14

Common Ownership by Investment Management Corporations and EU Policies

Please, Play Puzzles and not Mikado!

Marco Corradi

14.1 INTRODUCTION

The recent literature on the anticompetitive effects of parallel holdings[1] can be seen as one of the many expressions of both a scientific and societal concern for the increasing economic influence acquired by big investment management corporations throughout the world.[2] The findings of the authors of the seminal papers in this area[3] – although highly contested –[4] may highlight the existence of a (present or potential) antitrust issue, which still needs to be understood in all its complexity.

If we widen our perspective from the mere price effects correlated to the presence of parallel holdings to a larger range of variables, we may soon understand that the parallel holdings antitrust issue is nested within a complex set of systems and subsystems, which cannot be ignored while studying the possible policy reactions to the antitrust issues arising from common ownership. For instance, the raise of common ownership has occurred during a period of increasing concentration in product markets[5] and of significant changes in corporate governance worldwide.[6] The latter also aimed at pursuing ESG objectives that were previously considered as mere externalities in corporate governance.[7]

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1 See (n 11).

2 Such concerns go well beyond investment funds' parallel holdings. See, for example, the increasing concerns for the development of urbanization and re-urbanization investments by big investment corporations in large cities. Isabelle Rey-Lefebvre, 'Les Fonds d'Investissementscomme BlackRock Commencent à s'Intéresser aux Immeubles d'Habitation du Grand Paris' *Le Monde* (Paris, 3 September 2021) www.lemonde.fr/societe/article/2021/09/03/les-fonds-etrangers-se-disputent-les-immeubles-d-habitation-du-grand-paris_6093193_3224.html.

3 See (n 11).

4 *Ibid*.

5 See Section 14.6.

6 In particular, the rise of stewardship codes. See J Hill, 'Good Activist/bad Activist: The Rise of International Stewardship Codes' (2017) 41 Seattle UL Rev 497; D Katelouzou and M Siems, 'The Global Diffusion of Stewardship Codes' in Katelouzou and D Puchniak (eds), *Global Shareholder Stewardship: Complexities, Challenges and Possibilities* (Cambridge University Press, forthcoming).

7 See Section 14.5.

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Even if common ownership was unequivocally proven to be correlated with price increases, a well-designed policy reaction would not necessarily need to target parallel holdings or parallel holdings alone. On one hand, dismantling parallel holdings may jeopardise the efficiencies of such an investment system as well as their role in promoting ESG objectives.[8] On the other hand, it would need to be proven that a shift in corporate ownership structure can effectively improve competition ceteris paribus (i.e. despite highly concentrated product markets and despite a rather unpromising promotion of stewardship).[9] On top of that, given the massive presence of the biggest investment corporations worldwide, dismantling of parallel holdings and the entry of new foreign investors may trigger a series of geopolitical consequences among the three main areas of economic influence in the world (i.e. the US, Europe, and China) whose long-term effects may be hard to predict.[10]

14.2 PARALLEL HOLDINGS: A NEW ANTITRUST FRONTIER ALSO FOR EUROPE?

The academic debate on the anticompetitive effects of common ownership[11] started as a pure US antitrust one.[12] Nevertheless, the growing weight of Indexed Funds' equity holdings in the ownership structure of US[13] and non-US corporations[14] seems to have a substantial impact on the overall structure and functioning

[8] See Section 14.6.
[9] See Section 14.6.
[10] See Section 14.7.
[11] Such new corporate ownership configuration is also known as 'parallel holdings', 'horizontal shareholding', or, more recently, it has also been depicted as 'permanent universal ownership' – to highlight the (at least apparent) long-term commitment of common owners. See J Fichtner and E Heemskerk, 'The New Permanent Universal Owners: Index Funds, (Im)Patient Capital, and the Claim of Long-Termism' (2018) https://ssrn.com/abstract=3321597.
[12] The industrial organization debate stemmed especially from a seminal paper by Azar, Schmalz and Tecu, now published as J Azar, M Schmalz, and I Tecu, 'Anticompetitive Effects of Common Ownership' (2018) 73 J Fin 1513. A paper that followed fuelled the debate: J Azar, S Raina and M Schmalz, 'Ultimate Ownership and Bank Competition' (2019) https://ssrn.com/abstract=2710252. Azar, Schmalz and their co-authors' research was employed as grounds for a wider legal and policy debate. See E Elhauge, 'Horizontal Shareholding' (2015) 129 Harv L Rev 1267; E Posner, F Scott Morgan, and G Weyl, 'A Proposal to Limit the Anticompetitive Power of Institutional Investors' (2016) 81 Antitrust LJ 69. A far more articulated debate followed the seminal works by the abovementioned authors. For an exhaustive review of the debate, see M Schmalz Chapter 12 in this book.
[13] A significant number of US corporations represented in the S&P 500 index, which were previously known for their dispersed ownership structure, now have the same common owners: investment funds, such as Black Rock, Vanguard, Fidelity, State Street hold substantial blocks of shares of such corporations. 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(2) Business and Politics 298, 299.
[14] N Rosati and others, *Common Shareholding in Europe* (Publications Office of the European Union 2020) https://publications.jrc.ec.europa.eu/repository/handle/JRC121476. On the situation in Germany, see J Seldeslachts, M Newham, and A Banal-Estanol, 'Changes in Common Ownership of German Companies' (2017) 7 DIW Economic Bulletin 303.

of the economic, financial, and industrial systems worldwide. Hence, such a debate appears to be inherently global in nature – not only from the point of view of pure financial economics or industrial organisation theory but also for its wider policy and socio-political implications. Recent papers have argued that common ownership may produce significant wealth transfers and therefore affect the welfare of shareholders and consumers alike.[15] It may also create a sort of monopsony on the labour markets, while pushing managers to pursue cost reduction strategies, which in turn often entail dismissals and/or salary cuts.[16] The other flip of the coin is that large investment corporations – apart from their renowned capability to contain investment management costs and to promote investment efficiency and investment democracy through indexing –[17] have also become increasingly able to advance effectively ESG objectives.[18] Hence, common ownership by institutional investors seems to interact with a very wide range of stakeholders – maybe society as a whole – which makes any potential issue surrounding parallel holdings a matter of complex balance of conflicting interests.

The importance of the welfare effects (and competitive harm) attributed to common ownership seems to contrast with the limited decisional power historically enjoyed by common owners in relation to the strategic choices of most of their target corporations.[19] In most cases, none of the common owners seems to be able to exercise any control right on their target corporations, at least not on a standalone and stable basis.[20] This is a classic situation where owners could, at least in principle, acquire a degree of influence on corporations through coalitions. But, even if that was to become the case, the outcome of coalitions is often hard to predict and their stability can be challenged also by very subtle changes in the equity holdings.[21] This sort of influence, or 'potential influence' without proper control, is notably a conundrum for antirust and especially for EU competition law.[22]

[15] O Shy and R Stenbacka, 'Common Ownership, Institutional Investors, and Welfare' (2020) 29 J Econ Manage Strat 706.

[16] Z Goshen and D Levit, 'Common Ownership and the Decline of the American Worker' (2021) European Corporate Governance Institute Law Working Paper No 584/2021 https://ssrn.com/abstract=3832069.

[17] See Section 14.3.

[18] See Section 14.6.

[19] In most cases, common owners are depicted as passive investors. G Strampelli, 'Are Passive Index Funds Active Owners: Corporate Governance Consequences of Passive Investing' (2018) 55 San Diego L Rev 803. Nonetheless, traditionally passive indexed funds have recently signaled their ESG engagement. See M Barzuza, Q Curtis, and D Webber, 'Shareholder value (s): Index fund ESG activism and the new millennial corporate governance' (2019) 93 S Cal L Rev 1243.

