THE COMMON OWNERSHIP BOOM – OR: HOW I LEARNED TO START WORRYING AND LOVE ANTITRUST[1]

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1 The title of this article is inspired by Stanley Kubrick's 1964 satirical film "Dr. Strangelove or: How I Learned to Stop Worrying and Love the Bomb" depicting the fictional, apocalyptic fallout of an accidentally triggered nuclear war between the U.S. and the USSR during the Cold War era.

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CPI ANTITRUST CHRONICLE
MAY 2019

I. INTRODUCTION

Is common ownership the Doomsday Machine for the operation of free markets, competition and capitalism as we know it? An observer of cutting-edge law and economics literature may indeed tend to believe that we are approaching a point of ultimate antitrust apocalypse.

If the digital revolution has not managed to challenge the continuing relevance of competition rules and other regulations (e.g. privacy) that have proven agile enough to respond, then will the noted recent boom in common ownership of competing firms play that role?

The dramatic tone of the ongoing transatlantic debate on common ownership is underscored by a set of novel yet controversial economic theories, developing empirical evidence, and timid enforcement action. Commentators are split both as regards the significance and nature of the problem(s) posed by common ownership as well as over the need for regulatory intervention. Policymakers follow on scholarly developments but are reluctant to draw strong conclusions. This is potentially an area of public concern, but the million-dollar question is: how much of a (real) concern? Are we ready to step into action? On what basis? And what should be done when there is no clear consensus on the notion, extent and harmful implications of common ownership?

This short article reflects on these questions by drawing attention to four particular dimensions. In turn, Part II clarifies the definitional contours of common ownership against the divergent terminology used in recent literature. Part III investigates the negative externalities produced by common ownership and ponders on its various potential consequences for financial markets, firm behavior, and industry structure and performance. Part IV looks closer at the causal mechanisms that may link common ownership to anticompetitive harm. Part V considers possible antitrust law solutions to any competition concerns. Part VI concludes.

II. DEFINITIONAL CONNOTATIONS – WHO IS A COMMON OWNER?

In the terra incognita of common ownership we are lost in the very terminology used to describe this complex phenomenon. Is it common knowledge what we mean by "common ownership"? Without a clear definition, further analysis stumbles. The outline of the concept is the first issue that requires attention and clarity.

Recent scholarship discussing "common ownership" often and almost interchangeably employs terms such as "horizontal shareholding,"[3]

3 Einer Elhauge, "Horizontal Shareholding," (2016) 129 Harvard Law Review 1267; Fiona Scott Morton & Herbert Hovenkamp, "Horizontal Shareholding and Antitrust Policy," (2018) 127(7) Yale Law Journal 2026.

"parallel non-controlling shareholding,"[4] "multilateral partial ownership,"[5] or "overlapping financial investor ownership."[6] The verbal variance indicates the challenge of describing, let alone explaining, the underlying issue within established frames of reference.

From a competition law and economics perspective, a basic distinction is made between cases of direct ownership links among industrial competitors ("cross-ownership") and indirect ownership links due to one or more overlapping shareholders simultaneously holding equity in competing firms ("common ownership"). The common shareholder(s) is typically not active in the same product market as the partially acquired firms and need not be an industrial firm altogether ("common ownership by financial investors").[7] It is important to note that recent ground-breaking research on common ownership refers to the latter form of common ownership (overlapping fund owners-investors), although this is a special case of the more general scenario of common owners (any overlapping shareholders) of competitors.

But let us take a step back and see how we arrived at the socioeconomic context surrounding the common ownership debate. With the growth of capital markets and big corporations, the capitalistic model of organization has passed through different stages: from the early "sole owner-entrepreneur" to that of "professional business managers" to the contemporary world of "portfolio (money and asset) managers" and, in certain countries, to the rising stage of "savings planners."[8] This gradual shift from atomistic, then to managerial, to ultimately agency[9] or fiduciary[10] capitalism bears significant consequences. It is marked by an "increased division of labor, and increased participation in the fruits of the capitalistic enterprise."[11] The benefits of this increasing economic sophistication and specialization in terms of operational and financial efficiency are well recognized. What may not be fully understood yet is that the evolving characteristics of the capitalistic ecosystem may bring about broader implications in the way we perceive, analyze, and regulate ownership, investment, and corporate functions.

