and third countries' experts and based on the assumption that Article 101 and Article 102 TFEU could only tackle limited cases in which minority shareholdings may have anticompetitive effects.

The 2013 Commission Working document has received a number of responses[321] and is accompanied by two attachments. Annex I to Commission's Staff Working Document, *Economic Literature on Non-Controlling Minority Shareholdings ("Structural Links")* illustrates the theories of harm taken into account by the Commission for the purposes of the consultation. Annex II to Commission's Staff Working Document *Non-controlling minority shareholdings and EU merger control* provides examples on the importance of an adequate control of the anticompetitive effects of non-controlling minority shareholdings.

Annex I goes through the traditional economic analysis by recalling unilateral, coordinated and vertical effects, as described above (Chapter II). It is to be noted that there is no mention of the theories linked to the influence that the acquirer may exert as to prevent the target from taking competitive moves on the market, such as raising the target's capital, expand its activities in a new market or consolidate its market position by merging with a competitor. This is surprising given that the main competitive concerns raised in the UK Ryanair case were focused on such 'influence' effects[322].

As to strengthen the perceived need for a reform, the Commission recalls its consolidated powers to scrutinize pre-existing minority shareholdings in the context of separate mergers involving the holder of the partial ownership as a party to a notified concentration. For the sake of consistency with such powers, and to avoid subjecting the assessment of minority

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[320] Commission Green paper on the Review of Council Regulation (EEC) 4064/89, COM (2001) 745 final, 11 December 2001 (par. 109).

[321] Sixty-six responses from companies, authorities, law-firms, associations and private individuals have been published on the Commission's website.

[322] The Ryanair case is described and commented in Chapter IV.

shareholdings on the timing of the acquisition of the related shares, the Commission stresses its desire to extend the current scope of EUMR.

Another important element supporting extension of systematic antitrust scrutiny to non-controlling minority shareholdings, according to the Commission, is the fact that having minority shareholdings caught by national jurisdictions (such as the case of UK and Germany[323]) but not by the EUMR would lead to un-prevented anticompetitive effects beyond the boundaries of a single member state.

A preliminary consideration of three possible alternatives has been conducted by the Commission and put under consultation. Both *ex-ante* and *ex-post* control systems with respective benefits and drawbacks have been envisaged in a first moment by the Commission.

The two *ex-ante* review proposals are the "mandatory notification system", which mainly requires the extension of the scope of EUMR to acquisitions of non-controlling shares, and the "transparency targeted system" including a case selection based on *prima facie* anticompetitive effects.

By applying the transparency targeted system the Commission would have the discretional power to launch an investigation within pre-determined time limits when the *prima facie* anticompetitive effects are identified. If the Commission decides that further investigation is due, it could invite the parties to submit a full notification (Phase I applicable for concentrations); otherwise, after 15 days from the information notice (waiting period) the parties can implement the transaction. In order to take into account complaints and information coming from third parties, the Commission is allowed to nevertheless take up the case within further period of 4/6 months. If within such period of time the transaction has been already implemented (as the waiting period elapsed), the Commission would be enabled to order interim measured to be complied with until approval[324].

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323 The legal framework regarding United Kingdom and Germany is summarized in Chapter IV.
324 Impact Assessment Accompanying White Paper Towards More Effective EU Merger Control, SWD(2014) 217 final, para 64.

As an *ex-post* review, the Commission proposed a "self-assessment" system, which does not require prior notification nor standstill obligations. The parties would not be obliged to notify and could implement the merger without waiting for an approval. The Commission should rely on its own market intelligence or third parties complaints to gain knowledge of problematic transactions and would be free to investigate them at any time.

Leaving aside the different procedures that each proposed system would require, three relevant elements directly run in favor of an *ex-post* assessment under the EUMR.

First the data usually needed to assess the effects on competition are not available in a pre-minority acquisition situation or at least are less complete than in case of an *ex-post* assessment in a situation in which the Commission had the possibility to study and analyze the effect of the passive investment on the industry through empirical data[325]. Secondly having all passive investments falling under the scope of the EUMR and subject to mandatory prior notification could be extremely burdensome for the Commission (to the detriment of a high standard and quality appraisal) and the undertakings concerned (which will also experience delays) as well as disproportionate to the scale of the problem[326]. Thirdly, the benefit of an *ex-ante* assessment in terms of effects on the transactions are not so relevant as, unlike mergers, the divestment of minority shareholdings would not need de-merging but only sale of the shares.

From an opposite perspective it has been noted that in certain cases it would be more appropriate to avoid or prevent anticompetitive effects before they materialize[327] and that a mandatory *ex-ante* notification would delay and prevent investments. Conceiving a system whereby only potentially problematic transactions are caught is thus crucial.

After the closure of a first round of consultation, in the 2014 White Paper the Commission reiterated the main points of the Staff Working Document (likely competitive harms, theories of harms and insufficiency of Article 101 and 102) and opted to suggest an *ex ante*

325 Ezrachi, Gilo cit. page 348.
326 In such respect, it has been counter argued that a lowering of the turnover thresholds would lead to fewer transactions caught by the EUMR. Rusu C. S., *(Non-Controlling) Minority Shareholdings as Self-Standings Transactions under EU Merger Control Analysis: Prospective Solutions*, World Competition, Vol. 37, Issue 4 (December 2014), page 510.
327 Pini, cit. page 681.

"transparency targeted system" where great discretion on the cases to be investigated is granted.

The goal declared by the Commission is to create a balanced system taking into account the following core principles:

1. Capture potentially anticompetitive transactions.
2. Avoid unnecessary and disproportionate burdens on companies, Commission and national competition authorities.
3. Fit in with EU and national merger control regimes.

