ACTIVE AND PASSIVE INSTITUTIONAL INVESTORS: IS EU COMPETITION LAW READY?

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I. INTRODUCTION

Has the antitrust arsenal run out of novel theories or weapons? Think again. Recent scholarship has come to challenge conventional wisdom with the latest target of antitrust imagination being institutional investors, including diversified index funds. New economic research suggests that common ownership of competing industrial firms by large institutional investors leads to potential anticompetitive effects in the form of increased concentration and prices that may be captured by a new generalized HHI measure and have thus far remained undetected under traditional tools and analysis.[3] A number of mechanisms is said to support these anticompetitive effects such as voting,[4] private engagement[5] and compensation contracts.[6]

Reactions have been rapid and widespread. Antitrust enforcers started looking closer at certain industries as well as investigating the scope of their existing powers,[7] while policy makers considered that this might be an area prone to future regulation.[8] In the meantime, legal scholars have come forward with solutions to the purported antitrust problem, such as enforcement under Section 7 of the Clayton Act,[9] use of the rulemaking authority under Section 5 of the FTC Act[10] and a

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3 Azar, Schmalz & Tecu, *Anti-Competitive Effects of Common Ownership*, (2015) Michigan Ross School of Business Paper No. 1235; Azar, Raina and Schmalz, *Ultimate Ownership and Bank Competition*, (2016).

4 Azar, *Portfolio Diversification, Market Power, and the Theory of the Firm*, (2017) IESE Business School Working Paper No. 1170-E.

5 Fichtner, Heemskerk, & Garcia-Bernardo, *Hidden Power of the Big Three? Passive Index Funds, Re-Concentration of Corporate Ownership, and New Financial Risk*, (2017) Business and Politics, 1–29.

6 Anton et al., *Common Ownership, Competition, and Top Management Incentives*, (2016) Michigan Ross School of Business Paper No. 1328.

7 Testimony of Assistant Advocate General Baer of the DoJ Antitrust Division, Oversight of the Enforcement of the Antitrust Laws: Hearing Before the Subcommittee on Antitrust, Competition Policy and Consumer Rights (March 9, 2016).

8 US Council of Economic Advisers, Issue Brief: Benefits of Competition and Indicators of Market Power, 13–14 (April 14, 2016).

9 Elhauge, *Horizontal Shareholding*, (2016) 129 Harvard Law Review 1267-1317.

10 Baker, *Overlapping Financial Investor Ownership, Market Power, and Antitrust Enforcement: My Qualified Agreement with Professor Elhauge*, (2016) 129(5) Harvard

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new antitrust rule specific for institutional investor ownership of direct industrial competitors in concentrated markets.[11] In response, contrasting literature raises skepticism over the above-mentioned economic and legal findings and cautions against implementation of premature policy recommendations.[12] Institutional investors have also expressed their views, in defense of their existing business models.[13]

This fascinating line of research has attracted plenty of attention not only because it is intellectually interesting but also because it carries significant practical implications for capital markets and corporate governance. The finance industry is not a traditional domain for antitrust intervention and, notably, this recent debate takes place in the homeland of free competition, that is, the U.S.

In Europe, by contrast, corporate organization, corporate ownership structures and market realities differ and competition law policy discussion has not been visibly impacted for the time being. While two European Commission consultations focused on potential merger control reforms to address a perceived enforcement gap over non-controlling shareholdings between competitors (cross-ownership) and an ongoing consultation explores extending quantitative (turnover) rather than qualitative (control) thresholds, the issue of common ownership by institutional investors has been prominent in its absence.[14] Only Germany seems to have taken note of the antitrust issue raised across the Atlantic.[15] Surprising as it may be to the casual observer, differences may be explained by reference to the legal, institutional and historical context of U.S. and EU antitrust and corporate law driving the two to opposite directions.

