WHY COMMON SHAREHOLDINGS SHOULD NOT BE CONSIDERED IN MERGER ANALYSIS

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I. INTRODUCTION

Common shareholdings have generated extensive theoretical and empirical analysis and a vibrant competition policy debate over the past few years. They were discussed at length in the EU Commission (the "Commission's") clearance decision in *Dow/Dupont* (without being a basis for the outcome),[2] have been the subject of a roundtable at the OECD Competition Committee ("OECD"),[3] and were explored in the recent U.S. Federal Trade Commission ("FTC") Hearings on Competition and Consumer Protection in the 21st Century.[4] However, relatively little attention has been paid to the way in which such issues will be analyzed under merger control frameworks.

II. THE NATURE OF COMMON SHAREHOLDINGS

It is important to distinguish minority shareholdings held by one company in another company (particularly a competitor) from investors which own small voting interests in multiple publicly-traded companies (some of which may compete in particular markets). The OECD describes the former as "cross ownership" or "cross shareholdings" and the latter as "common ownership" or "common shareholdings."[5]

The holdings of individual institutional investors in common shareholder situations are typically less than 5 percent of the voting equity in any individual operating company, and they may well be as small as 1 percent or lower. They usually are not accompanied by a right to representation on the board of directors. Nevertheless, the cumulative interests of institutional investors with common shareholdings may be in the 15-25 percent (or above) range in multiple firms in some oligopolies. For example, in *Dow / Dupont*, the Commission determined that "a small number of common shareholders, 17, collectively own around [21 percent] of BASF, Bayer and Syngenta and around [29-36 percent] of Dow, Dupont and Monsanto."[6]

2 Case M.7932, *Dow/Dupont*, Commission Decision of March 27, 2017 ("*Dow/Dupont*"). The discussion in this paper is based entirely on the non-confidential version of the decision published by the Commission.

3 See OECD Secretariat; "Common Ownership by Institutional Investors and its Impact on Competition (Background Note)," DAF/COMP (2017)10 (November 29, 2017), available at https://one.oecd.org/document/DAF/COMP(2017)10/en/pdf ("OECD Note").

4 FTC Hearing #8: Common Ownership, Hearings on Competition and Consumer Protection in the 21st Century (December 6, 2018), materials available at https://www.ftc.gov/news-events/events-calendar/ftc-hearing-8-competition-consumer-protection-21st-century.

5 See OECD Note, *supra* note 3, para. 17.

6 *Dow/Dupont*, Annex 5, para. 80.

III. THE THEORIES OF HARM

The theoretical literature[7] has asserted that competitors that have significant common shareholders are likely to compete less aggressively with each other. The starting point is a variation on a "unilateral effects" theory of harm, with a focus on the common institutional shareholders.

The theory contemplates that each of the common institutional investors may have the ability and incentive to induce the various firms they have invested in to raise their prices or otherwise compete less aggressively. However, the theory is dependent upon the competing firms that have such shareholders choosing to raise their prices (or to compete softly on innovation or other non-price dimensions of competition) in order not to damage the broader interests of significant institutional shareholders (even though this may be contrary to the interests of remaining shareholders who do not hold shares in such competitors, and even though doing so may be a breach of fiduciary duties).

"Coordinated effects" theories of harm have also been extended to common shareholding situations. The potential basis for concern is that competing firms that have linkages at the shareholder level could reach understandings not to compete aggressively and/or may have increased incentives not to deviate from coordinated outcomes (e.g. not cutting prices). If the main competitors in an oligopolistic market each compete less aggressively, prices may end up above competitive levels and the firms may effectively exercise market power.[8]

IV. MERGER CONTROL LEGAL FRAMEWORKS

This article explores the key legal principles that would apply to reviews of mergers in industries characterized by extensive common shareholdings in Canada and the U.S., both of which use a "substantial lessening of competition" ("SLC") test, and in the EU, with its "significant impediment to effective competition" ("SIEC") test. The conclusions are similar in all three jurisdictions (and significant parallels are likely to exist in many other jurisdictions).

