15

Common Ownership and Minority Shareholding at the Intersection of Competition and Corporate Law

Looking Through the Past to Return to the Future?

Anna Tzanaki

15.1 INTRODUCTION

Common ownership is the talk of the town in antitrust land. Surrounded by mystery and noise, the competitive implications of rival firms being partially owned and controlled by a small set of overlapping owners are both fascinating and hotly contested. The fascination comes from the fact that the source of potential competition harm may be minority shareholder control in a setting of widely held companies.[1] In fact, the common ownership phenomenon is so pervasive, in particular in the US,[2] that if this new theory of harm is true, most markets could be beset by serious antitrust concerns. At the same time, scepticism among academics and policymakers abounds. Most notably, critics wonder about the likely prospect, quantum and mechanics of common owners' influence driving any pro- or anticompetitive effects.[3] It is often stressed that the antitrust analysis of common ownership is clearly distinguishable from that of cross-shareholding links between competitors.[4] Indeed,

Senior Lecturer at Lund University, Faculty of Law, Sweden; Senior Research Fellow at UCL Centre of Law, Economics & Society, London, UK; anna.tzanaki@jur.lu.se. This project has received funding from the European Union's Horizon 2020 research and innovation programme under the Marie Skłodowska-Curie grant agreement No. 846270. My special thanks to the editors of this volume for inviting me to contribute and for their careful review of my work. This chapter is part of a bigger research project starting with my PhD thesis and continuing under the Marie Curie grant, which is to be condensed in a forthcoming monograph 'Partial Ownership of Competitors in Europe: Economics, Law and Policy' (Cambridge University Press). This project has greatly benefited from various discussions with José Azar and Giorgio Monti, who I wish to thank for the intellectual stimulation and inspiring exchanges. I am also very grateful to Alessandro Romano, Elias Deutscher, Pedro Caro de Sousa and Stefan Thomas for helpful comments and suggestions.

1 A Tzanaki, 'Varieties and Mechanisms of Common Ownership: A Calibration Exercise for Competition Policy' (2022) 18 JCL&E 168; M Backus, C Conlon and M Sinkinson, 'Common Ownership in America: 1980–2017' Am Econ J: *Microecon* (forthcoming); cf A Dyck and L Zingales, 'Private Benefits of Control: An International Comparison' (2004) 59 J Fin 537.

2 J Azar, 'The Common Ownership Trilemma' (2020) 87 U Chi L Rev 263, 267–268 (summarising the empirical literature); cf N Rosati and others, *Common Shareholding in Europe* (JRC121476, Publications Office of the European Union 2020).

3 See chapter 13 by E Rock and D Rubinfeld in this book.

4 A Burnside and A Kidane, 'Common Ownership: An EU Perspective' (2021) 8 JAE 456, 457–458.

the novel concern caused by common shareholdings derives from indirect, and possibly partial, shareholder overlaps across rival firms rather than directly from competitive overlaps in product markets. A comprehensive account of partial ownership, capturing the competition dynamics of both cross- and common shareholding and the incentives of both individual and institutional investors, is notoriously missing.[5] Yet, so far, the spirited debate between antitrust and corporate law and economics scholars centres on whether this 'knowledge gap' is material, set to be filled by better understanding and experience as a matter of course or whether it is a fictional problem and an empty inquiry that is theoretically implausible and empirically unrealistic to unfold.[6]

Against this backdrop, this chapter aims to illuminate some of the latent connecting points in this debate, by looking back into the past and then fast forward to the future. There are two key takeaways from this analysis. The historical split of corporate and antitrust laws and their gradual specialisation in targeting different issues with distinct objectives in mind has unwittingly created regulatory gaps. This is the source of the present-day problem posed by minority and common shareholdings for competition law. With this understanding clear, the analysis moves on to offer a new taxonomy of (partial) shareholdings in light of their partial control characteristics, with distinguishable classifications based on competition and corporate law, as compared to broader economics-focused notions of control. The industrial organisation perspective reveals that commonly thought passive and highly diversified minority holdings are not necessarily innocuous in terms of their competitive implications. Rather, minority common shareholdings may give rise to actual or potential 'competitive influence' under certain circumstances ('influential' shareholdings).

The corollary is that antitrust cannot afford to neglect such corporate ownership structures and for this reason, it is called to look into the actual corporate governance dynamics in the substantive assessment of cases and in designing appropriate remedies. Yet, the historical and economic analyses further suggest that merger control needs to recalibrate its jurisdictional scope and embrace a 'structural' approach, combined with 'case-by-case', fact-specific analysis, also for shareholdings falling below legal thresholds of control. This reorientation would not only fill enforcement gaps and capture new theories of harm relating to common shareholding but also reconnect merger control to its corporate law origins in a way that holistically addresses agency costs and market power concerns linked to such shareholding. At

5 Institutional common shareholding marks the double movement from 'direct' to 'indirect' ownership holding structures along the different stages of organisational evolution of capitalism. That is, from retail individual investors to professional intermediary investors (investment fund intermediaries), and from direct ownership links between competing firms to indirect shareholding links via non-industrial third parties (common shareholders-investors). See A Tzanaki, 'The Common Ownership Boom – Or: How I Learned to Start Worrying and Love Antitrust' (May 2019) CPI Antitrust Chronicle 'Common Ownership Revisited' 3 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3401209.

6 For an overview of the state of the literature see chapter 12 by M Schmalz in this book.

the same time, corporate law and governance should be cognizant of these parallel developments and tread softly when shaping their own regulations so that they do not augment any antitrust concerns.

The structure of the chapter is as follows. Section 15.2 provides relevant background on the two-sided history of regulating shareholding acquisitions under corporate and competition laws. Section 15.3 illustrates antitrust's embeddedness in pre-existing corporate laws and forms, documenting the early unity and progressive quiet disconnect of the two fields in regulating ownership structures and intercorporate links. Section 15.4 presents the contemporary common ownership (hypo)thesis and the distinct challenges and opportunities that it poses for both antitrust and corporate law. Section 15.5 develops a working taxonomy of (minority) shareholding types and their (partial) control characteristics from different perspectives with a particular focus on competition economics. Section 15.6 focuses on the economic attributes and competitive effects of common shareholding seen and analysed through the lens of corporate property rights theory. Section 15.7 concludes with an urge to competition and corporate governance and finance policy-makers for harmonic progression in seeking regulatory solutions to address common ownership and with further implications for competition law following the preceding analysis.

15.2 MERGERS AND MINORITY SHAREHOLDING: A TWO-SIDED HISTORY

Minority shareholding is an old story in the realm of competition or antitrust laws. It takes us back to the origins of antitrust, or even to preceding developments in corporate law that led to its birth.[7]

Ever since its inception, antitrust was designed to tackle a rampant wave of mergers and acquisitions fuelled by technological and industry developments as well as holding structures ('trusts')[8] between competing companies that essentially led to concentrated economic power and monopolistic market outcomes. The antitrust movement was an immediate reaction to evolving corporate laws. The emergence of the trusts and multistate corporate mergers was the result of a 'race to the bottom'[9]

[7] See chapter 1 by M Meagher in this book.

[8] W Cary, 'Federalism and Corporate Law: Reflections upon Delaware' (1974) 83 Yale LJ 663, 664; H Hovenkamp, *Enterprise and American Law, 1836–1937* (Harvard UP 2009) 259. Hovenkamp lucidly explains that the business and legal 'geniuses who invented the trusts' with the intention to evade state corporate law employed different, privately negotiated, trust arrangements but every such 'late nineteenth-century acquisition was organized around one of three legal models: (1) the stock-transfer trust model; (2) the asset-transfer combination; (3) the holding company'.

[9] On the 'race to the top' versus the 'race to the bottom' debate in corporate law scholarship, indicating states with corporate laws favoring shareholders and minimising agency costs versus states with management-friendly corporate laws, see R Romano, *The Genius of American Corporate Law* (American Enterprise Institute 1993). In this chapter, the 'race to the bottom' argument is employed in the broader context of regulatory competition among jurisdictions, which in attempting to

with US states 'competing' for corporate charters and New Jersey being the first to enable 'interstate' holding structures intended to monopolise or cartelise national industries.[10] US federal antitrust law was born in 1890 in an attempt to rein in this 'accommodating' interstate competition in corporate laws among different states. Up to that point, state law treated jointly 'issues of antitrust and corporate authority'.[11] Yet, not all anticompetitive mergers or restraints of trade were captured by those initial antitrust laws. In fact, the Sherman Act originally targeted 'loose' combinations (cartels) rather than 'tight' ones (mergers)[12] but later case law (1904) also applied it to the holding company ('single business firm').[13] Stock acquisitions only became a specific antitrust target of US merger control with the coming into force of the Clayton Act in 1914.[14]

Similarly, the founders of the EU avoided incorporating rules controlling corporate ownership structures in the Treaty of Rome, which included solely behavioural rules on cartels and abuse of dominance. Only in 1990, EU Members States agreed to have a pan-European Merger Regulation ('EUMR') in place to address cross-border mergers and acquisitions. Till then, the available EU antitrust rules were used as a *de facto* merger control regime.[15] Indeed, over time, EU authorities decided to make use of Article 102 TFEU to address mergers and 'majority' acquisitions.[16] While later on, EU case law further applied Article 101 (and 102) TFEU to minority shareholdings

outperform each other and attract business drive and lower standards to a minimum. Critically for our current discussion on minority shareholding acquisitions, these phenomena can play out at the same time: a 'race to the top' in corporate laws that are efficient for shareholders (and possibly firm value) may simultaneously produce 'race to the bottom' effects in terms of product market competition. In other words, what might be privately optimal for shareholders from an agency theory perspective is not necessarily socially optimal from a competition perspective (a classic instance of externalities that US federal antitrust law was enacted to remedy).

10 M Roe, 'Delaware's Competition' (2003) 117 Harv L Rev 588, 607–610.

11 *Ibid*. at 608 (noting that the two categories were severed when the US federal government took away antitrust from the states).

12 Hovenkamp (n 8) 242, 248–249, 266. The logic was that while rigorous antitrust enforcement was considered 'effective against interstate cartels, merger policy was [better] to be left to individual state [corporate laws]'. Yet, this early antitrust choice had its own unintended consequences as 'the Sherman Act actually forced firms to merge than collude.' At the same time, state corporate law lost its grip once anticompetitive mergers and combinations became 'multistate creatures' and thus 'corporate law forced the common law trusts to reorganize as asset acquisitions or holding companies'. Ironically, the resounding success of federal antitrust and state corporate laws against the trusts led to renewed organizational ingenuity by businesses that sought to control markets.

13 *Ibid*. at 264–266.

14 E Posner, F Scott Morton and E Weyl, 'A Proposal to Limit the Anti-Competitive Power of Institutional Investors' (2017) 81 Antitrust LJ 669, 670–671.

15 A Tzanaki, 'The Regulation of Minority Shareholdings and Other Structural Links between Competing Undertakings: A Law & Economics Analysis' (DPhil Thesis, University College London 2017).

16 Memorandum on The Problem of Industrial Concentration in the Common Market, Commission, Competition Series No 3 (1966); and Case 6/72, *Europemballage and Continental Can v Commission* [1973] ECR 215.

linking competitors and giving rise to 'some influence'.[17] In fact, part of the reason for the adoption of the EUMR was the foregoing 'expansive' use of Articles 101 and 102 TFEU by the European Commission to go after 'minority' share acquisitions in competitors.[18] Under pressure, Member States decided to compromise by yielding part of their regulatory powers checking anticompetitive mergers, acquisitions, and joint ventures under national law rather than be *de facto* completely swept away by creeping EU antitrust competence. The end result of this pragmatic political settlement was that the EUMR was designed to jurisdictionally cover only cases of 'concentrations' that give rise to a 'lasting change of control', i.e. multistate corporate combinations that confer upon the acquirer positive or negative 'decisive influence'.[19]

Perhaps counterintuitively and for different reasons, US and EU merger control laws shared a little noticed, common trajectory in their origin. Their absence was conspicuous in the inaugural design of cross-Atlantic antitrust rules. EU antitrust law had a 'top-down' inception inspired by a high-level political commitment towards an internal market integration objective. Coming only later and independently, EU merger control was the political product of Member States agreeing to a 'lesser evil' against pressing supranational antitrust expansion.[20] Initially, however, cross-border mergers were seen as a positive force furthering European integration and the competitiveness of its industry rather than in need of any legal constraint.[21] In contrast, US antitrust law had clear 'bottom-up' origins reflecting populistic sentiments of the time against cartelising business trusts and monopolistic merger combinations. US merger control also came into force later but predominantly to fill the gaps left by state corporate laws. Accordingly, the initial omission of merger law both in the EU and the US from the traditional body of antitrust law was not a random policy choice. US antitrust legislators consciously chose to break free from the 'formalities' of state corporate law and its 'structural model' of dealing with the 'trust problem' while opting for a 'strategic model' merely governing agreements and combinations in restraint of trade 'based on economic theory that purported to distinguish between competitive [and] anticompetitive' ones.[22] The distinct

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

[18] A Burnside, 'Minority Shareholdings: An Overview of EU and National Case Law' (2013) e-Competitions Bulletin No 56676 2.