This essay aims to disentangle the complex issues surrounding common ownership by institutional investors, and suggest a holistic approach that brings together the corporate with the competition law aspects of the problem. Accordingly, the analysis first sheds light on the corporate governance dimensions (Part II). Next, it outlines the theories of harms that correspond to the distinct forms and levels of shareholder activism or passivity (Part III). It then revisits the existing legal and policy antitrust framework and compares the EU versus the U.S. experience (Part IV). Finally, it wraps up the discussion with some concluding remarks on the EU competition law outlook (Part V).

II. CORPORATE GOVERNANCE DIMENSIONS - LOOKING FOR THE BIGGER PICTURE

The last decades have witnessed revolutionary changes in the ownership structure and governance of large corporations. Also from a corporate governance perspective, institutional investors are now at the core of a renewed and exciting debate.[16] In the U.S., the Berle and Means' model[17] of dispersed ownership has been eroded by the emergence of private equity[18] on one hand and of the so-called parallel "horizontal shareholding" by indexed funds on the other hand.[19] Moreover, hedge funds have

Law Review Forum 212–232.

11 Posner, Scott Morton, & Weyl, *A Proposal to Limit the Anti-Competitive Power of Institutional Investors*, (2016) Antitrust Law Journal, Forthcoming.

12 Rock & Rubinfeld, *Defusing the Antitrust Threat to Institutional Investor Involvement in Corporate Governance*, (2017) NYU Law and Economics Research Paper No. 17-05; O'Brien & Waehrer, *The Competitive Effects of Common Ownership: We Know Less than We Think*, (2017); Woodbury, *Review of "Anti-Competitive Effects of Common Ownership"*, (December 2014) ABA – The Antitrust Source, Paper Trail; Woodbury, *Review of "Ultimate Ownership and Bank Competition"*, (June 2016) ABA – The Antitrust Source, Paper Trail; Patel, *Common Ownership, Institutional Investors, and Antitrust*, (2017) Antitrust Law Journal, Forthcoming.

13 BlackRock, 'Index Investing and Common Ownership Theories,' Public Policy Viewpoints (March 29, 2017).

14 See the 2013 and 2014 consultations entitled "Towards more effective EU merger control," and the 2017 consultation on "Evaluation of procedural and jurisdictional aspects of EU merger control," including comments received and policy documents.

15 "Hauptgutachten XXI: Wettbewerb 2016" - Biennial Report of the Monopolies Commission under § 44(1) ARC, Chapter III (September 20, 2016); Wambach and Weche, *Gefährden Institutionelle Anleger den Wettbewerb?* (2016) 96(12) Wirtschaftsdienst 900–904.

16 For the economics debate see Heineman & Davis, *Are Institutional Investors Part of the Problem or Part of the Solution?*, (Yale School of Management 2011); Gilson & Gordon, *The Agency Costs of Agency Capitalism Activist Investors and the Revaluation of Governance Rights*, (2003) 113 Columbia Law Review 863-928.

17 Berle & Means, *The Modern Corporation and Private Property* (Transaction Publishers 1932).

18 Armour & Cheffins, *The Eclipse of Private Equity*, (2008) 33 Delaware Journal of Corporate Law 2-65.

19 Elhauge, supra note 9. From a governance perspective, see Gilson & Gordon, supra note 16.

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often reverted to "morphable ownership" strategies, pursuing new ways of influencing corporate boards without or with little stable equity ownership.[20] These new forms of ownership have enriched the classic binary taxonomy based on the distinction between concentrated and dispersed ownership.[21] They have also shown that the "classic" ways to analyze institutional investors' involvement in corporate governance have to be rethought.[22] The old agency costs framework was complicated by the emergence of a new economic agency relationship, the one between record-holders and beneficiary owners, to be added to the traditional one between shareholders and directors.[23] The tension between record-holders' preference for cheaper exit strategies and beneficiary owners' interest in value enhancing but expensive voice strategies brought to the scene "rationally reticent" behaviors by institutional investors.[24]