[20] Control seems to be still contestable in the presence of several blockholdings of around 3% to 5% and absent any agreement among blockholders for the exercise of joint control. Such percentages are reported to be extremely frequent in praxis by Fichtner and Heemskerk (n 11) 10.

[21] M Corradi, 'Bridging the Gap in the Shifting Sands of Non-Controlling Financial Holdings?' (2016) 39 World Competition 239, 248ff.

[22] See further text corresponding to n 77 to 90.

The unprecedented situation triggered by common ownership does not puzzle only antitrust and competition law experts. It is also a corporate law and governance primary issue.[23] In contrast with what had been foreseen by Hansmann and Kraakmann in their famous essay on the 'end of the history of corporate law', the world financial and industrial systems, including the European ones, have not converged to a full extent and univocally towards what the authors call 'the standard model'.[24] Today, the US corporation looks increasingly dissimilar from that 'standard model' and has not become the end point of any other corporate law model in the world.[25] Hence, a degree of legal diversification is actually the standard.

In the presence of parallel holdings, corporate directors may not be as strong as they used to be (or at least as they used to be depicted) when there was more significant capital dispersion.[26] This may be the case especially when common owners adopt active strategies in relation to some of their holdings.[27] But even if they stay passive the dimension of their blockholding – the now famous '800-Pounds gorilla'[28] – may pose a potential threat to corporate directors' inefficient behaviours.[29]

Despite the primary importance of Indexed Funds in the US, the rest of the world still hosts a completely different corporate reality in terms of ownership structure. For instance, continental European corporations still are characterised

[23] It is not by chance that the most authoritative comparative corporate law book in its concluding chapter, now hints to parallel holdings as 'arguably itself becoming an important source of international convergence in corporate law'. R Kraakman and others, *The Anatomy of Corporate Law: A Comparative and Functional Approach* (Oxford University Press 2017) 270.

[24] H Hansmann and R Kraakman, 'The End of History for Corporate Law' (2000) 89 *Geo LJ* 439. For instance, at 441ff, the authors claimed that managers will respond exclusively to shareholders. Nonetheless, by examining German corporate law, it is clear that managers are also accountable in front of employees. See the *Mitbestimmungsgesetz* 1976, known in English as the Codetermination Act 1976, which enables employees to appoint members of the supervisory board which in turn will appoint the members of the management board. Unlike what the authors had predicted in 444, the German codetermination model has not disappeared. The authors also predicted the end of the stakeholder model at 447, whereas actually, in the light of the ESG corporate governance discussion, such model is re-emerging.

[25] M Roe, *Strong Managers, Weak Owners* (Princeton UP 1996).

[26] A Berle and G Means, *The Modern Corporation and Private Property* (MacMillan 1932) described the transition of the US corporate reality towards such a model in the 1930s. More modern description of the main features of the pre-common ownership US corporate system are found in F Easterbrook and D Fischel, *The Economic Structure of Corporate Law* (2nd edn, Harvard UP 1996); R Romano, *The Genius of American Corporate Law* (American Enterprise Institute Press 1993).

[27] A Hamdani and S Hannes, 'The Future of Shareholder Activism' (2019) 99 BUL Rev 971, 986.; M Mallow and J Sethi, 'Engagement: The Missing Middle Approach in the Bebchuck-Strine Debate' (2005) 12 NYUJL & Bus 385; D Lund, 'The Case against Passive Shareholder Voting' (2017) 43 J Corp L 493.

[28] Term initially by L Strine, 'The Inescapably Empirical Foundation of the Common Law of Corporations' (2002) 27 Del J Corp L 499, 509 and now adopted by Goshen & Levit (n 16) 55.

[29] Goshen & Levit (n 16) 55ff.

by the prevalence of one or a few controlling shareholders – very often an entrepreneurial family.[30] But think also of the People's Republic of China's (PRC), whose economic system may be described as 'socialism with many capitalists'.[31] In PRC, since the end of the 1970s many private corporations have emerged as significant alternatives to the traditional State-owned industries[32] – including today several cross-border active high-tech giants, such as Lenovo[33] – while the Chinese Communist Party has acquired a substantial influence on the country's private business reality.[34] An influence which seems to have increased after the mixed-ownership reform of State-Owned Enterprises (SOEs).[35] The PRC example shows that the combinations between institutional and political variables can reach levels of creativeness that perhaps we could not have expected in the 1980s, when the world was largely polarised between the capitalist and the socialist/communist models.

Even in a globalised world, the diversity of the local business and organisational models is mindboggling. Therefore, even if Indexed Funds invest worldwide, their investments in such diversified corporate environments cannot be understood in the light of a monolithic theoretical framework. The real challenge ahead is not only understanding the potential competitive consequences deriving from parallel holdings but also adapting any potential policy response in the most adequate way possible to different business and organisational realities. This may require avoiding early and easy fixes and considering the wider social and political variables triggered by the intertwining between finance, industry, and corporate governance.[36]

[30] G Aminadav and E Papaioannou, 'Corporate Control Around the World' (2000) 75 J Fin 1191, 1210. Note that a family-dominated industrial system is not necessarily less efficient or less desirable than one with dispersed ownership, as highlighted by R Gilson, 'Globalizing Corporate Governance: Convergence of Form or Function' (2001) 49 The Am J Comp L 329.

[31] For the political origins of such a peculiar social and economic experiment, see A Sihotang, 'Strategy of China's Political Economy on the Era of Deng Xiaoping in China to Build Economic Growth' (2020) 10 *Intl J Social Science Economics Art* 79.

[32] X Chen, *Chinese Private Manufacturing Firms: The Challenges of Global Competition* (Routledge 2018).

[33] L Zhijun, *The Lenovo Affair: The Growth of China's Computer Giant and Its Takeover of IBM-PC* (John Wiley & Sons 2006).

[34] X Yan and J Huang, 'Navigating Unknown Waters: The Chinese Communist Party's New Presence in the Private Sector' (2017) 17 *The China Review* 37. See also the case of Huawei, which exemplifies the complexity of the relationship of the Chinese Communist Party with important private players; C Hawes, 'Why Is Huawei's Ownership so Strange? A Case Study of the Chinese Corporate and Sociopolitical Ecosystem' (2021) 21 JCLS 1.

[35] J Wang and T Cheng-Han, 'Mixed Ownership Reform and Corporate Governance in China's State-Owned Enterprises' (2020) 53 Vand J Transnatl L 1055.

[36] As suggested by the authors of the *Anatomy of Corporate Law* (n 23) 270, '[g]lobal institutional investors have generated pressure for the international adoption of the governance practices prevailing in developed (typically UK and US) markets. This may, however, result in a convergence that is more formal than functional, if "investor-oriented" strategies are applied beyond the extent justified by the type of agency problems they address'.

14.3 NON-CONTROLLING EQUITY HOLDINGS AND MINORITY SHAREHOLDINGS: PIECES OF A SCATTERED PUZZLE

Indexed Funds, a type of Exchanged Traded Fund – had hardly ever attracted negative public comments until 2016.[37] Indexed Funds are based on an ingenious intuition by John 'Jack' Bogle who published copious essays and books in defence and for the promotion of his investment strategies.[38] The merits of indexing as an investment technique is proven by its success: Indexed Funds have become prevalent over alternative international financial investments in 2003.[39] Bogle's investment strategy consists of mimicking financial indexes: Indexed Funds have been renowned for being rarely outperformed by alternative investment strategies.[40] Their expanded diversification system offers ideal risk containment; the prevalence of passive investment strategies for such holdings[41] entails very low management costs, with consequent lower fees for investors.[42]

Despite parallel equity holdings being mostly qualified and treated as passive investments,[43] they are significantly different from other forms of non-controlling minority holdings and/or passive investment, such as minority non-controlling holdings by competitors or cross-shareholdings in the same product market or across the supply chain – on which EU competition law literature abounds.[44] They also differ

[37] Pre-2015 US press extolled the economic and financial benefits of indexing. See for instance Edward Wyatt, 'Riding Wall St. on Autopilot: Indexed Funds Draw Investors' *The New York Times* (New York, 29 January 1997) 1.