[19] EU merger rules make a clear reference both to a lasting structural change in corporate control as well as in industry control affecting competition. See Article 3(1) of the EUMR, and Recitals 6 and 20.

[20] To be sure, there had been previous EU proposals for a pan-European Merger Regulation, repeatedly rejected by Member States. However, once the European Commission grew in determination to employ existing antitrust law to scrutinise merger and minority shareholding transactions and use that position of power as a threat point against continuing non-adoption of the EUMR, the soil was ripe for Member States to retreat.

[21] K Banks, 'Mergers and Partial Mergers Under EEC Law' (1987) 11 Fordham Int'l LJ 255, 257.

[22] Hovenkamp (n 8) 244–249. The 'trade restraints model' chosen by the Sherman Act was the 'weaker' of the two 'because of the "rule of reason" inherent in its application', especially as applying to

concern of the antitrust approach when examining a merger or combination was 'its object or effect' on market competition, not 'its form'.[23] In addition, it was initially believed that issues of firm formation, ownership transfer agreements, and the sale and purchase of property or stock acquisitions, either by a corporation as a legal business entity or by its business owners as physical persons, were beyond the regulatory ambit of antitrust rules.[24]

Seen in this light, the noted 'foundational deficit'[25] of EU competition law in reaching to partial ownership structures and share acquisitions has not been a singular EU story. Traces may also be found in US legal history, albeit in subtler forms. Yet, what is noteworthy about US antitrust law is its ability for fast(er) adaptation to emerging business and economic realities, such as the disaggregation of state corporate and antitrust policy and the proliferation of multistate business firms, as well as to the rapidly changing content and scope of state corporate laws towards more liberal and enabling rules favourable to private ordering. Indeed, jurisdiction and substantive review under US merger control now resolutely rely on 'effects-based' tests, whereas EU merger control jurisdiction retains its 'formalistic' reliance on a narrow legal conception of 'control'.[26]

mergers, whereas state corporate law applied across the board (a categorical '*per se*' approach) prohibiting all mergers or combinations of certain form, not merely the anticompetitive ones. The state corporate model was legal or 'noneconomic'; antitrust had 'economic' grounding since the outset.

[23] H Hovenkamp, 'Antitrust Policy, Federalism, and the Theory of the Firm: An Historical Perspective' (1990) 59 Antitrust LJ 75, 87.

[24] *Ibid.* at 88–90; Tzanaki (n 15) 86, 102, 128. In the EU, share purchase agreements were initially presumed to be outside the scope of EU competition rules until the 1966 Memorandum (n 16). Later case law (n 17) abolished this complete immunity rule and established a 'no influence' safe harbour for minority shareholding up to 25% (ie corresponding to control of 25% of the voting rights and no other special contractual or corporate rights), relying on a formalistic presumption existing under national corporate law (eg Germany at the time). See *ibid.* at 113. Similarly, in the US, shareholders used to have an 'absolute' right to transfer their shares, unless restricted by the corporate charter or state law. Such share transfer agreements were only subject to state corporate law as they touched upon an essential feature of the very corporate form (ie the free transferability of shares). Thus, while it was later recognised that 'every corporation is a "combination" of its shareholders', potentially subject to antitrust review to the extent it resulted in 'a merger [giving] the participants effective control of the market', the 'mere formation of such a combination should never be considered illegal'. See Hovenkamp (n 23) 89.

[25] M Corradi and A Tzanaki, 'Active and Passive Institutional Investors and New Antitrust Challenges: Is EU Competition Law Ready?' (June 2017) CPI Antitrust Chronicle 'Index Funds – A New Antitrust Frontier?' 7 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2996518.

[26] Economic conceptions of 'control' and theories of harm are notably broader than the legal definition of control under the EUMR, while some Member States have more encompassing national merger control statutes based on wider notions of 'influence' ('material', 'significant'). A Tzanaki, 'The Legal Treatment of Minority Shareholdings Under EU Competition Law: Present and Future' in *Essays in Honour of Professor Panayiotis I Kanellopoulos* (Sakkoulas Publications 2015) 861, 863 (fn 10), 878–880. Indeed, the definition of a notifiable merger transaction can be based on different 'objective' or 'economic' criteria focusing on the potential mechanism of competitive harm. See OECD, 'Definition of Transaction for the Purpose of Merger Control Review' (2014) DAF/COMP(2013)25, 6. The Commission had proposed introducing an 'effect-based model', regardless of the applicable

15.3 ANTITRUST EMBEDDEDNESS IN CORPORATE FORMS: THE QUIET DISCONNECT

But the interplay between competition and corporate laws goes one level deeper. Antitrust choices regarding rules or analytical frames had been implicitly premised on pre-existing corporate law and practice in the formative era. Early corporate law in the US till the end of the nineteenth century was much more restrictive and unitary in nature in regulating business entities, their structure and operation, as a legal and social phenomenon. Corporate law not only included far more outright prohibitions (mandatory rules) rather than balancing or enabling rules regarding ownership structure and governance practices within any individual firm but also strictly regulated intercorporate relations. Indeed, in the early days of US corporate law agency problems within the firm were not a major concern as the law and surrounding circumstances at the time ensured there were:[27]

i) no 'separation of ownership and control',[28]
ii) no 'separation of ownership and consumption',[29]
iii) no 'separation of control (voting rights) and investment (financial interests)'.[30] Or even further, from the perspective of shareholders:

EUMR turnover thresholds establishing an 'EU dimension' of a notifiable 'concentration', which would practically have allowed it to retain an alternative "back door" to pursue non-controlling minority shareholding cases that would be subject to merger review in at least three Member States. See Commission, 'Green Paper on the Review of Council Regulation (EEC) No 4064/89' COM(2001) 745 final, paras 54–63. Recent EU policy has devised new ways to overcome jurisdictional limitations of EU merger control by allowing case referrals to the Commission by Member States of mergers that may not require notification under national law at all. See Commission, 'Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases' C(2021) 1959 final.

[27] The analysis that follows implicitly compares the position of contemporary US law applicable to large public corporations and surrounding market and investment conditions compared to earlier developments in the nineteenth century. The situation however may differ from country to country and for different types of companies, hence a closer look into the corporate law details and relevant context is warranted in such cases.

[28] A Berle and G Means, *The Modern Corporation and Private Property* (Macmillan Co 1932); E Fama and M Jensen, 'Separation of Ownership and Control' (1983) 26 JLE 301 (referring to the 'separation of decision and risk-bearing functions observed in large corporations').

[29] H Hansmann and M Pargendler, 'The Evolution of Shareholder Voting Rights: Separation of Ownership and Consumption' (2014) 123 *Yale LJ* 948; cf H Demsetz, 'The Structure of Ownership and the Theory of the Firm' (1983) 26 JLE 375. According to Demsetz, the 'agency problem' (or the cost of 'on-the-job consumption') is not a problem of agency – a single owner may similarly engage in corporate 'waste' if unchecked – but due to lack of competitive pressure or diverging objectives of the controlling owner or manager from the assumed pure profit maximisation motive. In essence, this problem distinguishes the 'real modern corporation' facing positive monitoring costs vis-à-vis the ideal 'profit-maximizing firm of economic theory' that is a 'good approximation of precorporate real firms' of the nineteenth century.

[30] F Easterbrook and D Fischel, 'Voting in Corporate Law' (1983) 26 JLE 395, 400, 410 ('It is not possible to separate the voting right from the equity interest. […] Attaching the vote firmly to the residual equity interest ensures that an unnecessary agency cost will not come into being. Separation of shares from

iv) no 'separation of ownership from ownership',[31] and
v) no 'separation of ownership and awareness'.[32]

The first legally organised companies had been novel combinations of 'private investment and state-granted monopoly privileges' to undertake important community projects under special charters.[33] Once chartered companies obtained 'perpetual existence' and 'strong entity shielding', shareholders acquired a legal 'right to sell their shares without the consent of other owners' in exchange for their lost ability to withdraw from the joint venture at will.[34] Such monopoly grants served two

votes introduces a disproportion between expenditure and reward.'); H Manne, 'The Publicly Held Corporation as a Market Creation' (1981) 137 *Zeitschrift für die gesamte Staatswissenschaft / JITE* 689, 690 ('The share can be viewed as a two-part package of the underlying investment value plus the value of the vote. […] If, however, the shareholders did not have the right to sell their vote, they would be left as residual claimants largely in name only, rather like the presumed beneficiaries of a not-for-profit organization. So long as the votes [whether as part of a share package or separately] can be bought and sold then the stock market will constrain managers to work in the shareholders' interest.'); H Manne, 'Some Theoretical Aspects of Share Voting. An Essay in Honor of Adolf A. Berle' (1964) 64 Colum L Rev 1427, 1432, 1436–1437; cf G Rauterberg, 'The Separation of Voting and Control: The Role of Contract in Corporate Governance' (2021) 38 Yale J on Reg 1124. Voting is a proxy for shareholder power and the default mechanism for board control. Decisions are usually made based on a majority voting rule. The default rule for allocating voting rights among shareholders-owners of the corporation is 'one share-one vote', although contractual deviations are possible. As Easterbrook and Fischel, *ibid.* at 408–409, explain, the principle of the 'presumptively equal voting right attached to shares' is justified from economic efficiency perspective given that shareholders are the 'residual claimants' of the firm generated profits; any departure from this principle creates '(unnecessary) agency costs'.

31 U Rodrigues, 'Corporate Governance in an Age of Separation of Ownership from Ownership' (2010) 95 Minn L Rev 1822, 1826–1829 (crediting Leo Strine as the original inventor of the term); L Strine, 'The Delaware Way: How We Do Corporate Law and Some of the New Challenges We (and Europe) Face' (2005) 30(3) Del J Corp L 673, 687 (referring to this as the 'separation of capital from capital'); cf J Fisch, 'Securities Intermediaries and the Separation of Ownership from Control' (2010) 33 Seattle U L Rev 877, 878–882.

32 H Hovenkamp, 'Neoclassicism and the Separation of Ownership and Control' (2009) 4 Va L & Bus Rev 373, 400–402 (noting that 'the result of marginalist finance theory, particularly the efficient capital market hypothesis, was to take Berle and Means' separation of corporate ownership and control one step further, to the separation of ownership and awareness. […] A random selection of stocks produces the same return as the most careful research. […] Shareholders of publicly traded corporations could invest with indifference and indiscrimination – a massive shift away from the nineteenth century vision of the corporation as a device to facilitate investment predominately by groups of active owner-operators who sought to limit their liability.'); cf Rodrigues (n 31) 1826 (noting that long-term investors are 'indifferent as to how that long-term goal is achieved').

33 H Hansmann, R Kraakman and R Squire, 'Law and the Rise of the Firm' (2006) 119 Harv L R 1333, 1376–1377. As the authors point out, the inventor of the joint stock company was fourteenth century Genoa that 'sold shares in state-backed monopolies' engaged in various public-interested ventures. However, these commercial enterprises were small and 'operate[d] under a rule whereby every owner had to consent to any sale of a firm's shares'. England and the Netherlands followed this example in organising their own large-scale chartered companies in the seventeenth century such as their famous East India Companies but allowing shareholders to freely transfer their shares without prior consent from others.

