Common Ownership and Coordinated Effects

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Abstract

With the growth of common ownership and investor engagement with portfolio firms, the possibility of adverse competitive effects of common ownership has become an important issue. To date, most of the focus has been on “unilateral” effects. In this Article, we shift the focus to the potential “coordinated” effects of common ownership and the appropriate antitrust treatment. After examining the ways in which a common owner could be a particularly effective cartel facilitator, we identify four scenarios, based on antitrust case law and enforcement experience, in which common ownership could plausibly increase the potential for coordinated conduct in concentrated markets. For each, we provide an economic analysis of the potential anticompetitive coordinated effects and we consider the appropriate legal treatment under Section 1 of the Sherman Act. The four scenarios are: Common Owners as Cartel Initiators; Common Owners as Trustworthy Conduits; Common Owners as Brakes; Common Owners as Vectors of Infection. We then turn to whether and how the anticompetitive potential for coordinated effects of common ownership might affect merger analysis under Section 7 of the Clayton Act or the EU Merger Regulation.