Oligopoly theory does not provide clear benchmarks or methodologies to predict whether, and to what degree, oligopolistic competitors may engage in highly vigorous competition versus softer competition (often described as "conscious parallelism" or "tacit collusion"). The common shareholdings literature suffers from the same lack of clarity. It is possible that publicly-traded competitors in a concentrated oligopoly which have significant overlaps among their shareholders will compete less aggressively than in the absence of any shareholder overlaps, with the result that market power may be exercised by such companies. However, the intensity of competition in any particular oligopolistic market – with or without common shareholders – at any particular point in time requires a fact-specific inquiry.

There is now widespread consensus in industrial organization economics that horizontal mergers between competitors raise economic welfare concerns when a transaction is likely to preserve or enhance the ability of firms to exercise market power. Such concerns may arise through unilateral or "coordinated" effects (i.e. without, or with, accommodating responses by the competitors to the merging parties). In order to determine whether a merger would allow market power to be exercised, the critical comparisons are (i) the expected behaviour of the merging parties after, versus in the absence of, the merger; and (ii) whether the other current or potential competitors are likely to respond in a competitive or in a non-competitive manner.

7 See, e.g. E. Elhauge, "Horizontal Shareholding," 129 Harvard Law Review 1267 (2016); and E. Posner, F. Scott-Morton and E.G. Weyl, "A Proposal to Limit the Anti-Competitive Power of Institutional Investors," 81:3 Antitrust Law Journal 669 (2017).

8 However, soft competition is also a possible outcome under the standard industrial organization theory of oligopolistic industries, even in the absence of any common shareholdings. See OECD Note, *supra*, note 3, paras. 39-42.

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The analytical frameworks in the merger review guidelines of the Canadian Competition Bureau ("CCB"),[9] the U.S. FTC and Department of Justice Antitrust Division (collectively, the "U.S. Agencies"),[10] and the Commission,[11] all define relevant markets and then consider market concentration plus various other factors in order to assess competitive effects that are likely to be caused by a merger.[12]

V. MARKET DEFINITION

The CCB, the U.S. Agencies and the Commission all undertake market definition as an important first step in merger reviews. The Commission's guidelines focus on demand-side and supply-side substitutability.[13] The U.S. and Canadian guidelines purport to use the "hypothetical monopolist" methodology, but in practice this often devolves to more qualitative assessments of a variety of factors that ultimately speak to demand-side and supply-side substitutability.

The common shareholdings literature has paid relatively little attention to the difference between the broad concept of an industry or sector and the much narrower approaches used to define relevant markets as a starting point for assessing whether or not market power can be exercised. Broadly-defined oligopolistic industries will often encompass numerous relevant product and geographic markets. The common shareholdings literature does not provide any basis for abandoning market definition and the assessment of market power at the level of the relevant markets in which specific suppliers compete to sell to specific products or services to specific customers.

The difference between broad sector-level assessments and relevant market analysis can be observed in *Dow/Dupont*. While the common shareholdings were discussed in respect of the six largest multinational companies in the global agro-chemical industry as a whole, the competitive effects analysis required consideration of numerous separate markets. The Commission separately examined four broad product categories: crop protection, seeds and gene editing, material science, and specialty products, each of which encompassed broad ranges of commercial activity. Within crop protection products, for example, there were four overlapping sub-categories: herbicides, insecticides, fungicides, and nematicides. However, product markets were defined at an even more granular level, along segmentations by crop/pest combination. The Commission also defined separate geographic markets for individual EU Member States. This approach resulted in a large number of extremely narrow market definitions (e.g. "post-emergence broadleaf selective cereal herbicides in Denmark").[14]

Individual relevant markets may or may not include each firm that has common shareholders in a concentrated oligopoly, and may or may not include various other firms that will be important to a correct assessment of market power in each specific market. For example, the six major agro-chemical companies that were the focus of the common shareholdings analysis in *Dow/Dupont* were each involved in numerous relevant product and geographic markets, but there were some markets in which one or more of these firms were not active, and there were numerous markets in which additional competitors were present to varying degrees. The Commission then analyzed competitive effects separately in each affected market where the merging parties had significant combined shares and concluded that the merger was likely to result in an SIEC in some markets, but not others.

