CPI TALKS…

With Judge Douglas H. Ginsburg

In this month's edition of CPI Talks we have the pleasure of speaking with Judge Douglas H. Ginsburg. Judge Ginsburg is a Senior Judge serving on the United States Court of Appeals for the District of Columbia Circuit, Chairman of the International Board of Advisors of the Global Antitrust Institute at George Mason University, and a former Assistant Attorney General in charge of the Antitrust Division of the U.S. Department of Justice.

Thank you, Judge Ginsburg, for sharing your time for this interview with CPI.

1. Is common ownership a threat to corporate America? If so, what is the root of the problem? Is it an antitrust or investor protection problem? Or something else?

Concern about common ownership dates to two economic papers that found a statistically significant correlation between the degree of common share ownership by major investment managers (Blackrock, Fidelity, et al.) and prices elevated by about five percent on certain airline routes and on bank checking accounts.[1] A third paper estimates that common ownership is correlated with executive compensation policies that may weaken the incentive for firms to compete aggressively.[2] Eight other economic papers now challenge these findings on theoretical,[3] or both theoretical and empirical, grounds.[4] In any event, the problem, if it exists, is one of diminished competition – not necessarily an antitrust violation, and certainly not an investor protection problem inasmuch as increased prices would make companies more profitable and their shares more valuable.

2. Why is there so much debate around the economic analysis of common ownership? Can you see some lines of agreement regarding the recent theoretical and empirical economic research underscoring the competitive implications of common ownership?

There is much debate among economists because the topic is potentially important to the economy – but the economic evidence is still not sufficiently definitive to resolve the question. Academic lawyers debate the theory because there are always some keen to find new causes of action about which to write – and, in some cases, perhaps to consult or to appear as expert witnesses. They represent what Donald Turner called "the inhospitality tradition" in antitrust.[5] Others, who are concerned about the effects of premature or ill-conceived antitrust intervention in less-than-fully understood new ways of doing business, respond in kind.

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1 José Azar, Martin C. Schmalz & Isabel Tecu, *Anti-Competitive Effects of Common Ownership* (Univ. of Mich. Ross Sch. of Bus., Working Paper No. 1235, 2015) [hereinafter Airline Study], http://papers.ssrn.com/abstract=2427345 (airlines); José Azar, Sahil Raina & Martin C. Schmalz, *Ultimate Ownership and Bank Competition* (Jan. 8, 2016) [hereinafter Banking Study], http://ssrn.com/abstract=2710252 (checking account fees and fee thresholds).

2 Miguel Antón, Florian Ederer, Mireia Giné, and Martin C. Schmalz, *Common Ownership, Competition, and Top Management Incentives* (Nov. 15, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=280233.

3 Daniel P. O'Brien & Keith Waehrer, *The Competitive Effects of Common Ownership: We Know Less than We Think*, 81 Antitrust L.J. 729 (2017).

4 Andrew Koch et al., *Common Ownership and Competition in Product Markets* (Feb. 22, 2019) (Working Paper) (common ownership is not robustly positively related with industry profitability or output prices), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2965058; Patrick J. Dennis, Kristopher Gerardi, and Carola Schenone, *Common Ownership Does Not Have Anti-Competitive Effects in the Airline Industry* (Feb. 5, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3063465; Committee on Capital Markets Regulation, Common Ownership and Antitrust Concerns, Nov. 2017, https://www.capmktsreg.org/wp-content/uploads/2017/11/CCMR-Common-Ownership-1.pdf; Pauline Kennedy, Daniel P. O'Brien, Minjae Song, and Keith Waehrer, *The Competitive Effects of Common Ownership: Economic Foundations and Empirical Evidence* (July 24, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3008331; Edward B. Rock & Daniel L. Rubinfeld, *Antitrust for Institutional Investors*, 82 Antitrust L.J. 221 (2018); Jacob Gramlich & Serafin Grundl, *Testing for Competitive Effects of Common Ownership*, Fed. Reserve Bd. Fin. & Econ. Discussion Series Paper No. 2017-029 (Feb. 19, 2017), https://www.federalreserve.gov/econres/feds/files/2017029pap.pdf; Heung Jin Kwon, *Executive Compensation under Common Ownership* (Nov. 29, 2016), http://fmaconferences.org/Boston/ExecutiveCompensationunderCommonOwnership.pdf.

