The Competitive Effects of Minority Shareholdings: Legal and Economic Issues. By Panagiotis Fotis and Nikolaos Zevgolis (eds.) [Oxford: Hart Publishing, 2016. xxxv + 349 pp. Hardback £75. ISBN 978-1-84-946534-2.]

Transactions fall to be considered under the EU merger regulation, inter alia, when they result in one firm being able to control another. In early 2006 Ryanair, an airline based in the Republic of Ireland, acquired a 19% shareholding in Aer Lingus, a competing airline. This acquisition did not enable Ryanair individually or jointly to control Aer Lingus. In late 2006 Ryanair made a public bid to increase its shareholding in Aer Lingus to over 25%; the increased shareholding (from 19% to above 25%) would enable Ryanair at least to control Air Lingus jointly; and such control would result in a significant reduction in the ability or incentive of Aer Lingus to compete with Ryanair. Consequently, the increase in shareholding was notified and subsequently prohibited: Commission decision of 27 June 2007, Case No. COMP/M.4439 – *Ryanair/Aer Lingus*. What of the original 19% shareholding? Whilst not conferring the ability to control Aer Lingus the minority shareholding might enable Ryanair to increase its own prices. Ordinarily, the ability to increase price is constrained by the prospect of customers' switching to an alternative provider of goods or services. The loss of customers is, however, mitigated if the firm increasing its price is also entitled to a share of profits made by firms to whom the customers switch. A second concern is that the minority shareholder may obtain rights to information from the firm that is of competitive significance. Since the Commission could not prevent Ryanair from retaining the 19% shareholding in its competitor – because this shareholding did not enable Ryanair to control Aer Lingus, its acquisition was not a transaction reviewable under the EU merger control – a gap in regulatory coverage exists: Case T-411/07 R, *Aer Lingus Group plc v Commission* [2008] E.C.R. II-411. Thus, interest in how EU law competition law should respond to the competitive consequences of minority shareholdings was re-ignited.

Fotis and Zevgolis provide a contribution to the debate as to whether EU law contains sufficient tools to address the consequences for competition that arise in transactions that do not confer control but nonetheless alter incentives in the market place. It is a curious contribution in that it does not have an introduction and the chapters are organised in a somewhat random fashion. Chapter 4 seems the place to begin. It provides a review of the economic literature setting out the theoretical objections to, and benefits flowing from, non-controlling minority interests in other firms. Chapter 7 then provides a review of the empirical economics literature supporting the theoretical concerns. Having defined the competition problems that may arise from minority shareholdings (in a manner more accessible to economists than to lawyers), Fotis and Zevgolis then turn to the existing legal tools that may be used to address the competition concerns. This is prompted by the Commission's launch, in June 2013, of a public consultation on possible approaches to closing the perceived regulatory gap highlighted in *Ryanair/Aer Lingus* and, following this in July 2014, of a White Paper, *Towards More Effective EU Merger Control*. The latter proposed, inter alia, that acquisitions of non-controlling minority shareholdings should be subject to review under the EU merger regulation. Chapter 3 sets out the merger control provisions of various jurisdictions and the extent to which non-controlling minority interests are subject to review under these instruments; chapter 5 supplements chapter 3 by setting out the central cases decided under the relevant instruments in the jurisdictions identified. The authors conclude that the national laws and EU law applicable outwith the EU merger regulation are sufficient to address the consequences for competition of a non-controlling interest

in another firm. Non-controlling minority interests create a cognisable competition problem, but the enforcement gap is small because national regimes and EU law powers outwith the merger control regime are sufficient to capture the majority of the problematic instances. Thus, having reviewed, in chapters 8 and 9, the Commission's White Paper, the authors conclude "that the existence of an enforcement gap in EU competition law regarding potential anticompetitive effects from acquisitions of non-controlling minority shareholdings has not been confirmed" (at p. 344).

The initiative to close the perceived enforcement gap was brought forward under Commissioner Almunia. In late 2014 a new Commissioner for competition was appointed. The new Commissioner, Magrethe Vestager, swayed by the views reflected in Fotis and Zevgolis, has not been persuaded that the issue of non-controlling minority shareholdings is one to be pursued as a priority, and in a speech entitled "Thoughts on Merger Reform and Market Definition" delivered on 12 March 2015 she stated:

> [B]efore we take steps to change regulation, we listen to experts, business, the public, and to those who take an interest. … [M]y conclusion is that the balance between the concerns that this issue raise[s] and the procedural burden of the proposal in the White Paper may not be the right one and that the issues need to be examined further. … There is no need to rush. What counts is that the new rules – when they are introduced – work well and are proportionate to the problem.