Notably, the Commission did not conduct its analysis of the potential effect of common shareholdings for each relevant product and geographic market. It simply observed that common shareholdings were widespread in the agro-chemical industry and asserted that the market share calculations in the decision likely underestimated the concentration of the market structure and market power of the merging parties. However, had the Commission wanted to rely on common shareholdings as a relevant factor in any specific relevant market, the effects on concentration levels and market power would need to have been assessed on that narrower basis.

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9 CCB Merger Enforcement Guidelines ("MEGs").

10 U.S. Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines* (August 19, 2010) ("HMGs").

11 Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31 (2004) ("ECMGs").

12 Canada has a somewhat unique and complex efficiency gains defense: see *Competition Act*, s. 96, and MEGs, Part 12. There is also some limited scope for efficiencies to be considered in the U.S. and EU merger review regimes: see HMGs, § 10, and ECMGs, Part VII. However, common shareholdings do not generally give rise to efficiencies that could be relevant for merger analysis. Efficiencies are therefore not discussed in this article.

13 Commission Notice on the definition of relevant market for the purposes of Community competition law, 97/C 372/03 ("EC Market Definition Notice").

14 The Commission also considered "innovation competition" (i.e. competition in respect of research and early pipeline products) both at the industry level and at the level of crop/pest combinations globally (or at least within the EU) as separate relevant markets.

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VI. COMPETITIVE EFFECTS

Market power — and the effect of a merger on the ability to exercise market power — is difficult to measure in practice. Factors which are likely to affect the possibility of market power being exercisable as a result of a merger include market shares and concentration, the competitive vigour of the party being removed as an independent competitor, the effectiveness of remaining competitors in a market, any countervailing power of buyers, and the possibility of competitive responses from other parties, e.g. product or geographic expansion strategies, repositioning, new entry, innovation, etc. (collectively, "supply responses").

A. Market Shares and Concentration

Market shares and industry concentration are relevant, but not determinative, considerations in the assessment of competitive effects of mergers. While there is a general expectation (and in some regimes, such as the U.S., a presumption) that higher market shares and/or concentration levels are associated with higher likelihood that market power can be exercised, there is not a precise level of market share or concentration — and/or merger-induced change in shares or concentration — that corresponds to an ability to exercise market power. Other factors affecting the ability of firms to exercise market power in practice must also be considered. This principle is reflected in the guidelines of the CCB, the U.S. Agencies, and the Commission.

The U.S. and EU guidelines put significant emphasis on HHI[15] as a measure of concentration that is assessed in parallel with market share data. The CCB tends to focus on market shares, supplemented by a simplistic CR4 concentration ratio and occasional consideration of the HHI measure.

The common shareholdings literature makes considerable use of a generalization of the HHI that takes into account partial ownership.[16] This "Modified HHI" ("MHHI") is equal to the HHI plus a term known as the MHHI Delta, which is a measure of the additional concentration that arises due to common ownership.

As with market shares and the HHI, there is not an exact MHHI level — or merger-induced change in the MHHI — that reliably indicates whether or not market power can be exercised. Given the much shorter history of the MHHI, with limited practical use to date in real cases,[17] extra caution is warranted if competition authorities begin to use such calculations as a component of merger reviews.

Calculation of MHHIs is a data-intensive exercise. Unlike traditional HHIs, correct calculations of the MHHI require detailed information regarding *all the shareholders* (including affiliation relationships between them) of *all the competitors* in each relevant market, not just merging parties. In particular, correct calculation of the MHHI Delta requires information about the ownership share of each shareholder in each firm in the market and control weights of each shareholder over each firm in the market (measuring the degree of control or influence each shareholder has over each firm).

Some ownership shares may be available through public company shareholder disclosures. However, the affiliations between shareholders are often not transparent (particularly with private equity investors where separate funds with different individual investors may be managed by the same investment firm). The control weights used in MHHI calculations are generally based on assumptions. The simplest is the "proportional control" assumption, which assumes that the control weights are proportional to the number of votes each shareholder has. However, shareholders may have different practices regarding how they exercise their votes. For example, some shareholders may not vote at all or may give proxies to other shareholders. To ensure an appropriate calculation of the MHHI, the control shares require careful calibration for each shareholder/firm pair.

