

Antitrust Regulation Disputes on Horizontal Shareholding: A Comparative Analysis Between China and the United States and Its Implications

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Horizontal shareholding refers to the behavior of operators acting as investors, holding partial shares in two or more companies with competitive relationships in the same relevant market. The antitrust law and economic studies concerning this behavior have emerged as a new area of focus in developed market economies, represented by the United States, and in the traditional antitrust law field in recent years. The United States Federal Trade Commission (FTC), the Organization for Economic Cooperation and Development (OECD), have held hearings on the antitrust issues behind horizontal shareholding. Influential antitrust law and economics scholars such as Hovenkamp have joined the discussion, and fierce debates continue. This article first systematically sorts out the basis, principles, and methods of antitrust regulation of horizontal shareholding behavior, and compares the rules and value orientations of antitrust regulation of horizontal shareholding behavior between China and the United States, and finally provides some suggestions for possible antitrust regulation of horizontal shareholding behavior in China in the future.

Keywords: horizontal shareholding, competitive damage, anti-monopoly regulation, comparison

Horizontal Shareholding Behavior and Its Theoretical Foundation

In 2016, Einer Elhauge, a professor at Harvard Law School, published an article titled “Horizontal Shareholding” in the *Harvard Law Review*, initiating the discussion on antitrust regulation of horizontal shareholding behavior into the focus of antitrust law and economic studies (Elhauge, 2016). In December 2017, the Organisation for Economic Cooperation and Development (OECD) held a roundtable discussion on the topic of “The Competitive Influence of Institutional Investors’ Horizontal Shareholding” and released a meeting report.¹ On December 6, 2018, the Federal Trade Commission (FTC) held its 10th open hearing on “21st Century Competition and Consumer Protection”, reviewing the impact of “Common Ownership” on antitrust. This hearing featured the world’s most renowned antitrust law and economics scholars, including Einer Elhauge, Fiona Scott Morton, Martin Schmalz, Herbert Hovenkamp, Steven Davidoff Solomon, Tim Wu from Harvard University, Yale University, Oxford University, University of Pennsylvania, University of California, Berkeley, Columbia University, as well as the former chief economist of the U.S. Congressional Antitrust Committee,

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¹ See at <http://www.oecd.org/daf/competition/common-ownership-and-its-impact-on-competition.htm>.

Jonathan Baker.² On November 23, 2020, the American Economic Liberties Project, a non-profit organization founded by veteran American journalist and political commentator Barry Lynn, released a report titled “New Type of Trust Funds: How Large Asset Managers Control Our Economy and What We Can Do”. The report argues that the “Big Three” asset managers—BlackRock, Vanguard, and State Street—have impacted all aspects of American life through their shareholding, suggesting that they should be broken up under antitrust laws.³ Holding shares in two or more mutually competitive companies is known as Horizontal Shareholding (Elhauge, 2016) or Common Ownership (Azar, Schmalz, & Tecu, 2018). A similar concept is Overlapping Financial Investor Ownership. Although these concepts have slight differences in expression, the meanings conveyed are almost entirely identical. Therefore, the concept of “horizontal shareholding” will be uniformly adopted in the following discussion of this paper.

Antitrust law focuses on behaviors that have or may have the effect of excluding or limiting competition. Therefore, when discussing the antitrust regulation of horizontal shareholding behavior, it is essential first to clarify its real or potential anti-competitive effects. Anti-competitive effects under antitrust law refer to operators raising the price of their products in the relevant market above competitive levels through the exclusion or restriction of competition, thereby harming consumer welfare.

As early as 1986, economic literature suggested that the presence of profit rights between competitive enterprises might weaken competitive dynamics. According to a study in the field of economics based on the Cournot market model, suppose a market with a high degree of concentration, but competitors in the market do not collude. They found that, in the absence of market entry, partial mutual interests among competitors would lead to anti-competitive effects of reduced output and increased prices. These competitive effects occur because the arrangement of mutual partial interests is positively correlated with the interests of competitors. In this sense, these competitive effects are purely structural: they arise not because of increased collusion opportunities or concentration of control, but because the benefit link generated by mutual partial interests makes competitors less motivated to compete with each other and engage in actions that maximize the common interest of all parties (Reynolds & Snapp, 1986).

