

Insights

## THEORIES OF HARM: COMMON OWNERSHIP – WHERE THE GREEKS WALK THE WORLD FOLLOWS?

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### SUMMARY

In this article we discuss the evolving global attention towards a less common theory of harm: common ownership. We conclude by assessing the notably bullish approach taken by the Hellenic Competition Commission (the “HCC”), and what implications this may bring for companies. We sound off with a word of caution for companies which hold common shareholdings, or which have ‘interlocking directorates’ with common management across horizontal or vertical companies; any observed anti-competitive effects in the market may draw in the attention of a competition authority.

The common ownership theory of harm outlines that when investors own shares in horizontal competitors, those competitors may have reduced incentives to compete – which can potentially lead to outcomes such as price collusion, reductions in R&D and innovation, or foreclosure of the relevant market to third parties. As outlined below, this theory of harm is not solely confined to horizontal relationships; common shareholdings across vertical parties can also come under scrutiny.

Historically, common ownership is a seldom-pursued theory of harm. We list below four potential (non-exhaustive) reasons for this:

- i. Causal connections between common shareholdings (especially in relation to minority shareholdings) and anti-competitive behaviour are difficult to establish and (outside of any object infringement) may require extensive effects based analyses;
- ii. Without evidence of causal connection to distortions of competition, intervention would arguably be *ex ante*. Any infringement findings based solely on common shareholdings would be a novel area of intervention (though note *ex ante* findings in relation to the European Union’s Digital Markets Act and merger regulation are established areas of intervention);

- iii. Without firm evidence of distortions of competition, any investigation into common shareholdings would potentially come into conflict with a national authority's prioritisation principles; and
- iv. Finding infringements solely on the existence of common shareholdings (*ex ante*) may carry economic (and therefore political) implications insofar that such findings may have a knock on effect on foreign direct investment and investor confidence.

Notwithstanding the reasons outlined above, there are signs that global headwinds on common ownership are changing. Preliminary examples include:

- a. the U.S. Federal Trade Commission ("FTC") and Department of Justice publicly outlining their opposition to common ownership (in this case, indirectly through management) in relation to private equity firms and 'interlocking directorates' (where private equity executives are board members of competing companies). As we have written, this has progressed into action; the FTC announced revised thresholds to Section 8 of the Clayton Act, 15 U.S.C. § 19 to address interlocking directorates; and
- b. the Financial Services Agency of Japan announcing a proposal for Japanese companies to disclose (and describe in detail) business transactions with companies with which they hold cross-shareholdings.

These steps can be perceived as *ex ante* steps taken in relation to common ownership, in that they apply universally to all markets within jurisdiction, and therefore do not arise and are not implemented as a result of any observed effects on a specific market. We address the implications of this further below.

The most overt action in relation to common ownership however, is arguably the market investigations and actions taken by the Greek competition authority, the HCC.

## HCC INVESTIGATIONS

In August 2022, the HCC published its second interim report relating to its market investigation into the competitive state of Greece's construction sector, which reinforced the conclusions of the first interim report published in April 2021.

The first interim report found that common ownership of the two largest construction companies may have led to reductions in competition, incentives to compete, and potentially coordinated effects. The second interim report found that, despite a reduction in the common shareholdings, the remaining common ownership and structural conditions of the market remained favourable towards competitive distortions. The HCC also found a relative symmetry of market shares in the construction of large public works and a symmetry of cost structure and production capacity

between competing companies, which, it outlined, contributes to 'parallel common interests' due to horizontal shareholding and possible joint market power (ultimately distorting competition).

The HCC proposed remedies which included requirements for independent management of and information barriers between the two companies, a notification obligation to the HCC where one of the companies acquires a greater than 5% share in a horizontal competitor, and further obligations to 'active common shareholders' in the sector and sub-markets.

In addition to this, the HCC in November 2022 found concerns in relation to **vertical common ownership** between publishers and the press distribution agency (which operates as a private natural monopoly). The HCC considered that vertical common ownership might be contributing to price effects observed in the sector, via an increase to the costs of distribution, which may limit the quality of the products of competing publishers. Remedies the HCC enforced were requirements of notification to the HCC for changes in the shareholding structure of the press distribution agency, information barriers between the press distribution agency and publishers, the creation of an advisory committee to formulate commercial policies for the press distribution agency, and an ombudsman/mediator to monitor the requirements enforced.

## CONCLUSIONS

What can we conclude from the above? The HCC is not afraid to be bullish in addressing common ownership, whether horizontal or vertical, over sections of Greece's economy. Though this is the case, the HCC did not take an *ex ante* approach to common ownership. That is, the HCC found effects within the markets to which it attributes common ownership as a cause. This is separate to the approaches of the FTC and the Japanese Financial Services Agency.

If this *ex ante* approach of the FTC develops across Europe, it might well be the case that any measures are universally deployed across markets through legislation, rather than through specific market application by competition authorities. However, if European authorities instead take an approach similar to the HCC, it is likely that observed market distortions will promote investigation into common ownership.

Furthermore, the HCC did not enforce structural remedies (e.g. divestment) outlining that, in relation to the construction sector, it did not consider that the recent partial divestment in one of the two companies neutralised the negative effects of the common ownership. Whilst European authorities are more at ease with behavioural remedies in relation to merger investigations, it would be interesting to see if the CMA, who are more favourable of structural remedies, would take the same approach if a case involving common ownership landed on their desk.

Whether other European authorities will tackle common ownership is an open question. Authorities could follow in the footsteps of the HCC and impose remedies in relation to common ownership following observed effects in the market, or authorities could follow the FTC approach and make universal legislation changes to *ex ante* tackle common ownership. An advanced novel step would

be whether any authorities will begin assessing common ownership in **specific markets** *ex ante*, independently of any observed effects.

In light of these options, the take-home message for companies is to be cautious either in relation to any common shareholdings they hold, or in relation to overlaps with horizontal or vertical companies via interlocking directorates. Any perceived anti-competitive effects within a concentrated market may perhaps draw in the eye of competition authorities.

If you have any questions on this article and the impact this may have on your business, please contact our Antitrust and Competition team.

## RELATED PRACTICE AREAS

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## MEET THE TEAM



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