Common ownership is an epiphenomenon of these trends. It is the corollary of two steps in this evolutionary process: (i) the more dispersed shareholder base of firms due to increasing stock market investing by individuals, and (ii) the move away from direct and towards indirect ownership due to the rise of institutional investors and the pursuit of financial investment diversification.[12]

Diffusion of corporate ownership characterizing the first step prompted the Berle-Means thesis of a "separation of ownership from control," which served as the paradigmatic frame of analysis for corporate relations between shareholders and business managers over the past century.[13] More recently, with the advent of professional fund managers, a second rapidly accelerating "separation of capital from capital" is evidenced in both the U.S. and Europe.[14] In other words, collectivization of investment led to what I call "the two faces of ownership." That is, property entitlements are now divided between ultimate owners (residual claimants in the profits linked to their portfolio firms' stock) and beneficial owners (institutional intermediaries acting as financial investment advisors and portfolio managers on behalf of ultimate owners). In such a legally and economically complex environment, the question arises whether the very concept of ownership and its definitional contours

4 Marco Claudio Corradi & Anna Tzanaki, "Active and Passive Institutional Investors and New Antitrust Challenges: Is EU Competition Law Ready?," (2017) Index Funds – A New Antitrust Frontier? CPI Antitrust Chronicle, June 2017.

5 David Gilo, "Chapter 67: Passive Investment," *Issues in Competition Law and Policy*, vol 3 (ABA Section of Antitrust Law 2008).

6 Jonathan B. Baker, "Overlapping Financial Investor Ownership, Market Power, and Antitrust Enforcement: My Qualified Agreement with Professor Elhauge," (2016) 129 Harvard Law Review Forum 212.

7 Essentially, minority shareholding between rivals is cross-ownership whereas minority shareholding by third parties (usually investors) in several rival firms at the same time is dubbed common ownership. OECD, "Common Ownership by Institutional Investors and Its Impact on Competition," (2017) DAF/COMP(2017)10 9.

8 Robert Charles Clark, "The Four Stages of Capitalism: Reflections on Investment Management Treatises," (1981) 94 Harvard Law Review 561.

9 Ronald Gilson & Jeffrey Gordon, "Agency Capitalism: Further Implications of Equity Intermediation," [2014] Columbia Law and Economics Working Paper No. 461.

10 Gerald F. Davis, "A New Finance Capitalism? Mutual Funds and Ownership Re-Concentration in the United States," (2008) 5 European Management Review 11.

11 Clark, *supra* note 8, 567–568.

12 "Direct" is ownership of listed corporate stock by individual investors (ownership by retail investors) whereas "indirect" means ownership via financial intermediaries due to increasing stock market investment of individuals through diversified funds (ownership by institutional investors). OECD, *supra* note 7, 11. This direct-indirect classification of ownership from a financial investment perspective should not be confused with the same linguistic dichotomy used above (see note 7) from a competition law and economics perspective to distinguish cross-ownership from common ownership.

13 Adolf A. Berle & Gardiner C. Means, *The Modern Corporation and Private Property*, (Macmillan Co 1933).

14 Leo E. Strine, "The Delaware Way: How We Do Corporate Law and Some of the New Challenges We (and Europe) Face," (2005) 30(3) Delaware Journal of Corporate Law 673, 687.

are affected, and if so, how.[15]

In light of the above competition-focused definition: who is then a "common owner"? Is it retail investors having nominal ownership and retaining mere financial claims, or institutional investors managing capital provided and having actual investment authority and control over firm management by exercising shareholder rights and functions within corporate governance?

What is more, the proliferation of "passive investment" strategies offered by index funds and exchange-traded funds ("ETFs"), plus "closet indexation by active funds," may have inadvertently led to widespread "overlap in ownership by indexation."[16] As we level up stages of capitalism, is "ownership by proxy" conceivable at all? Or conversely, can there be "bare ownership" of capital providers, completely divorced from their exercising shareholder rights in firm governance? In such an intricate universe of pervasive (and hidden) corporate and financial interlocks,[17] we run the risk that once-straightforward answers may no longer be either linguistically accurate or analytically rigorous.

The "index investing revolution"[18] may have created complex legal characterization problems as regards the split personalities of common owners, amplified across multiple and overlapping investments. In this setting, is it an oxymoron to suggest that a single set of actors may be "passive investors," "active owners" and "strategic acquirers" all at once?[19] Approaching common ownership from different analytical perspectives (finance, corporate governance, antitrust) may lead to such diverse and seemingly conflicting epistemic qualifications.

If meaning ascribed to words matters, conceptions of the relative "passivity" of actors or "public" nature of capital markets, listed firms and investors trading in or holding listed stock may become equally convoluted. The academic and policy debate on common ownership presses us to revisit some fundamental theoretical underpinnings of modern economic organization.

III. NEGATIVE EXTERNALITIES – WHAT IS THE PROBLEM?

The above definitional reflections on common ownership allude to the source of potential concern: indirect partial ownership of competitors may produce counterintuitive side-effects and harmful externalities on non-contractual parties. The double separation of "ownership from control" and "ownership from ownership" leads to concurrent, dual "agency costs" between: (i) shareholders-business managers; and (ii) asset owners-financial investment managers.