34 *Ibid.* at 1377 (explaining how 'a company's need for fixed capital' was traded off against 'a shareholder's need for liquidity'). It is also implied that, for practical reasons, the unanimity rule for shareholder voting was set aside once shares were freely tradable.

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purposes, one balancing against the other. Monopoly rents were the bait to attract self-interested investors against the risk of 'control-person opportunism'.[35] At the same time, the public interest was also served by enabling large-scale ventures that would not have been possible otherwise. With the corporate form becoming widely available under general incorporation statutes,[36] exclusive privileges were no longer *a priori* guaranteed. Democratisation of the corporate form paved the ground for free market competition. Success in the marketplace was now the driver of private profit-seeking venturers and also the only assurance for firm survival. Competition among independently operating companies was the new *modus operandi* for serving the public and consumer welfare.

Thus, although anachronistic today, it is no surprise that in its early days, US corporate law was primarily seen as a response to problems of monopoly and market power rather than concerned over agency problems inside the firm.[37] Prominent examples are rules regarding voting (caps) or purpose restrictions (*ultra vires* doctrine),[38] prohibition of separately allocating cash flow and control rights or splitting shareholders' property interests in the firm (bar on the separation of ownership/investment and control),[39] prohibition of acquisitions of foreign (out-of-state) companies,[40] prohibition of 'intercorporate stock ownership' (interlocking shareholding or 'common stockholders')[41] and 'intercorporate influence' (interlocking directorates

[35] *Ibid.* at 1378–1379. It is further argued that the monopolistic scale of business was to facilitate an efficient market for corporate shares and their free transferability while charters were primarily granted for large fixed-asset investment (rather than manufacturing) projects where the risk of opportunism by firm controllers was minimal.

[36] *Ibid.* at 1386, 1394.

[37] Hansmann and Pargendler (n 29) 950–951 ('In the late eighteenth and early nineteenth century, the main economic evil linked to the corporate form was not managerial or controlling-shareholder opportunism toward small shareholders, but rather Adam Smith's first concern: monopoly. […] early corporate law and practice were frequently designed to minimize the abuse of that market power.').

[38] Hansmann and Pargendler (n 29); Hovenkamp (n 23) 77 (the 'rule that stock transfer trusts involved corporations in *ultra vires* partnerships condemned all mergers by stock transfer trust').

[39] See n 30 above.

[40] Hovenkamp (n 8) 63–64, 258–262 (noting that a mere transfer of shares evaded this rule because in the holding company the shareholders were 'foreign', not the other corporation as in asset-acquisition mergers); cf Roe (n 10) 609.

[41] W Roy, *Socializing Capital: The Rise of the Large Industrial Corporation in America* (Princeton UP 1997) 148–155; Hovenkamp (n 23) 77 (the 'rule forbidding one corporation from owning the shares of another corporation forbade all holding companies'). Roy also discusses the progressive relaxation of rules on intercorporate stock ownership and its implications (151: 'The social structure of ownership permitted by intercorporate stock ownership sharply contrasted with that of individually owned businesses [which] were structurally atomistic [and interacted] primarily through the market. […] proprietary relationships made it possible to control the market through two types of networks [of ownership], holding companies and communities of interest. When states began to allow corporations to own stock in other corporations, they gave birth to the holding company, a company that existed solely to own other companies. […] In a community of interest, competitors own a noncontrolling interest in one another, giving each an incentive to maximize their mutual benefit rather than competing by undermining their rivals.'). Interestingly, exceptions to the prohibition of cross-ownership were permissible primarily for firms operating 'in similar lines of business'. Although

or 'shared directors').[42] During this era, it was not obvious that separate corporate entities could acquire or own property or equity interests (shareholding) in others or engage in combinations (mergers) of assets (productive facilities) or stock (capital).[43] The legal and economic environment of the time was in other words quite different to what is observed today.

Progressively, however, most of these restrictions were abandoned as corporate law relaxed and redirected its focus on the 'internal affairs' of firms,[44] aiming to minimise agency costs and conflicts of interest. Companies were gloriously emancipated from early state (corporate) control; at the age of adolescence, the only credible constraint on their market and transactional activities was (federal) antitrust law.[45] Given its liberalisation trends, corporate law was now oriented on developing alternative means of protecting investors, mostly notably minority shareholders,[46] rather than providing any form of consumer protection against them. While antitrust grew to fill in those gaps, it only comprehensively did so with regard to mergers.

surprising to a modern antitrust minded observer, the logic supporting this rule is understood considering that the 'purpose' of the corporate form or practice was the key criterion for assessing its legality under corporate law.

42 Roy (n 41) 155 ('interlocking directorates helped to control competition among the firms in a market, facilitate raising capital from commercial and investment banks, solidify and reduce transaction costs with suppliers and customers, and coordinate the activities among firms with common ownership.').

43 *Ibid.* at 149–151 (explaining that under the 'property' conception of the firm, corporations were essentially 'a contract among individuals to pool their resources [but] not be entities that themselves could hold property other than their physical assets'. Under the 'entity' view of the firm, the corporation was treated 'as an individual [but] it did not necessarily follow that corporations could fully engage in owning any form of property' as natural individuals. 'Although judicial law generally held that corporations could own physical property […], there was a continuing debate over their right to own the stock of other corporations.'); Hovenkamp (n 23) 81, 85, 88–89 (noting that under corporate law 'the acquisition of property had to be "useful or convenient" for the corporation's operation of the business "for which it was organized." As a result, horizontal acquisitions [of a competitor's assets] were generally lawful.'; and that the holding company legal merger and share transfers among business owners were over time considered 'merely a purchase and sale of property' and generally legal under state corporate law, but case law had observed that 'because a corporation is merely a fictional person and not a natural one, a corporation's acquisition of property could constitute a "combination"' under antitrust law).

44 Hansmann and Pargendler (n 29) 993.

45 It is also instructive that the predecessor of the US Federal Trade Commission, an independent administrative agency with an antitrust enforcement mandate, was the US Bureau of Corporations (1903–1915). The Federal Trade Commission Act came into force the same year as the Clayton Act (1914), including statutory provisions on the control of mergers and acquisitions and a flat prohibition of interlocking directorates between competing corporations. The US Bureau of Corporations, having a mission of transparency reporting and conducting industry studies (also addressing issues of ownership and control), was a curious experiment in 'state-corporate cooperation'. In effect, it operated as an institutionalised 'forum' for informal bargaining between the US government and business corporations and was 'the pragmatic means by which Roosevelt pursued a conservative, yet effective, reigning in of big business power'. See W Murphey, 'Theodore Roosevelt and the Bureau of Corporation: Executive-Corporate Cooperation and the Advancement of the Regulatory State' (2013) 14 *Am Nineteen Century Hist* 73.

46 cf Hansmann, Kraakman and Squire (n 33) 1398.

Minority share transactions have been loosely regulated especially in the EU whose merger control rules imported corporate law norms, conceptions, and formalities to single out controlling acquisitions from presumably harmless 'non-controlling' ones.[47] Thus, the staggering specialisation of corporate and competition laws on firms and markets, respectively, had its own unintended consequences as the regulation of minority shareholding came to 'fall between the cracks'.

15.4 THE COMMON OWNERSHIP (HYPO)THESIS: CORPORATE SENSIBILITY OR ANTITRUST OVERKILL?

Nowadays, concern over potentially anticompetitive minority shareholding has taken novel forms. The buzzword is 'common ownership'[48] or 'horizontal shareholding'.[49] The dramatic growth of large institutional investors[50] and the indirect concentration of (partial) ownership of publicly listed firms it brought with it, not only signalled the promise of improved corporate governance[51] but also created a major 'challenge to market competition'[52] or indeed the 'greatest anticompetitive threat of our times'.[53] More fundamentally, however, common institutional shareholding has both deep and mixed implications for corporate as well as for competition laws.[54] Arguably, parallel horizontal shareholdings by

47 Tzanaki (n 1).

48 J Azar, M Schmalz and I Tecu, 'Anticompetitive Effects of Common Ownership' (2018) 73 J Fin 1513; OECD, 'Common Ownership by Institutional Investors and Its Impact on Competition' (2017) DAF/COMP(2017)10.

49 E Elhauge, 'Horizontal Shareholding' (2016) 129 Harv L Rev 1267; F Scott Morton and H Hovenkamp, 'Horizontal Shareholding and Antitrust Policy' (2018) 127(7) Yale LJ 2026. Note also the different emphasis by economists (on the market structure and competitive impact of common ownership) vis-à-vis lawyers (on the definition of the antitrust problem and the framing of its implications in terms of the (horizontal) nature of the competitive relationship).

50 L Bebchuk and S Hirst, 'The Specter of the Giant Three' (2019) 99 BU L Rev 721.

51 OECD, *The Role of Institutional Investors in Promoting Good Corporate Governance* (OECD Publishing 2011); E Rock, 'The Logic and (Uncertain) Significance of Institutional Shareholder Activism' (1991) 79 Geo LJ 445.

52 E Posner, F Scott Morton and G Weyl, 'A Monopoly Donald Trump Can Pop' *The New York Times* (New York, 7 December 2016) ('the real challenge to competitive markets today does not come from mergers […]. The great, but mostly unknown, antitrust story of our time is the astonishing rise of the institutional investor – a large [financial intermediary] company […] that buys stock in substantial quantities for the benefit of clients and customers – and the challenge that it poses to market competition.').

53 E Elhauge, 'How Horizontal Shareholding Harms Our Economy – And Why Antitrust Law Can Fix It' (2020) 10 Harv Bus L Rev 207, 285.

54 In the sense of the above noted (n 9) disconnect between the private welfare of common shareholders and social welfare. Interestingly, the disconnect may simultaneously be evidenced within the context of both corporate law and competition law for different reasons. Specifically, common shareholders' interests and actions may be found in opposition to the fiduciary principle in corporate law (to the extent they are in opposition to the interests of the firm as a whole and any non-diversified group of shareholders) but also be the source of consumer and competitive harm (to the extent they induce suboptimal outcomes in product markets that would not have existed in the absence of common ownership).

institutional investors may be perceived as the 'new trusts': a modern version of horizontal shareholder structures interconnecting competing firms.[55] The interest and curiosity in increasing common ownership by institutional investors arouse not only due to its *a priori* ambiguous welfare effects[56] but also even more because it challenges the fundamentals of antitrust (and organisational) conventional wisdom.

Traditionally, *minority cross-shareholdings* have been a natural object of competition law concern and attention considering the direct *competitive overlaps* between firms operating in a (horizontal or vertical) competitive relationship.[57] Now, a new 'economic blockbuster'[58] has become the epicentre of ground-breaking competition law and economics scholarship: the same group of large, concentrated, and diversified financial intermediaries partially own and control significant parallel shareholdings in the major competing firms within a given industry across the economy. On the one hand, the stakes held by each institutional investor in individual firms are small in absolute terms, thus considered 'non-controlling' on a stand-alone basis from a governance perspective, and often 'passive' given the indexation and portfolio diversification investment strategies employed by institutional investors from a finance perspective. However, empirical and theoretical economic research reveals that they may (and do) nonetheless affect competition outcomes in product markets.[59] Modern finance theory and the evolution of capital markets have transformed the investment landscape towards increasing diversification and institutional investment, with indirect (and unintended) consequences for corporate ownership,

[55] Elhauge (n 53) 269, 271 (noting that 'the reason that the Sherman Act was called an antitrust law was that it aimed to prohibit trusts that in fact were horizontal shareholders' but also that in contrast to 'pre-Sherman Act trusts' that were per se illegal as they involved 'horizontal agreements with no plausible procompetitive justification', horizontal shareholdings by institutional investors should be scrutinised under a rule of reason standard as they 'provide investment capital and diversification benefits').