[38] An interesting anthology of his publications is J Bogle, *John Bogle on Investing: The First 50 Years*. (John Wiley & Sons 2015). See also J Bogle, *Common Sense on Mutual Funds: New Imperatives for the Intelligent Investor* (John Wiley & Sons 1999). John Bogle later seemed to regret the 'unrestrained' success of his own creation – due to the excessive concentration and the lack of new entrants in the financial industry; J Bogle, 'Bogle Sounds a Warning on Index Funds' *Wall Street Journal* (New York, 29 November 2018).

[39] J Sommer, 'Exchange-Traded Funds Are Now in Favor' *The New York Times* (New York, 8 June 2003) 6.

[40] J Bogle, 'An Index Fund Fundamentalist' (2002) 28 J Portfolio Manage 31. Nonetheless, already in the beginning of the twenty-first century, there were voices of disagreement with respect to the efficiency of such an investment technique. G Gastineau, 'Equity Index Funds Have Lost Their Way' (2002) 28 The J Portfolio Manage 55. Moreover, alternative investment strategies, such as hedge funds, are known for being able to outperform equity markets. T Bali, S Brown, and K Demirtas, 'Do Hedge Funds Outperform Stocks and Bonds?' (2013) 59 Manage Sci 1887.

[41] Even if at times they may engage in active behaviours for larger holdings. See (n 27).

[42] Although IF's fees today are extremely differentiated – which in turns depends on a degree of product differentiation. A Hortaçsu and C Syverson, 'Product Differentiation, Search Costs, and Competition in the Mutual Fund Industry: A Case Study of S&P 500 Index Funds' (2004) 119 The QJ Econ 403.

[43] Strampelli (n 19)

[44] A seminal work is that of A Ezrachi and D Gilo, 'EC Competition Law and the Regulation of Passive Investments among Competitors' (2006) 26 Oxford J Leg Studies 327. See also S Russo, 'Abuse of Protected Position? Minority Shareholdings and Restriction of Markets' Competitiveness in the European Union' (2006) 29(4) W Comp 607; F Caronna, 'Article 81 as a Tool for Controlling Minority Cross- Shareholdings between Competitors' (2004) 29 Eur L Rev 485; E Moavero Milanesi and A Winterstein, 'Minority Shareholdings, Interlocking Directorships and the EC Competition

from the so-called circular ownership, a situation in which each firm on a given relevant market owns equity in at least one of its competitors.[45]

Even though they may at times have anticompetitive effects, holdings in a competing firm (i.e. nothing to do with holdings deriving from investment based on indexing, which are normally in non-competing firms) can be supported by a financial and/or an industrial rationale.[46] On one hand, a company may be willing to invest in one's competitor simply because that competitor is well positioned for meeting the market demand and such information is easily retrievable by other actors within the same industry.[47] On the other hand, a company may want to have a stake in one of its competitors in order to increase collaboration, for instance for the purpose of innovation – i.e. pursuing dynamic efficiency.[48] There may also be cases where two competitors set up a jointly owned corporation expressly as an R&D joint venture and their interests are (limitedly) aligned as equity owners. Finally, the acquisition of non-controlling equity holdings may anticipate an intention to merge, such as in the case of certain types of earnouts M&A operations.[49] *None* of such strategy is present in parallel holdings – where the inherent rationale is purely financial and is based on maximum diversification through indexing.

Secondly, the influence of the investment performance of one single minority holding in a competitor's balance sheet may be rather significant, as it will be diversified only against the industrial activity of the acquirer.[50] By contrast, for an indexed fund, the relevance of the investment performance of one single non-controlling equity holding will fade against the myriad of additional holdings represented in the reference index that the investment fund aims at mimicking. Therefore, the kind of action in which a competitor is ready to engage is likely to be different from the actions undertaken by an indexed fund. As a matter of fact, when Indexed Funds have been active, they have normally focused on wide common objectives and not on one single holding.[51] For the reason outlined above, one cannot consistently employ the theoretical findings on minority holdings in a competitor for tackling the problems which might arise in the case of parallel holdings.

Rules – Recent Commission Practice' (2002) 1 *Competition Policy Newsltr* 15; R Struijlaart, 'Minority Share Acquisition below the Control Threshold of the EC Merger Control Regulation: An Economic and Legal Analysis' (2002) 25(2) W Comp 173.

45 Corradi (n 21) 244.

46 Ezrachi & Gilo (n 44) 328.

47 *Ibid.*

48 As in the case of joint ventures, see R Reynolds and B Snapp, 'The Competitive Effects of Partial Equity Interests and Joint Ventures' (1986) 4 Int J Ind Org 141.

49 R Ragozzino and J Reuer, 'Contingent Earnouts in Acquisitions of Privately Held Targets' (2009) 35 J Manage 857, 862.

50 Ezrachi & Gilo (n 44).

51 See Section 14.6.

14.4 THE PECULIARITIES OF INDEXED FUNDS' PARALLEL HOLDINGS IN THE EU CORPORATE CONTEXT WITH PREVALENCE OF TRADITIONAL CONTROLLING SHAREHOLDERS

In the US, the phenomenon known as common ownership arose from the ashes of a corporate world that was previously characterised by dispersed corporate ownership structure.[52] But dispersed ownership structure is not a common feature of European corporations,[53] with the exceptions of the UK and Ireland.[54] In certain industries dispersed corporate ownership structure is present also in continental Europe – although far from being the dominant model.[55] Therefore, if we purport to understand the impact of Indexed Funds' investments on competition in European product markets, the case for a potential competitive harm deriving from common ownership needs to be analysed considering two alternative hypotheses: dispersed and concentrated corporate ownership structure – concentrated ownership being the most commonly found in practice. The literature on competitive harm in case of dispersed corporate ownership structure is already abundant; yet an overall agreement over the existence of such harm has not been reached yet.[56] Had an agreement on such harm to be reached, as we will see, US literature would not necessarily be of great use in the EU institutional context. Neither from a legal,[57] nor from a policy perspective.[58]

When it comes to concentrated corporate ownership structure, the chances that the same mechanisms described in the US literature on common ownership apply within the EU corporate context are extremely remote. In a system characterised by concentrated corporate ownership structure directors will chiefly respond to the controlling shareholder(s).[59] As recently shown, this will occur despite the emphasis put by stewardship codes on the role of institutional investors in corporate governance in those systems characterised by concentrated ownership structure.[60]

Yet, one may still hypothesise a residual anticompetitive role of common owners in a context of concentrated ownership. For instance, one might want to investigate

[52] Berle & Means (n 26); F Barca and M Becht (eds), *The Control of Corporate Europe* (Oxford University Press 2001).

[53] Aminadav & Papaioannou (n 30) 1216.

[54] *Ibid*. at 1209. For an analysis of the process of corporate ownership dispersion in the UK, see B Cheffins, 'Does Law Matter? The Separation of Ownership and Control in the United Kingdom' (2001) 30 JLS 459; B Cheffins, *Corporate Ownership and Control: British Business Transformed* (Oxford University Press 2008).

[55] Aminadav & Papaioannou (n 30). This holds particularly in certain sectors in Germany; see WG Ringe, 'Changing Law and Ownership Patterns in Germany: Corporate Governance and the Erosion of Deutschland AG' (2015) 63.2 Am J Comp L 493.