Professors Bresnahan and Salop demonstrated that the extent to which market prices exceed marginal costs would be correlated with horizontal shareholding when some companies are joint ventures and some competitors have dividend rights and/or control rights (Bresnahan & Salop, 1986). In recent years, new empirical research has shown that the anti-competitive risk of horizontal shareholding can explain the growing gap between corporate profits and investments over the past few decades, as well as the rapid growth in economic inequality. From 1999 to 2014, the amount of horizontal shareholding in the United States skyrocketed, during which the likelihood of two competitive companies having significant horizontal shareholding institutional investors in the S&P 500 index increased from 16% to 90%. Moreover, industrial economics research shows that horizontal equity has had an anti-competitive effect in the seed and pharmaceutical markets, and after eliminating the impact of unrelated variables, the research indicates that an increase in the number of horizontal shareholdings raises the price of seeds.

² See at <https://www.mofo.com/resources/insights/1901-ftc-antitrust-common-ownership>.

³ See at <https://www.economicliberties.us/our-work/new-money-trust/>.

In 2000, O'Brien and Salop, recognizing that profit rights and corporate governance rights each have different roles in competitive impact, first systematically analyzed the unilateral effects that different types of minority share acquisitions might have after acquiring a certain percentage of minority shares due to different corporate governance rights. Furthermore, their research innovatively proposed quantitative tools that can be applied to different types of minority share acquisitions (Salop & O'Brien, 2000).

The Theory of Competitive Harm in Horizontal Shareholding

The theory of competitive harm is a theoretical framework used in antitrust law to analyze the anticompetitive effects of anticompetitive behavior. Anticompetitive effects under antitrust law refer to the actions of operators who exclude or limit competition, thereby raising the price of their products in the relevant market above the competitive level, and thus harming consumer welfare (Hovenkamp, 2015, pp. 101-104). In a competitive market, every operator faces competitive pressure from existing or potential competitors to some extent. If an operator wants to profitably increase product prices without improving its product competitiveness, it can either collude with competitors or exclude or block competitors. Depending on the different methods of excluding and limiting competition, anticompetitive effects under antitrust law can be divided into two types: collusive anticompetitive effects (also known as collusive effects) and exclusionary anticompetitive effects (also known as exclusionary effects).

If operators collude with competitors through trading arrangements, engaging in collusive price fixing, output reduction, market division, and other behaviors, competition in the market will be directly excluded and restricted, resulting in collusive anticompetitive effects. As competitors often have incentives to deviate from collusion when they unite, a mature and stable alliance often has monitoring mechanisms and punishment mechanisms. In this sense, any behavior that can promote the achievement, supervision, and punishment of the alliance may have collusive anti-competitive effects. Or if operators block competitors through trading arrangements, raise the costs of competitors, and thereby increase product prices, competition in the market will be indirectly excluded and restricted, and the behavior will also have exclusionary anticompetitive effects (Krattenmaker & Salop, 1986).

At present, there is no general consensus on the anti-competitive mechanisms and effects of horizontal shareholding. During the 10th "Competition and Consumer Protection in the 21st Century" public hearing held by the U.S. FTC, some participants believed that common ownership might lead to a reduction in competition and increase market prices. Other participants argued that common ownership does not necessarily lead to anti-competitive effects. On the contrary, common ownership can bring efficiency gains and better corporate governance. This public hearing further initiated the debate on whether horizontal shareholding has anti-competitive effects.⁴

It's worth noting that different views exist due to the complexity and diversity of the scenarios in which horizontal shareholding occurs. Some scholars argue that the anti-competitive effect of horizontal shareholding depends on factors such as the concentration of the market, the degree of horizontal shareholding, the role of institutional investors, and whether there are coordination mechanisms among competing firms.

⁴ See at <https://www.mofo.com/resources/insights/1901-ftc-antitrust-common-ownership>.

In any case, whether horizontal shareholding leads to anti-competitive effects is an empirical question that needs to be answered by more rigorous theoretical and empirical research. Antitrust authorities and policymakers should be cautious and take into account the potential pro-competitive effects of horizontal shareholding when considering the adoption of stricter regulatory measures. At the same time, they should also be aware of the potential risks and monitor the market accordingly.

The economic research that supports the anti-competitive effects of horizontal shareholding is most prominently represented by scholars such as Jos é Azar. Azar and his colleagues have published papers several times in top-tier journals to prove the anti-competitive effects of horizontal shareholding, and they have conducted extensive reflections on data, research methods, theoretical assumptions, and more.