15 The HHI is the sum of the squares of the market shares of all the competitors in a market.

16 This is an extension of D. O'Brien and S. Salop, "Competitive Effects of Partial Ownership," 67 Antitrust Law Journal 559 (2000).

17 The Commission calculated MHHI measures at the industry level in Dow/Dupont, but did not rigorously assess or rely upon them for purposes of its decision.

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Proper application of the MHHI methodology therefore requires data from third parties in addition to the merging parties. Significant agency time is also required to obtain and properly analyze the common (and any affiliated) shareholders and their behaviours. In *Dow/Dupont*, for example, the Commission requested the merging parties to provide harmonized information on common shareholders amongst Dow and Dupont, as well as in respect of the other major competitors in the agro-chemical industry. The Commission also referred to publicly-available shareholding information. However, it acknowledged that "it did not perform a case-specific assessment that would justify applying a specific assumption on the control weights."[18]

B. Removal of a Vigorous Competitor

Whether one of the merging parties is a particularly vigorous and effective competitor is an important consideration when assessing whether a market is vulnerable to coordinated behaviour among major competitors. The Canadian, U.S., and EU guidelines all consider whether a firm is a "maverick" that plays a disruptive role in the market to the benefit of customers in respect of prices or any important form of non-price competition (e.g. innovation).

The relevance of the vigorous competitor factor in a merger analysis that takes common shareholdings into account will depend upon the pre-merger ownership of the firm being acquired. If there are significant common shareholdings between the acquiree and other competitors in a relevant market (possibly, but not necessarily, including the acquiror), the common shareholdings theory would predict that the acquiree would not be a vigorous pre-merger competitor or maverick. In such circumstances, the merger is less likely to enable incremental market power to be exercised because the merger would not remove a significant source of competitive discipline from the market. Conversely, where the acquiree has no or insignificant common shareholders with the other main competitors in the industry, the vigorous competitor factor will apply in the normal manner and no additional consideration of common shareholdings is required.

C. Effectiveness of Remaining Competitors

The ability of merging parties to exercise market power depends in large part on whether current competitors are likely to discipline a post-merger attempt to increase prices (or to reduce non-price dimensions of competition), or whether they are likely to accommodate and follow such an action by the merging parties. The Canadian, U.S., and EU guidelines all give prominent consideration to the extent of the competitive constraints that would be imposed by existing competitors.

While the effectiveness of remaining competitors is sometimes considered in the aggregate, the effectiveness of individual competitors may vary. The common shareholdings theory suggests that the competitive discipline provided by a particular competitor may depend on the extent of common shareholdings between the merging parties and that competitor. The degree of common shareholdings, and the extent to which any mechanisms that induce soft competition are operative, may vary widely. A rigorous analysis of the competitive effects of common shareholdings would require assessing these issues *individually for each competitor* in order to determine whether that firm is likely to discipline or to accommodate a post-merger attempt to exercise market power.

D. Buyer Power

In some situations, the merging parties' customers may have sufficient countervailing power to resist an attempt to exercise marker power. The CCB, the U.S. Agencies, and the Commission all recognize that such an ability is not simply a matter of size or sophistication, but depends on the extent to which individual buyers have practical options that can allow them to resist price increases, such as the ability to switch suppliers, sponsor new entry, or retaliate against the supplier when making purchases in other product or geographic markets.

If the merging parties make significant sales to publicly-traded companies, it is possible that common shareholdings between the merging parties and their customers could affect the likelihood of an attempt being made to exercise market power. There is no *a priori* reason why common shareholdings between competitors in the same market (i.e. "horizontal common shareholdings") would affect their incentives to compete, but common shareholdings between suppliers and customers (i.e. "vertical common shareholdings") would not affect a supplier's incentive to attempt to exercise market power against downstream customers. This possibility requires *buyer-specific* analysis.

18 *Dow/Dupont*, Annex 5, para. 79.