The picture in Europe is somewhat different. With the notable examples of the UK and Ireland and despite signs of dispersion trends in Germany,[25] concentrated ownership can still be considered as the prevailing model in most EU Member States' corporate environments.[26] Nevertheless, the U.S. debate on the role of institutional investors in corporate governance has reached the European legal and business community with similar intensity – also affecting corporate governance soft law making. Promotion of stewardship as an effective means of containing different sets of agency costs emerged as the new leitmotif in European corporate governance music.[27] And it goes without saying that in a concentrated ownership environment, where exit is not always effective, voice by institutional investors may become an efficient way to contain agency costs.[28] When it comes to activism, it might sound however slightly disappointing that the stewardship wind of change blowing on the European corporate governance landscape could not feel as refreshing as expected. Not even the Shareholders' Rights Directive, which is presently undergoing substantial reform, seems to have significantly increased voice in terms of exercise of minority rights.[29] Therefore, apart from the cited "rationality reticent activism," the core activism modality by institutional investors often tends to stick to old practices.

Besides hedge funds activism,[30] there is a full set of "behind-the-scenes" behaviors that, albeit prominent in the corporate governance literature since the 1990s and in empirical research still today, have received little attention by antitrust lawyers.[31] Institutional investors' engagement with management has traditionally included activities such as one-to-one meetings with senior management, site visits to plants and at least one yearly presentation providing a full update on current trading and strategic thinking.[32] In some well-documented cases, it has gone as far as influencing corporate strategy on very important

20 Hu & Black, *Hedge Funds, Insiders, and the Decoupling of Economic and Voting Ownership: Empty Voting and Hidden (Morphable) Ownership*, (2007) 13 Journal of Corporate Finance 343-367.

21 This debate has been particularly relevant for the European economic environment, which provides examples of both dispersed and concentrated ownership. See Barca & Becht (eds), *The Control of Corporate Europe* (OUP 2001); Faccio & Lang, *The Ultimate Ownership of Western European Corporations*, (2002) 65 Journal of Financial Economics 365-395. For a dynamic analysis of the 'dispersion' that took place in the UK, see Cheffins, *Corporate Ownership and Control: British Business Transformed* (OUP 2008).

22 For seminal ideas on institutional investors' activism see Rock, *The Logic and (Uncertain) Significance of Institutional Shareholder Activism*, (1990) 79 Georgetown Law Journal 445-506; Black, *Agents Watching Agents: The Promise of Institutional Investor Voice*, (1992) 39 UCLA Law Review 811-893.

23 Gilson & Gordon, supra note 16.

24 Id.

25 Ringe, *Changing Law and Ownership Patterns in Germany: Corporate Governance and The Erosion of Deutschland AG*, (2015) 63(2) American Journal of Comparative Law 493-538.

26 Barca & Becht, supra note 21.

27 Kraakman et al., *The Anatomy of Corporate Law* (OUP 2004) Ch 2.

28 As when corporate control is not contestable, equity price drops due to exit may not expose controllers to takeovers.

29 Proposal for a Directive of the European Parliament and of the Council amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement and Directive 2013/34/EU as regards certain elements of the corporate governance statement COM/2014/0213 final - 2014/0121 (COD). See also Pacces, *Hedge Fund Activism and the Revision of the Shareholder Rights Directive*, (2017) European Corporate Governance Institute - Law Working Paper No. 353/2017.

30 Kahan & Rock, *Hedge Funds in Corporate Governance and Corporate Control*, (2007) 155 University of Pennsylvania Law Review 1021-1093; Cheffins & Armour, *The Past, Present, and Future of Shareholder Activism by Hedge Funds*, (2016) 37 Journal of Corporation Law 51-103.

31 McCahery, Sautner, & Starks, *Behind The Scenes: The Corporate Governance Preferences of Institutional Investors*, (2016) 71(6) The Journal of Finance 2905-2932.