In particular, the Commission proposes a new jurisdictional test for transactions creating a "competitively significant link" and sets three main requirements for such test to be satisfied in addition to the turnover thresholds which would continue to apply.

The first requirement relates to the competitive dimension and looks at the market relationship between the involved companies.

- Only minority shareholdings acquired in a competitor or in a directly vertically-related company would fall in the Commission's competence[328] as they create a competitive link.

The second requirement regards the significance of the competitive link, which would be established by reference to the level of shareholdings.

- Shareholdings equal or higher than 20% would automatically attract merger review (always on condition that the Community dimension threshold is reached or exceeded).

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[328] In the proposal the Commission excludes the need to have a proper antitrust analysis (and market definition) for the establishment of a competitive relationship between acquirer and target companies "*Rather, [the concept of competitor] would take into account whether the companies are active in the same sector and the same geographic area and, based on the self-assessment of the parties, whether the acquirer has a competitive relationship to the target*" (Consultation Paper, par. 88). It has been noted that such exercise of individuating the same sector and same geographical area, although less stringent than a proper market definition, can nevertheless create legal uncertainty for the parties to a transaction (see Bas K., *Reforming the Treatment of Minority Shareholdings in the EU: Making the Problem Worse Instead of Better?*, World Competition (2015) 38, Issue 1, page 101).

- In case of shareholdings comprised between 5% and 20%, additional elements (including rights attached to the shares) should be considered as to make the transaction fall under the merger control regime. Examples of such additional elements are low attendance at shareholders' meetings, participation to the board and right to access competitively sensitive information.

The third requirement is a negative one.

- A safe harbor below 5% is proposed in view of the unlikely significance of the competitive link, if any, in such case[329].

In the Commission's view, the reason for setting the level around 20% is mainly derived from corporate national laws, which frequently provide minority shareholders with an average of 25% voting rights to block special resolutions[330] and thus exercise influence over the target company's strategy. In this regards, however, the consultation paper lacks of detailed analysis of corporate national laws. Taking for example the legal regime in Germany one could argue that even corporate national law granting certain rights to minority cannot always be assumed *per se* as conferring relevant power to influence the target company business. Indeed, under German law shareholders meetings of stock corporations do not decide on important business issues but only influence the appointment of supervisory (*i.e.* non-executive) board members who usually do not directly manage the company; in addition the rights of the shareholders to access information is limited to data related to finance, profits and assets and can be blocked by the board in case a disclosure of such information can damage the company[331]. A further example of constraint under national corporate law is given by the voluntary application of the Dutch Corporate Governance Code of 30 December 2004. It was observed that the provision limiting individuals from being members of the Supervisory Board of many companies was respected in most cases by listed companies[332].

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[329] In the White Paper the Commission proposes that, for the sake of legal certainty, the targeted transparency system should also allow voluntary notifications (para 49).
[330] Belgium, Germany and United Kingdom apply the 25% threshold to a publicly listed companies.
[331] Schmidt J.P., *Germany: Merger control analysis of minority shareholdings – A model for the EU?* Concurrences N° 2-2013 – pp. 207-212.
[332] Rusu C.S., *EU Merger Control and Acquisitions of (Non-Controlling) Minority Shareholdings – The State of Play*,

As regards the differentiation between threshold above and below 25%, the Commission explains that the effects of minority shareholdings on financial incentives may be less significant in case of lower shareholdings.

The jurisdictional test envisaged by the Commission for the targeted transparency system seems to have its logic. However, it has been objected that the use of a "shareholding size" test (percentage of equity held in another company), even if combined with safe harbors, may not be appropriate given that financial counterincentives are not exclusively based on the level of shareholdings[333]. What really matters is the *ratio*. For example, the effects that the ownership by company A (profit x) of a 5% shareholding in company B (profit 2x) are different from the effects of the same 5% owned by B in A.

Although many critiques have been raised against the proposed system, the strong effort by the Commission to continue its way towards improving the concentration control system, preserve proportionality and keep a high standard of appraisal[334] is to be appreciated.

C. Open issues for the EU Review's Extension on Non-Controlling Shareholdings

The debate triggered by the Commission proposal raised multiple questions and concerns. Some wondered whether an effective need for a reform exists, if significant regulatory or enforcement gaps have been identified; others asked whether the proposed amendments will render the current set-up more efficient, what is the preferred substantial test to tackle really problematic transactions, how to set-up the antitrust scrutiny, etc.

1. *Why there is a need for a reform?*

Starting from the question on why there is a need for a reform, a number of supporting elements can be listed.

CLASF Working Paper Number 10 February 2014, page 19.

[333] Corradi M.C., *Bridging the gap in the 'Shifting sands' of Non-Controlling Financial Holdings?* (Notes in the recent Commission's White paper 'Towards a more efficient Merger Control') (2015) page 19 - Bergen Competition Law Policy Conference – Bergen 23 and 24 April 2015.

[334] The Simplification Package adopted in 2013 is an example of such effort (the Notice on Simplified Procedure, the Merger Implementing Regulation and the standard model for divestiture commitments have been simplified) which allowed the Commission to rebalance its workload and focus on more problematic transactions.

First the frustration of the Commission for the outcome of the Ryanair's attempt to take over Aer Lingus. As illustrated above[335], the lesson learned from the Ryanair case is that a regulatory gap at European level exists, given the Commission's limited powers to review mergers involving acquisitions of non-controlling shareholdings and the differentiated protections available at member states level.

Clearly the regulatory gap produces an enforcement gap and its effects are more dangerous considering that the EUMR does not catch certain transactions which are caught instead by some member states.

Although strongly supported by many voices[336], the maintenance of the *status quo* would undermine harmonization of rules, enhance existing divergences, prevent transactions based on the territory where the effects are produced and impede common market objectives. Further, divergent substantive and procedural rules between different domestic systems may lead to inconsistent outcomes, reduce legal certainty and increase burdens and costs for businesses in case of cross-borders transactions.

