The resurgence of the whole discussion on 'minority shareholdings' in Europe as research into 'common ownership' transcends across the Atlantic

COMPETITION POLICY INTERNATIONAL

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It has been nearly half a decade since the European Commission (hereinafter 'the Commission') published its well-known White Paper on 'non-controlling minority shareholdings' without receiving too much positive feedback from stakeholders in favor of giving green light to the proposal.[1]

The White Paper put forward a 'targeted transparency system' that would empower the Commission to scrutinize non-controlling minority shareholdings under the European Union Merger Regulation, Regulation nº. 139/2004 (hereinafter the 'EUMR').[2] Jurisdictions, such as that of the EU, whose concept of concentration is conditional upon the ability of the acquiring undertaking to exercise (some) influence on the target's strategic policy "focus on different gradations of 'control' as the principal litmus test".[3] As a result of it, non-controlling minority shareholdings fall out of the jurisdictional scope of the law.

The proposal's frosty reception made the Commission sort out its priorities and put the spotlight on other, at least apparently, more pressing issues.[4] Nonetheless, as of mid-2016, since *Harvard Business Review* published an article digging out facts and figures on 'common ownership' in major US economic sectors the shadowy memory of the White Paper has steadily been reemerging in the old continent if it actually ever got to fully vanish.

The bottom line is that by the time the Commission raised awareness of the potential anticompetitive effects that may eventually arise from structural links it seems that not all the necessary attention had been paid to this

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1 Summary of replies to the public consultation on the White Paper "Towards more effective EU merger control", 16 March 2015
2 White Paper, "Towards more effective EU merger control", COM(2014) 449 final, 9 July 2014, p. 12, para. 45
3 Barry E. HAWK & Henry L. HUSER, "Controlling the Shifting Sands: Minority Shareholdings Under EEC Competition Law", Fordham International Law Journal, Volume 17 Issue 2, 1993, p. 295
4 Speech by Commissioner Mrs. Margrethe Vestager, "Refining the EU merger control system", Studienvereinigung Kartellrecht, Brussels,

issue when such links are commonly held in competing firms by institutional investors.

Accounting for "for half of the volume of trades on the New York Stock Exchange", institutional investors are large organizations that, by pooling the money of their members, purchase diversified portfolios in an attempt at reducing the risk that entails buying from a single issuer.[5] Generally, the latter practice is a way of passively investing, i.e. of making purchases of a variety of financial securities with no other intent but to generate a return on such an investment at a minimum cost and risk. Acquisitions of stakes in a target's equity capital are normally carried out in small percentages in such a way that money can be put into a wide range of undertakings so as to spread the risk. Thus, any underlying intent to control the behavior of an economic sector might easily go unnoticed to the enforcer's naked eye. In order for the acquirer to dodge merger control rules it is inevitably bound to avert the lower boundaries of the jurisdictional scope of those jurisdictions at stake in the given transaction.

The greatest danger lies: "in oligopolistic markets where competitors have shareholders in common, (…), prices may be higher, collusion may be more likely, and management incentives may be oriented toward industry, rather than firm, performance".[6]

In a speech delivered in Washington by Mrs. Kara Marlene Stein, the Commissioner posed the following question to the audience: "Does ownership concentration affect the willingness of companies to compete and invest in innovation?"[7] Such a remark was made in the face of an ever increasing presence of massive asset management corporations in the market for the purposes of passive investing in rival firms. The concern spilled over across the Atlantic when her European counterpart, the Commissioner Mrs. Margrethe Vestager suggested that the Commission will keep an eye on the issue and attempt to figure out if it is widespread in practice.[8]

The US banking sector might be pointed as a paramount example of this phenomenon. Scholarly suggests that there is "a big difference in competitive outcomes between counties where banks are more commonly owned by the same set of investors and counties where they're not".[9] "In counties where common ownership increases, banks raise fees for deposit accounts and lower savings interest rates".[10]

At the end of 2017, Bloomberg ventured to foresee that in less than a decade the global investment managers *BlackRock* and *Vanguard* will together account for nearly $20 Trillion in the asset management industry.[11] These management corporations alongside others, also of major significance, hold non-controlling minority shareholdings in the main banks of the US, such as *JP Morgan Chase*, *Bank of America*, *Wells Fargo* or *Citigroup*.

'Ownership overlaps' are also detected in other major industries such as those of the aviation, phone

[5] Investopedia: "What's the difference between institutional and non-institutional investors?", New York

[6] OECD, "Common Ownership by Institutional Investors and its Impact on Competition", DAF/COMP(2017)10, 29 November 2017, p. 5, para. 2

[7] "The Markets in 2017: What's at Stake?": Speech delivered by Commissioner Kara M. Stein on 24 February 2017

[8] Speech delivered by Commissioner Margrethe Vestager in Innsbruck at FIW Symposium on 16 February 2018

[9] Martin SCHMALZ, "One Big Reason There's So Little Competition Among U.S. Banks", *Harvard Business Review*, 13 June 2016; In reference to José AZAR, Sahil RAINA & Martin Schmalz, "Ultimate Ownership and Bank Competition", 23 June 2016.

[10] Ibidem.