[56] That is both anti- and pro-competitive effects. See Á López and X Vives, 'Overlapping Ownership, R&D Spillovers, and Antitrust Policy' (2019) 127 J Pol Econ 2394; J Azar and X Vives, 'General Equilibrium Oligopoly and Ownership Structure' (2021) 89 *Econometrica* 999; M Backus, C Conlon and M Sinkinson, 'The Common Ownership Hypothesis: Theory and Evidence' (2019) Brookings Economic Studies Report https://www.brookings.edu/wp-content/uploads/2019/02/ES_20190205_Common-Ownership.pdf; O Shy and R Stenbacka, 'Common Ownership, Institutional Investors, and Welfare' (2020) 29 J Econ & Manage Strat 706; O Shy and R Stenbacka, 'An OLG Model of Common Ownership: Effects on Consumption and Investments' (2019) 62 J Macroecon 103155; A Gibbon and J Schain, 'Rising Markups, Common Ownership, and Technological Capacities' (2022) Int J Ind Organ https://doi.org/10.1016/j.ijindorg.2022.102900.

[57] OECD, 'Antitrust Issues Involving Minority Shareholdings and Interlocking Directorates' (2009) DAF/COMP(2008)30.

[58] Elhauge (n 49) 1267.

[59] Azar, Schmalz and Tecu (n 48); J Azar, S Raina and M Schmalz, 'Ultimate Ownership and Bank Competition' (2016) Working Paper https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2710252; M Newham, J Seldeslachts and A Banal-Estanol, 'Common Ownership and Market Entry: Evidence from Pharmaceutical Industry' (2018) DIW Berlin Discussion Paper 1738.

governance, and industry structure.[60] The intriguing possibility raised by the 'common ownership hypothesis' is that the combination of institutional re-concentration of ownership and portfolio diversification has systemic corporate governance and market competition effects.[61] In the case of *minority common shareholdings*, the (partial) *shareholder overlaps* in the ownership structure of the major competitors in concentrated industries that are said to (indirectly) increase the 'effective' market concentration and also produce competition harm and possibly productive efficiencies.[62] In effect, the common (financial) owners of rival (industrial) firms may have the incentives and ability to affect the operation of firms and markets away from individual profit maximisation leading to increased prices and reduced industry output.[63]

The fundamental antitrust question is: is this 'new wine' that needs to be distilled and fit into 'old (legal) bottles' or would such a fit simply be unnatural – an 'antitrust overkill'? The myriad of new concerns and possibilities common ownership raises in a variety of legal and economic fields may easily let the debate go astray. Yet, the intimate relation between competition and corporate governance and finance lay at its heart, both in terms of theory and practice. What policy-makers decide on either side shall have profound implications on the way firms are organised and governed as well as on how financial and product markets operate.[64] Therefore, the

[60] Azar (n 2) 263; R Gilson and J Gordon, 'The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights' (2013) 113 Colum L Rev 863; B Braun, 'American Asset Manager Capitalism' 25–26 https://osf.io/preprints/socarxiv/v6gue/ ('the Great Re-Concentration and the growth of asset managers have transformed the U.S. into a concentrated-ownership liberal market economy with strong minority shareholders and a large amount of indexed, and thus patient, capital. [...] Two features, however, distinguish the new asset manager capitalism from the Gilded Age money trust [as well as from corporatist "Germany, Inc." prior to the 1990s]. First, unlike their robber baron predecessors, today's dominant owners are fully diversified. Second, asset managers are economically disinterested intermediaries – they lack skin in the corporate game. [...] their business model is to compete for capital and management fees from investors. [They] only own the legal title, not the economic interest in the corporations whose stock they hold. [...] asset manager capitalism is without historical precedent.').

[61] Azar (n 2); Backus, Conlon and Sinkinson, 'The Common Ownership Hypothesis' (n 56); J Coffee, 'The Future of Disclosure: ESG, Common Ownership, and Systematic Risk' (2020) ECGI Law Working Paper 541/2020.

[62] Azar and Vives (n 56).

[63] M Schmalz, 'Common-Ownership Concentration and Corporate Conduct' (2018) 10 Annu Rev Financ Econ 413; M Condon, 'Externalities and the Common Owner' (2020) 95 Wash L Rev 1.

[64] See for example the recent but opposing policy initiatives for EU merger control reform regarding minority shareholding (2014) vis-à-vis the Capital Markets Union initiative (2015) and the Revised Shareholder Rights Directive (2017). Arguably, more 'active' and 'empowered' common institutional owners may inadvertently exacerbate any competition concerns over minority shareholding that currently fall outside the EUMR to the extent it is deemed 'non-controlling'. Analogously, specialised regulators in the US move to opposing directions: despite the FTC Hearings on the competition implications of common ownership (2018), the SEC is proposing reforms to limit disclosure obligations for institutional investment managers regarding reporting of their equity holdings (2020).

aforementioned functional regulatory schism offers no excuse for overlooking the systemic consequences of the issue in point.[65]

15.5 SHAREHOLDING TYPES AND ANTITRUST: THE CONTROLLING, THE PASSIVE, AND THE INFLUENTIAL

Let us then take a step back and refocus the analysis in order to better appreciate where we stand. From a competition perspective, the interesting cases of minority shareholding have been those involving 'non-controlling' or 'passive' financial stakes acquired in rival firms, which may escape antitrust scrutiny.[66] Despite the gradual updating of antitrust rules to capture new forms of potentially anticompetitive practices, it remains a matter of debate whether their scope or interpretation extends to 'partial' ownership of a competitor[67] when participation in the share capital is limited to a *minority position* (nominal equity holding) and not accompanied by *majority voting* control (corporate legal control),[68] or any other form of *active influence* (by means of governance actions or activist intent) over the commercial activity of the competing company.[69] Complex theoretical and factual issues at the intersection of competition and corporate laws naturally arise in the analysis of those cases. Changes in the ownership structure (shareholder base) of firms may impact corporate governance (managerial and firm behaviour) which in turn affects competition (market concentration and industry performance).

Usually, control is seen as a key determinant of an antitrust theory harm and also part of the mechanism that translates (partial) common ownership into suboptimal

[65] As the popular parable goes: 'In the land of the blind, the one-eyed man is king' (Desiderius Erasmus is credited with first coining the phrase and coding it in his Adagia (1500)). Let us then proceed on the issue of common ownership cautiously with the limited knowledge we possess at hand, rather than hide behind the limited capacity and mandate of specialised regulators to look at a fragmented view of the problem and thus miss the 'big picture'.

[66] The first term is usually employed in the EU context to suggest the absence of 'legal control' that is used as a jurisdictional criterion under EU merger rules; the latter term is most common in US law & economics literature suggesting that the shareholding is 'silent' (non-voting) or a 'purely financial interest' (without any corresponding 'control rights'), thus not directly affecting the partially acquired rival's behaviour. See D O'Brien and S Salop, 'Competitive Effects of Partial Ownership: Financial Interest and Corporate Control' (2000) 67 Antitrust LJ 559. This terminology also fits the open-ended 'economic effects' jurisdictional test and 'passive investment' exception under US merger control rules. See n 19 and 26 and surrounding text.

[67] Ultimately, both 'cross-ownership' and 'common ownership' are distinct forms (direct vs indirect) of partial ownership of firms competing in the same relevant market. See Tzanaki (n 5).

[68] That is holding 'less than 50% of voting rights attached to the equity of the target firm'. See Annex I 'Economic Literature on Non-Controlling Minority Shareholdings ("Structural links")' to Commission Staff Working Document, 'Towards More Effective EU Merger Control' SWD(2013) 239 final, para 19.

[69] Tzanaki (n 1). In other words, the competition law concept of control ('inter-firm') analytically relies on corporate law conceptions of control ('intra-firm'). For a theoretical voting model that formally links the two, see J Azar, 'Portfolio Diversification, Market Power, and the Theory of the Firm' (2016) Working Paper http://papers.ssrn.com/abstract=2811221.

corporate and market outcomes.[70] Yet, 'control' is a complex and multifaceted concept, and 'partial' control arising from minority shareholding is not clear or well established in legal or economic theory.[71] Indeed, it is often a form of 'factual' control situation that may heavily depend on the surrounding context and specifics of the particular case.[72] At this point, it becomes both interesting and instructive that minority shareholding alludes to the 'many faces' of ownership[73] and 'shades' of control, with each combination leading to different kinds and degrees of competition effects. The variety in effect contrasts sharply with our limited word stock that is often misleading or inaccurate given the overlapping use of common terms such as (ownership or) control for different purposes and bodies of law. In order to dissolve some of the unnecessary confusion and elucidate the competitive harm potential of distinct shareholding types, I elaborate on the different layers of control attending a given minority position. Accordingly, minority shareholding can be classified as follows:

i) *controlling* or *non-controlling* – from the perspective of (EU) competition law – depending on whether the acquirer is able to exercise formal (legal) control over the target or not;[74]
ii) *solely* or *jointly (partially) controlling* – from the perspective of (EU) competition law – depending on whether there is a single dominant shareholder with clear (*de jure*) sole control over the target or control is (*de facto*) shared among many individual minority shareholders, in *ex ante* unascertainable ways (e.g. if joint control exists on the basis of 'changing coalitions' and no 'stable' majority can be established even in the presence of equal equity positions and identical rights among the shareholders[75]);

[70] For instance, theories of harm on 'unilateral' anticompetitive effects rely on formally modelling 'control weights' corresponding to 'financial interests' arising out of the acquired shareholding. See O'Brien and Salop (n 66); Azar, Schmalz and Tecu (n 48); Backus, Conlon and Sinkinson (n 1).

[71] D O'Brien and K Waehrer, 'The Competitive Effects of Common Ownership: We Know Less than We Think' (2017) 81 *Antitrust LJ* 729, 766–767; Tzanaki (n 5) 8 ('common ownership is not associated to either formal legal control or even clear economic control of the firm on a stand-alone basis but rather with situations of indirect, *de facto*, collective control in firm governance and product markets due to the interaction and cumulative effect of small parallel holdings in competitors by diversified investors').

[72] Tzanaki (n 1) 177, 184, 189, 222, 233, 242-243.

[73] Tzanaki (n 5) 3. The double separation of 'ownership from ownership' and of 'ownership from control' have split property entitlements in the firm between 'ultimate' and 'beneficial' owners, or between 'legal' and 'economic' owners.

[74] See n 19 above and surrounding text.

[75] Such minority shareholdings, albeit cumulatively as a group may lead to a situation of *factual* joint control (*de facto* voting bloc power), fall outside the scope of the EUMR as it defines 'joint control' on a *legal* basis (majority control by 'stable coalitions' that is *ex ante* verifiable and creates a 'permanent' change in control) and given a 'strong commonality of interests' (that goes beyond any 'symmetric' financial interests and control rights attached to the equity holdings). Tzanaki (n 15) 84. See also O'Brien and Salop (n 66) 570; M Corradi, 'Bridging the Gap in the Shifting Sands of Non-Controlling Financial Holdings?' (2016) 39 W Comp 239, 248–249.

iii) *active* or *passive* – from the perspective of corporate law – depending on the acquirer's ability to exercise some active (economic) influence over the target or not, usually given its shareholder rights or corporate governance actions;[76]

iv) *totally* or *partially controlling*[77] *(actively influential)*[78] – from the perspective of competition economics and corporate governance – depending on whether there is a dominant shareholder with clear total (legal) control, due to either a majority or a minority equity holding, or a formally non-controlling minority shareholder with some (economic) influence over the target, due to a *de facto* 'blocking minority' (veto power) or some other situation of 'informal influence' arising out of statutory corporate law or contractual rights (e.g. voting rights, information rights, disproportionate board representation, board observer seats);[79] and

v) *actively or passively (strategically)*[80] *influential* – from the perspective of competition economics and corporate governance – depending on whether an 'active' shareholding directly affects the behaviour of the acquired firm given the acquirer's ability to exercise active influence over the target, by operating within its corporate governance, or a formally 'non-controlling' or 'passive' shareholding affects the acquirer's own incentives to compete due to the strategic interaction between rival firms in oligopoly even if the competitors are linked by purely financial interests without any apparent influence or control in the target's governance.[81]

The above exposition reveals that the legal and economic views of the different shareholding types are not fully overlapping. That is, some shareholdings that are: a) only 'partially' or not standalone controlling or b) completely 'non-controlling' and 'passive' as a matter of competition or corporate law, and possibly outside the reach of antitrust or merger laws, may still turn out to be 'competitively influential'

[76] See n 24 and 26 above and surrounding text.