On the contrary, a reason that would support maintenance of the *status quo* is the possible 'domino effect' that could be triggered in the jurisdictions of member states where non-controlling minority shareholdings are not currently caught by antitrust review[337]. Notwithstanding the desirable objective of legal convergence in the Single Market, such a domino effect triggered by the influence of European law on national legislation and practice would clearly increase costs for enterprises and authorities.

2. *Are the existing legal instruments not sufficient?*

A second question one may ask is why to support a reform of the EUMR rather than a wider application of the existing legal instruments. Among the responses to the public consultation, it has interestingly been proposed to extend the current reach of the

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335 Chapter IV.

336 Among the responses to the Commission's Consultation 'Towards More Effective EU Merger Control', see the submissions of the International Bar Association, McMillan, ICC, American Chamber of Commerce, (Clifford Chance). See also Jens Peter Schmidt, *Germany: Merger Control Analysis of Minority shareholdings – A model for the EU?*, Competition L.J. N° 2-2013, 211-12 (2013).

337 This approach is sustained by Ghezzi, cit., Levy N., *EU Merger Control and non-controlling minority shareholdings: the case against a change*, Eur. Comp. J., 2013, and some respondents to the public consultation (among which, ICLA In-House Competition Lawyers' Association, 19 September 2013).

prohibition of agreements and concerted practice and Article 101-related enforcement powers provided by Regulation 1/2013 to further cover problematic minority shareholdings[338].

Assuming that the intrinsic limits set for the application of Article 101 can be circumvented (see Chapter IV, Section D), this solution would entail the adjustment of enforcement priorities relating to minority shareholdings through a set of guidelines clarifying the scope of the Commission's intervention[339]. Such solution may be supported by an extensive teleological interpretation of the notion of agreement or concerted practice by the Court (which seems to be possible by looking at the case-law stretching the concept of agreements as to cover different forms of collusion)[340].

As a counterargument in this respect, it can be argued that a systematic intervention such as the regular and methodical merger review would be more opportune than the implementation of sporadic and unmethodical actions. According to this view, it is very important to ensure that the Commission's power to scrutinize anticompetitive effects is not limited to a non-regular enforcement based on antitrust infringements (if and when detected).

In any case, it is noted that the instruments of Article 102 and 101 TFEU have not been construed for acquisition of shareholdings which may also have structural effects[341], in addition to behavioral ones. With the consequence that the enforcement of the antitrust rules would not impair structural effects (and leave them unchanged) as the merger regulation would instead do.

Further, the application of Article 102 and 101 TFEU does not provide a timely and effective response to the potentially negative effects of an acquisition as the EUMR does –

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338 Hogan Lovells, *European Commission Consultation of 20 June 2013 - Towards more effective EU merger control*, September 2013.
339 This view is expressed by Rusu C. S., *(Non-Controlling) Minority Shareholdings as Self-Standings Transactions under EU Merger Control Analysis: Prospective Solutions*, World Competition, Vol. 37, Issue 4 (December 2014), page 504.
340 See for example *T-Mobile Netherlands and Others*, case C-8/08 (2009), I-04529.
341 Rusu C.S., *European Merger Control: the Challenges raised by twenty years of enforcement experience, Kluwer*, 7 CECL 115-116 (2010).

which may be problematic given the rapid path of the economic interests behind acquisitions.

In addition to the timely responsiveness, the flexibility provided by specific features of the EUMR is also a relevant element supporting the extension of the EUMR. For example, the possibility to propose remedies[342] and the application of corrective measures and sanctions seem more appropriate than the mere nullity of the agreement as per Article 101, paragraph 2.

In addition, one should also consider the higher legal certainty set by a clearance decision[343] when compared to the possible outcome of an antitrust infringement proceeding[344].

Considering a wider context of efficient appraisal and use of available expertise and resources and tools developed during the years of application of the EUMR, the similarities in the economic analysis of mergers and minority acquisitions (unilateral and coordinated effects) and the common indexes and tools used to asses market structure changes driven by both full mergers and partial acquisitions (e.g. HHI) demonstrate that a merger-like control would be more appropriate.

As regards the need to maintain consistency with the Commission power to scrutinize minority shareholdings in the context of a full concentration notified under EUMR and eventually extend such power, one should consider the fixed requirements set for this power to be enforced. First, the acquiring company should be involved in a transaction regarding the same market in which the target company operated. Second the concentration should be caught by EUMR; in other words the control and Community

342 In analyzing the EU decision making practice, two broad categories of remedies to remove anticompetitive effects of minority shareholdings are identified: (a) divestments of the shareholdings or overlapping assets (structural remedies) and (b) measures to discipline rights or behaviors of the minority shareholder (behavioral remedies) e.g. Chinese walls to avoid exchange of competitive information, elimination of interlocking directorates, measures that render the investment passive, etc.). As a matter of general policy, the Commission has been reluctant to accept behavioral remedies for antitrust concerns raising from coordination from interlocking directorates but always preferred

343 See Ghezzi F., Pini D. *Partecipazioni di minoranza e disciplina europea delle concentrazioni tra imprese (osservazioni sulle proposte di ampliamento dell'ambito di applicazione del regolamento n. 139/2004)*, Rivista delle società Anno 2014 LIX Fasc. 1-2014, page 119.

344 The outcome of an infringement procedure is strictly linked to the specific facts and circumstances of the case.

dimension tests should be met. Third the concentration should be apt to determine a significant impediment to the competition.

All in all even if all those requirements are met it is argued that the tackling of existing minority shareholdings within notified mergers lacks effectiveness because of the *ex-post* necessary nature of the intervention which may possibly be implemented at a very long time distance from the problematic acquisition of the stake at issue[345].