Azar's school of thought believes that as institutional investors continue to grow in scale and influence, their holdings of shares in multiple competing companies are becoming increasingly common. Analysis of data from industries such as banking, aviation, and chemical industries indicates that when institutional investors hold shares horizontally, this common ownership can lead to price collusion in the market, reducing competition and resulting in higher prices. Moreover, the less competitive the industry, the more pronounced the anti-competitive effect of horizontal shareholding (Azar, Schmalz, & Tecu, 2018).

Azar et al.'s research attracted a great deal of attention from regulatory authorities and academia, and they reflected on their research data and theories. They even published articles to reflect on the overall design, data collection, analysis methods, and causal inferences of current research, calling for more factors and variables to be considered in the study of the relationship between horizontal shareholding and market competition, and for more rigorous and accurate processing of data and statistical analysis to obtain more reliable conclusions (Azar, Schmalz, & Tecu, 2021).

Then, in 2021, Azar and his team, upon discovering some limitations in the previous assessment methods of the negative impact of horizontal shareholding research on market competition, made stricter controls on the research methods, used more refined empirical models, and conducted simulation experiments to verify the robustness of their results. They conducted a more comprehensive discussion of the impact on the market competition mechanism. In addition to directly considering the impact of horizontal shareholding, they also considered the impact of other factors on the competition mechanism, such as industry concentration and market structure. Moreover, they conducted a more in-depth theoretical discussion on the relationship between horizontal shareholding and market competition. Based on a new theoretical framework, they believed that horizontal shareholding might affect the market behavior of enterprises, but this influence is limited and closely related to other structural factors in the market. Subsequently, Azar and his team came to a new conclusion: In actual markets, horizontal shareholding does not have a significant negative impact on competition, but it still needs to be acknowledged that the impact of horizontal shareholding on market competition is complex, and further theoretical and empirical research is needed (Azar & Vives, 2021).

Indeed, there are also quite a few opposing voices in the relevant field of economic research. Douglas H. Ginsburg (2018) has provided some theoretical and empirical evidence that horizontal shareholding does not lead to anti-competitive effects, challenging the idea that horizontal shareholding would encourage institutional investors to reduce the competition of their portfolio companies to increase profits. For example, even though

there is horizontal shareholding in the banking industry, competition between banks remains intense, and horizontal shareholding has not led to increased price or reduced product diversity. In the telecommunications industry, horizontal shareholding can even promote market competition. He also pointed out that the traditional antitrust law framework of market concentration and market power is not suitable for dealing with issues brought about by common ownership. Even if antitrust law is used for analysis, the efficiency gains brought about by horizontal shareholding should also be considered, such as competition between institutional investors, which can curb the motivation to reduce the competition of portfolio companies, so institutional investors' horizontal shareholding will not pose a significant threat to competition (Ginsburg, 2018).

Alden Abbott (2017) places more emphasis on the role of horizontal shareholding in promoting portfolio diversification, reducing risk, and thereby encouraging shareholder investment, and improving corporate governance. Therefore, he believes that horizontal shareholding does not necessarily lead to anti-competitive effects and warns regulatory authorities to be alert to the overuse of antitrust interventions (Abbott, 2017).

George S. Dallas (2018) also questions whether horizontal shareholding by institutional investors will produce anti-competitive effects. He reasons that positive returns can offset potential anti-competitive effects, believes that economies of scale and efficiency gains help to reduce corporate costs and improve competitiveness, and that the impact of institutional investors' horizontal shareholding on individual companies is not as significant as traditional monopolists.

Patrick Dennis and other scholars even directly used the research results of Azar et al. to criticize Azar's research conclusion on horizontal shareholding in the aviation sector, and also published the article in *The Journal of Finance*. After analyzing the data from the U.S. airline industry over several years, Dennis, Gerardi, and Schenone (2021) found that horizontal shareholding by institutional investors did not lead to price collusion between airlines, did not affect market competition, and that the pricing strategy of airlines has no direct connection with the horizontal shareholding behavior of institutional investors. Moreover, the horizontal shareholding among institutional investors is not related to the operational performance of airlines, and they have also demonstrated the efficiency gains brought about by horizontal shareholding. Unlike Azar et al., Dennis and his team mainly used statistical empirical research methods, while Azar mainly used theoretical assumption methods with mathematical models (Dennis et al., 2021).

Otherwise, there is also an "unknown" perspective represented by scholars like O'Brien. Based on a critical analysis of previous research methods, data, and conclusions, they argue that there are misunderstandings and exaggerations about the impact of horizontal shareholding in the existing research, because current studies overlook actual market conditions, including but not limited to the degree of market segmentation, non-financial connections between companies, the diversity of equity structures, the diversity of portfolios, and the dynamic changes in common ownership. They suggest a more rigorous and comprehensive study of this issue (O'Brien & Waehrer, 2017).