5 Donald F. Turner, *Some Reflections on Antitrust*, 1966 N.Y. St. B. Ass'n Antitrust L. Symp. 1, 12 ("I approach territorial and customer restrictions not hospitably in the common law tradition, but inhospitably in the tradition of antitrust law").

3. **Can existing antitrust law and doctrine reach to the purported common ownership problem? If so, which legal theories – new and old – are more plausible and better fit to capture any anticompetitive cases?**

If the empirical literature ultimately indicates antitrust enforcement against common ownership is warranted, there is no need to devise an entirely new analytic framework; the underlying behaviors with which commentators are concerned are not new to antitrust law. If the anticompetitive effect is attributable to investment managers meeting with corporate officials and helping to coordinate their conduct, then they should be prosecuted for organizing a hub-and-spoke conspiracy, or for orchestrating the exchange of competitively sensitive information. These are conventional antitrust violations of Section 1 of the Sherman Act that do not require the agencies to devise a new theory of liability for the asset management industry.

That said, because the mechanism causing the perceived harm is currently unknown, as everyone in the common ownership debate acknowledges, academic commentators have been creative in proposing new bases for antitrust liability that would make common ownership itself a violation of either Section 7 of the Clayton Act[6] or, in one case, Section 1 of the Sherman Act.[7] Contrary to the assertion that antitrust liability for common ownership requires only a straightforward application of Section 7 doctrine, it actually would be an entirely novel application of Section 7, as essentially all precedents address *cross* ownership rather than *common* ownership.[8] Similarly, it is doubtful common ownership violates Sherman Act Section 1, which requires a plaintiff to identify a viable less restrictive alternative that can realize the same legitimate objectives as do investment managers,[9] viz., offering even small investors the ability to reduce risk through diversification and to do so with minimal transaction costs.

4. **Do we need more law to address the common ownership problem? If something needs to be done, is antitrust law part of the solution? What could be a good solution, more broadly?**

Assuming there is a problem, i.e. that significant common ownership by investment managers diminishes competition among their portfolio companies in concentrated markets, such as airlines, the first (and perhaps the only) thing to be done would be to revisit the current thresholds at which mergers are thought to be anti-competitive. The objective would be to identify the level of concentration in a well-defined antitrust market at which common ownership by investment managers begins to dampen competitive vigor, and to deny mergers that would exceed that level.

5. **To what extent does common ownership reflect conscious parallelism?**

An empirical answer to this question is impossible – but it is likely the perceived price effect of common ownership largely reflects conscious parallelism among firms in a concentrated industry, which is neither unlawful, at least according to Supreme Court dictum in *Brooke Group* nor, as a practical matter, remediable.[10] That is precisely why antitrust agencies take the potential for coordinated behavior into account when analyzing the likely effect of a merger. With respect to how corporations react to shareholder proposals, the investment managers – like the great majority of publicly traded firms – tend to follow the advice of the major proxy advisory firms, regardless whether they have a significant degree of common ownership, so their similar voting patterns are not probative even of conscious parallelism.

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6 Fiona Scott Morton & Herbert Hovenkamp, *Horizontal Shareholding and Antitrust Policy*, 127 Yale L.J. 2026, 2033-37 (2018).

7 Einer Elhauge, *Horizontal Shareholding*, 129 Harv. L. Rev. 1267, 1304, 1308 n.205 (2016); Einer Elhauge, *New Evidence, Proofs, and Legal Theories on Horizontal Shareholding* (Jan. 11, 2018) (Working Paper), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3096812.

8 See Note to the OECD by the United States at ¶¶ 2-4, 9, Hearing on Common Ownership by Institutional Investors and Its Impact on Competition, OECD DAF/COMP/WD(2017)86 (Dec. 6, 2017) (pointing out that "common ownership is distinct from cross-ownership," "the U.S. antitrust agencies have not litigated a case involving common ownership by a single institutional investor," and the portion of the U.S. Horizontal Merger Guidelines that Elhauge cited "is concerned more directly with cross-ownership" (cleaned up)).

9 See VII Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 1502 (4th ed. 2014) (describing the "classic" burden-shifting framework, which concludes with an inquiry into whether "the restraint [is] reasonably necessary for the achievement of any such legitimate objectives," and thereby considers whether a less restrictive alternative exists).

10 *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 ("Tacit collusion, sometimes called oligopolistic price coordination or conscious parallelism, describes the process, not in itself unlawful, by which firms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing, supra-competitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions").

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