[77] This distinction (total vs partial control) largely corresponds to the one first suggested by O'Brien and Salop (n 66) 577–584 in their seminal analysis of 'partial ownership' (who also propose several analytical sub-categories of 'partial control') and the quantification of its competitive implications in terms of degree of potential harm.

[78] As noted above, some countries (Germany, UK) use such a broader jurisdictional criterion (competitively significant or material influence) based on corporate law rules and an analysis of the actual governance dynamics (eg shareholding position equivalent to that of a blockholder of above 25%) to determine the scope of their merger control regime. See n 24 and 26 above.

[79] See relatedly Commission, 'Staff Working Document accompanying the White Paper, "Towards More Effective EU Merger Control"' SWD (2014) 221 final, paras 90–93.

[80] In my doctoral dissertation I propose the term 'influential' in the economic sense to signify 'intermediate' cases of minority shareholding that may give rise to positive or negative 'strategic influence' and thus affect the competition dynamics, although formally 'non-controlling' in the legal sense. See Tzanaki (n 15). Unlike actively influential shareholding, strategically influential minority shareholdings are not systematically captured by existing competition and merger control rules. See Tzanaki (n 1), section II.B.

[81] Tzanaki (n 1) 232.

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as a matter of industrial organisational theory. The economics perspective also vividly illustrates that there is a continuum of effects on competition due to the multiple shades of control and non-control that accompany minority shareholdings. Effectively, this economics-informed analysis adds another shareholding type in the traditional legal dichotomy – controlling, *influential*, passive – that may be of competition concern. That said, this continuity in effects does not necessarily suggest that there is a linear progression in terms of the magnitude of potential harm: occasionally a totally controlling shareholding (active sole control) may be quantitatively more detrimental to competition than a full merger,[82] or similarly, partially controlling or mutually influential shareholdings (*de facto* joint control) may be equally harmful to a full merger.[83]

A visual representation of the taxonomy of shareholding types based on their control qualities from the three distinct analytical perspectives employed above is shown in the following table. The cells highlighted in grey illustrate the potentially problematic (competitively influential) minority shareholdings that may escape competition scrutiny in certain jurisdictions such as the EU or others that follow its example and the underlying reasons that trigger this situation, i.e. legal gaps due to formalistic definitions of shareholdings in competition or corporate law. In light of the above, it is also important to realise that both active and passive minority shareholdings may give rise to 'competitive influence', which may flow from either governance influence or strategic influence, respectively.[84] The table thus visually reflects how precisely and what specific types of minority shareholding came to 'fall between the cracks'.

Taxonomy of shareholding types			
Competition law	Non-controlling	*Actively influential*	Controlling
Corporate law	Passive	*De facto controlling*	Active
Competition economics	*Strategically influential (pure financial interest)*	*Partially controlling (jointly controlling)*	Totally controlling (solely controlling)

Seen from the broader economic point of view, competitively 'influential' minority shareholding may be further subcategorised, considering the time horizon, intensity of economic control, and degree or reciprocity of profit internalisation, as follows:

i) *statically* or *dynamically influential* – depending on whether the acquirer is able to exercise current influence over the target, and thus have an observable impact on competition (present effects) or possibly exercise future influence

[82] O'Brien and Salop (n 66) 578–579.
[83] Tzanaki (n 1) 224.
[84] *Ibid.* at 9, 72.

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(potential effects), in light of its theoretical shareholder rights that could put into use (e.g. voting or other special contractual rights such as rights of first refusal);[85]

ii) *proportionately* or *disproportionately influential* – depending on whether the acquirer's degree of internalisation of rival profits (the 'profit weight' as a function of financial interest and control[86]) is proportionate to its partial shareholding investment in that rival (the 'control weight' is equal to the nominal percentage of the equity position[87]) or disproportionate (the actual degree of control vis-à-vis the target's management discretion ('agency costs') is more or less than the nominal equity position);[88]

iii) *one-directionally or bi-directionally influential* – depending on whether only the acquirer is induced to internalise its partially acquired rival's profits, due to its financial interest linked to its shareholding investment, or also the target is induced to take into account the acquirer's shareholding,[89] due to the latter's corporate influence exercised in the target firm's governance,[90] or due

85 Tzanaki (n 15) 87, 96. This distinction focuses on the time horizon of the (present or future) manifestation of competition effects, rather than the time horizon of holding the minority investment stake (ie whether an equity holding is temporary or long-lasting). In fact, depending on the circumstances, a long-term shareholding may have both static and dynamic effects on competition, but possibly also only dynamic ones.

86 Backus, Conlon and Sinkinson (n 1) (suggesting that the common owners' 'profit weights' may be mathematically decomposed into two elements: 'overlapping ownership' and 'relative investor concentration').

87 O'Brien and Salop (n 66) 583 (discussing the 'proportional control' scenario flowing from 'partial ownership').

88 For instance, the theoretical 'proportional control' assumption regarding 'voting' shareholding may not be justified and could be revised accordingly in the specific case. See D O'Brien and S Salop, 'The Competitive Effects of Passive Minority Equity Interests: Reply' (2001) 69 Antitrust LJ 611, 622–625 (suggesting applying a 'discount rate' in estimating the competitive effects of shareholding and calculating the MHHI when the acquirer has no ability to exercise control over the target management in practice, thus no influence over the use and distribution of the target's profits); Azar (n 2) 286–293 (analysing common ownership with managerial entrenchment ('agency costs') within a context of oligopoly theory with (and without) shareholder voting, in which case the theoretical anticompetitive incentives of common owners towards monopoly (under a proportional control assumption) are attenuated).

89 M Hunold and F Schlütter, 'Vertical Financial Interest and Corporate Influence' (2019) DICE Discussion Paper 309, Düsseldorf University Press. Importantly, it is noted that also a unilateral shareholding *may* be able to produce reciprocal influence, ie 'bi-directional internalisation' for the acquirer and the target in case the partial shareholding is accompanied both by cash flow (profit) and control rights. Partial control over the target, even if 'unilateral', matters in estimating both the acquirer's own internalisation function but also that of the partially acquired rival as it affects the incentives of both. That is, the acquirer's 'control rights in one direction' (corporate influence) are said to potentially have the same effect *as if* the target had 'profit rights in the other direction' (financial interest), which is functionally equivalent to a 'reciprocal' shareholding (pure financial interest) by the acquirer and the target in each other.

90 The corporate influence exercised by means of the acquirer's minority shareholding in the target need not be positive ('incentive' to internalise acquirer's profits) but may also be negative ('constraint' on the target's competitive choices or actions). Partial control or influence over the target may lead to a

to target's own parallel shareholding and financial interest in the acquirer.[91] Importantly, a 'bi-directionally influential' minority shareholding (mutual internalisation) need not be harmful to competition (softening of competition or collusion) due to the internalisation of competitive externalities but may also be welfare enhancing (pro-competitive or efficiency creating) due to internalisation of productive or innovation spillovers.[92]

15.6 COMMON SHAREHOLDING IN ANTITRUST AND CORPORATE GOVERNANCE: FROM COMPETITION EFFECTS TO PROPERTY RIGHTS

It follows from the above analysis that minority shareholding that is considered 'non-controlling' or 'passive' in the legal sense may well be *de facto* competitively 'influential' in the economic sense given its present or potential impact on the corporate control and competition dynamics. Further, from a corporate perspective, so long as the shareholding is 'voting' stock it is not really a passive one but rather *dynamically* influential in that the power of the vote may always be exercised later in the future,[93] or in fact, the implicit threat stemming from its mere existence may produce *current* results and change equilibrium outcomes given its deterrent disciplining effect.[94] In addition, so long as stock is voting and 'freely

situation of 'mutual internalisation' or to a 'competitive disadvantage' imposed on the target (and an 'artificial advantage' secured by the acquirer). See M Hunold and K Stahl, 'Passive Vertical Integration and Strategic Delegation' (2016) 47 Rand J Econ 891; I Lianos and others, 'Financialisation of the Food Value Chain, Common Ownership and Competition Law' (2019) 16 ECJ 149; Tzanaki (n 15).

91 A 'bi-directionally influential' minority shareholding may thus also arise because of purely financial interests among competitors that are parallel and induce an alignment of interests of rival firms and their managers to their shareholders' interests under a unilateral theory of harm. This situation may emerge only due to a 'passive' form of economic control that implicitly relies on the assumption that shareholders are interested in the internalisation of competitive externalities of the rival firms' conduct and managers are interested in the maximisation of shareholder profits. See Tzanaki (n 1) (elaborating on plausible passive influence mechanisms); R Inderst and S Thomas, 'Common Ownership and Mergers between Portfolio Companies' (2019) 42 W Comp 551 (outlining the unilateral theory of harm based on common ownership); J Azar and A Tzanaki, 'Common Ownership and Merger Control Enforcement' in Ioannis Kokkoris and Claudia Lemus (eds), *Research Handbook on the Law and Economics of Competition Enforcement* (Edward Elgar Publishing, 2022) (similarly).

92 López and Vives (n 56); Azar and Vives (n 56).

93 Although potentially in combination with other voting shareholders in order to reach the requisite majority under corporate law (majority voting bloc), if not possible by means of the *de jure* or *de facto* vote share corresponding to any individual minority shareholding. The *possibility* of a majority voting position or coalition is critical to make the shareholders' threat to vote against management 'credible'. See A Shleifer and R Vishny, 'A Survey of Corporate Governance' (1997) 52 J Fin 737, 764–765. Thus, while (a group of) concentrated shareholder(s) may be relied upon to solve the 'free rider problem' among shareholders in corporate governance and as a result, the vertical agency problem; if the coalition is solid albeit changing, they may potentially create a horizontal agency problem between the shareholders who are in control versus others.

94 In equilibrium the vote need not be exercised to impact outcomes and behaviour. Its potential use may discipline management and change behaviour as long as the threat of its use is 'credible' and the

tradable' (either as a package of share plus vote or simply the vote), there is no real 'separation of ownership and control'[95] in the sense that corporate control is *contestable*.[96] Management is disciplined by both the stock market and the market for corporate control, while shareholders remain 'residual claimants'[97] with the power to hold/exercise and buy/sell their votes. The latter bear both the residual risk and the corresponding residual rights to control of the corporate property (due to their equity share in the corporation's profits). Thus, the 'atom of property',[98] albeit diffused among many shareholders and partially split between principals-passive owners and agents-actual managers in large public corporations,[99] is remarkably solid: out of all corporate constituents, only shareholders as a class generally bear the marginal gains and losses of corporate actions or omissions and thus have the right incentives at the margin to check and redirect management towards improved

possession of voting rights is 'known' (conditions easily met since voting rights typically attend shareholding by statute, unless otherwise provided, and majority voting control is possible absent a dominant blockholder) in order to be anticipated, internalised and be able to *ex ante* deter undesirable behaviour. For the realistic nature of such potential, see Coffee (n 61) discussing two fundamental changes occurring in US securities markets: '(1) institutionalization (with the result that institutional investors now dominate both trading and stock ownership); (2) extraordinary ownership concentration (with the consequence that the three largest U.S. institutional investors now hold 20% and vote 25% of the shares in S&P 500 companies)'.

95 G Stigler and C Friedland, 'The Literature of Economics: The Case of Berle and Means' (1983) 26 JLE 237, 248 ('The majority of the voting stock is the ultimate control over a corporation even if that stock is diffused among many owners. The stock may be acquired by a small group by stock purchases if the shares become an attractive speculation, so in an ultimate sense ownership and control cannot be separated. […] In the absence of a struggle for control, one cannot know whether a given management or set of stockholders controls the selection of the board, or indeed whether they are a single coalition. We suggest a test of *de facto* control').