On the one hand, we have the traditional agency problem in corporate governance whereby cashflow rights accruing to shareholders financing the business enterprise (principals) are separated from actual control over the corporation run by professional managers (agents). On the other hand, financial interests and control rights over invested capital are split between ultimate investment beneficiaries and portfolio managers. In a continuously innovating finance ecosystem, with multiple types of asset owners and managers as well as other intermediaries such as proxy advisors,[20] determination of who is the principal and who the agent, and for what purpose, may not be a trivial legal issue or *a priori* typified. For instance, in the case of ETFs "end investors are not known to the asset managers."[21] Also, it has been suggested that asset

15 The above description corresponds to the standard "fiduciary or trust relationship" between economic owners (individual investors) and fund managers (institutional investors). However, depending on the specific investment arrangements between the parties (e.g. ETFs), they could be seen as having a "reverse trust relationship" in the sense that the traditional roles can be reversed whereby the financial investor is the ultimate owner and the investment client is the beneficial owner. In this light, the concept of ownership presumably remains intact. The difficulty lies however in that under different analytical lenses the same set of actors (financial investor) may at the same time have identities of both a fiduciary/ beneficial owner (due to investment funds' fiduciary duties and securities reporting rules) and of an ultimate/ mandate owner (due to the economic reality and *de facto* power dynamics of the relationship). See note 22 below.

16 John C. Coates, "The Future of Corporate Governance Part I: The Problem of Twelve," [2018] Harvard Public Law Working Paper No. 19-07 19.

17 Jan Fichtner, Eelke M. Heemskerk & Javier Garcia-Bernardo, "Hidden Power of the Big Three? Passive Index Funds, Re-Concentration of Corporate Ownership, and New Financial Risk," (2017) 19 Business and Politics 298.

18 Robin Wigglesworth, "Passive Attack: The Story of a Wall Street Revolution," (*Financial Times*, December 20, 2018). The FT reports on this phenomenon as "the Manhattan Project of investing [that], ultimately, helped birth a nuclear bomb that would rip through the global asset management industry."

19 Ian R Appel, Todd A. Gormley & Donald B Keim, "Passive Investors, Not Passive Owners," (2016) 121(1) Journal of Financial Economics 111; Anna Tzanaki, "The Regulation of Minority Shareholdings and Other Structural Links between Competing Undertakings: A Law & Economics Analysis," (Doctoral Thesis, UCL (University College London) 2017).

20 BlackRock, "The Investment Stewardship Ecosystem," (2018).

21 Jan Fichtner & Eelke M. Heemskerk, "The New Permanent Universal Owners: Index Funds, (Im)Patient Capital, and the Claim of Long-Termism," (2018) 25.

managers are in fact "mandate owners" when they hold shares in corporations and/or exercise voting rights while financial risk and/or legal title remains with their clients.[22]

The above noted "double agency costs" and "corporate ownership concentration" associated with common ownership by institutional investors has wide-ranging potential consequences. As we only start to understand the broader implications of "institutional ownership," I focus here on three areas of potential concern: (i) corporate governance; (ii) finance; and (iii) antitrust. More specifically, common institutional ownership may create conflicts of interest between corporate constituents and financial investment stakeholders and also spillover effects on product market competition,[23] with distinct legal and welfare implications. The interplay of these three dimensions of the common ownership problem is particularly significant, as it is said to underscore a "policy trilemma" between shareholder value maximization, portfolio diversification, and competition, all desirable objectives in their own right.[24]

It is recalled that the firm is typically perceived and analyzed in economic conception as a "neutral nexus of contracts."[25] The firm is "not an individual" but "a legal fiction" where "conflicting objectives of individuals are brought into equilibrium within a framework of contractual relations," which delineate the property rights of corporate constituents.[26] Firm behavior is thus the outcome of this process where business managers direct firms to maximize profits in the best interests of shareholders. In a diffused model of corporate ownership, shareholder activism and the market for corporate control are seen as major devices to discipline management and align principal-agent incentives. In case of concentrated corporate ownership, the focus is on resolving intra-shareholder conflicts as controlling shareholder(s) may serve to minimize managerial agency costs but their private interests may be in conflict with those of the minority. Hence, a key function of corporate law is to protect minority shareholders against inappropriate value diversion and constrain controllers' ability to influence managerial decisions.[27]

