

COMMON OWNERSHIP AND ANTITRUST: EIGHT CRITICAL POINTS TO GUIDE ANTITRUST POLICY



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CPI ANTITRUST CHRONICLE MAY 2019

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CPI Antitrust Chronicle May 2019

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I. INTRODUCTION

Common ownership became the subject of extensive scholarly debate after economists conducted empirical studies showing a potential causal relationship between common ownership and competitive harm in the airline and banking industries.² Common ownership has since moved beyond the academic realm, and is now the active subject of worldwide regulatory concern. This past December, the Federal Trade Commission conducted an all-day hearing addressing the potential competitive effects of common ownership.³ The Department of Justice very recently indicated that it too is more closely evaluating common ownership.⁴ The European Commission also has announced that it is looking into the common ownership issue.⁵ Other jurisdictions' competition authorities appear to be following suit.⁶

In this short article, I relay eight critical points that can aid the ongoing and early development of antitrust policy relating to common ownership. These critical points touch on some of the most salient issues concerning the relationship between common ownership and competitive harm and have important implications on how regulators should craft antitrust policy as it relates to common ownership.

Taken together, these eight points demonstrate a broader point that, while common ownership can theoretically harm competition, there is no simple answer to whether a particular manifestation of common ownership in a given market will generate substantial competitive harm. At its core, common ownership is no different than the many other potential sources of competitive harm that antitrust regulators capably evaluate as a matter of course. Specifically, like these other sources of potential competitive harm, whether a specific instance of common ownership generates competitive effects will depend on a panoply of factors relating to market structure, market participant incentives and behavior, and other economic

2 José Azar, Martin Schmalz & Isabel Tecu, *Anticompetitive Effects of Common Ownership*, 78 J. FIN. 1513 (2018); José Azar, Sahil Raina & Martin Schmalz, *Ultimate Ownership and Bank Competition* (July 23, 2016) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2710252.

3 Competition and Consumer Protection in the 21st Century: Hearing Before the Fed. Trade Comm'n (Dec. 6, 2018), <https://www.ftc.gov/news-events/events-calendar/ftc-hearing-8-competition-consumer-protection-21st-century>. See also Prepared Remarks of FTC Commissioner Noah Joshua Phillips, Taking Stock: Assessing Common Ownership (June 1, 2018), https://www.ftc.gov/system/files/documents/public_statements/1382461/philips_-_taking_stock_6-1-18_0.pdf.

4 See Andrew C. Finch, Concentrating on Competition: An Antitrust Perspective on Platforms and Industry Consolidation (Dec. 13, 2018), <https://www.justice.gov/opa/speech/file/1120486/download>, at 13.

5 See Margrethe Vestager, Competition in Changing Times (Feb. 16, 2018), https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/competition-changing-times-0_en.

6 See Julius Melnitzer, *Are Big Fund Managers' Sizeable Holdings in Companies Hurting Competition? The Competition Bureau Thinks it Might*, FIN. POST (Mar. 5, 2019), <https://business.financialpost.com/investing/are-big-fund-managers-sizeable-holdings-in-companies-hurting-competition-the-competition-bureau-thinks-it-might> (discussing common ownership investigations by Canada's Competition Bureau).

fundamentals. This simple point generates a correspondingly simple proposition about how regulators should structure antitrust policy concerning common ownership: rather than *per se* prohibitions, safe harbors, or wide-scale investigations, regulators should evaluate the competitive effects of common ownership on a case-by-case basis, just as they currently evaluate other potential sources of competitive harm.

II. COMMON OWNERSHIP: EIGHT CRITICAL POINTS

The following eight points can serve as helpful guides for regulators when formulating antitrust policy concerning common ownership.⁷

Critical Point 1: Recent empirical and theoretical work on common ownership is based largely on a specific microeconomic model of firm behavior which predicts that common ownership generates unilateral effects through price increases.