32 Stapledon, *Institutional investors and corporate governance*, (1996).

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issues such as new acquisitions.[33] As a temporary conclusion, the present corporate governance debate acknowledges the centrality of behind-the-scenes activism. Such form of activism is not accounted for in the EU Merger Reform White Paper,[34] which focused on minority shareholders' rights and especially on veto rights. Nevertheless, from an antitrust perspective, it looks like an important and overlooked variable, in-between passivity and activism but interestingly projecting on passive investment strategies. As such, it deserves some further consideration when considering old theories of harm associated with non-controlling financial holdings and their potential application to institutional investors.

III. ANTITRUST THEORIES OF HARM – RETHINKING THE TRADITIONAL FRAMEWORK

Traditional literature on the anticompetitive effects of financial holdings deals with corporate investment strategies. These strategies differ structurally and substantially from equity acquisitions by institutional investors. Equity investments of a corporation in a competitor may be justified on grounds of efficiency. For instance, they can be explained by lower transaction and information costs or by strategies aimed at hedging hold-up costs deriving from long-term contractual relationships such as joint ventures.[35] As regards theories of harm, the distinction between unilateral versus coordinated effects was conceived for analyzing a specific set of cases, i.e. corporate investments. In the case of corporate investments, this distinction may be difficult to apply to certain grey areas without engaging in a "dynamic" analysis.[36] For instance, equity purchases may start as a mere passive investment and end up constituting valuable coordination tools through information exchanges. When such information flows are made through informal channels (e.g. not through independent directors appointed in the investee/competitor) the subject of communication may be difficult to prove. More generally, economists usually focus on financial (dis)-incentives, whereas lawyers' attention is usually caught by behavioral patterns and hard evidence. Despite the different emphasis in approach to analyzing anticompetitive holdings, these theories may combine and therefore constitute a continuum of practices and anticompetitive effects – and this is actually an important point to consider when dealing with institutional investors holistically. Trying to map an already complex and at times controversial analysis onto equity purchases by institutional investors may encounter some meaningful obstacles.

When we analyze institutional investors' investments, we may recognize *some* situations that look *similar* to the ones depicted in corporate investment literature – along with cases that have little to do with that analysis. The nature of the activity exercised by an institutional investor consists of identifying target investees (corporations) that will produce the optimal return risk for those who invest in funds. To some extent, investment funds may be neutral in respect of the way their investees earn through their activity. Institutional investors *might* benefit from their investees' restricting competition *if* they are able to appropriate a share of the anticompetitive activity. For this to happen, there must be good synchrony between the timing of the investment and that in which restrictions of competition produce profits.[37] For instance, a short-term investment strategy may not be capable of reaping the anticompetitive profits of a cartel, which starts at the time when the investment fund purchases its equity stake in the corporation which participates in the cartel.

Investment strategies may be extremely diversified and they may combine in several ways. In some cases one may encounter scenarios of the kind described by Gilo, whereby a parent company invests in a competitor of one of its subsidiaries.[38] This might occur in the case of a private equity fund which has brought a given company private and subsequently acquires a non-controlling equity stake in a competitor of its fully controlled company.[39] Nevertheless the control variable is likely to

33 Id, 105.

34 White Paper 'Towards More Effective EU Merger Control,' Brussels (July 9, 2014), COM(2014) 449 final.

35 Ezrachi & Gilo, *EC Competition Law and the Regulation of Passive Investments Among Competitors*, (2006) 26 Oxford Journal of Legal Studies, 327-349, 328.

36 Discussion on how non-controlling financial holdings may produce unilateral or coordinated effects can be read in detail in some of the seminal articles by both legal and economics scholars. See an overview in Corradi, *Bridging the Gap in the Shifting Sands of Non-controlling Financial Holdings?*, (2016) 39(2) World Competition 239-265.