Common ownership by diversified investors raises serious concerns from a corporate governance perspective to begin with. The paradox we face is that shareholders of operating firms may be "both more active and more conflicted," while institutional investors may have incentives to act "in a way that is bad in the long-run for a particular operating company whose shares they hold if that act would benefit their overall portfolio."[28] In other words, shareholder activism does not necessarily solve the vertical agency problem (shareholder-manager conflicts) but may additionally create a new horizontal one (conflicts between diversified *vis-à-vis* non-diversified shareholders). Furthermore, the impressive feature of this new landscape, where institutional investors hold very small equity positions in individual companies, is that formal "control"[29] is not a necessary medium to effect the above horizontal conflicts, which "may give rise to the expropriation of undiversified shareholders" (a situation akin to "tunneling") and which may seem counterintuitive in a "widely-held firm" setting.[30]

Conversely, the double "ownership splitting" brought about by common institutional ownership may lead to the following paradoxical result: (i) an "ownership deficit" and "risk bearing dilution," meaning inherent governance inertia and inadequate risk assumption due to the free riding problem, and externalization of liability risk linked to indirect partial ownership; (ii) non-firm specific shareholder engagement due to investment diversification and proxy voting; and (iii) indirect concentration of corporate power and economic control due to concentration of "ownership via intermediation" and increased shareholder engagement by a few, large institutional investors.

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22 Carmel Shenkar, Eelke M. Heemskerk & Jan Fichtner, "The New Mandate Owners: Passive Asset Managers and The Decoupling of Corporate Ownership," (2017) Index Funds – A New Antitrust Frontier? CPI Antitrust Chronicle, June 2017 3.

23 OECD, *supra* note 7.

24 José Azar, "A New Look at Oligopoly: Implicit Collusion Through Portfolio Diversification," (PhD Dissertation, Princeton University 2012).

25 Oliver E. Williamson, "Corporate Finance and Corporate Governance," (1988) 43 Journal of Finance 567.

26 Michael C. Jensen & William H. Meckling, "Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure," (1976) 3 Journal of Financial Economics 305, 311.

27 Jeffrey N. Gordon & Wolf-Georg Ringe (eds), *The Oxford Handbook of Corporate Law and Governance* (Oxford University Press 2018).

28 Strine, *supra* note 14, 689.

29 By "formal control" here I mean *de jure* sole control on a stand-alone basis.

30 Matthew Backus, Christopher Conlon & Michael Sinkinson, "Common Ownership in America: 1980-2017," (2019) NBER Working Paper 25454. Typically, tunneling is associated with corporate governance structures where a "blockholder" has a controlling interest or "when control rights are explicitly divorced from cash flow rights." In this setting, "control" of the firm is indirect and *de facto* due to parallel and formally non-controlling shareholdings by diversified shareholders-investors.

In this hybrid setting of both dispersed (direct) and concentrated (indirect) ownership, a series of interrelated questions pertaining to the operation of firms and markets emerge:

(a) what do firms maximize in theory and practice (firm value or portfolio value of diversified and collectively dominant shareholders);

(b) whose interests do business managers serve (diversified or undiversified shareholders);

(c) what do (active and passive) investment fund managers strive to maximize (individual client or portfolio value) and at which level (own fund portfolio or fund family value);

(d) whether and how common ownership concentration (diversified shareholder overlap) may translate into corporate power concentration (shareholder power) or lead to poor firm performance (firm value reduction);

(e) whether and how common ownership concentration (diversified shareholder overlap) may translate into industrial concentration (market power) or affect product market competition (consumer welfare);

(f) whether and what legal control mechanisms may address any problematic outcomes (conflicts of interest or welfare reduction)?

The burgeoning literature on common ownership shows that, at least theoretically, a range of concerning situations may arise such as suboptimal or destructive corporate governance structures, empowered but unaccountable (financial or corporate) agents, lack of transparency about exercise of indirectly concentrated corporate power or investment authority, suboptimal operation of financial markets (increased volatility and blunted price signals due to indexation[31]), inefficiencies in the market for corporate control (gatekeeping role of institutional investors in M&A attempts by other investors[32]), reduced performance or stabilization of product market competition (unilateral or coordinated anticompetitive effects). In turn, common ownership may be seen as a corporate governance, an investor protection or capital markets,[33] or a competition problem.