Speaking a year later Commissioner Vestager expressed the view that reviewing minority shareholdings was a disproportionate means of closing the enforcement gap, noting "what I've seen so far hasn't convinced me that this is a change we absolutely have to make to our system" (speech entitled "Refining the EU Merger Control System" delivered on 10 March 2016). So when, in October 2016, the Commission launched a new consultation on merger simplification, the issue of non-controlling minority shareholdings had been dropped from the agenda.

With the issue having dramatically diminished salience, Fotis and Zevgolis cast *The Competitive Effects of Minority Shareholdings* as "an up-to date retrospective view of the legal and economic issues concerning minority interests" (p. 345). It does of course provide an in-depth account of the issue and an explanation of why the 2014 approach has not been pursued. In Case 142 & 156/84, *British American Tobacco Co. Ltd. v Commission* [1987] E.C.R. 4487, at [37]–[40], [65], the Court of Justice made it clear that there are very limited circumstances in which one firm's acquisition of a minority shareholding in a second firm would constitute an infringement of Articles 101 or 102 of the merger regulation. Concepts of collective dominance and concerted practices may become relevant. These are some of the most challenging concepts to apply, even *ex post* let alone *ex ante*. And, given the authors' thesis that the extant law outwith the EU merger regulation is sufficient to capture the economic concerns that arise, a more robust account of that law and its shortcomings is warranted. Further, whilst able to show that the 2014 White Paper would impose too great a regulatory burden in relation to the number of transactions that actually fall into the gap, the authors do not claim that it is impossible to articulate a clear *ex ante* test to determine when substantive concerns will arise and so justify compulsory notification and the attendant costs associated with obtaining clearance. Whilst the issue of non-minority shareholdings is no longer subject to reform, this is not to say that the issue is no longer subject to debate. The Commission has recently published the *Support Study for Impact Assessment Concerning the Review of Merger Regulation Regarding*

Minority Shareholdings (2016). This shows that a more in-depth understanding of the problem is still being sought and that the design of a response proportionate to the size of the problem remains under active consideration.

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Philosophical Foundations of Law and Neuroscience. By Dennis Patterson and Michael S. Pardo (eds.) [Oxford University Press, 2016. 272 pp. Hardback £60. ISBN 978-0-19-874309-5.]

Neuroscience has the potential to transform aspects of legal theory, doctrine and proof by transforming our understanding of human agency, mental states and the mind. The nature and scope of this potential, however, are deeply contested. While it is clear that neuroscience will revolutionise our understanding of the brain, the implications of neuroscience for the law are not straightforward, but rather turn on a variety of controversial issues that are carefully explored in the chapters of this volume. For any reader who is interested in the intersection of neuroscience and the law, as well as for many who are not as yet, this collection will provide thought-provoking and enlightening reading.

One argument for modifying the law based on neuroscience, advanced in the opening chapter by Adam Kolber (ch. 1), relies on the intent of those who created the various parts of the law. Regarding the criminal law in particular, Kolber argues that although Anglo-American criminal law does not explicitly adopt a theory of free will, it was created by individuals who are likely to have believed that humans have souls and the ability to make decisions that are not wholly determined by the laws of physics. If so, it is plausible that they did not intend to punish decisions that are made, as neuroscience suggests human decisions are made, in a purely mechanistic manner. Kolber thus concludes that if the meaning of laws (including the criminal law) is to be determined at least in part by its intended purpose, there is a strong argument that the criminal law embodies a faulty assumption and should be modified.

If we set aside the original intended purpose of the criminal law, however, and instead focus on its normative justification, there is a strong argument – developed by Stephen Morse (ch. 2) – that it does not assume the existence of free will. Rather, the criminal law merely assumes that we have rational agency: the ability to act for reasons, such that our behaviour can be causally explained by our mental states. Even if these mental states are themselves causally determined, Morse argues, we are justified in holding people legally responsible, contrary to the claim that determinism is incompatible with responsibility. Morse then turns to a more radical neuroscience-based critique of responsibility, according to which mental states do not exist or are mere epiphenomena. He concludes that either possibility would be incompatible with rational agency and responsibility, but that neuroscientific evidence does not currently support this critique.

The relationship between determinism and responsibility is also the focus of the contribution by Nita Farahany (ch. 3), who argues that the law's conception of free will should be understood as mere "freedom of action", consisting of three components: acting in a manner that one desires, moving with a will that is one's own and identifying and being identified with the action. On this view, determinism and retributivism are compatible, regardless of whether we have freedom with respect to our underlying desires or dispositions. In addition, going beyond mere compatibility,