37 Corradi & Nowag, *The Anticompetitive Investment*, (Lund University Working Papers in Competition Law n.1, 2017).

38 Gilo, *The Anticompetitive Effect of Passive Investment*, (2000) 99(1) Michigan Law Review 1-47, 22 ff.

39 Hale & Travers, *Private Equity: A Transactional Analysis* (Globe Law and Business 2015).

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be absent in most institutional investor cases. This notwithstanding, when institutional investors coalesce in so-called wolf packs, in the face of ownership dispersion there may be temporary situations in which investors' voice gets very strong with a temporary degree of influence close to control.[40]

In terms of investment strategies, at the opposite pole of the spectrum of private equity, we find those described by Azar and others,[41] whereby the largest mutual funds simultaneously invest in the top companies of a given industry. Here the original and paradigm shifting "unilateral effects" analysis by Azar and others meets the comprehensive explanation provided by Elhauge, who identifies a previously unexplored set of new connections between antitrust and corporate law variables.[42] Unilateral effects of passive investment by institutional investors seem to be the perfect matching for corporate governance strategies which remunerate directors on a market performance basis and which often see institutional investors not taking necessary action in proxy contests against inefficient directors.[43]

Fitchner and others take the analysis a step further suggesting that institutional investors' engagement with management adds new perspectives on the passive investment/unilateral effects centered theory.[44] If we consider that in the beginning of the 1990s, institutional investors started setting up in-house research for collecting and processing highly business sensitive information on their targets, our perception of behind-the-scenes activism may change. Well-informed institutional investors have also proved able to *coalesce* in absolute discretion – "behind the scenes" – for the purpose of removing poorly performing directors.[45] Institutional investors' preference for behind-the-scenes action can be perceived like an invisible thread, which used to characterize and still distinguishes nowadays activism by institutional investors. Hence, these practices seem to provide a very wide set of situations to explore from an antitrust perspective.

The way activism manifests (the structural aspect) must be kept separate from the content of the information acquired (and potentially exchanged) by institutional investors in this context. One can imagine here at least two scenarios involving the processing of information obtained by institutional investors behind the scenes. In case the performance of the fund highly depends on the set of information it acquires from corporate management, each institutional investor may be discouraged from revealing it to its competitors. Nevertheless, where long-term investment strategies look homogeneous within the finance industry – as for index funds, then there is little reason why this information could not be exchanged. Clear evidence lacks with reference to a system of information exchange that may entail a breach of competition law. Nevertheless, the situation highlighted here adds some further anticompetitive variables to Azar and others' hypothesis.

IV. U.S. VERSUS EU LAW AND POLICY – THE TRANSATLANTIC DIVIDE

One key area where U.S. antitrust and EU competition law differ considerably is in their respective treatment of partial ownership interests and acquisitions in competitors.[46] As a general matter, U.S. law is broader in scope and instruments and more flexible in its application whereas EU law has been more limited and rigid since the outset. The paradigmatic case of this transatlantic divide is joint ventures.[47] The basic legal principles applicable to industrial firms with direct or indirect holdings in horizontal or vertical competitors may also be extended to the case of common ownership by institutional investors, albeit with notable limitations in the EU context.

40 Brav, Dasgupta & Mathews, *Wolf Pack Activism*, (2017) European Corporate Governance Institute - Finance Working Paper No. 501/2017; Briggs, 'Corporate Governance and The New Hedge Fund Activism: An Empirical Analysis' (2006) 32 Journal of Corporation Law 681-737.

41 Azar, Schmalz & Tecu, supra note 3.

42 Elhauge, supra note 9.

43 Id.

44 Fichtner, Heemskerk, & Garcia-Bernardo, supra note 5.

45 Stapledon, supra note 32, 127.

46 For the antitrust treatment of minority shareholdings and partial acquisitions in the EU and the U.S., see 1(1) CPI Antitrust Chronicle (January 2012).