The recent economic and legal studies of common ownership are based principally on an economic model of common ownership developed by Daniel O'Brien & Steven Salop,⁸ who built on earlier work by Timothy Bresnahan & Steven Salop.⁹ The model specifies a market in which competing firms sell a homogeneous good through Cournot (i.e. quantity) competition. The model includes common ownership – investors in the model each hold shares in one or more of the competing firms in the relevant market. The model postulates that each firm's manager maximizes a weighted sum of shareholders' portfolios, which, for a particular shareholder, is assumed to equal the sum of the profits the shareholder obtains from all firms in the relevant market.

The O'Brien-Salop model predicts that common ownership generates unilateral effects through price increases. The reasoning is straightforward. Because a manager is assumed to choose how vigorously to compete by assessing the effects of that level of competition on each of its shareholder's portfolios, and because at least some shareholders' portfolios will include interests in rival firms, the manager will compete less vigorously than if there were no common ownership, since some of the profits lost by the firm from its diminished competition will be returned back to the firm's shareholders through their interests in rival firms.

In the context of the O'Brien-Salop model, therefore, common ownership impairs consumer welfare by causing firms to compete less and prices to rise. These competitive effects are similar to the competitive effects of a firm's acquisition of an ownership interest in a rival firm. Scholars have extensively studied the competitive effects of such partial ownership acquisitions, and they have been the subject of enforcement activity. Finally, note that within the structure of the O'Brien-Salop model, common owners need not exercise actual control over firms for common ownership to generate competitive harm.

Critical Point 2: The underlying economic model of common ownership postulates a specific objective of firm managers, and if managers behave in a manner different than that specified by the underlying model, even extensive common ownership may not substantially impair competition.

A fundamental assumption of the common ownership model discussed above is that firm managers set the level of competition in order to maximize the weighted sum of shareholder portfolios. While this assumption makes the model tractable, it is not yet supported by sufficient theoretical or empirical support,¹⁰ and alternate specifications of the manager's objective function can result in even high levels of common ownership having little or no adverse competitive effects. The clearest example is if firm managers maximize the profits of their own firms rather than the weighted sum of shareholder portfolios. In this case, common ownership would have no competitive effects, since each manager's competition decision would be equivalent to her decision if there were no common ownership.

7 Some of these points are developed further in Menesh S. Patel, *Common Ownership, Institutional Investors, and Antitrust*, 82 ANTITRUST L.J. 279 (2018). For recent surveys of common ownership, see Martin C. Schmalz, *Common-Ownership Concentration and Corporate Conduct*, 10 ANN. REV. OF FIN. ECON. 413 (2018) and Matthew Backus, Christopher Conlon & Michael Sinkinson, *The Common Ownership Hypothesis: Theory and Evidence* (Jan. 2019) (unpublished manuscript), https://www.brookings.edu/wp-content/uploads/2019/02/ES_20190205_Common-Ownership.pdf.

8 Daniel P. O'Brien & Steven C. Salop, *Competitive Effects and Partial Ownership: Financial Interest and Corporate Control*, 67 ANTITRUST L.J. 559 (2000).

9 Timothy F. Bresnahan & Steven C. Salop, *Quantifying the Competitive Effects of Production Joint Ventures*, 4 INT'L J. INDUS. ORG. 155 (1986). Einer Elhauge identifies an early paper by Julio Rotemberg in which Rotemberg links common ownership and incentives to compete. See Einer Elhauge, *Horizontal Shareholding*, 109 HARV. L. REV. 1267, 1273 n.28 (2016) (citing Julio J. Rotemberg, *Financial Transaction Costs and Industrial Performance 2* (1984) (unpublished manuscript), dspace.mit.edu/handle/1721.1/47993).

10 O'Brien & Salop are careful in their modeling. They expressly make clear that while "a parsimonious way to model shareholder influence is to assume that the manager of the firm maximizes a weighted sum of the shareholder's returns," managers' actual objectives will "turn[] on the corporate control structure of the firm, which determines each shareholder's influence over decision-making within the firm." O'Brien & Salop, *supra* note 8, at 609.