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E. Entry and Other Supply Responses

Even if the competitors and/or customers of the merging parties are not likely to constrain attempts to exercise market power, such discipline may emerge from other firms that can provide supply responses (e.g. repositioning strategies, expansion from adjacent markets, new entry or innovation). The Canadian, U.S., and EU guidelines all consider whether these types of supply responses may provide a sufficient competitive constraint on the merged firm and also assesses the likelihood, timeliness and sufficiency of such supply responses.

In theory, each of these types of supply responses may be affected by the degree of common shareholdings between the firms that have the ability to undertake such responses and the merging parties (as well as other existing competitors in the relevant market). In practice, assessments of whether a constraining supply response is likely to occur should be made on a firm-by-firm basis since the ability, incentives, and likely behaviour of *each potential responding firm* may differ.

F. Mechanisms by which Competitive Harm Would Occur

The burden of proof for establishing that a merger is anti-competitive normally rests with the competition authority. While it is not entirely clear how much specificity would be required to establish that common shareholdings would result in a merger being found to generate an SLC or SIEC, a general assertion of the theory that common shareholdings may increase the likelihood of unilateral or coordinated effects is unlikely to be sufficient to justify interfering with a specific merger transaction under the Canadian, U.S., or EU regimes, or in any other merger control system that requires evidence-based decision-making.

The common shareholdings literature hypothesizes four main mechanisms by which institutional investors with common shareholdings may have the ability and incentive to get the firms in which they hold shares to compete less:[19]

- ***Shareholder Votes.*** In a public company whose shares are widely held, institutional shareholders with holdings in the 1-5 percent range may be given careful consideration by directors and management. However, votes typically occur at annual shareholder meetings, are limited to broad governance matters and rarely involve day-to-day operating decisions or even larger competitive strategy decisions.

- ***Direct Communications.*** Meetings or other direct communications with senior management and/or directors of the competing firms in which an institutional shareholder has invested could allow for more detailed communications regarding significant aspects of competitive strategy. However, this mechanism involves potentially serious legal risks for both the institutional investors and the competing firms if the communications involve pricing or other specific competitive matters. Understandings between an institutional shareholder and the managements of two or more firms in which it has invested could give rise to liability for a "hub-and-spoke" conspiracy or concerted practice that may be substantial to significant penalties in many jurisdictions including Canada, the U.S., and the EU.[20] In addition, senior management and directors would expose themselves to allegations of breaching their duties to act in the best interests of all their company's shareholders, rather than just the institutional shareholder(s) with the common shareholdings.

- ***Compensation.*** Compensation systems can potentially encourage management personnel to maximize industry profitability instead of the company's own profitability. For example, publicly-traded firms often compensate executives through stock options, and it has been argued that share prices can be driven more by industry performance than by individual firm performance. However, plausibility of the compensation systems mechanism has been questioned for several reasons. For example, a firm which competes more aggressively and effectively than its rivals may achieve higher profitability and stock prices than its rival. Moreover, one or more significant competitors that are not adhering to a "soft competition" approach can result in other rivals competing more vigorously to avoid reductions of their sales, profits and stock prices. In addition, management's incentives to operate in ways which benefit the publicly-traded rivals with common shareholders could well be in tension with similar incentives to not injure publicly-traded customers whose shareholders include common institutional investors.

19 The OECD Note, *supra* note 3, contains useful discussions of these mechanisms and related critiques. See particularly paras. 51-80. The Commission did not examine these possible mechanisms in *Dow/Dupont*, and there has been limited documentation of such mechanisms operating in practice.

20 In some jurisdictions, including Canada, the U.S., and certain EU Member States, there are also serious potential personal exposures for the individual representatives of the institutional investor as well as the company executives.

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- ***Reduced Pressure to Compete.*** It has been suggested that institutional investors with common shareholdings in competing firms have less incentive to pressure managers to compete vigorously, and managers in turn are less likely to expend the effort to compete vigorously. However, this mechanism is more vague than the direct communications or compensation systems mechanism and is subject to similar uncertainties in practice.