While exploring the full range of such potential concerns is beyond the scope of this article, what is clear is that common ownership may fundamentally change our perception of current financial, corporate and industrial reality. The implications are devastating because the above questions not only suggest that business organizations (industrial firms or investment funds) may fail to deliver on their social function[34] but also hint to the fact that the "firm" may no longer be the relevant atom of economic analysis, as its previously conceived organizational form and function may no longer correspond to prevailing economic reality. In this light and recalling Coase's words, questions of tractability and the realistic nature of economic assumptions become paramount as well as insurmountable.[35]

IV. ANTICOMPETITIVE MECHANISMS – IN SEARCH OF A CAUSAL LINK?

Zooming into the competition aspect of the common ownership problem, the above observations are of particular relevance. Most scholarly debate on common ownership focuses on and fights over three key issues: (i) empirical research (dis)confirming the anticompetitive effects of common ownership; (ii) economic tools to measure its impact on market concentration and consumer welfare; (iii) potential transmission mechanisms or channels of influence.

31 Coates *supra* note 16, 20.

32 David Gelles & Michael J. de la Merced, "New Alliances in Battle for Corporate Control," (*New York Times*, 18 March 2014).

33 Robert J. Jackson, Jr., "Common Ownership: The Investor Protection Challenge of the 21st Century," (*Harvard Law School Forum on Corporate Governance and Financial Regulation*, 14 December 2018).

34 Strine, *supra* note 14, 687: "The goal of corporations, after all, is to create societal wealth. That means creating new products and services, and delivering them in efficient ways. Corporate governance is a means, not an end".

35 Ronald H. Coase, "The Nature of the Firm," (1937) 4(16) Economica 386, (quoting Joan Robinson).

On the positive side, perhaps we can agree that effects may vary across industries and also depend on the specific type of investor,[36] and that establishing some sort of causality between common ownership and any purported harmful effects is necessary. Yet, there is fundamental disagreement about the concrete empirical methods and theoretical measuring tools used[37] and, perhaps more importantly, about the broader conceptual exercise of translating ownership patterns to control variables to competitive outcomes.[38]

Economic analysis of common ownership to date has concentrated on modeling and measuring unilateral anticompetitive effects[39] and is thus largely micro-founded and embedded in a corporate governance context where determination of control rights, and appropriate weights corresponding to partial ownership, is a necessary intermediate step to estimating effects on competition.[40] Moreover, criticism regarding the implausibility of anticompetitive strategies or mechanisms underpinning such effects rests on the same analytical foundations.[41]

Less attention is devoted to potential coordinated effects.[42] This is so even though it is recognized that: (vi) collusive outcomes may be beneficial for all firms and stakeholders involved[43] (i.e. both diversified and undiversified shareholders, business managers, portfolio fund managers, investors in active and passive index funds or investors in both horizontal rivals within an industry and their suppliers and customers upstream and downstream[44]) and thus more likely; (ii) existing legal control mechanisms (fiduciary duties of business or fund managers, antitrust liability) are ineffective or inadequate to address collusive effects; [45] and (iii) diversification benefits are minimal in case of collusion since industry firms subject to joint decisions face similar risks.[46]

Economists are humble to admit the tractability challenge of modeling coordinated effects.[47] To complicate the above analysis even further, potential (explicit or tacit) coordination may not necessarily be socially harmful: it is potentially harmful for consumers in certain cases, but in other instances it might also be pro-competitive or innovation enhancing.[48] Further, while such efficiency enhancing effects may rely on control assumptions,[49] it is clear and critical that coordination need not depend on active influence or control over a firm's management.[50]

More broadly, if the general concern is that common ownership may "facilitate anticompetitive conduct throughout the economy," "further research will also be needed to identify the [precise anticompetitive] mechanisms through which [it] leads firms to raise product prices," e.g.

36 C. Scott Hemphill & Marcel Kahan, "The Strategies of Anticompetitive Common Ownership," [2018] Yale Law Journal (forthcoming); Angel Luis Lopez & Xavier Vives, "Overlapping Ownership, R&D Spillovers, and Antitrust Policy," [2017] IESE Business School WP-1140.

37 Monopolkommission, "Biennial Report XXII: Competition 2018," Chapter II.

38 Xavier Vives, "Institutional Investment, Common Ownership and Antitrust," (2017) Index Funds – A New Antitrust Frontier? CPI Antitrust Chronicle, June 2017.

39 Empirical analysis of the U.S. airline and banking industries and seed sector suggests that common ownership leads to higher prices. José Azar, Martin C. Schmalz & Isabel Tecu, 'Anticompetitive Effects of Common Ownership' (2018) 73 The Journal of Finance 1513; José Azar, Sahil Raina & Martin C. Schmalz, "Ultimate Ownership and Bank Competition," (2016); Mohammad Torshizi & Jennifer Clapp, "Price Effects of Common Ownership in the Seed Sector," (2019).

40 Daniel P. O'Brien & Steven C. Salop, "Competitive Effects of Partial Ownership: Financial Interest and Corporate Control," (2000) 67 Antitrust Law Journal 559; José Azar, "Portfolio Diversification, Market Power, and the Theory of the Firm," (2016).