The diversity of these perspectives shows that the topic of horizontal shareholding and its potential anti-competitive effects is indeed complex and multifaceted. Different scholars use different research methods, theoretical foundations, and empirical data, which can lead to divergent results and conclusions. It suggests that more comprehensive research incorporating a wider range of factors, deeper theoretical exploration, and more precise data analysis methods are needed to gain a more accurate understanding of the effects of horizontal

shareholding on market competition. It also underscores the need for regulatory authorities to strike a balance between preventing potential anti-competitive effects of horizontal shareholding and recognizing its potential efficiency gains and contributions to corporate governance.

The Applicability of Antitrust Law to Horizontal Shareholding Behavior

From the preceding discussions, it can be observed that existing viewpoints do not completely negate the possibility that horizontal shareholding behavior can have anticompetitive effects. There exist disputes on issues such as how to construct theories of competitive harm, how to find corresponding evidence, and whether the conclusions of existing research can be generalized. Given that horizontal shareholding behavior may potentially result in anticompetitive effects, we should explore how antitrust law is applied to such behavior.

The first problem faced is whether, if horizontal shareholding behavior has certain negative externalities, industry regulatory rules or antitrust laws would be more effective in addressing the issue. Scholars like Eric A. Posner favor regulation of potential negative effects of horizontal shareholding through industry regulations. Posner, Morton, and Weyl (2017) argue that some institutional investors who hold shares in several competing companies are unlikely to support competitive proposals or object to mergers of one company with others. This is because such actions might decrease the overall value of the shares they hold. To solve this problem, mandatory disclosure of the proportion of shares held by institutional investors in multiple competing companies should be implemented, along with restrictions on their voting power in these companies. This can help reduce the impact of institutional investors on market competition and promote the effectiveness of market competition (Posner, Morton & Weyl, 2017).

Representative scholars who advocate for antitrust regulation of horizontal shareholding, such as Einer Elhauge, are on the other side of the debate. After publishing his first significant findings on the topic in 2016, Elhauge (2020) further argued in his subsequent research that horizontal shareholders could restrict competition by influencing corporate strategies and holding shares in multiple companies in the same industry. This not only leads to efficiency losses but might also hinder innovation, thus requiring stronger supervision of horizontal shareholding within antitrust law (Elhauge, 2020). After his conclusions were questioned by some researchers, Elhauge put forward new theories and evidence to demonstrate that horizontal shareholding could lead to price coordination and market share stability, thereby harming consumer interest and market efficiency. Elhauge cited research data from the airline, banking, telecommunications, and retail industries to show the real and increasingly common trend of horizontal shareholding. He validated the positive correlation between horizontal shareholding and market concentration—the more institutional investors with horizontal equity, the higher the market concentration. Especially in highly concentrated markets, horizontal shareholding could lead to price increases and supply reduction. Therefore, horizontal shareholding should be regarded as anti-competitive behavior in competition policy, and antitrust laws should impose restrictions on it. In particular, Elhauge introduced an analytical theory called “Competitive Fringe Theory”. According to this theory, horizontal shareholding creates a “competitive fringe” where investors are grouped together, leading them to no longer be true competitors because they share profits and losses. This may result in these investors collectively seeking to reduce competition rather than independently seeking to improve the performance of their own companies. Elhauge (2018) argues for comprehensive antitrust regulation of horizontal shareholding based on this theory.

On the other hand, Professor Herbert Hovenkamp, an eminent figure in the field of antitrust law, takes a more cautious approach. Although he also analyzes industry data, he suggests that horizontal shareholding should be considered as a factor when antitrust enforcement agencies assess market competition, and corresponding measures should be taken to protect consumer interests when necessary. However, Hovenkamp generally supports imposing antitrust regulations on horizontal shareholding (Morton & Hovenkamp, 2018).

Joseph Gerakos studied the impact of horizontal shareholding on competition in the Paragraph IV generic drug entry. They found that when drug manufacturers are associated through common ownership, they are more inclined to engage in coordinated pricing below market levels, delaying the entry of competitors into the market, resulting in increased healthcare expenditures. They suggest that antitrust regulation can mitigate this competition harm (Xie & Gerakos, 2020).

Therefore, while there are varying perspectives, scholars like Elhauge argue for comprehensive antitrust regulation of horizontal shareholding, while others like Hovenkamp advocate for considering horizontal shareholding as a factor in assessing market competition and implementing measures to protect consumer interests when necessary.