A further issue that has received little attention is whether and how the senior management who are assumed to be responding to communications from and the interests of common institutional shareholders would implement instructions or incentives to compete softly to the relevant lower level managers responsible for day-to-day decision-making in specific relevant product and geographic markets. Even if senior management were to accept shareholder preferences for less competition, it cannot simply be assumed that there would be transmission to and adherence by the numerous line managers that make pricing or other competitive decisions.

Where common shareholdings exist, the functioning of the foregoing mechanisms should be testable. A review of pre-merger evidence regarding whether mechanisms of competitive harm have been operative has the potential to be informative in a merger review two ways. In the absence of such evidence, some theory of harm and supporting evidence regarding the likelihood of these mechanisms emerging post-merger would be necessary to demonstrate that the common shareholdings are likely to result in the merger having anti-competitive effects. Conversely, pre-merger evidence that such mechanisms are operative would suggest that they are likely to continue to operate post-merger. In order to attribute anti-competitive effects to the merger, there would need to be a basis for expecting that the mechanisms would have materially greater effects on competition if the merger proceeded, relative to the likely effects in the absence of the merger.

The resource burdens of undertaking this type of analysis are likely to be significant. The competition authority would need to obtain and analyze information about shareholder votes, direct communications, compensation systems and reductions in competitive pressure, as well as the extent of transmission from senior management to line managers. The scope of this analysis would need to include the various competing firms with the common shareholders, in addition to the merging parties. Regardless of whether the competition authority undertakes this analysis proactively, it can be expected that merging parties would develop advocacy submissions to attempt to rebut such theories.

VII. CAUSATION

The appropriate approach for evaluating the competitive effects of a merger is to compare the likely levels of prices (and/or non-price dimensions of competition) if the merger occurs against the levels that would likely prevail in the absence of the merger transaction (often described as a "but-for analysis"). Under such an approach, the focus is on whether the merger is expected to result in some preservation or enhancement of market power, relative to the non-merger scenario (which is often assumed to resemble the pre-merger conditions).

A. Pre-Merger Market Power

The common shareholdings literature predicts that there would already be soft competition between the merging parties, the other competitors and the potential supply responders who have common shareholders (and that such behaviour would be expected to continue absent the merger). It would therefore be necessary to assess whether the nature or extent of the unilateral anti-competitive behaviour and/or accommodating behaviour would be likely to increase materially as a result of the merger, and thereby facilitate a greater degree of market power being exercised than was already occurring pre-merger.

B. Effect of the Merger

The pre-merger to post-merger increase in an HHI or MHHI measure is one potential indicator that a merger may have market power implications. However, there is no clear standard that connects any particular level of increase in concentration measures to any particular degree of ability to exercise market power. Moreover, such calculations are market-wide aggregates that do not specifically address how any particular current competitor or potential supply responder is likely to behave.

As discussed above, in order to reliably assess whether common shareholdings are likely to result in less competitive discipline on merging parties, considerable evidence about the firms linked by common shareholdings is likely to be required. More specifically, competition authorities to gather and analyze evidence regarding:

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- The extent to which the merging parties were providing meaningful competitive discipline on each other pre-merger, having regard to any common shareholders.

- The likelihood and degree to which the remaining publicly-traded competitors with common shareholders are going to become more accommodating than they were pre-merger.

- The likelihood and degree to which one or more firms with common shareholders that were going to reposition/expand/enter/innovate in the absence of the merger would choose not to do so as a result of the merger.

- The extent to which there are existing competitors, buyers with countervailing power and/or or supply responders, without common shareholders, that would provide competitive discipline on attempts to exercise an incremental level of market power post-merger.

Competition authorities may consider that, in an environment where competition is already soft and market power is being exercised pre-merger, any further lessening of the level of competition that does exist could be a concern. However, as a matter of law, it will still be necessary to apply the general SLC or SIEC merger control test on an appropriate, proportional and non-discriminatory basis. A specific merger is not problematic unless the likely magnitude of change in the extent to which market power may be exercised is "substantial lessening" of, or a "significant impediment" to, competition.