96 Given the threat of takeover against inefficient firm managers, ultimate control remains with shareholders even in large corporations. See n 30 above, especially Manne (1981) regarding the dynamics of the market for corporate control and the significance of the free transferability of votes; K Kastiel and Y Nili, 'Competing for Votes' (2020) 10 Harv Bus L Rev 287 (suggesting that the free 'float' of votes, the distribution of control/ voting power among shareholders and the fluctuation in voting patterns matter for the intensity of competition for votes [the 'liquidity' of this voting market] to reach majority control).

97 From a financial point of view, all common stock shareholders of large corporations – regardless of the distribution of power within a given corporation – are considered 'residual risk bearers' that 'contract for the rights to the net cash flows' and thus have a residual claim in the firm's profits. See E Fama and M Jensen, 'Agency Problems and Residual Claims' (1983) 26 JLE 327, 428. From a corporate law perspective, however, one also needs to consider any relevant statutes and bylaws to see whether there are multiple classes of equity and whether some of them may not be qualified as having a residual claim.

98 L Ryan, 'Shareholders and the Atom of Property: Fission or Fusion?' (2000) 39(1) Bus & Soc 49 ('if the atom did split, it may now be fused' given the recent re-concentration of corporate ownership and control, in light of the growth and governance role of institutional investors).

99 Although shareholders are 'passive' property owners in the sense that they have delegated day-to-day management and operational decisions of the corporation to 'specialised agents', they retain (latent) 'ultimate control' as principals and can shift the strategic direction of the organisation by possessing the residual control rights (voting) or by operation of the market for corporate control (takeover). This specialisation of functions, including the shareholder-investor 'passivity', is an inherent feature of the

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corporate performance by the (actual) use or (deterrent effect of) possession of voting rights.[100] Consequently, shareholders' private profit motive remains the (valid) driver for financial investment in corporations and management discipline as well as for more efficient use of an industrial property. Private property, free markets, and competition reassuringly remain the 'holy triad' upon which modern corporate and industrial organisation solidly relies.[101]

The above analysis also makes clear that investor 'passivity' does not necessarily translate into permanent corporate 'silence' or would justify an *a priori* antitrust immunity.[102] If the minority shareholding is accompanied by voting rights and the shares or votes can be exchanged, potential control persists. Yet it is difficult to tell *ex ante* if and how such shareholder power may be exercised.[103] Considering this *ex ante* uncertainty and the importance of the surrounding factual circumstances (shareholder control dynamics, market and legal constraints) to assess the competitive significance and effects of any minority shareholding, it is unlikely that a purely *ex ante* merger control regime will be effective in distinguishing and addressing potentially harmful cases of minority cross- or common shareholding. This is so even if such prophylactic regimes were not structural (corporate law model) or formalistic (as in EU merger control) but effects-based (as in US merger control).

modern corporate form and does not upset *per se* the allocation of property *rights* in the firm. Thus, although shareholders may occasionally *de facto* lose (part of) their corporate power vis-à-vis management, they always hold the *legal* right to control (as a group). See J Coates, 'The Future of Corporate Governance Part I: The Problem of Twelve' (2018) Harvard Public Law Working Paper No 19-07. Managerial entrenchment and fiduciary duties towards shareholders-principals are factual matters. See M Isaksson and S Çelik, 'Who Cares? Corporate Governance in Today's Equity Markets' (2013) 8 OECD Corporate Governance Working Papers No 8 50 (discussing the fiduciary duty of institutional investors to their ultimate beneficiaries, whose interpretation they suggest is an 'empirical matter').

[100] Easterbrook and Fischel (n 30) 403–406 ('shareholders are the residual claimants to the firm's income. […] The right to vote [that is, the right to exercise discretion] follows the residual claim.').

[101] A Alchian, 'Corporate Management and Property Rights' in Henry G Manne (ed), *Economic Policy and the Regulation of Corporate Securities* (American Enterprise Institute 1969) 339, 342, 350.

[102] O'Brien and Salop (n 88) 625 (suggesting that even a conservative economic 'analysis would not justify an exemption from Section 7 or a dramatic increase in antitrust permissiveness towards passive minority financial interests'); Elhauge (n 49) 1305–1312 (cogently explaining that even institutional investors with passive financial investment strategies do not usually qualify for either the substantive [liability] or the filing [notification] passive investment exemption under US merger control given that: i) 'antitrust passivity' requires lack of any (even legitimate) influence (voice, voting) by large institutional investors as 'active owners' that may affect corporate management and, in any event, is negated in case of actual anticompetitive effects, and ii) the filing exemption narrowly applies to investors with 'no intention to participate in or influence management' who acquire less than 10% of the target's voting securities (15% for the special case of institutional investors); while US antitrust authorities consider 'merely voting' as not *a priori* inconsistent with 'passive investment intent', it is suggested that in light of the latest common ownership scholarship, this interpretation of the statute is 'unwisely overbroad because horizontal investors who individually have less than 10–15% of corporate stock can nonetheless significantly alter the competitive incentives of corporate management by simply voting their shares, especially because collectively their share of corporate stock may be far higher than 10–15%').

[103] That is, when and how a *dynamically* influential shareholding may turn into a *statically* influential one.

Nonetheless, the US merger regime has a resolutely sound economic structure: its open-ended scope for liability (no safe harbour for any actual 'lessening of competition') combined with its 'passive investment' exemption from filing a notification provide both flexibility and reduced regulatory burden yet leave the door open for 'residual *ex post* enforcement' in case a 'passive' investor's initial intent changes later and becomes 'active'. Furthermore, the 'solely for investment' exemption explicitly does not apply in case of cross-shareholding (the acquirer is a competitor) or interlocking directorates (a controlling shareholder, director, officer, or employee simultaneously serves as an officer or director of the issuer), and more generally if the holder of voting securities (1) nominates a board candidate or is represented in the corporate board; (2) submits a shareholder proposal for approval; or (3) solicits proxies.[104] Therefore, US merger law is fit to capture a range of potentially problematic minority acquisitions by applying: i) an *ex ante* licensing regime (transaction filing and regulatory approval) when the potential of harm is most likely to materialise (active financial investments) and foreseeable (present corporate influence) and ii) an *ex post* safety valve (potential future liability and enforcement) when passive intent is negated by the acquirer's subsequent corporate governance actions (*ex post* opportunism) or actual competition harm is evidenced (passive financial investments, individually or collectively). Seen in this light, 'passive' minority shareholding merely indicates cases where a full fact-specific antitrust analysis is required. If needed, such analysis will become relevant after the actual acquisition.

While *investor passivity* and the *vertical agency problem* are an inherent part of the modern corporation model and no obstacle to antitrust enforcement, the real challenge for both corporate and antitrust law is *investor diversification*. Common shareholding that is not only 'passive' but also 'diversified' changes the analysis completely: it surely can be 'influential' in the antitrust sense (in terms of its competition impact) but in counterintuitive ways (in terms of its mechanics). The 'separation of ownership from ownership'[105] and the ensuing *horizontal agency problem* (potential conflicts between diversified versus undiversified shareholders) challenge long-standing foundations and analytical frames in corporate finance and governance (shareholder unanimity[106] or homogeneity as a class[107]) and competition

[104] Elhauge (n 49) 1311–1312 (discussing the statutory requirements and the related guidance by US antitrust agencies).

[105] See n 31 above.

[106] H DeAngelo, 'Competition and Unanimity' (1981) 71 Am Econ Rev 18; Azar (n 2) 272.

[107] On the 'Fisher Separation Theorem' which shows that under perfect competition all shareholders agree on a 'single firm objective' (own firm profit maximisation) that may hold 'despite the heterogeneity of shareholders' preferences' under certain conditions, and on the heterogeneity (and complexity) of institutional investors and the shareholdings in their portfolios, see A Romano, 'Horizontal Shareholding and Network Theory' (2021) 38 Yale J on Reg 363, 366 ('The problem with diffuse institutional ownership is not so much that it reduces the incentives of horizontal competitors to engage in aggressive competition, but that it results in institutional investors having a different objective function from that of other shareholders.'; and quoting 'Hansmann [who] argued that one of the advantages of

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law (control-based and entity-centric antitrust analysis[108]). The 'democratisation of investment'[109] brought about by the 'index investing revolution'[110] has triumphantly enabled access to low-cost, widely diversified portfolios via a single investment product for a wider part of the population. However, this paradigmatic shift towards passive portfolio investment strategies has transformed not only the investment landscape but also it has created far beyond ripple effects yet to be fully appreciated. For one, the resultant widely diversified ownership structures (shareholder overlaps in many competing firms across industries) may well make firm-specific or market structure irrelevant, signalling a fundamental change not from firm 'independence' to inter-firm 'control' (the focal point of traditional antitrust analysis), but from shareholder 'focus' to investor 'indifference' (the new corporate reality brought about by financial innovation).[111] Diversified investors are rationally interested in the aggregate return gained from their portfolio investments,[112] following a portfolio-wide investment and governance strategy,[113] and less so in the individual

investor-owned firms is that "investors generally share a single well-defined objective: to maximize the net present value of the firm's earnings per dollar invested.'"); E Rock and D Rubinfeld, 'Antitrust for Institutional Investors' (2017) NYU Law and Economics Research Paper 17-23 10–16 (noting that the common ownership thesis explicitly challenges 'the basic assumption in finance research that a firm's objective is to maximize its own value and that firm and investor optimization are separable' and also, it 'assumes implicitly that individual firms maximize the weighted average of the profits enjoyed by the shareholders of the firms, accounting for the shareholders' ownership of horizontal competitors.').

108 Under EU competition law, 'positive' control (actual) is key to determine whether firms form part of a 'single economic entity' (for purposes of vicariously attributing parental liability for subsidiary companies' antitrust violations under Article 101 TFEU) and 'negative' control (potential) is the criterion used to decide whether there is a 'merger or acquisition' (for purposes of assessing jurisdiction in case of a possible permanent change of control between previously independent companies, and increased market concentration, under the EUMR).

109 B Novick, 'How Index Funds Democratize Investing' *Wall Street Journal* (New York, 10 January 2017) A.11; J Duca, 'The Democratization of America's Capital Markets' (2001) Federal Reserve Bank of Dallas – Economic and Financial Review 10 (noting the 'dramatic' decline in transaction costs of mutual funds and ETFs, that induced rising household investing in 'a diversified stock portfolio by buying mutual fund shares rather than by directly buying stocks').

110 R Wigglesworth, 'Passive Attack: The Story of a Wall Street Revolution' (*Financial Times*, 20 December 2018). Critics had called 'the greatest invention in the history of finance', the 'index-tracking mutual fund' for mass investors, as 'un-American', 'devouring capitalism' and 'worse than Marxism' as it aimed at mimicking the market and achieving 'average returns' for investors.

111 See L Boller and F Scott Morton, 'Testing the Theory of Common Stock Ownership' (2019) NBER Working Paper 27515, 6 (distinguishing between 'common ownership' by diversified, overlapping shareholders and 'focused ownership' by undiversified shareholders that have more incentives to compete in product markets as they internalise only profits from their own firm); and n 35 above (where Hovenkamp and Rodrigues describe the model of the 'indifferent investor' propelled by modern finance advances). To be sure, common ownership induced by passive index investment can be an extreme example of financial diversification that exacerbates its effects such as the 'indifference' of diversified investors.

112 That is both diversified institutional investors and the part of retail or individual investors that are indirectly diversified through them.

113 Coffee (n 61) 2–5, 36 ('Not since Berle and Means announced the separation of ownership and control have shareholders as a group perceived themselves to possess the power to behave as "true owners." But, unlike the "true owners" of the 19th Century [the railroad, oil and bank barons], the

performance of portfolio companies[114] or spurring atomistic competition in product markets.[115] Common diversified shareholding takes the 'depersonalisation of ownership' of the public corporation[116] one step further: private property interests have become not only 'split' as in the age of managerial capitalism (specialisation of ownership and management functions) but also 'parallel' and 'concurrent' in the current capitalism era of professional portfolio managers and savings planners[117] (many small shareholders are partial 'co-owners' not only of a single but also several competing corporate enterprises at the same time). Corporate ownership is rendered both diffuse and collectivised at the same time: the concern now is not the 'objectification of the corporate enterprise'[118] (with business management separate and independent of its own shareholders – 'owners') but rather the 'institutionalisation'[119] of investment and savings (with institutional intermediaries separate and independent from any individual business corporation, and its undiversified shareholders). Consequently, the cherished image of a (homogeneous) shareholder as a corporate 'property owner' is shattered, and we may no longer speak of individual

focus of institutional investors as owners will logically shift to maximizing portfolio value, not the value of individual stocks. […] The era in which retail investors "owned" companies or moved the trading markets is long gone […] with high common ownership across a broad portfolio, it becomes rational and predictable that these institutional investors will make both investment and voting decisions on a portfolio-wide basis […]. This, in turn, permits the netting of gains and losses across the portfolio, and the implications of this transition are sweeping.').