Indeed, there are strong reasons why firm managers may not behave in the manner postulated by the common ownership model. It can be shown that the assumption that a manager maximizes the weighted sum of shareholder portfolios is equivalent to the manager maximizing a combination of her own firm's profits *and the profits of all other firms in the relevant market subject to common ownership*.¹¹ Stated differently, the model of common ownership effectively specifies that when deciding how vigorously to compete, a firm's manager trades-off the profits of her own firm for the profits of all other firms in the relevant market in which the firm's shareholders have a concurrent equity interest.

Legal rules and the risk of legal sanction may dissuade managers from behaving in this manner. For instance, under state corporate law, directors, officers, and other fiduciaries have a fiduciary obligation to make a good faith effort to further the best interests of their corporation and its shareholders. This legal obligation may disincentivize firm managers from trading off their own firm's profit for the profits of rival firms and cause managers to instead focus solely on maximizing their own firm's profit.¹² Even if common ownership were to ultimately cause the firm's profits to increase because of the resulting diminution to market-wide competition, the risk of liability may eliminate or at least mitigate managers' incentives to trade off their own profit for the profit of rival firms.

There are many other reasonable specifications for managerial behavior that may cause common ownership to have little or no competitive effects. To take one example, if firm managers look to the profits of other firms when making output or pricing decisions only when the extent of common ownership exceeds some threshold amount, then common ownership levels below this threshold will not generate any competitive effects.

Critical Point 3: The distribution of ownership interests, including in economically related markets, can mute common ownership's competitive effects.

Much of the recent theoretical and empirical academic scholarship on common ownership focuses exclusively on common owners' interests in horizontal competitors. But common owners, especially large institutional investors, often will also have concurrent interests in firms in economically related markets, such as downstream firms, upstream suppliers, and firms in complementary markets. These other ownership interests can cause common ownership to have greater or lesser competitive effects than if the competitive effects analysis focused solely on common owners' interests in horizontal competitors.¹³ For instance, if common owners have significant interests in downstream firms, then their preference for diminished competition in the relevant market will abate.

As a theoretical matter, if it is the case that firm managers set the level of competition to maximize the weighted sum of shareholder portfolios, there is no obvious reason why managers would focus only on the specific portion of shareholder portfolios relating to firms in the relevant market, rather than shareholders' entire portfolios, which may include interests in economically related markets. More generally, if firm managers are assumed to maximize shareholders' joint utility, then managers would be expected to evaluate the effects of their competition decisions on shareholders' entire portfolios, rather than just a portion of those portfolios.

The extent of competitive harm caused by common ownership also will depend on the distribution of investors' interests across firms in the relevant market. In a given market, shareholders' ownership interests across rival firms may vary significantly. For instance, some shareholders may have ownership interests in some rival firms, though not the same rival firms, while the remaining shareholders may have no ownership interests in rival firms. These heterogeneous holdings may hinder shareholders' ability to agree on the extent to which the firm should diminish its level of competition and the particular form of that diminished competition. Furthermore, depending on the particular distribution of common ownership interests across rival firms, a common ownership-induced reduction in competition could make some shareholders worse off than if there were no common ownership.¹⁴ These shareholders would have an incentive to prevent the firm from curtailing its level of competition in response to common ownership.

11 See, e.g. Patel, *supra* note 7, at 317.

12 Somewhat forgotten in recent academic discussion of common ownership is that O'Brien & Salop themselves discuss the role of fiduciary duty in shaping managerial objectives. See, e.g. O'Brien & Salop, *supra* note 8, at 571 & 580-81.

13 For early discussion of this point, see John R. Woodbury, *Paper Trail: Working Papers and Recent Scholarship*, ANTITRUST SOURCE 6 (Dec. 2014), www.americanbar.org/content/dam/aba/publishing/antitrust_source/dec14_paper_trail_12_16f.authcheckdam.pdf and Jonathan B. Baker, *Overlapping Financial Investor Ownership, Market Power, and Antitrust Enforcement: My Qualified Agreement with Professor Elhaage*, 129 HARV. L. REV. F. 212, 217 (2016).