[56] See the literature referred to in Schmalz (n 12).

[57] See Section 14.5.

[58] See Section 14.6.

[59] This is a well-known tenet in comparative corporate law analysis. See R Kraakman and others (n 23) 30ff.

[60] D Puchniak, 'The False Hope of Stewardship in the Context of Controlling Shareholders: Making Sense Out of the Global Transplant of a Legal Misfit' (2021) Am J Comp L (forthcoming).

whether controlling shareholders' (industrial families or other institutional owners) interests may occasionally or stably be aligned with those of Indexed Funds towards a collusive objective.[61] But the role of Indexed Funds in these cases could only be marginal. For instance, one *might* think of a potential role of investment funds in relation to information exchanges within the same industry, so to ease up the collective action problems that are normally seen in collusive contexts with many players.[62] But such a hypothesis, unless corroborated with sound empirical research, should be considered as little less than fantasy for the time being.

Another difference between the US and the EU context is that Indexed Funds may not employ the same indexes in the two economic environments. In fact, the equivalent of the S&P index in Europe is the FTS Eurofirst 300. Yet, it does not seem to enjoy much success when it comes to indexing. The EU is rather diversified both from an institutional and industrial perspective – which makes regional areas extremely differentiated from an investment perspective.[63] Therefore, for investors, such as BlackRock, it makes sense to create Indexed Funds based on country-based indexes (e.g. iShares MSCI Germany Index Fund (NYSE: EWG)).[64] Indexed Funds' overall investment techniques may be characterised by more significant fragmentation in the European context, as compared to the US one. Such a fragmentation may reduce the degree of coordination vis-à-vis potential interventions within the governance of the target companies. But, as already mentioned, what represents one of the core obstacles in tackling potential issues deriving from common ownership is the legal variable.

14.5 EU COMPETITION LAW AND THE ABSENCE OF AN ADEQUATE LEGAL FRAMEWORK FOR PARALLEL HOLDINGS

The hypothetical competitive harm scenario depicted by the common ownership industrial organisation literature encompasses two alternative explanations.[65]

According to one of them, the modification of the investees' corporate ownership structure, subsequent to the increase in common ownership, may induce a behavioural change in the members of the target companies' boards of directors. Corporate directors would tend to compete less vigorously in order to please

[61] This would require a degree of stability in the product market in question, i.e. at least a low degree of contestability. See R Van den Bergh, *Comparative competition law and economics* (Edward Elgar Publishing 2017) 57ff.

[62] *Ibid*. at 194.

[63] This is often acknowledged in those EU reports that focus on industry. See, for instance, European Commission, 'Report of Expert Group on removing tax obstacles to cross-border Venture Capital Investments' (2009) https://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/company_tax/initiatives_small_business/venture_capital/tax_obstacles_venture_capital_en.pdf, 1.

[64] 'iShares MSCI Germany ETF' (Blackrock) www.blackrock.com/us/individual/products/239650/ishares-msci-germany-etf accessed [12/10/22].

[65] S Hemphill and M Kahan, 'The Strategies of Anti-Competitive Common Ownership' (2019) 129 Yale LJ 1392.

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common owners – without actually being actively encouraged or forced to do so, i.e. consistently with a passive investment scenario. It has been hypothesised that such behaviour may be reinforced by the fact that directors are remunerated on the basis of the performance of the market, instead of on the basis of the performance of the corporation they serve.[66]

A completely different explanation considers an active involvement of Indexed Funds, directed to curb target companies' directors' behaviours towards a collusive approach. As highlighted by Hemphill and Kahan, this would require the generation of the appropriate strategies, a transmission of the information to the targets' directors and a behaviour inducement.[67] Indexed Funds could also act 'behind the scene' and try to influence corporate directors in the course of private meetings – instead of risking to leave evidence of their intentions in their voting preferences.[68]

Hemphill and Kahan have claimed that most of the abovementioned strategies are unlikely to occur – basing their analysis on the relationships between Common Owners (CCOs) and Non-Common Owners (NCOs). According to the authors, the only effect of common ownership on competition could consist of some cases of selective omission vis-à-vis Indexed Funds' stewardship engagement, because '[c]ompared to NCOs, CCOs would tend to push less for aggressive competition where more aggressive competition would increase firm value (because of its effect on the value of competitors in which the CCO has a stake)'.[69]

But let's hypothesise that Hemphill and Kahan got it wrong and Indexed Funds' managers want to engage also in active behaviours in European companies: let's see how this could be tackled by EU competition law. Let's first consider both the active and passive hypothesis within the EU corporate environment characterised by the same features of the US one – i.e. absence of a controlling shareholder – a type of corporate ownership structure which, as already said, is rather uncommon in continental Europe.[70] A legal framing of such behaviour under EU competition law may not be without difficulties. Unlike presumed by US literature,[71] it has been

[66] Antón and others, 'Common ownership, competition, and top management incentives' (2020) Ross School of Business Paper 1328. It is unclear whether such a claim, when proved truthful, could be labelled as a passive investment case, as the authors suggest. In fact, Hemphill & Kahan (n 65) qualify it as an 'active micro mechanism'.

[67] Hemphill & Kahan (n 65).

[68] M Corradi and A Tzanaki, 'Active and Passive Institutional Investors and New Antitrust Challenges: Is EU Competition Law Ready?' (2017) 1 Antitrust Chronicle 1.

[69] Hemphill & Kahan (n 65) 43. In the sense of a general Indexed Funds' lack of interest for monitoring their investments see L Bebchuk, A Cohen, and S Hirst, 'The Agency Problems of Institutional Investors' (2017) 31 J Econ Perspect 89.

[70] See Section 14.4.

[71] E Elhauge, 'New evidence, proofs, and legal theories on horizontal shareholding' (2018) 37ff https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3096812, claiming the applicability of abuse of collective dominance and excessive pricing to common ownership under TFEU art 102; and at 33ff, claiming the applicability of the rules on concerted practices under TFEU art 101.

demonstrated that at least two potentially relevant EU competition law rules may not apply to such cases.

Firstly, rules on collective abuse of a dominant position will not apply because of the lack of the requirements outlined in the *Airtours*[72] and *Impala*[73] cases.[74] So far, there is no evidence of any coordination – and therefore of any shared understanding regarding such (non-existent) coordination. As a consequence, there is not even question of monitoring and sustainability of such coordination – nor of a threat of competitive constraints jeopardising such coordination.[75]

Secondly, rules on concerted practices may also prove to be of extremely difficult application, both at the level of the market for financial investments and at the level of product markets of the target companies.[76] As a matter of fact, none of the requirements identified in the *Anic* case[77] seem to occur in the case of parallel holdings. Not a concertation between undertakings (no evidence of concertation among investment management corporations nor among the investees), nor a specific behaviour of the undertakings pursuant such (non-existent) concertation.

Not even the *Philip Morris*[78] doctrine – had it to be considered living and applicable –[79] would probably be a good point of reference for such cases. In the *Philip Morris* line of cases the CJEU and later the EU Commission assessed the potential competitive harm deriving from an investment of a firm in one of its *competitors*.[80] But in the EU law pre-dating the first EUMR, and in the context of merger reviews under TEU article 86 (now TFEU article 102) the concept of influence emerged as a way to assess concentrations.[81] Such a concept – had it been properly developed and expanded as a standalone concept – might have helped framing the intermediate, nuanced, stages which may emerge in practice as corporate ownership arrangements that lay in between an anticompetitive agreement and a proper merger, both in their active and passive versions.[82] Nonetheless, neither the EU Commission nor

[72] Case T-342/99 *Airtours* v *Commission* [2002] ECLI:EU:T:2002:146.