41 Hemphill & Kahan, *supra* note 36; Daniel P. O'Brien & Keith Waehrer, "The Competitive Effects of Common Ownership: We Know Less Than We Think," (2017) 81(3) Antitrust Law Journal 729; Thomas A. Lambert & Michael E. Sykuta, "The Case for Doing Nothing About Institutional Investors' Common Ownership of Small Stakes in Competing Firms," [2018] University of Missouri School of Law Legal Studies Research Paper No. 2018-21.

42 Edward B. Rock & Daniel L. Rubinfeld, "Common Ownership and Coordinated Effects," [2018] NYU Law and Economics Research Paper No. 18-40; Tzanaki, *supra* note 19.

43 Monopolkommission, supra note 37, 22.

44 Einer Elhauge, "How Horizontal Shareholding Harms Our Economy - And Why Antitrust Law Can Fix It," (2018) 45–48.

45 Such fiduciary duties acting as legal constraints against the noted "double agency costs" may not be sufficient to eliminate them, either in theory or in practice. *Ibid* 43–45, 49.

46 OECD, *supra* note 7, 29. More generally, within-industry diversification has limited benefit as firms are subject to "industry-wide trends" while common financial investors may have less restrictive alternatives to diversify their portfolios by holding shares in several industrial firms across different industries or by investing in multiple mutual funds or ETFs. Hence, any such "benefits within the relevant industry [would likely] be small relative to the anticompetitive harm." Baker, *supra* note 6, 228–230.

47 Eric A. Posner, Fiona M. Scott Morton & E. Glen Weyl, "A Proposal to Limit the Anti-Competitive Power of Institutional Investors," (2017) 81(3) Antitrust Law Journal 669, 689.

48 Jie (Jack) He & Jiekun Huang, "Product Market Competition in a World of Cross-Ownership: Evidence from Institutional Blockholdings," (2017) 30 The Review of Financial Studies 2674.

49 Lopez & Vives, *supra* note 36.

50 Monopolkommission, *supra* note 37, 23.

express or tacit coordination via communication or observation, exclusion or discouraging potential competition.[51] Thus, it may be that under certain circumstances, long-term anticompetitive strategies such as (tacit) collusion or (parallel) exclusion may be more likely theories of harm compared to any short-term pricing effects.[52]

These remarks suggest that a one-sided focus on static unilateral effects and anticompetitive mechanisms premised on corporate governance and measured by structural market indices relying on a (partial) merger control model may not be the (only) relevant locus of inquiry. That is, firm management control and market concentration may not be good predictors of harm. Indeed, it is admitted that concentration indices are to be used in merger analysis as a screen to identify a potentially conducive setting for anticompetitive effects to arise, rather than as a conclusive indicator of harm.[53] This observation is important because common ownership is not associated to either formal legal control or even clear economic control of the firm[54] on a stand-alone basis but rather with situations of indirect, *de facto*, collective control in firm governance[55] and product markets due to the interaction and cumulative effect of small parallel holdings in competitors by diversified investors.

Consequently, common ownership forces us to think beyond conventional wisdom in order to cope with the new emerging reality. In light of the above, could it be that the firm becomes an "open box" rather than a "black box"; is hierarchy and (partial) control a useful way of working out firm and market interactions in a world of diversified investors-shareholders; is market concentration, capturing a reduction in the number of firms being formally independent in the market post-merger, a meaningful proxy to screen harmful common ownership situations or correlate to its potential anticompetitive effects? Could it be that our existing tools and methods or even concepts are not only not sharp enough, but also not well suited to fully understand the determinants and implications of common ownership for firm and market outcomes?

This reminds of the well-known economists' joke of looking not at where the keys might have been lost but at where the streetlight is. Prudence is not a virtue of drunk men; the task is enlightenment. In looking for alternative paths of inquiry to approaching common ownership and appreciating its operation and welfare consequences – if we follow Brandeis' guidance: "sunlight is said to be the best of disinfectants; electric light the most efficient policeman" – perhaps we can also find that much sought-after missing causal link.[56]

V. ANTITRUST LAW SOLUTIONS – REVOLUTION OR EVOLUTION?

Where does the above leave us then? Is there any point of speaking of solutions when we do not know what the relevant problem is? A closer look suggests that the territory we are currently stepping on might not be a safe one. Why? Because doing nothing might be just as socially harmful as overreacting to the purported concerns.