14 See, e.g. Patel, *supra* note 7, at 312. For a thorough analysis of theories of common ownership that involve either a conflict or consensus among firm investors, see C. Scott Hemphill & Marcel Kahan, *The Strategies of Anticompetitive Common Ownership*, YALE L.J. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3210373 (Mar. 29, 2019).

Critical Point 4: Common ownership's competitive effects will depend on the structure of the relevant market, including the extent of substitutability and ease of entry.

Like any other potential source of competitive harm, the competitive effects of common ownership in a particular market will depend on the underlying properties and structure of the relevant market. The extent of product substitutability is one example. Suppose, for example, that there are three firms, A, B, and C, and that firms A and B are subject to common ownership, while firm C is not. If the three products are homogenous, the anticompetitive effects arising from common ownership would be different than if the products instead were differentiated and A and B were poor substitutes for one another. In the latter case, firms A and B would be less likely to curtail competition in response to common ownership, as more of the sales they lose would be diverted to the firm not subject to common ownership (firm C) rather than the other commonly owned firm.

As another example, the competitive effects of common ownership in a market with relatively easy entry will be less than in a market with difficult entry, all else being equal. In the extreme case in which entry is complete and costless, common ownership would generate no competitive effects; with or without common ownership, prices would be at or tending to their competitive levels.

Critical Point 5: Empirical analysis concerning the competitive effects of common ownership is ongoing and the results so far are mixed.

The two initial empirical studies on common ownership suggested that common ownership was having dramatic competitive effects in the markets examined. The authors of the airline study concluded that common ownership increases U.S. airline ticket prices by 3 to 7 percent, or even 10 to 12 percent.¹⁵ The authors of the banking study found that common ownership was positively related to the amount of bank deposit fees and deposit threshold.¹⁶ Both studies used leading econometric techniques to evaluate the empirical relationship between common ownership and competitive effects.

However, there is an ongoing academic debate whether these empirical findings reflect a causal relationship between common ownership and competitive effects or spurious correlation. Some scholars have argued that the empirical results suffer from endogeneity issues.¹⁷ Others have conducted empirical studies showing little or no relationship between common ownership and competitive effects in the airline industry,¹⁸ the banking industry,¹⁹ or industry-wide.²⁰ Other scholars have observed that well-known data problems may be clouding the empirical results.²¹ And yet others have argued that the empirical evidence does not support the potential underlying mechanisms that may link common ownership with competitive harm, such as the structure of executive pay.²² At this stage, it would be premature to conclude that the empirical evidence demonstrates that common ownership causes substantial competitive harm in the evaluated markets.²³

15 Azar, Schmalz & Tecu, *supra* note 2, at 1517-18.

16 Azar, Raina & Schmalz, *supra* note 2.

17 See Daniel P. O'Brien & Keith Waehrer, *The Competitive Effects of Common Ownership: We Know Less Than We Think*, 81 ANTITRUST L.J. 729, 747-48 & 752-56 (2017); Edward B. Rock & Daniel L. Rubinfeld, *Antitrust for Institutional Investors*, 82 ANTITRUST L.J. 221, 242 (2018).

18 See Pauline Kennedy, Daniel P. O'Brien, Minjae Song & Keith Waehrer, *The Competitive Effects of Common Ownership: Economic Foundations and Empirical Evidence*, (July 2017) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3008331; Patrick J. Dennis, Kristopher Gerald & Carola Schenone, *Common Ownership Does Not Have Anti-Competitive Effects in the Airline Industry*, (Feb. 2018) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3063465. Azar et al. provide a reply to Kennedy et al. in José Azar, Martin C. Schmalz & Isabel Tecu, *The Competitive Effects of Common Ownership: Economic Foundations and Empirical Evidence: Reply*, (Sept. 2018) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3044908.