114 Isaksson and Çelik (n 99) 38, 42 ('the fundamental economic rationale for providing shareholders with the means to monitor and engage' and '[a]ll of these rights are given to shareholders under the assumption that they, as residual claimants, have a unique incentive to care and inform themselves about the long-term success of the enterprise. It is assumed that there is a direct link between the performance of the corporation and the shareholder's income. […] this direct link is broken by an increasingly complex universe of intermediaries whose business is to manage other people's money. […] Has the fundamental incentive for active and informed ownership – on which so much of the corporate governance doctrine rests – simply disappeared for large or dominant groups of shareholders?'). It is also stressed that the different categories of shareholders, the 'lengthened and ever complex chain of intermediaries between savers and companies' and the great heterogeneity of institutional investors complicate general corporate governance policy, in particular given the possibility that 'regulatory initiatives to increase shareholder engagement may have unintended consequences'.

115 Azar (n 69) 17–20 (discussing the inapplicability of the Fischer separation theorem and the profit maximisation assumption of 'atomistic' firms if there is 'imperfect competition' in product markets and firms are not 'separately owned').

116 Berle and Means (n 28) 352 (quoting Walther Rathenau); Fisch (n 31) 886 (discussing the shareholder-centric model of corporate law on the basis of property rights theory and the implications given contemporary trends in institutional stock ownership).

117 R Clark, 'The Four Stages of Capitalism: Reflections on Investment Management Treatises' (1981) 94 Harv L Rev 561. The main figures and stage roles of investors along the evolutionary path of capitalism are said to be: (1) the entrepreneur, (2) the owner, (3) the capital supplier, and (4) the beneficiary.

118 Berle and Means (n 28) 352 (quoting Walther Rathenau); Fisch (n 31) 887.

119 D Langevoort, 'The SEC, Retail Investors, and the Institutionalization of the Securities Markets' (2009) 95 Va L Rev 1025, 1025–1026, 1081 (noting that the US securities regulator 'thinks of itself as the [retail] investors' advocate […] The last thirty years or so have brought a rapid shift toward institutionalization in the financial markets in the United States […] to repeat what now should be almost self-evident, the SEC is the retail investor's champion only in a bounded way.').

shareholders (even if passive investors) as 'residual risk bearers' identifiable with a distinct corporate organisation[120] as they may not fully bear any firm-specific risk or be concerned about targeted governance actions.[121]

The horizontal 'separation of capital from capital'[122] creates a 'double split' in the 'atom' of corporate property, both with regard to the unity and identity of its key *actors* (shareholders) and *components* (shares). On the one hand, institutionalisation has produced two sets of 'owners': 'ultimate' owners, who retain investment authority (but not necessarily voting control authority) and the associated risk for their investment choices, and 'beneficial' owners, who are only entitled to a future stream of profits from the invested funds (a claim that is more of a fixed contractual than residual nature).[123] It will depend on the circumstances to decide whether and who of any institutional or individual investors have in fact residual or beneficial ownership status. On the other hand, diversification introduces another form of 'decoupling'[124] financial interests (risk) from corporate control

[120] S Martin and F Partnoy, 'Encumbered Shares' (2005) 3 Ill L Rev 775, 778, 813 (speaking of 'financial innovation' and analogous derivates cases and their implications for the allocation of corporate voting [residual control] rights, 'it is far too simplistic to assume that shareholders uniformly hold the residual claims to a corporation's assets or cash flows.' […] 'assumptions central to the paradigmatic position on corporate voting [homogeneity of shareholder preferences, residual claimant position of shareholders] are no longer valid.').

[121] Diversification acts as *de facto* insurance against such 'unsystematic' risk. See Coffee (n 61) 10, 35 (noting the divergence of interests between diversified institutional and undiversified individual investors as regards risk, the first being more exposed and sensitive to 'systematic' risk, which cannot be diversified away, while the latter are more interested in 'unsystematic' or firm-specific risk); Fisch (n 31) 882.

[122] See n 34 above.

[123] It may be that institutional investors bear the investment authority and associated risk, in which case they are the ones, perhaps counterintuitively, to be considered 'ultimate owners'. If retail investors retain investment risk and authority, they may still delegate any voting authority with regard to their shares to fund management agents. Thus, the identity of investors who have 'ultimate' or 'beneficial' status will depend on the details of the particular investments involved. See Tzanaki (n 5) 3–5 (pointing out the differences between index funds and ETFs regarding this distinction); Ryan (n 98) 68–69 (distinguishing between 'defined benefit' and 'defined contribution' retirement plans and analysing their respective property rights implications as to who, between institutional and retail investors, retains 'ultimate' versus 'beneficial' ownership status); cf Braun (n 60) 18 (analysing the position of 'disinterested' shareholders that hold 'the legal title (shares and the attached voting rights) but not the economic interest' vis-à-vis the 'ultimate "asset owners" (retail or institutional investors)').

[124] WG Ringe, 'Hedge Funds and Risk-Decoupling – The Empty Voting Problem in the European Union' (2013) 36 *Seattle U L Rev* 1027, 1030 ('while a normal shareholder would always bear a certain economic risk that corresponds to the size of their stake in the company, hedge [and analogously index] funds, by contrast, try to disconnect the relationship between equity and risk'). Risk-decoupling may be: i) 'negative' – 'a shareholder with reduced risk exposure retains its voting power and its influence in the company, but it does not bear the risk of negative returns'; or ii) 'positive' – 'activist investors acquire an economic stake in a company without gaining voting power', in which case no disclosure is required during a takeover. Risk-decoupling may create distorted incentives for the exercise of voting rights assigned to shareholdings and also 'private benefits of control' for the risk-decoupled shareholder (conflicts of interest with other shareholders). In essence, 'a risk-decoupled shareholder creates new agency costs'. See *ibid*. at 1059, 1062.

(influence).[125] That is, diversification of investment may render (legal) ownership 'empty'[126] and (voting) control 'hidden':[127] the legal title is not congruent with economic interest and voting power need not follow the residual claim. As the economic link between cash flow and control rights is broken, economic and voting ownership is no longer proportionate to the nominal equity holding of a shareholder.[128] Thus, the nominal level of the shareholding does not automatically reflect the level of economic risk and governance power a 'shareholder' may have.

This 'double split of ownership' in equity shareholding – i.e. 'two faces of ownership' and the 'risk-bearing dilution' brought about by passive, diversified investment[129] – has important implications for corporate governance. First, it significantly complicates the analysis as to who and to what extent is a residual claimant and thus raises questions as to the actual allocation of property rights in firms (real versus nominal owners). Second, it may lead to *ex ante* unforeseeable or *de facto* 'morphable' control situations. Given the fragmentation of shareholding in large public corporations and in the absence of a large dominant block holder or special asymmetric governance structures, control is likely shared among several shareholders and not *ex ante* ascertainable or fixed.[130] Control is 'morphable' in that although no single shareholder has standalone control, some of them have the *de facto* ability to form control coalitions as a group.[131] Third, it raises the possibility that the

[125] Fisch (n 31) 882–883, 878 ('Diversification, however, decouples economic interest from ownership in the same way as complex financial products. […] the decoupling effected by intermediation offers the potential to alter corporate decision making. The extent to which this decoupling affects corporate operations depends on the extent to which intermediaries can exercise governance power. […] decoupling may create incentives for some market participants to exercise control rights in a manner that is inconsistent with the interests of other shareholders and the corporate enterprise and that, most problematically, these actions can be undertaken in secret.'); Ringe (n 124) 1066–1067 (noting that in case of 'risk-decoupling' by index funds as opposed to activist hedge funds, diversified institutional investors may come to 'hold the shares of two direct competitors' unintentionally or randomly whereas hedge funds' strategy is 'intentional').

[126] Tzanaki (n 5) 4–5 (referring to this phenomenon as 'nominal ownership', 'bare ownership', 'ownership by proxy', 'ownership via intermediation'); cf Ryan (n 98) 49, 68–69 (speaking of 'ownership representation').

[127] Or indeed, control becomes *de facto* 'morphable'. By reverse analogy to the terminology used by Hu and Black, who first analysed these 'decoupling' phenomena. See H Hu and B Black, 'The New Vote Buying: Empty Voting and Hidden (Morphable) Ownership' (2006) 79 South Calif Law Rev 811.

[128] *Ibid.* at 908 ('existing legal and economic theories of the public corporation presume a [proportional] link between voting rights and economic ownership that can no longer be relied on.'); Ringe (n 124) 1073 ('Economically, […] a risk-decoupled share is more akin to debt than equity, but legally speaking, a risk decoupler remains a shareholder [of an empty shell] and retains the voting right. […] If this risk is eliminated, the justification for the assignment of voting rights disappears. […] A risk-free shareholder cannot fulfill the function of the vote – to express the best possible decision for the strategic direction of the company [and thus promote firm value, directly, and societal value, indirectly]').

[129] Tzanaki (n 5) 3, 5.

[130] Tzanaki (n 1) 184, 222, 243.

[131] cf Hu and Black (n 127) 812.

individual self-interest may become 'destructive' both for the corporation and society as the pursuit of private profit and the exercise of voting rights may produce externalities on third parties (e.g. undiversified shareholders, other stakeholders, consumers) under certain circumstances.[132] Put differently, the concern is not only that individual investors may not be the 'real' owners and institutional investors are but also that no one is a truly responsible and concerned 'owner' in the traditional sense (sole proprietor).[133] With the (partial) separation between financial risk and control due to diversification, it is not that self-interest is extinguished but rather that the very diversified investors' self-interest is oriented towards the maximisation of their collective interests flowing from the pool of their portfolio invested firms' profits (portfolio value maximisation). In addition, there are actors (institutional investors and business managers) that could potentially implement such altered preferences – to the extent they come to benefit themselves from any strategic shift away from individual firm profit maximisation and atomistic market competition. Indirectly, this complex and opaque constellation of agency relationships and fragmentation of property rights may further raise concern as to the robustness of market forces (capital market, market for corporate control, product markets) to efficiently allocate financial or investment capital, to drive corporate management towards improved performance and to move economic resources to their most productive uses and users across society.

The implications for competition law are equally significant as diversification and common ownership by large institutional investors induce corporate shareholders to be both rationally 'apathetic' and 'indifferent'[134] – a mutation of the archetype.[135] At this point, it is worth revisiting the potential competitive effects of common shareholding in light of the above taxonomy on the various 'shades' of partial control related to partial ownership. Accordingly, common diversified shareholding, although individually a minority one with no standalone control, may be *dynamically* influential (potential effects on competition)[136] as it may affect both

[132] Of course, it is also possible that large, diversified investors' self-interest operates in 'beneficial' for society ways in that they may create positive externalities (innovation) or internalise negative ones (climate change). In fact, they have been called to act as 'stewards for the commons', see G Serafeim, 'Investors as Stewards of the Commons?' (2018) 30 *J App Corp Fin* 8. Importantly, however, the extent to which the self-interested activity of diversified investors produces net harm or benefit from a societal point of view always depends on whether this 'will benefit their portfolio on a net basis'. See Coffee (n 61). This is a factual matter.

[133] cf Coates (n 99) 2; Tzanaki (n 1) 217.

[134] Fully diversified investors become 'passive' (no control) and 'indifferent' (no ownership) given the devaluation or decoupling of the vote and the diluting of firm-specific risk that attends index funds and passive financial investment strategies, as noted above. This is not an aberration, but they should rationally be so, as per modern finance theory. Yet, in such novel universe, established notions and common language terms, such as (partial) ownership and control, start to lose meaning.