The current state of discussion reflects the “legitimation crisis” proposed by Habermas, where economists aim to provide “facts”, legal scholars seek to establish “norms”, and various voices raise questions. Bridging this gap requires rational dialogue, which in turn places potential demands for “congruence” on the knowledge structures of the parties involved. However, when each party possesses their own knowledge structure, they may fall into a “knowledge trap” and rely on psychological “naïve realism” to replace logical thinking, resulting in erroneous judgments due to overlooking key information, focusing only on certain known facts while neglecting overall patterns or trends, exhibiting biases that lead to unjust or incorrect assessments in a particular field or issue, or misinterpreting language or expressions and arriving at faulty judgments, rendering logical reasoning elusive. Moreover, the “curse of knowledge” can hinder this process of dialogue, as individuals who possess specialized knowledge in a particular field may find it difficult to imagine the mindset of those lacking such knowledge, thereby lacking empathy towards those unfamiliar with the field and struggling to effectively communicate with them (Hogarth & Redish, 1992). In this article’s perspective, the current state of discussion precisely exemplifies these dynamics.

Next, let’s further clarify the contentious question: Is it necessary for a business practice to meet the criteria of having an exclusionary or restrictive effect on competition, both theoretically and empirically, in order to be subject to antitrust law? The answer is no. As stated in Article 1 of China’s Anti-Monopoly Law, apart from “prohibiting” monopoly behavior, the legislative purpose of this law also includes “preventing” such behavior. Particularly in cases of market concentration, not only do market concentrations with exclusionary or restrictive effects fall within the scope of antitrust enforcement, but also those that “may” have such effects are within the purview of antitrust scrutiny. Currently, previous researchers have theoretically proposed that horizontal shareholding may have anticompetitive effects, and empirical studies based on industry-specific data have demonstrated the negative impact of horizontal shareholding on competition. Building upon these two research advancements, from the perspective of legal practice and the cost-benefit analysis of regulation, the question that needs to be further examined is whether horizontal shareholding truly warrants scrutiny and regulation under

antitrust law. In other words, even if such behavior has the potential to harm competition, if the extent of the harm is minimal, it may not be a priority issue for competition enforcement authorities to consider.

The Approach to Antitrust Regulation of Horizontal Shareholding Exhibits Some Differences Between China and the United States

The attention drawn to horizontal shareholding by public opinion, authoritative scholars, regulatory agencies, and international organizations is due to the belief held by some segments of the American public that Wall Street capital oligarchs have locked in the nation's capital structure through various horizontal shareholding arrangements, thereby controlling various aspects of people's lives, consumption, and employment. Additionally, concerns or risks have been raised about reduced competition at the capital level and the erosion of the foundation of economic democracy. Although there have not yet been actual cases that demonstrate these concerns, there is still a need for theoretical research. Importantly, different countries and regions have different capital structures, market characteristics, social interests, and legal environments. Therefore, the controversies surrounding antitrust issues in the United States may not have universal, direct implications or references for other countries. As the debate on antitrust issues related to horizontal shareholding originated in the United States, it is helpful to consider the US antitrust rules, market foundation, and regulatory values as a starting point for comparison with China. Such a comparison will provide insights for China's future rule-making and legal practices.

Legal Difference

In the United States, the Clayton Act provides ample scope for the application of antitrust regulations to horizontal shareholding. Section 7 of the Act states that "no person shall acquire, directly or indirectly, the stock or other share capital and assets of two or more competing corporations, where the effect of such acquisition may be to substantially lessen competition or tend to create a monopoly." This provision, based on the effects principle, comprehensively regulates stock and asset acquisitions that have anti-competitive effects. Therefore, there is no dispute regarding the applicability of the Clayton Act to horizontal shareholding.

However, the situation in China is different. According to Article 25 of the Chinese Anti-Monopoly Law, the first step is to determine whether an operator can exert decisive influence over one or more operators to assess whether a business conduct constitutes an operator concentration. If it does, then the next step is to determine whether this concentration has anti-competitive effects. This differs from the U.S. approach, which is more focused on the effects-based regulation.

It's important to note that the specific application of antitrust regulations, including those related to horizontal shareholding, can be subject to interpretation and may differ between jurisdictions.