[73] Case C-413/06 P *Bertelsmann and Sony Corp of America v Independent Music Publishers and LabelsAssociation* [2008] ECLI:EU:C:2008:392 ('Impala').

[74] A Burnside and A Kidane, 'Common ownership: an EU perspective (2020) 8 JAE 456, 494–495.

[75] *Ibid*. at 500.

[76] *Ibid*. at 495

[77] Case C-49/92 P *Commission v Anic Partecipazioni* [1999] ECLI:EU:C:1999:356. See Burnside & Kidane (n 74) 495.

[78] *Am Tobacco Co Ltd and RJ Reynolds Indus Inc v Commission of the European Community*, Joined Cases 142/84 & 156/84, [1987] ECR 4487, [1988] 4 CMLR 24.

[79] In this sense, see Burnside & Kidane (n 74) 491, who claim that Philip Morris has not been overruled or contradicted.

[80] Even in the Gillette case, the disputed equity (and debt) acquisition by Gillette was in the parent company (Eemland) of its competitor (Wilkinson Sword); see Case No IV/33.440, Warner-Lambert/Gillette and Others, and Case No IV/33.486, BIC/Gillette and Others [1993] OJ L 116/21.

[81] B Hawk and H Huser, '"Controlling" the Shifting Sands: Minority Shareholdings under EEC Competition Law' (1994) 17 Fordham Intl LJ 294.

[82] As a matter of fact, empirical research shows that increasingly substantial equity stake tends to raise the directors' concern towards their holder. See E Gilje, T Gormley, and D Levit, 'Who's Paying

the CJEU ever seemed to give specific relevance to the concept of influence as an independent legal category to be applied beyond the boundaries of EU merger law pre-dating the first EUMR.[83]

The concept of influence could probably be interpreted as a phylogenetic trace of a former theoretical framework (the pre-EUMR merger one), which no longer plays any role in the present EU competition law system. Even if we considered *Philip Morris*' concept of influence as a living and fully applicable one, its adaptation to common ownership cases would require excessive logical stretching and, worse, a possible misreading of the rationale followed by the CJEU. In common ownership cases there is no issue of minority equity investment *in competitors* involved, because Indexed Funds operate in industries that have little or nothing to do with their target companies: hence the underlying facts are different from the *Philip Morris* scenario, which assessed investment in *competitors*.

As a matter of fact, the industrial distance between Indexed Funds and their target companies renders most of the EU competition law targeting influence down the supply chain inapplicable – as such law postulates a degree of industrially functional relationship between upstream and downstream firms.[84] Such functional relationship is found both in horizontal (competitors) and vertical (supplier/producer/distributor) cases. But in the case of common ownership – as the word suggests – we are in presence of mere 'owners' that are rarely operative in industries bordering with their targets.[85]

Perhaps, a possible way to catch hypothetically relevant Indexed Funds' managers behaviours could be framing them within a hub and spoke scheme, where Indexed Funds, the hubs, retrieve and process information, which they distribute down the chain of their investees. But it goes without saying that there is no evidence of a similar behaviour so far – and the likeability that anticompetitive activism is in the interest of Indexed Funds is rather low.[86] Apart for the limited economic incentives of such conducts, given the degree of public attention that Indexed Funds have received so far, it would be very unlikely that they would engage in such activity out in the open – which in turn may render the hub and spoke case law extremely difficult to apply.[87]

Attention? Measuring Common Ownership and Its Impact on Managerial Incentives' (2020) 137 J Financ Econ 152.

[83] Burnside & Kidane (n 74).

[84] See for instance the archetypical *Imperial Chemical Industries Ltd* v *European Commission* case (Case T-66/01 [2010] ECR II-02631, ECLI:EU:T:2010:255).

[85] A potential industrial overlap might occur in the case where common owners own bank, as big institutional investors have been known for their shadow banking activity. But in this case, the obstacle to the application of EU competition law may derive from the fact that such markets are normally national in nature. See Burnside & Kidane (n 74) 464.

[86] Hemphill & Kahan (n 65).

[87] GL Zampa and P Buccirossi, 'Hub and Spoke Practices: Law and Economics of the New Antitrust Frontier' (2013) 9 *Competition L Intl* 91, 98ff. The seminal cases on hub and spoke schemes is *AC-Treuhand* v *Commission* (Case T-99/04 EU:T:2008:256) and *AC-Treuhand* v *Commission* (C-194/14 P EU:C:2015:717).

But what is even more difficult to catch under present EU law are passive investments by Indexed Funds. The point of reference would be 'quasi-mergers' and that set of extremely vague situations surrounding the acquisition of a degree of influence over other corporations. Such nuanced situations normally become relevant for EU law only under merger reviews by the DG-Comp – hence posing the existence of a notified or notifiable merger as a pre-condition for the scrutiny of such situations.[88] In such a context the DG-Comp has already assessed the anticompetitive potential of common ownership[89] and it may do so in future on a casuistic base.[90]

Beyond the present state of the art, one may wonder whether new rules might be introduced within the EU competition law system in order to address the potential competitive harm deriving from corporate ownership structure modifications brought by common ownership in the rare cases of dispersed ownership found in the continental European context. One might think this will occur soon, because of the recent studies that the EU Commission[91] and the EU Parliament[92] have dedicated to the common ownership debate. Despite the accuracy of the cited studies, the likelihood that such new rules are introduced light-heartedly may be rather low. Or better, it is precisely the accuracy of such studies which may induce us to predict that such likeability is low.

In fact, since the first decade of the twenty-first century, the EU Commission has investigated a connected, although significantly different case – i.e. that of the potential anticompetitive effects of (non-controlling) minority shareholdings.[93] Such an investigation had culminated in a White Paper[94] which has not resulted in any modification to the EU competition law framework. The attempts to innovate the EU merger legislation in order to accommodate an assessment of minority shareholdings were dismissed on grounds of insufficiency of evidence with regard to the competitive harm deriving from minority equity holdings.[95] Such a dismissal confirmed the cautious attitude of the EU Commission when it comes to introduce completely novel competition rules. A similar cautious approach

[88] The problem was already present with reference to minority shareholdings. See Corradi (n 21) 254.

[89] Dow/DuPont (Case M.7932); Bayer/Monsanto (Case M.8084).

[90] As suggested by A Tzanaki and J Azar, 'Common Ownership and Merger Control Enforcement', in I Kokkoris (ed) *Research Handbook in Competition Enforcement* (Edward Elgar Publishing 2021).

[91] N Rosati and others (n 14).

[92] S Frazzani and others, *Barriers to Competition through Common Ownership by Institutional Investors* (European Parliament 2020) Study for the Committee on Economic and Monetary Affairs, Policy Department for Economic, Scientific and Quality of Life Policies www.europarl.europa.eu/RegData/etudes/STUD/2020/652708/IPOL_STU(2020)652708_EN.pdf.

[93] See Section 14.3.

[94] Commission, 'Towards More Effective EU Merger Control' COM (White Paper 2014) 449 final.