3. *Will the proposed reform go towards a 'more efficient' merger control?*

Another question that has been raised, inspiringly based on the title of the consultation document, is whether the proposal would render the current EUMR more efficient.

Considering that around 90% of the full mergers notified to the Commission are cleared in Phase I[346], it is legitimate to ask what is the likelihood and magnitude of competitive harms of minority shareholdings. Will those harms be sufficiently significant to justify consequent regulatory burden on businesses, extra-amount of work, diversion of authorities' resources from other priorities and uncertainty on merger assessment?

The preliminary assessment conducted by the Commission reveals that in the period 2005-2011, 43 minority acquisition cases of certain relevance would have met the Community dimension requirements and proved to be potentially problematic. This is potentially the number of transactions that escaped antitrust scrutiny in a 6-year time.

From the implementation of the first EUMR, out of 53 cases when minority shareholdings held by firms involved in concentration transactions in 20 cases potential anticompetitive effects of the structural links have been identified by the Commission and divestiture remedies have been imposed as a clearance condition. This is the number of minority shareholdings caught because of the involvement of the parties to a pre-existing concentration.

Arguably such numbers are not negligible they can be called in support of a further and detailed assessment of the issue[347]; however, as remarked by many voices, in order to fully

[345] See Ghezzi, Pini, cit. page 113.
[346] See EU Merger Control Statistics 2014.
[347] This view however is not generally accepted. See for example Haans J., *Not so business friendly. Should EU*

justify the present proposal for EUMR reform the Commission should have conducted further analysis on the cases which escaped antitrust scrutiny and should have looked for empirical evidence that prices, quantities and innovation had been impacted by the minority stake[348].

This same need for further investigation and deeper assessment of the views submitted by all stakeholders has been expressed in 2015 by Mrs Margrethe Vestager, the current Commissioner for Competition. In a speech of 12 March 2015 "*Thoughts on merger reform and market definition*", marking the 25th anniversary of EU merger control policy, the Commissioner stated that:

> "*While many acknowledge that there may be an enforcement gap, there is widespread concern regarding the proportionality of the White Paper's approach to closing that gap. Is it balanced? Will it work well? Against this background, my conclusion is that that the balance between the concerns that this issue raise and the procedural burden of the proposal in the White Paper may not be the right one and that the issues need to be examined further.*
>
> *Any system for the control of minority shareholdings at EU level would need to be carefully designed. Otherwise we risk adding too much red-tape that would not be justified by the number of cases that we could take on. To design such a system takes time and we need to discuss the modalities of any such system again internally, with Member States, and other stakeholders. There is no need to rush. What counts is that the new rules – when they are introduced – work well and are proportionate to the problem.*"[349]

4. *Is an intervention under EUMR justified? If yes, on which basis?*

As regards the significance of the harm potentially caused by minority shareholding, a reasonable justification to implement the proposed system would exist in case of a sound

merger control cover minority shareholdings, Competition Law Insight, 17 September 2013.

348 Clifford Chance, *Response to the Commission's public consultation: "Towards more effective EU Merger Control"*, September 2013, *Assonime response to the European Commission's public consultation on possible improvements to EU Merger control*, September 2013 and Ghezzi, Pini page 112.

349 The text of the Speech is available at https://ec.europa.eu/commission/2014-2019/vestager/announcements/thoughts-merger-reform-and-market-definition_en

predictive judgment that the concerns raised by the minority acquisition are "*sufficiently material to warrant intervention when set against the costs of doing so*"[350].

Two further questions therefore arise. How to define a sufficiently material concern justifying intervention? How to calculate the counterbalance between costs for businesses and potential benefits?

With regard to the first question, let us initially consider the following undisputed general statements. Partial acquisitions are less of a concern compared to full-fledged mergers. Small shares acquisitions in non-competing firms do not likely prove to be problematic. Companies with no ability to influence market structure for lack of market power have no potential to harm[351].

Already on the basis of those general statements, the need to have the test triggering the antitrust scrutiny and the substantial assessment set up in a clear and objective manner can be straightforwardly perceived. Further, companies and authorities should be guided through the defined tests by mean of clear cut rules and soft-law guidelines. In this respect, two alternatives may be considered: either changing the notion of control or setting a concrete threshold for intervention based on a predetermined level of shareholding, potentially accompanied by safe-harbors exemptions.

Authors supporting the first option argue that a test with pre-determined shareholding or voting threshold may not achieve the policy objective as it could be easily circumvented[352], and that a merely 'quantitative' safe-harbor focused on fixed shareholdings or voting rights would not allow a flexible approach and the desirable adaptation to the peculiar circumstances of each case[353]. Moreover, safe-harbors themselves may allow companies to adopt strategic conducts (*i.e.* a careful structuring of the transaction as to avoid the

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[350] Ignjatovic B. & Ridyard D., *Minority Shareholdings, Material effect?* COI Antitrust Chronicle January 2012 (1), page 3.

[351] Rusu C.S., *EU Merger Control and Acquisitions of (Non-Controlling) Minority Shareholdings – The State of Play*, CLASF Working Paper Number 10 February 2014, page 18.

[352] Friend M., *Regulating minority shareholding and unintended consequences,* European Competition Law Review 2012, 33(6), page 305.

[353] Ghezzi, Pini, cit., page 125. According to the authors, should any factor considered as significant as to assess potential anticompetitive effects the financial interest on the target company should be taken into account.

transaction to be caught by the Commission's scrutiny)[354]. From another prospective, it has been noted that a test applied only to actual or potential competitors or firms in vertically-related markets could raise definition problems especially for companies active in markets that the Commission had not yet defined[355].