[135] See Hovenkamp (n 32) noting this evolutionary transformation in shareholder character.

[136] See n 85 above and surrounding text.

the commonly held firms' incentives to compete and their corporate governance.[137] Such common shareholding may further qualify as *disproportionately* influential (given the potential concentrated influence and financial interest of the common owners linked to the shareholding)[138] and also as *bi-directionally* influential (due to the potential mutual influence such shareholding may induce among the commonly held rival firms).[139] Thus, depending on the circumstances, minority common shareholding that is considered passive and diversified may lead to situations of either 'hidden control' (shareholder concentration) or 'hidden reciprocity' (internalisation of externalities) in terms of effects despite its form (direction or symmetry of equity holding). Potential aggregation of individually small passive shareholdings and their parallelism in interest may give rise to cumulative *de facto* control and interactive, compound or network-like, competitive effects.[140]

The transformed quality of risk-diluted shareholding as closer to a debt holding in nature may add to such possibility. Interestingly, in this sense, 'negative' financial decoupling (disproportionate influence compared to the risk and size of a shareholding)[141] may indirectly lead to 'positive' linking of profits between competing firms (*de facto* profit correlation due to the rivals' competitive relationship and their common ownership links).[142] Mutual internalisation of rivals' profits may thus arise either due to common owners' asymmetric corporate influence or their (symmetric) parallel financial interests, given their *de facto* control in portfolio firms' governance and their aligned incentives to compete, or the induced financial dependence linked to their potential *de facto* position as largest shareholders and creditors of portfolio companies.[143] Besides, when 'exit' is excluded for index funds,[144]

[137] See n 74–81 and 84 above and surrounding text.

[138] See n 86–88 above and surrounding text.

[139] See n 89–92 above and surrounding text.

[140] Romano (n 107); L Enriques and A Romano, 'Institutional Investor Voting Behavior: A Network Theory Perspective' (2019) 1 Ill L Rev 223; Lianos and others (n 90).

[141] cf Ringe (n 124) 1073.

[142] R Reynolds and B Snapp, 'The Competitive Effects of Partial Equity Interests and Joint Ventures' (1986) 4 Intl J Industrial Org 141, 141–142. The profit internalisation may be reciprocal, but the mechanism and competitive effects are unilateral to begin with. See Azar and Tzanaki (n 91) 258–259; Tzanaki (n 1) section III.A and 235-236.

[143] Indeed, there is limited authority in EU case law suggesting that even a nonvoting, totally passive minority shareholding, originating from a loan, may lead to mutual internalisation of competitive externalities, with the same effect *as if* acquirer and target held cross-shareholdings in each other. See Cases IV/33.440 *Warner-Lambert/Gillette* and IV/33.486 *BIC/Gillette* [1993] OJ L 116/21. See also n 93 and 95 above and surrounding text, and Tzanaki (n 1).

[144] Unlike traditional index funds, ETFs may be freely traded (and may also be actively managed), which may impact and further complicate the competition analysis while tracking complex agency relationships and property rights allocations. See W Birdthistle, 'The Fortunes and Foibles of Exchange-Traded Funds: A Positive Market Response to the Problems of Mutual Funds' (2008) 33 *Del J Corp L* 69, 110 (suggesting that ETFs 'create a market – rather than a regulatory or litigated – solution to much of the mutual fund difficulties'; however, they have their own possible conflicts of interest, eg arising from stock lending plans).

the 'voice'[145] of diversified institutional investors is amplified, thus potentially having a greater weight in managerial and firm governance decisions and indirectly in competition outcomes in product markets.[146] Indeed, the voice of large 'long-term' institutional investors is actively encouraged by regulators and has become quasi-permanent (although *ad hoc* in its manifestation) and systemic (reaching their whole portfolio of invested companies).[147] It follows that there might be several ways through which passive diversified investors may be *competitively influential*, either at present or in the future, and not only in one direction but potentially bidirectionally.

15.7 IMPLICATIONS AND CONCLUSIONS

Coming full circle and looking back to press forward, history teaches us that it repeats itself. New forms of minority shareholding pop up as new ways of aggregating capital and savings and linking businesses are devised. Common shareholding by institutional investors brings to the fore the early unity and much-needed congruence between competition and corporate laws. The lesson for their continued interaction is for each discipline to assume a measure of modesty rather than 'going all the way' – alone – in solving the 'common ownership trilemma'.[148] 'New finance' with all the good that it brings for firms, markets, and people and the 'new trusts' with all their potential implications and distortions for the competition are one and the same problem: despite their modern functional split and specialisation, antitrust and corporate governance cannot bypass their deep interdependence both in terms of theoretical foundations and balanced regulatory solutions.

Yet, in this novel and unwieldy setting, a new role encounters antitrust: competition law enforcement may help rebalance and restore the initial allocation of property rights within firms (shareholders' residual claim) and thus indirectly protect undiversified shareholders, to the extent corporate law control mechanisms (fiduciary duties) are ineffectual. Antitrust could therefore be used to protect non-common shareholders who may be harmed – along with consumers – by suboptimal outcomes in the performance of individual corporate entities and industries.

[145] A Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* (Harvard UP 1970).

[146] E Elhauge, 'The Causal Mechanisms of Horizontal Shareholding' (2021) 82 Ohio St LJ 1, 66; I Appel, T Gormley and D Keim, 'Passive Investors, Not Passive Owners' (2016) 121 J Financ Econ 111, 133 (suggesting that passive institutional investors have an 'influential voice in decisions pertaining to firms' governance structures'); J Fisch, A Hamdani and S Solomon, 'The New Titans of Wall Street: A Theoretical Framework for Passive Investors' (2020) 168 U Pa L Rev 17, 37, 71.

[147] Fisch, Hamdani and Solomon (n 146) 27, 54; J Fichtner, E Heemskerk and J Garcia-Bernardo, 'Hidden Power of the Big Three? Passive Index Funds, Re-Concentration of Corporate Ownership, and New Financial Risk' (2017) 19 *Business and Politics* 298, 309, 321, 323; cf WG Ringe, 'Stewardship and Shareholder Engagement in Germany' (2021) 22 EBOR 87.

[148] Azar (n 2).

Developing an antitrust policy to tackle common ownership by large diversified institutional investors (*shareholder concentration and diversification*) and to supplement existing merger policy (*market concentration*) may unexpectedly return antitrust to its corporate law origins. Increasing diversification in financial investment and concentration and parallelism in corporate ownership calls antitrust to shift its operation from a pure conduct-oriented ('strategic model') to a structure-oriented approach: acting as a *de facto* early corporate law-like 'structural model' of checking the corporate structure and shareholder property rights exchange, internalising portfolio investment and governance externalities, and ensuring ongoing private versus public interest balancing.[149]

While antitrust is to retain its focus on economic effects, the source of potential competitive effects from minority shareholding and common ownership originates in changed corporate ownership structures well below any formal competition law threshold of 'control' (as in EU merger control). The foundations of competition and merger control when designing their scope and aims may be challenged, however, considering: i) the liberalisation of corporate law lifting intercorporate ownership and influence restrictions and ii) recent organisational and financial market developments undermining early corporate law assumptions (no separations of ownership or investment from control or consumption) that antitrust inherited. By turning its look inside corporate governance and shareholder structures, antitrust could provide an effective alternative tool to holistically capture problematic minority shareholdings that create both agency problems or conflicts of interest and market power concerns (just as early corporate law regulation of mergers and shareholding acquisitions did). Such a solution would not only rebalance disperse shareholders' private interests (property rights) inside the firm but in view of the historical split between corporate and competition law, it would also aim to safeguard and prioritise the public interest (consumer welfare). Against this backdrop, antitrust can simply not afford to not look closer at minority shareholding structures that 'came to fall between the cracks'. Essentially, and unlike the main antitrust rules that target behaviour (Sherman Act Sections 1 and 2; Articles 101 and 102 TFEU), merger control rules within modern competition law regimes have inherited and preserved to a certain extent corporate law's 'structural' regulatory approach. The question now is that merger control adjusts its jurisdictional ambit and tools below and beyond

[149] cf Hovenkamp cited in n 22 above and surrounding text, distinguishing the 'structural model' of early corporate law and the 'strategic model' adopted by antitrust law; cf also D Crane, 'The Dissociation of Incorporation and Regulation in the Progressive Era and the New Deal' in Naomi R Lamoreaux and William J Novak (eds), *Corporations and American Democracy* (Harvard UP 2017) 110 (noting that in the twentieth century the US federal government, having failed to introduce a federal chartering or licensing regime, 'found itself in the position of regulating *conduct* by "corporate persons" rather than creating, structuring and regulating *corporations themselves*'). Under the former model, antitrust would obtain a more discretionary character and a quasi-regulatory function.

obsolete legal thresholds and economic assumptions. The concentration of corporate ownership through novel shareholding structures and intermediaries may produce competitive influence, in significant although unfamiliar ways, which impels antitrust to be alert in shifting its attention and finetuning its enforcement tools. Curiously, as the new reality of the such evolved capitalist environment and organisational structure sets in, 'anti-trust' may be found anew to be well worth its name.[150]

At the same time, on a substantive level, common institutional shareholding calls antitrust to be not merely future proof but 'future perfect': new intriguing possibilities, both with regard to novel theories of harm and efficiencies, will have to be acknowledged and incorporated into competition law enforcement if it is to remain relevant. In light of its mixed effects, competition law should go past imposing hard limits or any *per se* prohibition against common ownership, even if a 'structural' approach is systematically employed to assess *ad hoc* their competitive significance and effects in the specific case. In such case, antitrust will have to enrich, refine, or complement its merger law-based measurement tools (HHI and MHHI), depending on the circumstances. In other words, the 'structural' approach will need to be combined with case-by-case analysis based on the specific factual context. In this connection and as illustrated above, it is important to realise that the combination of concentration and diversification related to common institutional ownership lends corporate property rights 'dual' or 'quantum' qualities: 1) minority shareholding may be both 'passive' and 'dynamically influential' at the same time, so long as there is some competitive relationship between the interlinked firms that may be undermined;[151] 2) diversified shareholders may be both 'owners' of the firm but 'empty' of any economic interest in its performance, challenging their residual claim status; 3) control may be 'hidden', concentrated and disproportionate in its actual *ex post* manifestations compared to its *ex ante* hypothetical properties considering the size and risk attached to a standalone shareholding; 4) in the presence of common ownership, the quantum 'atom' of corporate property may be composed of not only 'solid particles' (control rights) but also 'invisible waves' (parallel interests), the latter fundamentally changing the traditional identity of an equity share and a shareholder.[152] Yet, the existence and impact of these parameters are hard to pin down in the abstract; better observation and empirical evidence are needed and also bold theoretical leaps forward to fill gaps in our understanding of the emerging reality. While by no means easy, 'the only way out is through'.[153]

[150] See Elhauge cited in n 55 above and surrounding text.
[151] See Section 15.5 above.
[152] See Section 15.6 above.
[153] This is a sentiment common to laborers of all sorts, eloquently crystallised in Robert Frost's poem 'Servant to Servants'.

Generations of law and economic scholars will no doubt devote lifetimes to unravel the 'gordian knot' presented by common ownership. As Minority Report[154] reminds us one may not be able to predict the future from the past or credibly form a single-minded assessment of the likelihood of harm materialising or not. Still, it is possible to change the future once one is aware of its prospect. For the sake of a sustainable capitalist future and society, may both public officials and economic agents be mindful of the power they possess and use it with wise restraint and prudent foresight.

[154] A science fiction film (2002) directed by Steven Spielberg. By analogy to a pre-merger control regime, a futuristic, all-prescient government aims to completely prevent crime before it happens ('pre-crime' enforcement) by use of 'pre-cognition'. Yet, besides its theoretical perfection and immaculate prediction record, the system does present flaws and inaccuracies that were kept secret until exposed in a 'minority report': a dissenting prediction of the future that 'might' tell a different story and questions some of the predicted 'reality'. Tom Cruise, 'falsely' targeted as a future crime perpetrator, ultimately reveals the system's main flaw: 'people can change their future once they become aware of it'.

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