Market Difference

Many economic sectors in China are dominated by state-owned enterprises (SOEs), some of which operate in the same product and service markets and thus have competitive relationships. As China's capital shareholder, the ownership rights of state-owned enterprises are exercised by the State-owned Assets Supervision and Administration Commission (SASAC) at various levels on behalf of the corresponding levels of the government. The management system of state-owned enterprises has several differences compared to market-oriented conditions.

Institutional differences exist in terms of personnel appointments and dismissals. In non-publicly owned enterprises, the appointment and employment of leaders and managers are determined by the shareholder meetings, general meetings, and boards of directors elected by the shareholders. In the context of state-owned enterprises and state-owned capital, the leaders of state-owned enterprises are appointed by the party committee and government at the corresponding level.

Shareholders, enterprise leaders, and the incentive mechanisms of state-owned enterprises are not always based on maximizing profits. Compared to the non-public sector, state-owned enterprises bear more social responsibilities in terms of safety, welfare, etc. Additionally, the management of state-owned capital is included in the fiscal budget, and there is a requirement for state-owned enterprises to contribute their profits without compensation.

The compensation mechanism for managers in state-owned enterprises is not entirely market-driven. The remuneration of managers in state-owned enterprises depends on administrative levels and regulatory documents, rather than solely on the profitability of the enterprise. Similarly, similar to the compensation mechanism for social responsibilities undertaken by state-owned enterprises, managers in state-owned enterprises may consider administrative promotion, living conditions, etc., as non-market-based compensation incentives. However, the competition incentives for managers under this compensation mechanism and the competition incentives that horizontal shareholding brings to managers under the hypothesis of efficient markets are still different and cannot be quantitatively compared at present.

In state-owned enterprises and the state-owned sector, the “dual boards and one-stakeholder” decision-making mechanism partially replaces the decision-making mechanism of corporate governance under fully market-oriented conditions.

Differences in Regulatory Values due to Variations in Market Foundations

The United States is a country with a highly developed market system, and its market institutions have undergone a long history of free competition and natural development. The market structure, social interests, and rule of law in the United States have matured over time. However, the solidification of market interests in the United States has led to dissatisfaction among various sectors of society. Therefore, historical interventions such as the breakup of AT&T and potential interventions regarding horizontal shareholding are considered “results-oriented” and “improvement-oriented” interventions conducted within a naturally mature market and rule of law environment.

In contrast, the market in China is still in the process of development, and the situation is different. Since the Fourth Plenum of the 14th National Congress of the Communist Party of China (CPC) proposed the establishment of a socialist market economy and the inclusion of “the state implementing a socialist market economy” in the 1993 Constitution, China’s industrial development, market structure, social interests, and rule of law have been undergoing continuous changes. Market-oriented reforms that challenge vested interests have been carried out simultaneously with the maturing development of the market.

Since the 18th National Congress of the CPC, the central government has repeatedly emphasized the “decisive role of the market in resource allocation”, “gradually establishing the fundamental position of competition policy”, “strengthening the foundation of competition policy”, “promoting the construction of a new

development paradigm”, “building a high-level socialist market economy”, and “establishing a unified national market”. In the “14th Five-Year Plan” Outline, there is a specific mention of “further introducing market competition mechanisms and strengthening the regulation of natural monopoly industries”. In such a context, the structure of market interests itself may be subject to redistribution due to policy changes. Therefore, if China regulates horizontal shareholding through antitrust laws, it would be considered more of a “procedural” intervention and a “reform-oriented” intervention in relation to the market structure in China.

Recommendations for Regulating Horizontal Shareholding Behavior Under China’s Antimonopoly Law

The regulation of horizontal shareholding and its anti-competitive effects is still a subject of ongoing debate and controversy. However, from the perspective of China, there are some insights that can be gained from this discussion. Based on the conceptual understanding of horizontal shareholding, research on its potential anti-competitive effects, and an examination of the differences between China and the United States, it is important for China to pay attention to this issue and find its own approach in the process of legal practice.

First, in terms of methodological approaches to regulation, it is important to adopt a holistic and long-term intervention perspective that focuses on enhancing the market as the regulatory objective. As a unique domain transitioning from a planned economy, China’s antitrust law has a mission beyond the general protection of market competition mechanisms. It also bears the responsibility of actively expanding the scope of market competition, meaning that antitrust law should not only protect competition but also actively foster it. Therefore, the special role that China’s antitrust law needs to play in addressing the antitrust issues related to horizontal shareholding is to promote the reform of state-owned enterprises and the state-owned asset management system, safeguarding the achievements of reforms through the rule of law.