On the contrary, authors advocating for a threshold setting claim that an attempt to extend the notion of control to passive investment would *blur the criteria for prior notification* and *affect the legal certainty*[356], as well as add unnecessary administrative and regulatory burden. In particular, the analysis of vague concepts such as "material influence" or "competitively significant influence" would require companies and the Commission to analyze in deeper details substantive corporate legal aspects and evaluate domestic corporate laws in different jurisdictions; with the consequence that the Commission will face an increased number of inadmissible notifications because of excess of caution by companies[357], especially if the final test would include a penalty for failure to notify[358]. This is particularly the case because the proposal requires companies to conduct substantial *prima facie* assessments, first on the existence of a vertical or horizontal relation and then on the possible influence/significant link. As noted by authors, the mere definition of the relevant markets may not be always straightforward; this hold true by taking as example the standard suggested by the Form CO, whereby the parties notifying a merger are required to *submit, in addition to any product and geographic market definitions that they consider relevant, all plausible alternative product and geographical definitions*"[359].

A bright line test is easy to apply in practice[360], is more predictable and less expensive to apply; the opportunity for forum shopping may be reduced[361].

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354 See Office of Fair Trading and Competition Commission, *UK Competition authorities' response to DG Comp's Consultation on Reform of the EUMR*, 20 September 2013, and Pini, cit. page 655.
355 Friend, cit.
356 Ezrachi, Gilo cit. page 348.
357 Schmidt, J.P., *Germany: Merger Control analysis of minority shareholdings – A model for the EU?,* Horizons Concurrences revue des droits de la concurrence, n. 2/2013, page 212.
358 Motta G., *White Paper for a More effective EU Merger Control: How to review the acquisition of Non-Controlling Minority Shareholdings?*, Journal of European Competition Law & Practice, 2015 Vol. 6, No 4
359 See Form CO, Section 6.
360 Bardong A., *The German Experience, Merger Control and Minority Shareholdings: Time for a Change?* Concurrence – Revue des droits de la concurrence, 3/2011, page 36, who suggests a 10% threshold for minority interests given that a percentage based test is easy to apply.

Among other proposals supporting the need to apply the merger regime to minority shareholdings an interesting one envisages a test to measure the anticompetitive effects that takes into account both market shares and market concentration[362]. According to the authors who proposed such test, the market shares are taken into account by horizontal merger assessment as an evidence of market power of both the investing firm prior to the minority acquisition and the target firm. The higher the target's market shares, the more the investing firm has to lose to compete more vigorously and the stronger the anticompetitive effects. Additional elements to be taken into account, according to these authors, are the number, the market shares and the capacities of the rival firms on the market. The more significant the rivals are, the smaller the anticompetitive effects since they can constraint the investing firm's ability to harm competition (raise price). The involvement of a maverick firm may also make the difference, a situation in which the investing firm is a maverick is especially harmful. To the opposite, if the maverick is the firm in which the investment is made usually there are no coordinated effects.

Another proposal worth noting supports the view of having a bright line test according to which concentrations for the purpose of the EUMR would be established for all voting stocks acquisitions exceeding 25%[363]. As this test would not rule out enforcement of possible anticompetitive acquisitions structured in a way to meet the threshold, the authors propose to include a "sham" exception to the 25% rule to be applied in cases where "*economic integration is absent and the economic substance of the transaction appears to be little more than a carte agreement "disguised" as a joint venture or other minority acquisitions to escape automatic nullity and fining provisions of Article [101]*"[364].

According to the current view expressed by the Commission, the indication of a fixed shareholding threshold is the preferred one. In fact, a threshold of 20% have been indicatively proposed with a safe harbor below 5%.

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[361] Hawk B. and Huser H., *A Bright Line Shareholding Test to End the Nightmare Under The EEC Merger Regulation*, Common Market Law Review 30: 1155-1 183, 1993, page 1175, 1993 KIuwer Academic Publishers.
[362] Ezrachi, Gilo cit. page 345.
[363] Hawk & Huser, *A Bright Line Shareholding Test to End the Nightmare Under the EEC Merger Regulation*, 30 C.M.L.R. 1155 (1993), page 1174.
[364] Hawk and Huser, cit. page 1175.

All in all there seems to be a general *consensus* on the fact that the addition of a market share threshold may better achieve the goals set by the Commission's Proposal to catch only problematic transactions and avoid unnecessary burden by reducing the number of notifications and allowing the Commission to focus on more serious transactions. On the other side of the coin nonetheless the use of market share threshold may be objected based on the fact that a market share analysis may lead to imperfect outcome as market shares are not immediately verifiable, depend on the data used and (more importantly) on the market definition adopted[365].

However, proportionality issues may still remain even in case of acquisitions meeting the threshold but not having significant economic relevance. Should freedom of investments prevail in those cases?

5. *What are the costs?*

Another question regards the calculation of the costs that such system would imply for businesses and the community. Generally speaking, the costs mainly depend on the jurisdictional test and procedural mechanism implemented. The provision of clear cut rules would increase legal certainty and thus prevent the costs of application of sanctions for transactions consummated without prior approval[366]. In this respect, it can be argued that a vague test such as the "material influence" one may trigger errors by companies for the sake of caution, and thus waste of resources. In addition, the possibility to leveraging existing rules of national or EU corporate law or unfair competition that prevent or prohibit obstructive conducts by competitors may exist as to limit the costs of administrative work by antitrust agencies.

In the White Paper, finally the Commission opted to suggest the so-called transparency system leaving aside, at least temporarily, the notification and a self-assessment system. Such solution would require the parties to a concentration to file a short notice (details of

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365 Motta, cit.

