GIBSON DUNN

Common Shareholding and Competition in Europe

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On 29 September 2020, the European Commission ("**Commission**") issued its first report on concomitant minority shareholdings by institutional investors in companies active in the same market ("**Common Shareholdings**")("**Report**").[1] The findings of the 320 page Report were drawn upon lessons learned from five sectors which are considered by the Commission to be relatively concentrated, namely: Oil & Gas, Electricity, Mobile Telecoms, Trading Platforms, and Beverages.

The Report was triggered by the identification of an increasing number of Common Shareholdings in recent years. For instance, in 2014, 60% of U.S. public firms had a shareholder that held at least 5% both in the firm itself and in a competitor.[2] In Europe, Common Shareholdings with at least 5% participation concerned 67% of listed companies in 2016.[3]

Traditionally, Common Shareholdings have not been an antitrust issue as institutional investors usually held small minority stakes, falling far below the level necessary to give them the ability to exercise control, and implemented passive investment strategies. However, in recent years, Common Shareholdings have attracted the attention of antitrust enforcement agencies in Europe and the U.S.[4], given that fund managers have accumulated more substantial shareholdings, together with the related voting rights, in a large number of firms that are often direct competitors.

A number of economists have also raised concerns about this perceived concentration of power, the influence that could be exerted over the management of the companies affected, and the potential incentives to collude amongst the investors.

Overview of the competition assessments made thus far

To date, empirical research on the competitive effects of Common Shareholdings has been focused on the U.S. Specifically, two major studies of the retail banking and airline sectors have concluded that Common Shareholdings in those sectors were associated with higher prices (for banking deposit services and airline tickets respectively) and accordingly may have had a detrimental effect on competition.[5] Following the publication of those studies, the U.S. Federal Trade Commission held a hearing on Common Shareholdings in December 2018.[6]

In the EU, the Commission has examined the potential effects of Common Shareholdings in two recent merger cases: *Dow/DuPont*[7] and *Bayer/Monsanto*.[8] As a result of high levels of Common Shareholdings, the Commission concluded that the usual market share indicators (including the HHI Index) were likely to underestimate the level of market concentration, which would lead it to *"underestimate the expected non-coordinated effects of the Transaction"*.[9] The Commission's analysis noted in particular that Common Shareholdings may reduce the likelihood of companies to invest in R&D efforts where this would harm the interests of competing firms held in the same institutional investor portfolio.[10] In addition, the Commission observed that passive investors "*exert influence on individual firms with an industry-wide perspective*", and also that dispersed ownership exaggerates that influence.[11]

In 2018, Commission Vice-President Margrethe Vestager indicated that the Commission would be looking "*carefully*" at the prevalence of Common Shareholdings in the EU.[12] Consistent with this approach, the German Monopolies Commission also concluded in a lengthy report that institutional investors may have the means to influence certain of their portfolio companies' decisions and recommended that the issue receive more attention at EU level.[13] In early 2019, the European Parliament's Economic and Monetary Affairs Committee agreed to commission research to examine the prevalence of Common Shareholdings in the EU.

The Report's findings

The Report sets out evidence on the presence and extent of Common Shareholdings across the EU and its possible anticompetitive effects, without putting forward any concrete policy proposals. Its main findings are as follows:

- More than two-thirds of all listed firms active in the EU (67%) are cross-held by Common Shareholdings of at least 5% in each company.
- Portfolios of Common Shareholdings continue to be especially large – in some cases including between 30% to 40% of active companies – in the electricity, financial instruments, telecommunications, and beverage sectors.
- Despite the wide presence of Common Shareholdings, a causal link with competitive outcomes is still challenging, not least because of the definition of the relevant market, the measurement of the Common Shareholding itself, the choice of an appropriate competition indicator (market dominance, concentration levels), or data availability at firm or product level.
- The Report introduces a detailed study of the beverages sector, concluding that a 2009 merger between two institutional investors may have had an effect on the margins of the beverage firms in their portfolios.
- Nonetheless, the Report stresses that more detailed analysis is needed in specific cases regarding the precise causal link between a given Common Shareholding and any actual impact on competition.

Takeaway

As was clear from the Commission's *Dow/DuPont* and *Bayer/Monsanto* merger Decisions, Common Shareholdings are likely to become a more established element in the Commission's scrutiny of mergers, particularly in concentrated markets.

Following the publication of the Report, in cases where it believes that market shares and other traditional analytical tools underestimate the effect of a concentration the Commission may be inclined to argue that a material impact on competition is more likely where a Common Shareholding is present. This could result in even more complex merger review procedures, potentially including a review of investment histories and strategies.

The Report shows, however, that there are no hard and fast theories of harm of Common Shareholdings. We are currently none the wiser as to whether the Commission will seek to build such an analysis into its existing "coordinated effects"[14] theories or as part of a broader analysis in so-called "gap" cases.[15] It is, therefore, unlikely that the Commission will rely solely on Common Shareholdings to veto a merger. Nonetheless, it is likely that the Commission will view Common Shareholding as an "element of context" capable of magnifying anticompetitive concerns raised by other elements of the investigation.

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[1] Full report available here. The Report was undertaken by the Finance & Economy Unit of the Commission's Joint Research Centre at the request of the Commission's Directorate-General for Competition, as part of a project reviewing "Possible anti-competitive effects of common ownership".

[2] See OECD, 'Common Ownership by Institutional Investors and its Impact on Competition', Background Note by the Secretariat, 5-6 December 2017, p. 13, available at: https://one.oecd.org/document/DAF/COMP(2017)10/en/pdf.

[3] Common Shareholding Report, *op. cit*., at p. 2.

[4] OECD Background Note*, op. cit*., at p. 13.

[5] Jose Azar, Sahil Raina and Martin C Schmalz, 'Ultimate Ownership and Bank Competition', May 2019; Jose Azar, Martin C Schmalz and Isabel Tecu, 'Anticompetitive Effects of Common Ownership', Journal of Finance 28(4), 2018.

[6] FTC Hearing #8: Competition and Consumer Protection in the 21st Century, 6 December 2018, transcript available here.

[7] Case M.7932 *Dow/DuPont*.

[8] Case M.8084 *Bayer/Monsanto*.

[9] Case M.7932 *Dow/DuPont*, Annex 5, paras. 4 and 81; Case M.8084 *Bayer/Monsanto*, para. 229.

[10] Case M.7932 *Dow/DuPont*, Annex 5

[11] Case M.7932 *Dow/DuPont*, Annex 5, para. 7.

[12] Full speech accessible at: https://wayback.archive-it.org/12090/20191129215248/https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/competition-changing-times-0_en; see also https://globalcompetitionreview.com/dg-comp-looking-common-ownership-says-vestager.

[13] Full report available here.

[14] Coordinated effects occur where as a result of the merger, the merging parties and their competitors will successfully be able to coordinate their behaviour in an anti-competitive way, for example by tacit or explicit collusion.

[15] Mergers in oligopolistic markets which the Commission believes would significantly lessen competition without creating or strengthening a dominant position in the marketplace.

Gibson Dunn's lawyers are available to assist with any questions you may have regarding these developments. For additional information, please contact the Gibson Dunn lawyer with whom you usually work, any member of the Antitrust and Competition practice group or the following authors in Brussels:

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