As mentioned earlier, regulating horizontal shareholding behavior through the Antitrust Law in China differs significantly from the United States due to substantial foundational differences. The United States, having long implemented a market economy system, has achieved a relatively stable state in terms of industry structure, market development, social interests, and the rule of law. Therefore, the U.S. intervention in horizontal shareholding behavior aims at correcting market competition outcomes and falls under the category of “result-oriented” and “improvement-oriented” interventions. On the other hand, China’s market system and conditions are constantly evolving. In this process, interventions in horizontal shareholding behavior are more of a “process-oriented” and “reform-oriented” nature. The “result-oriented” and “improvement-oriented” interventions in the U.S. can be guided by the methodological framework of short-term equilibrium in economics, while China’s “process-oriented” and “reform-oriented” interventions require a long-term equilibrium perspective. Short-term equilibrium and long-term equilibrium are two types of equilibrium theories in microeconomics. Both observe the relationship between economic concepts such as price and quantity under market clearing conditions. The difference lies in the fact that short-term equilibrium focuses more on the impact of price and quantity changes on the equilibrium state, while long-term equilibrium primarily judges the equilibrium state through factors such as the allocation of production factors and technological progress, taking into account not only buyers and sellers but also suppliers of production factors.

Second, in terms of rule refinement, it is necessary to change the existing structural principles and improve the concept of concentration of undertakings based on the principle of effects. The reason why Hovenkamp affirms the applicability of the Clayton Act in the United States to horizontal shareholding is precisely because this law describes behavior based on the principle of effects. In China, the concept of concentration of undertakings borrows from the EU competition law's concept of merger control. Under this concept, the focus is initially on the market structure changes caused by the concentration of undertakings, followed by the actual effects. In other words, if the concentration of undertakings does not reach the level of active control and decisive influence, it will not fall within the scope of antitrust regulation. The theory of competition harm caused by horizontal shareholding challenges the aforementioned understanding. The concept of concentration of undertakings is no longer sufficient to encompass all the behaviors that the system intends to regulate. What the system should actually regulate is the potential adverse consequences of the concentration of economic power and market influence.

Third, it is necessary to promote interdisciplinary integration between economics and law. In order to reduce the insufficient mutual understanding between economic research and legal research in the field of antitrust issues related to horizontal shareholding, it is important to strengthen communication and integration between different disciplines. However, the premise of effective communication is to establish a problem domain with a common language system, so that disciplines can raise questions in a way that is understandable to each other. In other words, before engaging in interdisciplinary communication, there must be a full understanding of the sense in which the other party is conducting their argumentation. A fruitful interdisciplinary integration can facilitate the collaborative construction of a theory of competition harm under the organic cooperation of the two disciplines. The antitrust laws of different jurisdictions only specify the types of monopolistic behaviors that should be regulated, but they do not provide specific provisions for the corresponding theories of competition harm for each type of monopolistic behavior. As a result, the interplay between facts and norms in the application of antitrust law exacerbates the inherent uncertainty of this legal field. The theory of competition harm helps bridge the gap between the uncertainty of antitrust law and the requirement of legal certainty. In terms of nature and significance, the theory of competition harm serves as a methodological tool for both antitrust economic analysis and legal analysis, representing the thinking framework of antitrust analysis. The more complex antitrust cases become, the more precise and specialized analysis is needed in legal, economic, industry, and macro aspects. However, experts from different fields may have completely different conceptual frameworks in their minds due to their different disciplinary backgrounds, making interdisciplinary collaboration difficult. Therefore, the most important significance of the theory of competition harm as a tool for antitrust thinking is that it can break down the barriers to communication between economists, legal experts, and industry experts, enabling not only the possibility of interdisciplinary collaboration in antitrust matters but also the normalization of such activities.

Conclusion

Horizontal shareholding refers to the situation where an operator, in their capacity as an investor, holds partial equity stakes in two or more companies that compete with each other in the same product market. Although the operator may not possess control in the organizational sense, this behavior can subtly influence corporate governance and performance incentives, affecting the decision-making and actions of company management and

executives. As a result, it can lead to the exclusion or restriction of competition, causing market prices to be higher than equilibrium prices and output to be lower than equilibrium levels, ultimately harming consumers.

Horizontal shareholding is a relatively new research area that has gradually attracted attention in the fields of antitrust law and economics. The questioning of horizontal shareholding originated in the United States, but China can also gain insights from research and comparisons. When applying antitrust law to examine and regulate horizontal shareholding, China needs to pay particular attention to the differences in legal rules, market foundations, and management systems between China and the United States, which can result in divergent regulatory perspectives. The United States has a well-developed domestic market and corresponding institutional frameworks, and the regulation of horizontal shareholding represents a “results-oriented” intervention. On the other hand, China’s market is still evolving, and its regulation represents a “process-oriented” intervention that requires consideration of more issues and a longer-term perspective.