For instance, merger control enforcement that does not account for common ownership may be misguided in unexpected ways: the type of mergers, and the thresholds and type of market concentration relevant under merger control may change, taking into account common shareholding.[57] Moreover, merger control scrutiny may not be an effective means of regulating potential harm arising from common ownership, either because control and concentration may not be the critical locus of inquiry, or because tacit collusion or anticompetitive outcomes unrelated to a single legal merger situation cannot be coherently or aptly captured via an *ex ante* legal control regime.[58]

In Europe, there is not even the possibility of resorting to merger law to tackle common ownership concerns: the EU merger control regime cannot reach out to non-controlling minority shareholding, while the few Member States that have more encompassing merger rules

51 Baker, *supra* note 6, 213, 217–218, 226.

52 Tzanaki, *supra* note 19; Monopolkommission, *supra* note 37, 22–24.

53 O'Brien & Waehrer, *supra* note 41, 748.

54 *Ibid* 766.

55 Including the market for corporate control.

56 As noted by Ludwig Wittgenstein, Remarks on Frazer's Golden Bough: "To convince someone of the truth, it is not enough to state it, but rather one must find the path from error to truth."

57 Elhauge, *supra* note 44, 102–104. E.g. non-horizontal mergers, lower market concentration levels than under traditional merger analysis, relevance of local market concentration.

58 As explained above, the anticompetitive effect arising from common ownership is cumulative and any relevant control is indirect and *de facto*; in addition, merger control scrutiny is not triggered unless there is a new shareholding acquisition(s) by the common owners that meets the relevant statutory criteria.

still require some lower level of active influence linked to the shareholding.[59] Recent practice explicitly discusses common ownership links as a side-issue in notified merger cases.[60] While common shareholding is said to be a relevant "element of context in the assessment," its analysis in these decisions is non-consequential and conclusions on the broader policy issue are left open. U.S. merger control is more open-ended and not reliant on control: formally "passive" common shareholding proven to give rise to actual anticompetitive effects is not safe harbored, while recent enforcement action suggests that *de facto* "active" intent or informal influence may be enough to bring "passive" institutional investment within the reach of the law.[61]

Besides, antitrust law enforcement against common shareholding is also limited. In contrast to merger control that is effects-oriented,[62] antitrust law requires some kind of overt act. In legal terms, this may take the form of an anticompetitive "agreement" or a unilateral practice, i.e. "abusive" exercise of market power (EU) or "monopolization" (U.S.). In theory, the current U.S. and EU antitrust rules can be perceived and interpreted so as to apply to common ownership situations.[63] However, enforcement on the basis of Articles 101 and 102 TFEU against any share acquisition transactions (controlling or non), without express communication or coordination, has been moot since the adoption of the EU Merger Regulation and especially after the modernization of the EU antitrust regime.[64] On the other hand, Sherman Act § 1 has been enforced against anticompetitive horizontal "combinations" and mere stock acquisitions;[65] but "action has never been brought against parallel purchases of noncontrolling interests," although the legal elements of "agreement" and "effects" do not require and apply regardless of control.[66]

To the praise of regulators on both sides of the Atlantic, steps are being taken to better grasp the extent and significance of the common ownership phenomenon.[67] But what is to be done, if at all, on the current state of awareness and relative (empirical and theoretical) uncertainty? We may know that circumstances have changed, yet we may not know how. In doubt, shall we choose to intervene or not? Shall we presume any anticompetitive effects or introduce safe harbors? Can we rely on existing law or is further legislation necessary?

In the war on common ownership, the battles shall be over default rules. Opinions and concrete choices may vary across jurisdictions in light also of different market conditions, harm potential and industry structure, legal tradition, institutional arrangements and socioeconomic context. However, the present inactive enforcement and underdeveloped law are not a good position to stay. Without credible antitrust enforcement, the law's "non-secret weapon of deterrence" is effectively nullified. In turn, this may lead to more common ownership links in quantity and more harmful ones in quality. The argument usually given against regulatory action is the risk and cost of "chilling" legitimate behavior such as institutional investment. Yet, it is overseen that the law may have a "warming" effect too:[68] it can be designed in a way so as to encourage and allow good quality, not just any, institutional investment. The two opposing effects must be balanced before drawing conclusions on how to design and apply rules in any given case.

If antitrust is the "economic democracy of markets,"[69] perhaps what is needed is a committed evolution of existing law to adapt to the new reality of increasing common ownership. Citizens of the republic (enforcers, business, consumers) are all to benefit from such a development: antitrust enforcement ensures firms and markets operate in the public interest, so the long-term wellbeing of the system and its constituents is

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59 Tzanaki, *supra* note 19; European Commission, "Support Study for Impact Assessment Concerning the Review of Merger Regulation Regarding Minority Shareholdings," (2016) Report by Spark Legal Network and Queen Mary University of London.