47 Brodley, *Joint Ventures and Antitrust Policy*, (1982) 95 Harvard Law Review 1521–1590; Morais, *Joint Ventures and EU Competition Law* (Hart Publishing 2013).

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U.S. merger control is open-ended, dynamic and relies on an "effects" test. Any partial acquisition that "may be substantially to lessen competition" is prohibited under Section 7 of the Clayton Act.[48] Effectively, jurisdiction and substantive review under U.S. merger control is not contingent on notions of control or the level of shareholding but on the existence of probable and appreciable anticompetitive effects.[49] Only acquisitions made "solely for investment" may escape liability. Non-controlling shareholdings do not fall within this safe harbor unless the acquiring (institutional) investor is completely passive (i.e. no working control or influence over the target and no access to commercially sensitive information) *and* no actual anticompetitive effects resulting from the shareholding can be shown.[50] Under the Hart-Scott-Rodino Act, acquisitions of voting securities are subject to a filing obligation based on a size-of-person and/or a size-of-transaction test.[51] Purely "passive investors" acquiring holdings of 10 percent or less,[52] and "institutional investors" holding 15 percent or less, are exempt from notification requirements. An investment fund qualifies as an "institutional investor" if it buys the stock in the ordinary course of business and "*solely* for investment" purposes, is not a competitor of the issuer, and does not include any entity that is not an "institutional investor" and that holds voting securities of the target issuer.[53] Recent enforcement actions against activist investors, such as hedge funds, have confirmed that the filing exemption is narrowly interpreted and, crucially, may not necessarily benefit institutional investors, traditionally considered passive but who cooperate with activists or actively engage with management in practice.[54] The latter will also need to notify any increase of their shareholdings following any activism practices.

EU merger law relies on a "control" test (decisive influence), which does not necessarily correspond to economic control (lower levels or other forms of influence) or to the competition effects (unilateral or coordinated) resulting from a combination of assets or interests of competing undertakings.[55] Under the EU Merger Regulation,[56] the Commission has exclusive jurisdiction to review "concentrations" with an EU dimension, i.e. mergers and acquisitions that entail a lasting change of control and meet certain turnover thresholds.[57] Control may be established on a *de jure* or *de facto* basis.[58] Acquisitions of securities by financial institutions in the course of their normal activities and on a temporary basis, or by "financial holding companies," which exercise their voting rights only to maintain the value of the investment and not to determine, directly or indirectly, the strategic or competitive conduct of the partially acquired undertakings, are not deemed concentrations.[59] These exceptions however do not apply to "typical investment funds" that vote or adopt decisions to appoint management and board members or to even restructure the undertakings concerned.[60] Non-controlling shareholdings fall outside the EU merger control framework unless

48 15 U.S.C. § 18.

49 For the US legal position on partial stock acquisitions, see Areeda & Hovenkamp, *5 Antitrust Law: An Analysis of Antitrust Principles and Their Application* 283–301 (3rd ed. 2009). On their economic analysis, see US DOJ/ FTC Horizontal Merger Guidelines 2010 § 13.

50 Elhauge, supra note 9, (suggesting there is a higher standard of proof for passive investment, compared to active investment); Gilo, supra note 38, (suggesting there is a *de facto* exemption for passive investment given the difficulties to prove actual effects).

51 15 U.S.C. § 18a.

52 16 C.F.R. § 801.1(i)(1) and 802.9.

53 16 C.F.R. § 802.64.

54 Feinstein, Libby & Lee, *"Investment-Only" Means Just That*, FTC Competition Matters (August 24, 2015); Golden, *Does ValueAct Have Implications for Institutional Shareholders?*, Harvard Law School Forum on Corporate Governance and Financial Regulation, (April 7, 2016). Any intention to influence business decisions or participate in management or nominate board members and possibly engaging with corporate management or other shareholders regarding such matters is incompatible with the "passive investor" exemption. However, merely voting the acquired stock in relation to other matters does not negate the filing exemption. The recent ValueAct settlement is important because it suggests that internal discussions may be evidence of "active" intent.