19 See Jacob Gramlich & Serafin Grundl, *Estimating the Competitive Effects of Common Ownership*, (Apr. 2017) (unpublished manuscript), papers.ssrn.com/sol3/papers.cfm?abstract_id=2940137.

20 See Andrew Koch, Mario A. Panayides & Shawn Thomas, *Common Ownership and Competition in Product Markets*, (Feb. 2019) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2965058.

21 See, e.g. Backus et al., *supra* note 7, at 9-12.

22 See, e.g. David I. Walker, *Common Ownership and Executive Incentives: The Implausibility of Compensation as an Anticompetitive Mechanism*, (Mar. 2019) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3345120.

23 In addition to the empirical debate, there is also an ongoing academic debate about the extent to which Section 7 of the Clayton Act reaches common ownership. Compare Elhauge, *supra* note 9, at 1302-09 with Douglas H. Ginsberg & Keith Klovers, *Common Sense About Common Ownership*, CONCURRENTS REVIEW N° 2-2018 6-10 (2019).

Critical Point 6: The modified concentration measures used in the recent studies of common ownership may be poor predictors of competitive effects, and antitrust policy should not be based on either of the two measures.

Recent studies of common ownership extensively use two modified measures of market concentration, the Modified HHI (or the MHHI) and the MHHI delta. The MHHI is defined as the sum of the HHI, the standard measure of market concentration used in merger analysis, and the MHHI delta, which is a measure intended to reflect the extent of common ownership among firms in the relevant market.²⁴ The MHHI thus takes the HHI and adds to it a measure of common ownership.

Because of the inherent problems with these two modified measures, it would be unwise to base antitrust policy on either of them. Most important, neither the MHHI nor the MHHI delta is a good general predictor of competitive effects. The reason for this is based on the analytical origins of the modified measures. The two measures arise out of the O'Brien-Salop model discussed above and, in the confines of that specific model, provide a particular reflection of common ownership's competitive effects.²⁵ However, if the postulates of the model are not satisfied, then those modified measures will not serve as good gauges of competitive harm. For instance, the common ownership model from which the MHHI and the MHHI delta originate assumes that firms sell homogenous products; however, if products are differentiated, the MHHI will not properly reflect the extent of competitive harm.²⁶ Additionally, as others have shown, even without product differentiation, if the relevant market materially differs from the model in which the MHHI and MHHI delta are derived, those modified measures will be poor predictors of common ownership's competitive effects.²⁷

Critical Point 7: Common ownership may generate efficiencies, both within market efficiencies and out-of-market efficiencies, the latter of which may not be credited by courts in a competitive effects analysis.

Common ownership may generate efficiencies for consumers in the relevant market and generate out-of-market efficiencies. With respect to in-market efficiencies, there is a growing empirical literature suggesting that common ownership may increase innovation and R&D, at least with respect to particular types of common owners.²⁸ The proffered causal connection between common ownership and R&D is that common ownership causes firms to internalize technological spillovers, which have long been understood as impediments to welfare enhancing R&D activities. Like the empirical research on common ownership's price effects, the research concerning the effects of common ownership on R&D is still in its early stages, and needs time to coalesce and develop before it can be the basis of policy prescriptions. And, of course, whether common ownership generates offsetting benefits to consumers such as increased R&D and innovation depends on the relevant characteristics of the particular market at issue.

Common ownership may also generate efficiencies outside of the relevant market. With respect to institutional investors' equity interests in particular, potential efficiencies include improved corporate governance for the firms in which institutional owners have large interests, capital market benefits resulting from investors finding it is easier or less costly to diversify portfolio risk, and increased liquidity in equity markets.²⁹ Because these efficiencies do not accrue, at least in the first instance, to the benefit of consumers in the relevant market, under prevailing Section 7 law, courts may not credit these out-of-market when conducting a competitive effects analysis of common ownership.³⁰ This provides another reason why regulators should proceed with deliberate care when fashioning antitrust policy concerning common ownership.