366 An example of the relevant impact of fines, is the 2009 case against the company Electrabel which had been imposed a fine of 20 euro million for failing to notify an increase from 17.86% to 49.95 in its shareholdings of Compagnie Nationale du Rhone (case COMP/M/4994, Commission decision of 10 June 2009), even if no competition concerns were raised by such acquisition at the time the transaction was notified and unconditionally cleared (4 years after its implementation).

the parties, information on the transaction, level of shareholding, economic sector, relevant markets, etc.) that the Commission will then publish and assess. Based on a preliminary analysis, the Commission will discretionarily identify from the outset those cases that *prima facie* raise concerns and have a closer look at them[367]. The Commission investigation should take place in a pre-determined timeframe after the notice is submitted.

With such a move, the Commission demonstrates preference for a methodological asset that allows companies to have legal certainty in a reasonable time and the same Commission to (a) gain knowledge of as many problematic transactions possible (obligations to inform the Commission on *prima facie* problematic acquisitions), (b) reserve the right to have a deeper look by requiring additional information (if the *prima facie* concerns self-assessed by the company are confirmed) and (c) request, in case of need, a formal notification under the EUMR.

Compared to the other two proposals considered, the transparency system seems to entail a more balanced approach to the question of regulatory burden and costs for the business.

However several concerns remain. The desirable objective of legal certainty seems contradicted by the provision of a 4/6-month period during which, although the waiting period elapsed without the Commission asking for a full notification, a substantive investigation may still be brought on the Commission's own motion or upon third parties complaints with the consequence of a possible need to "unscramble the eggs" and restore the *status quo ante* the completed transaction. More worrisome is the power of the Commission during this period to order interim measures.

In addition, a formal notification may be still required by the Commission, implying administrative burden which can be all the more accentuated depending on the quality and quantity of information that the acquiring company will be obliged to disclose in the preliminary phase[368]. In this respect, further guidance on the limit of the discretionary powers to select relevant transactions would be desirable[369].

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[367] White Paper, para 45-59.

[368] Certain respondents to the consultation noted that the disclosure of certain preliminary information (such as strategic purposes of the acquisition) required by the Commission to third parties (as published for the purpose of acquiring knowledge of the market point of view) may also cause a problem of confidentiality

Due to the uncertain future of a transaction, the costs of administrative burden and the fear of overregulation there might be a risk of deterring firms from making procompetitive investments or doing business in the EU Internal Market?[370] An interesting point in this regard is the attractiveness of European companies to the eyes of foreign investors[371]. It is safe to implement a transaction that over a period of 4 months can be then declared void? Is the extension of antitrust control over non-controlling minority shareholding coherent with the EU Single market and related policy objective to enhance Europe competitiveness on the global market?[372]

As to conclude on the costs issue, general considerations on the devolvement of public enforcement resources to partial acquisitions cannot be avoided. By taking such a direction a risk exists that the control over other substantive (and potentially more dangerous) conducts and possibly the quality of the appraisal by the Commission will be lowered. Clearly, there should be an order of priority, but it is difficult to see tackling of minority shareholdings at the top.

which would prove disproportionate to the aim to control problematic acquisitions (see for example ORANGE, *Orange reply to the consultation "Towards more effective EU merger Control"*, September 2013).

369 Rusu C. S., *(Non-Controlling) Minority Shareholdings as Self-Standings Transactions under EU Merger Control Analysis: Prospective Solutions*, cit. page 511, suggests that the Commission should clarify on which elements the Commission will grounds its early examination of *prima facie* effects, and the evidentiary thresholds for such appraisal.

370 Several authors pointed out the risk of overregulation (Tóth A., *TEU Competition Law Aspects of Minority Shareholdings*, World Competition (2012) 35, Issue 4, page 619, and Drauz G. et al., *Recent Developments in EU Merger Control*, 3 (1) J. Eur. Competition L. and Prac. 601, 2012).

371 Bushell G., *Minority Report? The EC's public consultation on minority shareholdings*, Kluwer Competition Law Blog, 8 August 2013.

372 Rusu C.S., *EU Merger Control and Acquisitions of (Non-Controlling) Minority Shareholdings – The State of Play*, CLASF Working Paper Number 10 February 2014, page 9.

VI. CONCLUSIONS

The antitrust treatment of non-controlling minority shareholdings is not new to academic debates and policy regulations. The topic is well known and regulated in several jurisdictions all over the world, not only in Europe but also from the U.S. to Australia.

By comparing a number of different jurisdictions, it emerges that the gap perceived in the EU competition regime is real. In the EU, national merger control regimes of three member states (UK, Germany and Austria) include the power to scrutinize certain non-controlling minority shareholdings through a model which differs from the EUMR. Similarly, US antitrust agencies are allowed to review acquisitions of the whole or any part of shares or assets where "*the effect may be substantially to lessen competition*"[373].

The Commission decisional practice acknowledges this reality as well as the possible significance of competition concerns raised by non-controlling minority shareholdings[374].

Within the 2001 consultations which then led to the current reform of the EUMR the Commission openly launched the discussion but finally did not take any actions. This was based on three main reasons: the low number of problematic transactions, the low likelihood and magnitude of competitive concerns and the high burden of a mandatory notification such as the one required by the EUMR[375].

The same debate has been reactivated in 2013 in the aftermath of the Ryanair/Aer Lingus case, through which it was clarified that the possibilities to apply the EUMR to the acquisition of non-controlling minority shareholdings are limited.

Following the General Court's judgment in the Ryanair case, in 2011 the then Commissioner responsible for competition, Joaquín Almunia, announced that the Commission would have looked again at the issue. Following a public consultation, in 2014 a White paper was issued including proposals for a new regime under EUMR. Subsequent to Alumnia's mandate expiration the current Commissioner responsible for competition,

[373] See Chapter III.
[374] As seen in Chapter IV. Section A. paragraph 2.
[375] Chapter IV, Section C. paragraph 1.