[95] See EU Dg-Comp Commissioner Margaret Vestager's speech, 10 March 2016, unpublished, as reported in Van Bael & Bellis, 'Merger Control: Competition Commissioner Vestager discusses possible changes to EU merger control system' [2016] (3) VBB on Competition 4 www.vbb.com/media/original-attachments/CL_03_16.PDF.

accompanied the last EU Commission's decision on parallel holdings[96] and the subsequent declarations by DG-Comp Commissioner Vestager.[97]

14.6 EU POLICIES ON CORPORATE GOVERNANCE, COMPETITION GOALS AND COMMON OWNERSHIP: IN SEARCH FOR CONSISTENCY

Imagine that, as some of the authors of the seminal papers on common ownership have claimed, none of the criticisms brought to their work is solidly founded;[98] and/or that, in future, more convincing evidence emerges as to the competitive harm brought by common ownership on a wider sets of product markets than those object of the abovementioned papers.[99] One may still wonder whether the most advisable policy reaction would be to dismantle or limit common ownership, as several US academics suggested.[100] A core guideline in policymaking should be that not necessarily a solution to a problem is found at the same level of that problem. This is because what may be perceived as an issue or as a negative externality may actually produce also positive externalities at the same level: therefore, in such a case policy action could be more fruitfully carried out at a different level, in order to preserve the positive externalities.

To exemplify this principle with reference to common ownership, it is undoubtable that – besides the efficiency of indexing as an investment technique per se –[101] evidence is emerging on the biggest funds' managers capability to provide replies to the 'macro legal risks' (i.e. those corresponding especially to ESG) of our times in a far more efficient way than traditional owners.[102] Even Azar, one of the authors of the seminal common ownership papers, has co-authored a paper analysing the role of the 'Big Three' (BlackRock, Vanguard and State Street) in containing carbon emissions.[103]

[96] Bayer & Monsanto (n 89).

[97] M Vestager, 'Competition in Changing Times' (FIW symposium, Innsbruck, 16 February 18) https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/competition-changing-times-0_en. 'The thing is, just because investors might benefit from less competition, doesn't necessarily mean companies will oblige. There's a difference between holding shares in a company and controlling its decisions. Even without control, there are certainly ways for these funds to make their voices heard. But we can't just assume they have the power to change minds. We need to look closely at what actually happens – whether they can really get companies to compete less hard'.

[98] E Elhauge, S Majumdar, and M Schmalz, 'Confronting Horizontal Ownership Concentration' (2021) 66 Antitrust Bull 3.

[99] *Ibid*. at 5 refer to emerging literature that fortifies the original claims of the authors of the seminal papers on common ownership.

[100] Elhauge, Majumdar and Schmalz (n 98).

[101] See Section 14.2.

[102] A Eckstein, 'The Virtue of Common Ownership in an Era of Corporate Compliance' (2019) 105 Iowa L Rev 507.

[103] J Azar and others, 'The Big Three and Corporate Carbon Emissions Around the World' (2021) J Financ Econ (forthcoming).

ESG objectives, such as anything which has to do with the protection of the environment, the fight against climate change, and ultimately an urgently needed adjustment towards a more sustainable way of doing business, are very close to contemporary consumers' preferences (as well as to emerging investors' preferences)[104] – and in recent times strongly endorsed by policymakers.[105] One may argue that positive role played by IF"s managers may not concern most European corporations, because they may be unable to act as stewards for such objectives in corporate environments where concentrated ownership structure prevails.[106] But it is equally true that for such European corporations the potential anticompetitive harm brought by IF funds is still unclear and unproven – and it is unlikely to be particularly relevant.[107]

Besides that, possible policy interventions on common ownership should always consider EU competition law general principles. A core concept around which EU competition law has evolved is consumer welfare, which in the present interpretation refers to price effects. Nonetheless, it has been suggested that in future we may become more and more uncomfortable identifying consumer welfare exclusively with low prices – as we tend to do today.[108] This again may bring ESG positive externalities into the domain of consumer welfare, therefore rendering a dismantlement of common ownership controversial.

Regardless of such potential (and probable) interpretative evolution, consumer welfare does not even represent the only goal of EU competition policies. As the recent empirical paper by Iacovides and Stylianou has shown, in practice consumer welfare is one of the many objectives that are at the core of EU competition policies.[109] At that core there seem to be more a kaleidoscope of rather contradictory objectives than one univocal standard. Some of the objectives at the core of EU law

[104] S Yan, F Ferraro, and J Almandoz, 'The Rise of Socially Responsible Investment Funds: The Paradoxical Role of the Financial Logic' (2019) 64 Admin Sci Q 466. And, note that the kind of investor who selects ESG funds is normally actively scrutinizing the funds' ESG engagement. See A Weinberg, 'Demand for ESG means more decisions for investors' (2020) 48 Pensions & Investments 20.

[105] The problem of the relationships between competition policy and ESG is extremely complex and I am not tackling it in this chapter. Academic research has also reached the institutional arena. See recently OECD, *Sustainability and Competition*, *OECD Competition Committee Discussion Paper* (2020) www.oecd.org/daf/competition/sustainability-and-competition-2020.pdf. The author of the report has also pioneered the exploration of the legal framework surrounding the possibility to give space to ESG issues, such as the environmental ones within, within the EU competition law framework. See J Nowag, *Environmental integration in competition and free-movement laws* (Oxford University Press 2016). And clearly the discussion about ESG has become prevalent in corporate governance. See C Mayer, *Prosperity: Better Business Makes the Greater Good* (Oxford University Press 2018); C Mayer, 'The Future of the Corporation and the Economics of Purpose' (2020) ECGI Finance Working Paper 710/2020. And see implementation proposals as soft law such as The British Academy, 'Principles for Purposeful Business' (2019) www.thebritishacademy.ac.uk/publications/future-of-the-corporation-principles-for-purposeful-business.

[106] D Puchniak (n 60).

[107] See Section 14.4.

[108] OECD (n 105) 26ff.

[109] K Stylianou and M Iacovides, 'The Goals of EU Competition Law-A Comprehensive Empirical Investigation' (2020) https://ssrn.com/abstract=3735795.

may be efficiency, welfare, fairness, entrepreneurial freedom from competitors, market structure, European integration, and the protection of the competitive process.[110]

Hence, when it comes to introduce new EU competition rules capable to tackle potential issues arising from common ownership, it is inevitable that such rules need to be tested in the light of the different goals advanced by the EU in terms of competition policy. On one hand, given the multiplicity of objectives pursued by EU competition policies, it may be easy to find justifications to any potential way forward, i.e. emphasising one of such policy objectives over the other. But it may equally become easy to find reasons for not regulating common ownership – hence leaving any intervention open to an almost infinite set of potential adjustments – also in the light of the evolution of such standards for adapting to the pursuance of ESG objective.[111]

But given the ever-expanding reach of EU policies, an intervention on common ownership would not be exclusively a matter of internal consistency (i.e. with the goals pursued by competition law). A direct intervention against indexing would entail a redesigning of corporate ownership structure of many companies and such a change would reverberate on their corporate governance. Such shift would in turn raise the question of consistency with EU policies that lay beyond the competition law ones – for instance, corporate governance policies – stewardship, at least for those European companies that are characterised by dispersed ownership structure.[112] One may wonder whether a dismantlement of the biggest Indexed Funds would be consistent with requests for enhanced stewardship, when institutional investors, such as Blackrock or Vanguard have been among the most actively engaged investors in pursuance of sustainability.[113] A direct intervention on Indexed Funds' holdings may be similar to one of those unfortunate Mikado picks that make the whole stick-tower crumble. Hence, before dismantling parallel holdings, it would be better to know what financial reality will come next. And a more cautious way forward would entail examining the overall situation from a better viewpoint and putting all the different pieces of the puzzle in their right place – so to create the lesser frictions possible among different EU policies.

14.7 ZOOMING-OUT AND ZOOMING-IN: LOOKING FOR ALTERNATIVE WAYS FORWARD – ECONOMIC AND POLITICAL TRAJECTORIES

If the issue of parallel holdings is so deeply intertwined with several coexisting layers of policy choices, one may wonder what could be the alternative ways forwards that may produce the most positive externalities while reducing negative externalities.