C. Inherent Conflict in the Theory of Harm of a Merger Case

In most cases, it will be difficult to reconcile an assertion that pre-merger common shareholdings are significant and that a merger among two of the firms in such an industry will cause material negative competitive effects. This tension can be seen in *Dow/Dupont*. Annex 5 of the Commission's decision set out a detailed summary of the theoretical and empirical literature about the potential market power effects of common shareholdings. Due to procedural issues arising in the statement of objections process, the Commission decided that it would not base its decision on MHHIs and the common shareholdings analysis. Instead, it commented that "common shareholding in the agro-chemical industry is to be taken as an element of context in the appreciation of any significant impediment to effective competition that is raised in the Decision."[21]

In the context of "innovation competition" in respect of research and early pipeline products targeting the same product markets, in *Dow/Dupont* the Commission also observed that the significant level of common shareholdings among large agro-chemical companies "provide indications that innovation competition in crop protection should be less intense as compared with an industry with no common shareholding."[22] However, the Commission did not explain whether or *how the merger would change* the extent to which common shareholdings in the agro-chemical industry diminish innovation competition.

This approach allowed the Commission to avoid undermining its own primary theories of harm. Had it placed greater reliance on the degree of industry concentration resulting from common shareholdings, it would have introduced significant internal contradictions into its competitive effects analysis. No explanation was provided as to how the aggressive current competition findings and the innovation/new product competition findings could be reconciled with the significant common shareholdings between Dow, Dupont and the other major competitors. If the common shareholdings analysis was sound, the pre-merger competitive environment would already be characterized by soft competition, with market power being exercised by the merging parties and the other major competitors identified in that analysis. There would then be no basis for finding that the merger would be expected to cause an SIEC.

21 *Dow/Dupont*, para. 81.

22 *Dow/Dupont*, para. 2352, and Annex 5, para. 60.

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VIII. CONCLUDING OBSERVATIONS

It is difficult to estimate how many mergers might be inappropriately allowed to proceed if common shareholdings are ignored. However, it is clear from merger review statistics in the major competition law regimes that anti-competitive mergers are rare. For example, in 2017 the CCB challenged 3 percent, the Commission challenged 6 percent and the U.S. Agencies collectively challenged 2 percent of the mergers that were reviewed.[23] The number of additional cases that are likely to arise using a common shareholdings theory of harm would be expected to be very rare, having regard to the causation, materiality and mechanism issues discussed above. Moreover, the impact of enforcement in such cases would likely be modest because only the incremented level of market power attributable to the merger would be addressed, while the pre-merger market power being exercised through common shareholdings would not be affected.

As noted above, the initial step of identifying common shareholdings in an industry would involve obtaining and analyzing shareholder register data from the merging parties plus all public companies in each relevant market that are current competitors; customers with potential countervailing power; and potential supply responders. Even after shareholder lists are obtained, the identification of common shareholdings may not be straightforward because some institutional investors use an array of separate funds or affiliated entities to hold investments.

Substantively, a rigorous assessment of the competitive effects of common shareholdings would then need to consider the likelihood of competitive versus accommodating behaviour by the same universe of firms (on an individualized, not a generalized basis) in the future if the merger occurs, relative to a counterfactual in which the merger does not occur. This would consume significant additional agency, merging party and third-party resources related to data gathering and analysis, document production and review, third party market contacts, and the development and evaluation of merging parties' advocacy submissions. Moreover, if common shareholdings are a significant feature of the market both pre-merger and post-merger, enforcement action may have minimal impact.

Competition authorities should therefore consider very carefully whether the benefits from the potential identification and remediation of an occasional merger that is dependant on the analysis of common shareholdings (i.e. that could not have been challenged otherwise) would be expected to exceed the potentially substantial costs to agencies, merging parties and third parties from incorporating this additional analysis into merger review processes. Analysis of common shareholdings analyses will likely be a giant waste of time, benefiting the advisors who assist companies (or complainants) with merger reviews while potentially overwhelming resource-constrained enforcement agencies and, more importantly, having a net negative effect on economic welfare. In an environment of scarce enforcement resources, the case for expanding merger review to include common shareholdings is even weaker, as most competition authorities are likely to have other areas where they can make large positive contributions to improving economic welfare.

23 Global Competition Review, "Rating Enforcement" (2018), available at https://globalcompetitionreview.com/edition/1001254/rating-enforcement-2018.

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