References

- Abbott, A. (2017). Common ownership by institutional investors: Beware antitrust overreach. *Truth on the Market*. Retrieved from <https://truthonthemarket.com/2017/03/13/common-ownership-by-institutional-investors-beware-antitrust-overreach/>
- Azar, J., & Vives, X. (2021). Revisiting the anticompetitive effects of common ownership. *IESE Business School Working Paper; European Corporate Governance Institute—Finance Working Paper No. 827/2022*. Retrieved from <https://doi.org/10.2139/ssrn.3805047>
- Azar, J., Schmalz, M. C., & Tecu, I. (2021). Research on the competitive consequences of common ownership: A methodological critique. *The Antitrust Bulletin*, 66(1), 113-122.
- Azar, J., Schmalz, M., & Tecu, I. (2018). Anticompetitive effects of common ownership. *The Journal of Finance*, 73(4), 1513-1565.
- Bresnahan, T. F., & Salop, S. C. (1986). Quantifying the competitive effects of production joint ventures. *International Journal of Industrial Organization*, 4(2), 155-175.
- Dallas, G. S. (2018). Common ownership: Do institutional investors really promote anti-competitive behavior? *Harvard Law School Forum on Corporate Governance*. Retrieved from <https://corpgov.law.harvard.edu/2018/12/02/common-ownership-do-institutional-investors-really-promote-anti-competitive-behavior/>
- Dennis, P. J., Gerardi, K. S., & Schenone, C. (2021). Common ownership does not have anti-competitive effects in the airline industry. *Journal of Finance*. Retrieved from SSRN: <https://ssrn.com/abstract=3063465> or <https://doi.org/10.2139/ssrn.3063465>
- Elhauge, E. (2016). Horizontal shareholding. *Harvard Law Review*, 129(5), 1267-1317.
- Elhauge, E. (2018). New evidence, proofs, and legal theories on horizontal shareholding. Retrieved from <https://ssrn.com/abstract=3096812> or <https://doi.org/10.2139/ssrn.3096812>
- Elhauge, E. (2020). How horizontal shareholding harms our economy—And why antitrust law can fix it. *Harvard Law Review*, 134(4), 965-1010.
- Ginsburg, D. H. (2018). Why common ownership is not an antitrust problem. *Harvard Law School Forum on Corporate Governance*. Retrieved from <https://corpgov.law.harvard.edu/2018/12/04/why-common-ownership-is-not-an-antitrust-problem/>
- Hogarth, R. M., & Redish, D. C. (1992). The curse of knowledge in educational decision making. *Journal of Cognitive Psychology*, 4(1), 3-18.
- Hovenkamp, H. (2015). *Federal antitrust policy: The law of competition and its practice* (5th ed.). St. Paul: West Academic Publishing.
- Krattenmaker, T., & Salop, S. (1986). Anticompetitive exclusion: Raising rivals’ costs to achieve power over price. *Yale Law Journal*, 96(2), 209-293.
- Morton, F. S., & Hovenkamp, H. (2018). Horizontal shareholding and antitrust policy. *The Yale Law Journal*, 127(7), 2026-2047.
- O’Brien, D. P., & Wacher, K. (2017). The competitive effects of common ownership: We know less than we think. *Antitrust Law Journal*, 81(3), 729-776.
- Posner, E. A., Morton, F. M. S., & Weyl, E. G. (2017). A proposal to limit the anti-competitive power of institutional investors. *Antitrust Law Journal*, 81(3), 669-728.

- Reynolds, R. J., & Snapp, B. R. (1986). The competitive effects of partial equity interests and joint ventures. *International Journal of Industrial Organization*, 4(2), 141-153.
- Salop, S. C., & O'Brien, D. P. (2000). Competitive effects of partial ownership: Financial interest and corporate control. *Antitrust Law Journal*, 67(3), 559-614.
- Scott Morton, F., & Hovenkamp, H. (2018). Horizontal shareholding and antitrust policy. *The Yale Law Journal*, 127(7), 2026-2047.
- Xie, J., & Gerakos, J. (2020). The anticompetitive effects of common ownership: The case of paragraph IV generic entry. *AEA Papers and Proceedings*, 110, 569-572.