Margrethe Vestager, seemed willing to bring the issue to a step back recommending further analysis and assessment by the Commission to find a rightly balanced tool.

Taking from the comments of Mrs Vestager, we believe that the scope of the problem envisaged is the key element to assess whether the issue needs to be addressed and which appropriate legal answer is to be designed.

The real challenge is not the existence of a problem (as it is widely recognized that a number of problematic minority shareholdings may go undetected and unchallenged), but rather the significance of the problem (consequences of the gap) and the legal solutions that can solve it doing more good than bad.

Generally speaking the protection of competition *is not an end in itself* but is a mean to the ultimate end of establishing the internal market[376]. In this respect, tackling acquisitions of shares (either conferring control or not) with undue and disproportionate legal scrutiny represents an attempt to control the movement of capital and may thus result in a restriction to the free movement of capitals. Therefore a disproportionate obligation to report minority transaction not justified on sound competition concerns would endanger the objective of the internal market.

As discussed above, although lower than in full-fledged mergers anticompetitive concerns deriving from non-controlling minority shareholdings are evidenced by established economic theories of harm[377] but may vary and depend upon a number of factors. Among the elements that matter there are the size of shareholding, the market shares of relevant companies, the closeness of competition between them, the risks of collusion in the market as well as the presence of additional elements like interlocking directorates, information and co-determination rights, rights to appoint board members, veto rights, agreements on pre-emption rights, sales strategies, financial structure, call option, etc.

Once ascertained that minority transactions may be problematic even when full control according to the EUMR is not reached, the magnitude and scale of the problem as it has

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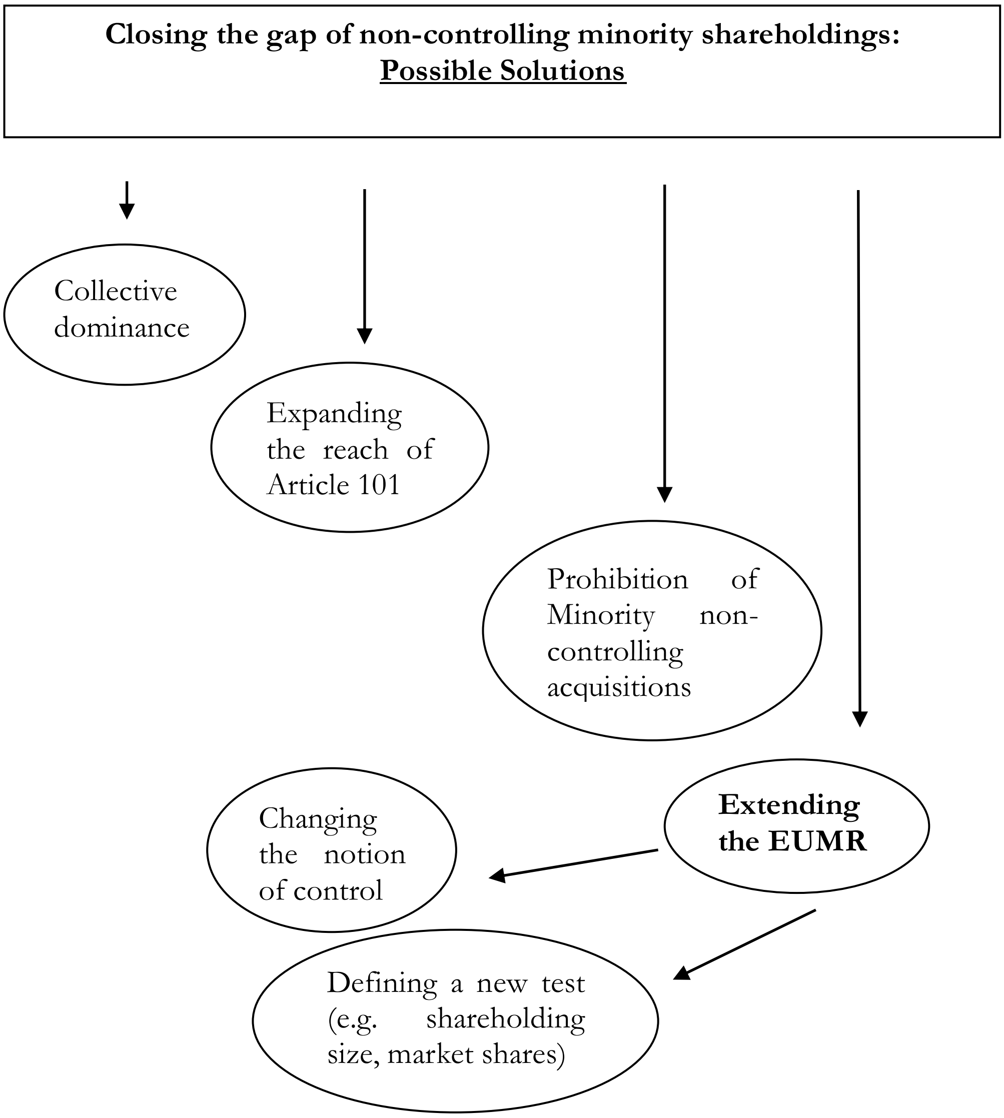
[376] See for example, the Commission Report on Competition Policy, 2006, p. 3.
[377] Chapter I, Section B, paragraph 1.

been tracked by the Commission based on past data (i.e. number of problematic transactions) can be debated, but this is only a matter of statistics and completeness of data.

In this regard, we share the point made by Mrs Vestager and believe that a further assessment by the Commission cannot hurt but would rather eventually give the way for a stronger case for improvement of the current legal means to tackle problematic transactions.