[11] Rachel EVANS, Sabrina WILLMER, Nick BAKER & Brandon KOCHKODIN, "BlackRock and Vanguard Are Less Than a Decade Away

communications, supermarkets or even soft drinks.[12] For instance, when it comes to competition between airlines "airfare on a given route goes up when competing airlines serving that route become more commonly owned by the same investors".[13] Others advocate against such a viewpoint on airfares arguing that there is no evidence of "the relationship between ticket prices and common ownership in the airline industry".[14]

What seems clear is that the academia should elaborate on the 'Theory of Harm' applicable to common ownership. By means of an exercise of abstraction it is deemed possible to apply some of the literature on anticompetitive effects stemming from 'cross ownership' to a 'common ownership' scenario. Cross-ownership takes place under those circumstances where competitors hold structural links in each other's equity capital. Following the theories of Salop and O'Brien, in doing so the acquirer of a non-controlling stake in a competitor might find it profitable to raise its own products' prices on the grounds that it may recoup losses from the increase in sales of its target.[15] This 'unilateral pricing incentives' theory might well be brought into the common-ownership arena.[16]

Aside from the internalization of competitor's profits, the larger the amount of non-controlling minority shareholdings purchased by institutional investors in the same competing firms the easier the access to sensitive information and, by extension, to conduct coordination. Actually when the ownership of rivals is coincidental the sharing of information may, at some level, work as a 'hub-and-spoke' where the institutional investor would act as the 'hub' and the rival firms as the 'spokes' of the information that ultimately paves the way for a collusive behavior. It must be recalled that invitation to coordinate suffices for an "unlawful conspiracy" to arise and just through the single action of a "ringmaster" it is possible to organize a cartel.[17]

Solutions from the academia have already been put on the table to address this ongoing issue some of which seem rather stringent. For instance the introduction of a ban on 'portfolio diversification' within an industry "unless the investor commits to playing a fully passive role in corporate governance".[18] Others advocate for laying down a cap on the percentage of shares to be acquired by an institutional investor in the equity capital of rival firms. Whereas some scholars stand up for the introduction of a 1% safe-harbor in a manner that "no institutional investor invested in more than a single (effective) firm in an oligopoly may own more than 1% of the industry or communicate with its managers".[19]

At any rate, and as claimed by Professor Elhauge, it is about time "current antitrust law" cracked down on the recent common ownership concerns.[20] However, what seems clear is that 'current antitrust law' in the EU lacks

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[12] Antonio GOMES & James MANCINI, "The new and controversial theories of harm stemming from common minority ownership of competing firms", *Competition Policy International*, January 2018, p. 2

[13] Martin SCHMALZ, "One Big Reason There's So Little Competition Among U.S. Banks", *Harvard Business Review*, 13 June 2016

[14] Patrick DENNIS, Kristopher GERARDI & Carola SCHENONE, "Common Ownership Does Not Have Anti-Competitive Effects in the Airline Industry", 5 February 2018.

[15] Steven C. SALOP & Daniel P. O'BRIEN, "Competitive Effects of Partial Ownership: Financial Interest and Corporate Control", *Antitrust Law Journal*, Vol. 67, 2000, pp. 606-607

[16] OECD, "Common Ownership by Institutional Investors and its Impact on Competition", DAF/COMP(2017)10, 29 November 2017, p. 18, para. 33

[17] Edward B. ROCK and Daniel L. RUBINFELD, "Antitrust for Institutional Investors", *Law & Economics Research Paper Series*, *New York University School of Law*, Working Paper Nº. 17-23, Draft 7/6/2017, July 2017, p. 4

[18] Antonio GOMES & James MANCINI, "The new and controversial theories of harm stemming from common minority ownership of competing firms", Competition Policy International, January 2018, p. 4

[19] Eric A. POSNER, Fiona SCOTT MORTON, & E. GLEN WEYL, "A Proposal to Limit the Anti-Competitive Power of Institutional Investors", 22 March 2017, p. 46

the necessary tools to come to grips with non-controlling minority shareholdings-related issues. "If the legislature had wished to grant the Commission broader powers than those laid down in the merger regulation, it would have enacted a provision to that effect."[21] As the law stands today in the EU, neither the EUMR, as already pointed out above, nor articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) are fully capable of coping with common-ownership issues that involve non-controlling links. As regards Article 101 TFEU, "it is unclear under which circumstances a structural link may constitute an 'agreement' (…), in particular if the structural link is built up from the acquisition of a series of shares via the stock exchange";[22] And as far as Article 102 is concerned, "the acquiring undertaking should already be dominant and that the acquisition should constitute an abuse would allow the Commission to deal with the competitive harm which may arise from structural links only in very narrow circumstances".[23]

Hence, it may be suggested three cumulative steps to be followed by the Commission if it ever wanted to tackle any competition concern that may eventually arise from these overlapping structural links purchased by institutional investors:

1) Conduct further research into the actual reality of 'common-ownership' in the European Economic Area (EEA) in order to shed some light on the true presence of problems stemming from common ownership and their real impact on the EEA.

   If research shows a real threat to competition in Europe then the Commission should proceed to amend the EUMR so as to cover 'non-controlling minority shareholdings'.

2) Either bring back the discussion on the proposed 'targeted transparency system' to the fore in order to evaluate the convenience of eventually incorporating it into the EUMR or put forward alternative jurisdictional mechanisms that would lower the 'decisive influence' standard.

   Just by establishing a homogeneous set of rules for all passive investors 'legal certainty' will be safeguarded. Only by doing so investors will be restrained from resorting to alternative lawful mechanisms or 'enforcement gaps' that would enable them to dodge the scope of the law.

3) Having widened the concept of a 'concentration' and included non-controlling minority shareholdings in its wording, additional legal provisions might be laid down in the EUMR in order to address any specificity that might entail the figure of the institutional investor, such as the establishment of a lower safe-harbor.

[21] Judgment of the General Court (Third Chamber) in Case T-411/07, Aer lingus Group vs Commission, 6 July 2010

[22] Commission Staff Working Document, "Towards more effective EU merger control", SWD(2013) 239 final, 25 June 2013, p. 6