24 See O'Brien & Salop, *supra* note 8, at 610-11.

25 Specifically, in the O'Brien-Salop model, the MHHI is proportional to the average Lerner Index. See *id.* at 610.

26 For additional discussion, see Patel, *supra* note 7, at 307-09.

27 See O'Brien & Waehrer, *supra* note 8, at 744-47.

28 See Jie He & Jiekun Huang, *Product Market Competition in a World of Cross-Ownership: Evidence from Institutional Blockholdings*, 30 REV. FIN. STUDS. 2674 (2017); Miguel Antón, Florian Ederer, Mireia Giné & Martin Schmalz, *Innovation: The Bright Side of Common Ownership?* (Sept. 2018) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3099578; Paul Borochoin, Jie Yang & Rongrong Zhang, *Common Ownership Types and Their Effects on Innovation and Competition*, (Mar. 2019) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3204767. There is also a growing theoretical literature examining the effects of common ownership on R&D. See, e.g. Ángel L. López & Xavier Vives, *Overlapping Ownership, R&D Spillovers, and Antitrust Policy*, (Oct. 2017) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2844112.

29 For additional discussion of these potential efficiency gains, see Baker, *supra* note 13, at 227-31. For an argument that the diversification efficiency gains and corporate governance efficiency gains attributed to common ownership may be overstated, see Eric A. Posner, Fiona Scott Morton & E. Glen Weyl, *A Proposal to Limit the Anti-Competitive Power of Institutional Investors*, 81 ANTITRUST L.J. 669, 710-716 (2017).

30 See *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 370 (1963).

Critical Point 8: Common ownership can have uncertain effects on the likelihood of coordinated behavior.

Existing research on common ownership largely addresses common ownership's prospect of generating consumer harm through unilateral effects. Relatively little research has been conducted into whether, and the mechanisms through which, common ownership can heighten the prospects of coordinated behavior.³¹

Common ownership can have countervailing effects on the likelihood of coordinated conduct. For example, a common owner may serve as an intermediary between the firms in which it has an interest, in the process making it easier for those firms to reach and sustain a collusive agreement, and also to detect deviations from the collusive agreement. But the dynamics may be more complex. If common ownership generates unilateral effects, then it will be more difficult for firms to effectively punish deviations from the collusive agreement, since the profit the deviating firm will make after punishment will be higher than if there were no common ownership. The bottom line is that as a general matter, it is uncertain whether common ownership will increase or decrease the likelihood of coordinated conduct, and the answer depends on the particulars of the market at issue.

III. CONCLUSION

There is no question that the amount of common ownership has substantially increased in recent decades and that a number of institutional investors now hold non-trivial interests in competing firms across a broad range of market segments. There is also no question that sound economic theories link common ownership with the potential for competitive harm. But what is less certain is how antitrust policy should be crafted to address common ownership's potential for competitive harm in light of our current understanding of common ownership's potential and actual competitive effects.

The eight points above collectively provide an answer to that question. Common ownership is similar to other potential sources of competitive harm – such as mergers and the acquisition of partial ownership interests – that may generate substantial competitive harm in some contexts but be competitively benign in others. For that reason, antitrust policy concerning common ownership should hew closely to antitrust's modern approach of evaluating the competitive effects of a transaction or course of conduct on a case-by-case basis. The relevant antitrust question is not whether common ownership generally harms competition but instead, whether a particular manifestation of common ownership in a specific relevant market substantially impairs competition. The eight points outlined above can help guide that necessary inquiry.

³¹ Exceptions include Patel, *supra* note 7, at 318-23, which elaborates on the points below, and Edward B. Rock & Daniel L. Rubinfeld, *Common Ownership and Coordinated Effects*, (Dec. 2018) (unpublished manuscript), https://sr.nelco.org/cgi/viewcontent.cgi?article=1478&context=nyu_lewp, which conducts a careful and systematic evaluation of the possible ways that common ownership may or may not generate coordinated effects.

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