Should the need for a reform be confirmed based on further researches and analysis, four possible solutions can be envisaged as discussed above in Chapter V, Section A and reported in the following chart.



We believe that extending the scope of the current EUMR is the most viable solution to ensure systematic and regular scrutiny. First because the merger regulation instruments are better placed to cover structural changes rather than behavioral conducts tackled by Article 101 and 102. Second, the application of the significant impediment test proposed by the EUMR eliminates the risk of having passive investments leading to anticompetitive unilateral effects by a non-dominant firm undetected and unchallenged.

Moreover, the theories of harm confirm that the economic assessment to be conducted with regard to minority shareholdings is the same as the one conceived by the EUMR. In case of full mergers, the Commission should indeed look at some common factors to the appraisal of minority shareholdings such as the incentives to raise prices, the possibility to offset losses thanks to the diversion of sale to the target, the market power of firms involved, the existence and magnitude of switching costs, etc. Finally the flexibility that characterizes the remedial powers granted to the Commission under EUMR is crucial to address efficiently problematic minority shareholdings.

Should the option of extending the reach of the EUMR prevail, two alternatives amendments are possible: (a) changing the notion of control or (b) setting a new jurisdictional test.

As said, the Commission so far opted for setting a new threshold test based on the specific size of the shareholding triggering antitrust scrutiny. However, we believe that working on the current notion of control is more appropriate and would lead to a more efficient reform. Overall because a wide scope of control would ensure a flexible and non circumventable approach which a fixed quantitative threshold cannot achieve. And flexibility is crucial when it comes to taking into account all special circumstances of the case and adapting the regulation to tackle problematic transactions. The need for flexibility can arise for example when assessing an acquisition of a very small share which nevertheless includes voting rights that may create competition concerns for example because of access given to the minority shareholder in the board of directors in the target company, rights to veto and/or rights to access the target company's strategic information.

In this case a fixed shareholding size threshold would lead competitive concerns unaddressed.

Should the Commission maintain the current proposal to set the size of the shareholding threshold test the ultimate and key point is how the legal solution is conceived. While expanding the notion of control would not require additional changes in the procedure of the Commission's assessment, introducing a new jurisdictional test would instead require further adjustment of the system.

In particular, a choice should be made between *ex ante* (like the German system) or *ex post*, mandatory or voluntary notification (like the UK system), self-assessment regime, etc.

As illustrated above the Commission examines three solutions[378] (1) prior *ex ante* notification like the system currently applicable to mergers control, (2) self-assessment by the parties and discretion of the Commission to subsequently launch investigation on problematic structural links (either upon complaint or on its own initiative); (3) "transparency" system in which the parties to a "*prima facie problematic structural link*" are obliged to file a short information notice.

In the following table a comparison of the three solutions is provided in the light of the three objectives that the Commission says it wants to achieve in the White Paper.

[378] Chapter V. Section B.

	Capture potentially anticompeti-tive transactions	**Avoid unnecessary and disproportionate burdens**	**Fit with EU and national merger regulations**
Mandatory Notification	×	×	✓
Targeted transparency system	✓	✓	×
Self-assessment	×	✓	×

The main concern regarding the mandatory notification is that this system would increase burden on companies, Commission and member states and thus result disproportionate and contrary to the goal of achieving internal market as it can deter investments and competitiveness of European companies.

The Commission itself indicates that a mandatory *ex ante* notification does not seem necessary as it is for full mergers (being the divestiture of a minority shareholding less difficult than unwinding a completed merger).

At a first sight, the option of the transparency targeted system is the one gaining more points to the objectives set by the Commission and also apparently achieving a certain degree of legal certainty and flexibility. However, an effective balance in favor of legal certainty and limited burden on companies would require a "really short" information notice, a clear definition of *prima facie* problematic structural links and an *ex-post* limited period for the Commission to intervene. Actually, to be "really short" the information notice should include very few basic information limited to a brief description of the parties, the sector in which they operate and the characteristics/rationale of the transaction, as well as the identification of any rights conferred to the acquirer.

However, we believe that in order to put the Commission in a position to provide a *prima facie* assessment of the transaction and possible concerns, the information requested in a truly short notice of information would not suffice. It is highly likely that the Commission will request additional data on the market, the size of the companies involved, the structural links between them and other market players, etc. even to conduct a basic assessment, with the consequent increase in the duration of the scrutiny.

Added to this, the collection of data could be burdensome for the companies and may be lead to similar requirements and effects of an *ex ante* notification.

On the contrary, a self-assessment regime like the UK one allowing companies to notify on a voluntary basis without a mandatory standstill obligation and allowing the Commission to control *ex-post* within a defined scope and timelines, would allow to combine the desired objectives.
Arguably, a vast majority of companies willing to enter into EU wide transactions would have the means and the expertise to conduct an antitrust self-assessment and, if in doubt, to engage in early informal discussions with the Commission ad to gather comfort on the need for a notification.

In particular, in order to ensure the predictability and the legal certainty needed not to discourage investment and to maintain business attractiveness the scope of the Commission intervention should be based on clear rules indicating the structural links that will be investigated, the safe harbors and the elements of the analysis. In this respect, the publication of specific and exhaustive guidelines by the Commission would be highly desirable.

As to reduce costs and delay, the timeframe within which the Commission would have the power to investigate completed transactions *ex-post* should be certain, short and fixed. This would avoid damages to the companies deriving by an *ex-post* unsuccessful scrutiny.

In conclusion, we support the recent statements of the Commissioner for competition on the need to reconsider the current proposal and define a more balanced and proportionate legal solution. We believe that a satisfactory response to the acknowledge enforcement gap would be the implementation of a self-assessment system allowing voluntary notification based on clear cut rules and strict timeframe. This is the only solution which balances the achievement of legal certainty and the proportion of the regulatory burden.

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