55 Germany, Austria and the UK have broader merger statutes under domestic law.

56 Council Regulation (EC) No 139/2004 of 20 January 2004 on the Control of Concentrations Between Undertakings [2004] OJ L 24/1.

57 Articles 1 and 3 of the EUMR. Such concentrations must be notified prior to completion.

58 On the basis of rights (e.g. voting, management, veto) or contracts (e.g. long-term), or given the surrounding factual circumstances (e.g. dispersion of shareholder base, historic voting patterns and participation at annual meetings).

59 Article 3(5) of the EUMR.

60 Commission Consolidated Jurisdictional Notice under Council Regulation 139/2004 on the control of concentrations between undertakings [2008] OJ C 95/1, para 115. Acquisitions by investment funds (e.g. venture capital or private equity) are analyzed on a case-by-case basis (see paras 14-15). These transactions are notified under a simplified procedure provided the investors do not have controlling interests in competitors; but there are also cases where substantive concerns have led to a

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they are pre-existing at the time of another notifiable acquisition, or they are part of a series of transactions qualifying as a "single concentration."[61] It follows that any holdings acquired by institutional investors, active or passive, which do not confer sole or joint control are immune under the EUMR.

Besides, U.S. antitrust law provides further means of enforcement against parallel horizontal shareholdings by institutional investors. In specific, "purely passive investment that lessened competitive incentives in a way that was likely to produce anticompetitive effects" may also be reviewed under: Section 1 of the Sherman Act as a "combination or agreement" that unreasonably restrains trade, or as a "facilitating agreement or practice" if likely to support oligopolistic coordination;[62] Section 5 of the FTC Act as an "unfair trade practice"; and possibly, Section 2 of the Sherman Act as a "monopolization (or attempted monopolization) practice" if the firms collectively possessed monopoly power.[63]

In theory, EU antitrust law provides similar possibilities under Articles 101 and 102 of the Treaty on the Functioning of the European Union ("TFEU") prohibiting agreements restrictive of competition and abuse of a dominant position respectively. Indeed, there are cases where these provisions have been used to prosecute acquisitions of non-controlling shareholdings between competitors.[64] However, Article 101 TFEU is unable to capture any unilateral effects of passive investment,[65] and cannot address tacit collusion either.[66] In addition, enforcement in this area has been limited or non-existent[67] ever since the enactment of the EUMR.[68] In light of this, it is all the more dubious whether EU antitrust law has real bite against institutional investors.

The origins of these doctrinal and enforcement differences may be traced in the historical and policy underpinnings of the U.S. and the EU regimes. In the U.S., federal antitrust law was introduced to discipline state corporate law competition authorizing the establishment of trusts or interstate holding companies to facilitate monopoly;[69] in the EU, competition policy was driven by the impetus for internal market integration, and antitrust law explicitly carved out, total or partial, corporate combinations and share acquisitions from its purview.[70] In short, anticompetitive holding structures were the source of U.S. antitrust whereas they were beyond reach under EU competition law until the introduction of the EUMR. That foundational deficit of the EU law is still with us today to a certain extent as described above.

Phase II prohibition. See Bellamy & Child, European Union Law of Competition, para 8.019 (Bailey & Rose eds., 7th ed. 2013).

61 Tzanaki, *The Legal Treatment of Minority Shareholdings Under EU Competition Law: Present and Future*, in University of Piraeus - Essays in Honour of Professor Panayiotis I. Kanellopoulos (Sakkoulas Publications 2015), 861–886.