60 Case M.7932, *Dow/DuPont* (March 27, 2017); Case M.8084, *Bayer/Monsanto* (April 11, 2018).

61 Corradi & Tzanaki, *supra* note 4, 6 (referring to the *ValueAct* case).

62 U.S. DOJ & FTC Horizontal Merger Guidelines 2010 § 13.

63 Elhauge, *supra* note 44; Tzanaki, *supra* note 19.

64 Tzanaki, *supra* note 19; Corradi & Tzanaki, *supra* note 4, 7.

65 Even when the result was a "single firm that is legally unable to fix prices with itself".

66 Morton & Hovenkamp, *supra* note 3, 2033–2036.

67 Tender contract COMP/2018/002 "Collection of European Market Share and Industry Level Concentration Data," (May 2018); U.S. FTC Hearings on Competition and Consumer Protection in the 21st Century, Panel #8: Common Ownership (December 6, 2018).

68 Daniel Jacob Hemel & Ariel Porat, "Free Speech and Cheap Talk," [2019] Journal of Legal Analysis (forthcoming).

69 Eleanor M. Fox, "The Symbiosis of Democracy and Markets," [2018] OECD Global Forum on Competition, DAF/COMP/GF(2017)5 2.

preserved. A revolution in the form of new regulation or limiting solutions[70] of the common ownership phenomenon we not yet fully understand may then not only be premature but also counterproductive. Revolutions may also have innocent casualties, sometimes being the social welfare and the openness of the system they were said to protect.

For the time being, we better put to good use what we already have. First, we may need to update traditional merger analysis to account for common shareholding when reviewing mergers between industrial firms or asset managers.[71] Second, we need to reactivate and update antitrust enforcement in line with any new theories of harm (collusion, exclusion) associated with common shareholding that go beyond merger control.[72] Third, we need to more deeply understand all possible ways in which common ownership may lead to anticompetitive effects or efficiencies, so we are able to duly appreciate and balance the two under merger control or antitrust enforcement. Overall, case-by-case analysis[73] based on informed competition policy and detailed enforcement guidance,[74] coupled with staggered legal change,[75] may be a wiser approach to the common ownership challenge.

VI. CONCLUSION

In the common ownership universe, interesting new harm theories spring to life such that our thus-far fundamental view of the world changes. Among others, common ownership may provide the terrestrial matter that brings figures such as Schumpeter and Marx closer than ever,[76] in that it blurs the boundaries between liberal and coordinated market economies. In this exotic universe, free market and stakeholder varieties of capitalism [77] may meet in a given jurisdiction by means of the cohesive force of institutional investor intermediation. In this sense, the echoes of the U.S. President punchline in the Kubrick movie may sound surprisingly prescient, if not apocalyptic:

"Gentlemen, you can't fight in here! This is the War Room!"

If as said, the current political and legal equilibrium is not sustainable,[78] and if "conspiracy against the public" is the more likely antitrust harm scenario,[79] then we better not stay "passive" observers of the common ownership revolution. Contemporary law and economics researchers should be attentive to this new economic state of affairs for firms, industries and financial markets, and press on exploring the common ownership puzzle through cross-disciplinary collaboration and focusing on asking the right questions. No less, policymakers should be open to any new lessons even when they go beyond traditional frames of jurisdiction-specific orthodoxy. Common ownership brings us together to re-discover points of juncture and convergence in full awareness of our diverging economic pasts, and perhaps with the hope of a shared new vision on socially-oriented growth for our societies and citizens. Let antitrust be the igniting force in this path.

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70 Posner, Scott Morton & Weyl, *supra* note 47.

71 Elhauge, *supra* note 44, 98; Azar, Schmalz & Tecu, *supra* note 39, 1560.

72 Rock & Rubinfeld, *supra* note 42; Tzanaki, *supra* note 19.

73 Elhauge, *supra* note 44, 33; Menesh Patel, «Common Ownership, Institutional Investors, and Antitrust,» (2018) 82(1) Antitrust Law Journal 279.

74 See European Parliament resolution of January 31, 2019 on the Annual Report on Competition Policy (2018/2102(INI)) - Brussels, point 31, calling for such guidance.

75 If necessary as regards the EU merger control regime. Anna Tzanaki, "The Legal Treatment of Minority Shareholdings Under EU Competition Law: Present and Future," [2015] Essays in Honour of Professor Panayiotis I. Kanellopoulos, Sakkoulas Publications, Athens 861, 885–886.

76 "Stealth Socialism" (*The Economist*, September 17, 2016).

77 Peter A. Hall & David Soskice, *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (Oxford University Press 2001).

78 Coates, *supra* note 16, 19.

79 Adam Smith, The Wealth of Nations (1776).

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