[110] *Ibid*. at 28, shows the uneven distribution of the centrality of such different goals among different EU institutions.
[111] OECD (n 105) 19ff.
[112] See Section 14.5.
[113] See Eckstein (n 102).

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A first point concerns the effects of the academic and institutional debate on Indexed Funds' managers. If Indexed Funds' managers had ever thought about actively engaging in restricting competition, the present trend of literature on common ownership may have persuaded them to refrain from doing so – by recalling the public attention on their activity and therefore increasing their chances they get caught.[114] Hence, today the main threat – if there is any – may derive from common owners' passive investment.[115] A possible way to analyse this case from a broader perspective is to consider one by one the different variables surrounding common ownership, as identified in the papers that have fuelled the debate on this topic. Occasionally, one can apply a counterfactual analysis to the potential modifications brought to each variable – hence comparing different policy alternatives.[116]

To exemplify, policies directed to avoid or limit the potential anticompetitive harm deriving from common ownership may attempt to operate on: the structure of the target companies' product markets;[117] the structure of the financial services product market;[118] the investment techniques adopted by companies active in the financial instruments' product market;[119] and the governance activity carried out by the financial firms within their target companies.[120]

Some of the policy ways forward proposed by US academics aimed at banning[121] or limiting indexing.[122] If we apply a counterfactual reasoning to the proposals aimed at banning or limiting indexing, the chances that removing common ownership may improve competition are at least questionable. Big investment management companies own extremely large amounts of stock and that such financial instruments would need to find new owners. One may wonder whom would purchase that stock. First, although the study of strategies for State direct investments in the economy are not unknown within the EU Member States' political arenas, especially in

[114] A notable component of deterrence. See R Cooter and B Freedman, 'The Fiduciary Relationship: Its Economic Character and Legal Consequences' (1991) 66 NYU L Rev 1045.

[115] Consistently also with what has been found by Hemphill and Kahan (n 65) and L Bebchuk, A Cohen, and S Hirst (n 69).

[116] Counterfactual reasoning has become the cornerstone of EU policymaking. For an in-depth analysis of this technique see D Geradin and I Girgenson, 'The counterfactual method in EU competition law: The cornerstone of the effects-based approach' (2011) https://ssrn.com/abstract=1970917.

[117] Both economics and legal literature have highlighted the fact that the core problem underlying the present raise in prices for many consumption goods and services in the US may actually be chiefly explained by the increased product market concentration. See T Philippon, *The Great Reversal* (Harvard UP2019); Rock and Rubenfeld in Corradi and Nowag (n 12).

[118] This is what was indirectly suggested by Jack Bogle when denouncing the present barriers to entry in those markets. See text corresponding to n 42. And more recently, see also Goshen & Levit (n 16) 51ff – although the paper proposes a split of the biggest investment management corporations mostly as a way to counter the labour monopsony problem supposedly created by common owners.

[119] See Section 14.2.

[120] That is, types of indexes employed.

[121] Elhauge, 'Horizontal Shareholding'(n 12).

[122] Posner, Morgan, and Weyl (n 12), suggesting that institutions should not hold more than 1% in more than a single firm in oligopolies.

the midst of the COVID-19 crisis,[123] it is unlikely that this becomes a generalised trend.[124] Hence, in line with the liberal economic model that the EU pursues, one may imagine that the equity holdings dismissed by Indexed Funds would be purchased by other private economic actor on the stock market, accompanied by some mechanisms due to temper the effects of a temporary oversupply of stock. Among potential purchasers, one might think of entrepreneurial families – the typical continental European blockholder – or for instance of other (non-indexed) investment funds. As to entrepreneurial families, this would contradict the present trend of families looking for external equity investors, more than co-investing in third-parties' companies.[125]

Other (non-indexed) investment funds would probably be the best candidates to substitute Indexed Funds in the ownership of such equity holdings. But literature has shown that the majority of institutional investors *not* employing indexing have not been champions in activism so far[126] – with some notable exceptions, such as hedge funds.[127] But hedge funds have traditionally been backed by other institutional investors for their active strategies.[128] Moreover, hedge funds are renowned for not been particularly well aligned with ESG concerns.[129] And this may again reverberate against the quest for internal EU policy consistency.

An alternative way to obtain a better competitive outcome might be to impose corporate governance rules that prompt investors to actively intervene in governance. One way could be promoting regular meetings for discussing pro-competitive issues, such as for example how to make the company more price efficient, how

[123] Agence France-Presse, 'Le coronavirus vaplonger la France dans la récession, des nationalisations envisages' *L'Express* (Paris, 17 March 2020) www.lexpress.fr/actualites/1/societe/le-coronavirus-va-plonger-la-france-dans-la-recession-des-nationalisations-envisagees_2121120.html.

[124] This would bring us back to times when autarchy prevailed in non-democratic regimes and when centralised holding institutions were created. For Fascist and post-WW2 Italy, see the 'Istituto per la Ricostruzione Industriale' (IRI), founded in 1933, as explained by R Petri, *Storia Economica d'Italia* (Il Mulino 2002) 97ff. For a detailed analysis of the economic activities exercised by the Italian State through IRI, see N Acocella,*L'impresa Pubblica Italiana e la Dimensione Internazionale: il Caso dell'IRI* (Einaudi 1983). For Frankist Spain, see the Instituto Nacional de Industria (INI), founded in 1944, and explained by V Binda and A Colli, 'Changing Big Business in Italy and Spain, 1973–2003: Strategic Responses to a New Context' (2011) 53 Business History 14, 16.

[125] J Neckebrouck, M Meuleman, and S Manigart, 'Governance Implications of Attracting External Equity Investors in Private Family Firms' (2021) 35 Acad Manag Perspect 25.

[126] B Black, Bernard and J Coffee Jr, 'Hail Britannia: Institutional Investor Behavior Under Limited Regulation' (1993) 92 Mich L Rev 1997; S Choi and J Fisch, 'On Beyond Calpers: Survey Evidence on the Developing Role of Public Pension Funds in Corporate Governance' (2008) 61 Vand L Rev 315. Such failure recently also hit Hedge Funds; J Heaton, 'The Unfulfilled Promise of Hedge Fund Activism' (2019) 13 Va L & Bus Rev 317.

[127] B Cheffins and J Armour, 'The Past, Present, and Future of Shareholder Activism y Hedge Funds' (2011) 37 J Corp L 51; M Kahan and E Rock, 'Hedge Funds in Corporate Governance and Corporate Control' (2007) U Pa L Rev 1021.

[128] Hamdani and Hannes (n 27).

[129] V Gerde, J Handy, and D Masson, 'Are Hedge Funds the Big, Bad Wolf' (Proceedings of the International Association for Business and Society 2017) vol 28.

to make its products more attractive and ultimately how to reap one's competitors' market shares. An even simpler way could be to impose a duty to actively promote competition. But it is unlikely that an omission could be sanctioned in a reasonable way: as a matter of fact, this would entail intruding in the discretionary choices of investors and especially directors which in modern corporate law have to abide by the business judgement rule.[130] Moreover, such an intrusion would introduce a level of public ordering that would go well beyond its level even in the most State intervention-prone jurisdictions.[131] A possible further intervention in governance could consist of limiting the potential contacts among different companies by way of dismantling interlocking directorships – which still seem to be very common both in Europe and in the US – and which may be the cause of anticompetitive harm beyond what might be causes by common ownership.[132]

Another way forward may consist of intervening on the structure of the target companies' product markets.[133] It goes without saying that such an intervention – at least in the US – would need to be backed by stronger evidence than presently existing.[134] But in Europe, where most product markets are less concentrated, a generalised policy against concentration may at times produce inefficiencies and it may also contrast with the political objective of the EU. For example, further market integration by facilitating cross-border transaction or even the creation of European national champions – an objective that is already pursued less vigorously than needed by present EU policies.[135] Moreover, in certain cases, such interventions would not even be needed, as some industries in Europe are national by nature or as a consequence of the legislation.[136]

Possibly, the most consistent way forward would entail intervening on the structure of financial services' product markets – i.e. trying to promote new entrants by bringing down barriers to entry and/or intervening with structural remedies, i.e. forcing the largest incumbent investment management corporations to split in a higher number of fund management companies. This idea has been proposed by Goshen and Levit, in relation to a parallel problem which seems connected to the emersion of the largest Indexed Funds, i.e. a monopsony in the labour markets. This has progressively caused a transfer of wealth from employees to equity holders,[137] and has also created labour instability, which seems at odds with the corporate

[130] For a general understanding of the business judgment rule, see SM Bainbridge, 'The Business Judgment Rule as Abstention Doctrine' (2004) 57 Vand L Rev 83.