62 This is not to deny the additional evidentiary challenges in establishing a Section 1 Sherman Act antitrust violation, which requires evidence of "agreement" (e.g. on a common investment plan) or at the very least communication (e.g. knowing exchange of strategic information from which agreement may be inferred). In other words, common ownership or parallel shareholdings by institutional investors without more, even if giving rise to potential anticompetitive effects, is not sufficient proof. A common investor-owner may facilitate agreement between direct competitors under a "hub-and-spoke" conspiracy theory in which case vertical agreements between the investor and the companies as well as horizontal agreements between the competitors must be established. See Karp, *Antitrust Executive Order and Common Ownership*, Harvard Law School Forum on Corporate Governance and Financial Regulation (May 24, 2016); Rock & Rubinfeld, supra note 12, 24; Patel, supra note 12, 65; Reed, *Private Equity Partial Acquisitions: Towards a New Antitrust Paradigm*, (2010) 5(2) Virginia Law and Business Review 303–348, 342.

63 Elhauge, *United States Antitrust Law and Economics* (Foundation Press 2011), 589–590; Elhauge, supra note 9, 1308.

64 Joined Cases 142 and 156/84, *BAT and Reynolds v. Commission* [1987] ECR 4487 ("*Philip Morris*"); Cases IV/33.440, *Warner-Lambert/Gilette* and IV/33.486, *BIC/Gillette* [1993] OJ L 116/21 ("*Gillette*").

65 Ezrachi & Gilo, supra note 35, 340–342.

66 González-Díaz, *Minority Shareholdings and Creeping Acquisitions: The European Union Approach*, in Fordham Competition Law Institute 2011, 471–472 (ed. Barry E. Hawk, 2012).

67 Especially after the modernization of the EU antitrust system in 2003.

68 Reynolds & Anderson, *Acquisitions of Minority Interests in Competitors: The EU Perspective*, American Bar Association, Section of Antitrust Law Spring Meeting (March 31, 2005).

69 Roe, *Delaware's Competition*, (2003) 117(2) Harvard Law Review 588–646, 607–610.

70 Memorandum on The Problem of Industrial Concentration in the Common Market, Commission, Competition Series No. 3 (1966). Article 101 TFEU could capture any post-acquisition coordination between independent undertakings but not the agreement for the ownership transfer as such.

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V. CONCLUSION – SHOULD EUROPE MOVE UP A GEAR?

In the brave new world of increasing common ownership by large and long-term institutional investors and its intersection with antitrust, we encounter some odd phenomena. U.S. law is potentially more interventionist and prophylactic, yet more flexible in its approach. For instance, U.S. merger control primarily focuses on anticompetitive effects and activism practices, even via informal channels, rather than an *a priori* definition of the type of investor as passive or active. Traditionally, EU law is more conservative in its economic predictions while more formalistic from a legal point of view. In particular, EU antitrust law and enforcement faces significant challenges in dealing with hybrid forms of ownership or financial structures: merger control analysis depends on the legal notion of decisive influence and heavily relies on explicit shareholders' rights rather than invisible forms of activism or coalitions whereas non-controlling financial holdings by either active or passive institutional investors are generally out of reach. Therefore, albeit theoretically somewhat equipped, EU law is found lacking practical antitrust weapons against parallel horizontal shareholding structures by institutional investors.

At the same time, however, the European economic market context and corporate environment may differ considerably from the U.S. setup, which may also mean that common ownership by diversified institutional investors or passive index funds may be less of a concern in Europe to begin with. In this regard, it is worth exploring the real extent of the problem in Europe in terms of prevailing ownership structures, forms of activism practiced by institutional investors and the proportion of institutional shareholding compared to other investment strategies. Besides fully theorizing the causality of antitrust concerns arising from institutional investor ownership of direct industrial competitors, one needs to establish its significance in terms of anticompetitive effects from an empirical perspective in the European context too before any firm conclusions are drawn. Ultimately, it is suggested that in order to decide whether a potential antitrust problem exists also in Europe and whether further regulatory action is desirable, one needs to carry out a deeper law and economics analysis that takes a holistic view of both the corporate and competition aspects of institutional common ownership across the EU.

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