[131] M Moore, *Corporate Governance in the Shadow of the State* (Hart Publishing 2013).

[132] See the Chapter 9 by Y Nil, Chapter 10 by F Thepot, and Chapter 11 by Ghezzi and Picciau in this book.

[133] E Posner, 'Policy Implications of the Common Ownership Debate' (2021) 66 Antitrust Bull 140, 148.

[134] Philippon (n 117); Rock and Rubenfeld (n 117).

[135] M Corradi and J Nowag, 'The relationship between Article 4 (1)(b) of the cross-border Merger Directive and the European Merger Regulation' in T Papadopoulos, Thomas (ed), *Cross-Border Mergers: EU Perspectives and National Experiences* (Springer 2019) 159.

[136] Burnside & Kidane (n 74) 464.

[137] Goshen & Levit (n 16).

governance-based sustainability objectives highlighted above.[138] Nonetheless, there is question as to whether such a modification in the ownership structure of big investment management corporations would grant the pursuance of the sustainability objectives that have been promoted so efficiently also thanks to the present financial services market concentration. And finally, this would be more a matter for US than EU competition authorities, given the limited reach of common ownership in Europe.

Concluding, there seem to be no perfect fix to the potential competitive harm deriving from parallel holdings by Indexed Funds, while, in a world characterised by urgent environmental and social problems, there seem to be a need for consistency among policies in bordering areas.

14.8 EU POLICIES FOR COMMON OWNERSHIP WITHIN THE GLOBAL CONTEXT

As I started this brief excursus by considering the EU policies on common ownership with a glance to the global perspective, it is worth concluding by considering such a wider viewpoint. And so far, at least one crucial player has not been included yet in this analysis: the PRC. To my knowledge, the MOFCOM has not released any statement concerning common ownership yet. Nonetheless, the present silence of Chinese authorities on this subject matter does not mean that the US and EU policy choices in relation to common ownership are not without consequences for the Chinese economic actors.

As a matter of fact, in the Chinese context, common ownership was already a hot topic far before than the whole Indexed Funds 'scandal' broke out. One may recall the fact that the EU – probably misunderstanding the way the PRC and its Communist Party manage their investment in SOEs – has qualified Chinese holdings in EU companies as common ownership.[139] Advancement on the analysis of the concept of common ownership in the context of Indexed Funds may in turn inform also the policies on SOEs' parallel holdings and vice versa. But beyond a potentially interesting comparison between Indexed Funds and SOEs common ownership law rules, a far more important question concerns the global financial implications triggered by a potential request addressed to Indexed Funds to dismiss part of their holdings –[140] or to allow for new entrants in the market for financial services.[141] In fact, earlier we identified other investment funds not employing indexing as potential acquirers of such holdings, or alternatively the entry of new investment management corporations in the financial market. But we have not discussed

[138] R Eccles, K Miller Perkins and G Serafeim, 'How to Become a Sustainable Company' (2012) 53 MIT Sloan Manage Rev 43.
[139] A Zhang, 'The Antitrust Paradox of China, Inc.' (2017) 50 NYUJ Int'l Law & Pol 159.
[140] See Section 14.7.
[141] *Ibid*.

potential acquisitions of dismissed holdings by PRC SOEs, which are renowned for their interest in cross-border acquisitions.[142]

The inability to replace entirely the present common owners with alternative European or US owners might provide far-East investors with unprecedented financial investments opportunities. And especially Chinese FDI may focus more intensively on Europe, given the limitations brought by the FIRRMA legislation approved under the Trump administration to foreign investment in US companies.[143] But if the EU Commission is still persuaded that most PRC holdings tend to be under the control of the Chinese Communist Party, this may well sound to the DG-Comp like throwing such holdings from the frying pan into the fire.[144] Faced with a potential increased demand from Chinese investors, EU policy-makers might be prompted to build even higher walls against PRC purchases in EU Member States' companies. This is turn may generate a spiral of tit-for-tat reactions – as the one we have already seen between PRC and US – which may be hard to contain and certainly not beneficial for the process of economic integration.[145]

As a matter of fact, the problem of common ownership – although seemingly only technical in nature – may have geopolitical implications hard to imagine for those who are mostly concerned with its potential price effects. And this might be another reason why the EU competition authorities are walking on eggshells – on one hand trying to gather as much data as possible on this subject matter and on the other trying to avoid untimely interventions.[146]

Ultimately, what needs to be understood before a final word is spent on common ownership is how the sustainability/growth conundrum will be solved at a corporate governance level and how each of the largest world economic blocks will carve their role in the pursuance of even far wider objectives – among which we must certainly include the protection of Human Rights.[147] If trust among global players and convergence in their progressive policies increases,[148] we may

[142] SOE are less likely to complete successfully cross-border acquisitions than private companies. J Zhang, C Zhou, and H Ebbers, 'Completion of Chinese Overseas Acquisitions: Institutional Perspectives and Evidence' (2011) 20 Intl Business Rev 226. Nonetheless, they are renowned for their minority acquisitions. See Zhang, *Chinese Antitrust Exceptionalism* (n 145).

[143] P Edelberg, 'Can Chinese Companies Still Invest in the United States: The Impact of FIRRMA' (2019) 16 US-China L Rev 12.

[144] Although, as demonstrated by Zhang (n 139), not necessarily the perceived threat is corroborated by a real danger.

[145] A Zhang, *Chinese Antitrust Exceptionalism: How the Rise of China Challenges Global Regulation* (Oxford University Press 2021) 214 ff.

[146] See Section 14.6.

[147] And there is a hope that institutional investors will improve their much-needed role of championing Human Rights protection. See K Buhmann, 'Institutional investors and climate justice: The role of investors in advancing prevention of human rights abuse in investment chains for fossil-free energy' (2021) in V Mauerhofer, *The Role of Law in Governing Sustainability* (Routledge 2021) 222.

[148] Zhang (n 145) 242 explains that 'there is a danger that the current Western trend of politicizing antitrust enforcement, if carried too far, can evolve into a double-standard used against Chinese firms', which in turn may trigger tit-for-tat reactions.

see a far larger set of cross-equity holdings of various nature across the globe and in every possible and imaginable direction. But suspicion and localism may put the word end to such cross-border interactions.[149] The hope is that the democratisation brought by investment funds in the financial arena will evolve into something even more positive – helping spreading progressive value beyond what the world is seeing today.

[149] And it is worth reminding that unfortunately suspicion is not only hovering on PRC's investments but also on Blackrock's ones. See, for instance, J Pouille, 'Blackrock: The financial leviathan that bears down on Europe's decisions' (*Investigate Europe*, 17 April 2019) www.investigate-europe.eu/en/2019/blackrock-the-financial-leviathan-that-bears-down-on-europes-decisions/.

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