

A COMPETITION LAW ANALYSIS OF COMMON SHAREHOLDINGS

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ABSTRACT

An emerging economics literature has raised concerns that “common shareholdings” by institutional investors in multiple public companies may give rise to soft competition and the exercise of market power in concentrated oligopolies. However, it would be a mistake to try to address such concerns using merger control regimes. While competition laws which prohibit “competitor agreements” may provide a basis for dealing with explicit coordination between competitors that is facilitated by common institutional shareholders,² the application of merger control laws to mergers involving two companies in an industry with significant common shareholdings or to the acquisition of common shareholding positions by institutional investors is unlikely to be effective and the costs would probably exceed the benefits.

INTRODUCTION

Common shareholdings have begun to come under scrutiny in oligopolistic industries where multiple institutional investors own voting interests in multiple publicly-traded companies. Notable examples include studies of common shareholdings in the major airlines operating in the United States³ and some of the major banks in the United States and Europe.⁴ Issues related to the market power effects of common shareholdings in public companies were also discussed at some length in an annex to the European Commission’s

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² Most competition laws contain a criminal or a serious non-criminal provision dealing with overtly anti-competitive collaborations between competitors, (e.g. agreements to increase prices). Such rules are often broad enough to encompass “hub-and-spoke” or “conduit” situations and may also be applied to a non-competitor that facilitates the coordination between the competitors. It is likely that some institutional investor and operating company compliance programs may not yet be attentive to this area of legal risk. However, the level of awareness and focus on this exposure will likely increase as the issue of common shareholdings receives greater attention.

³ J. Azar, M.C. Schmalz and I. Tecu, “Anti-Competitive Effects of Common Ownership” (March 15, 2017), Ross School of Business Paper No. 1235 (“Azar et al, Common Ownership”).

⁴ J. Azar, S. Raina and M. Schmalz, “Ultimate Ownership and Bank Competition” (July 23, 2016) (“Azar et al, Ultimate Ownership”).

Dow/Dupont decision⁵ and were the subject of a recent roundtable session at the OECD Competition Committee (“OECD”).⁶ However, relatively little attention has been paid to the application of existing competition law frameworks to such potential concerns.

As the OECD has observed, there has been a substantial growth in the types and activities of investment funds over the past half century.⁷ The holdings of individual institutional investors in common shareholder situations are typically less than 5% of the voting equity in any individual operating company, and they may well be as small as 1% or lower. Thus, they are much lower than the levels of cross shareholdings or other minority shareholder investments that historically have attracted competition law consideration (e.g. 10%-25%, depending on the jurisdiction) and they usually are not accompanied by any right to representation on the board of directors.

Nevertheless, the cumulative interests of institutional investors with common shareholdings may be in the 15%-25% (or above) range in multiple firms in some oligopolies, and they may be among the largest shareholders in some companies whose shares are widely held. For example, in *Dow/Dupont*, the Commission determined that “a small number of common shareholders, 17, collectively own around 21% of BASF, Bayer and Syngenta and around 29%-36% of Dow, Dupont and Monsanto.”⁸

The theoretical literature, lead by contributions from Elhauge⁹ and Posner *et al*,¹⁰ has asserted that competitors which have significant common shareholders will be incentivized to compete less aggressively with each other. The starting point is a variation on a “unilateral effects” theory of harm, but with a focus on the common institutional shareholders, not the firms themselves:

⁵ European Commission, *Dow/Dupont*, Case M.7932, Decision (March 27, 2017).

⁶ 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](https://one.oecd.org/document/DAF/COMP(2017)10/en/pdf) (“OECD Note”).

⁷ OECD Note at para. 23.

⁸ *Dow/Dupont*, Annex 5, at para. 90.

⁹ E. Elhauge, “Horizontal Shareholding”, 129 *Harvard Law Review* 1267 (2016); and E. Elhauge, “The Growing Problem of Horizontal Shareholding”, *CPI Antitrust Chronicle* (June 2017).

¹⁰ E. Posner, F. Scott-Morton and E.G. Weyl, “A Proposal to Blunt the Anti-Competitive Power of Institutional Investors”, forthcoming in *Antitrust Law Journal*.

In the example of an oligopolistic market in which an institutional investor holds a minority of all (or most) firms, it is certainly theoretically possible that a unilateral price increase by one of the firms would be profitable from the investor's perspective. Losses from diversion of customers to competitors could be recouped because of the gains these competitors realise.¹¹

The second step in the theory is that those common institutional investors will have the ability and incentive to induce the various firms they have invested in to raise their prices or otherwise compete less aggressively. The third step in the theory is that the firms that have such shareholders will choose to raise their prices or otherwise compete softly (in order not to damage those important shareholders' other interests – 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 such linkages at the shareholder level could facilitate the reaching of understandings between the firms in which they hold shares to not compete aggressively and/or could increase incentives to not deviate from coordinated outcomes.¹² If major competitors in an oligopoly each compete less aggressively, prices may end up above competitive levels and the firms may effectively exercise market power.

This paper explores how a standard merger review framework would apply to mergers in industries characterized by extensive common shareholdings as well as the potential for review of acquisitions by institutional investors of common shareholdings in competing companies.

¹¹ OECD Note at para. 33. This is an extension of D. O'Brien and S. Salop, "Competitive Effects of Partial Ownership", 67 *Antitrust Law Journal* 559 (2000) OECD Note at para. 33.

¹² OECD Note at paras. 39-41.

MERGERS WITHIN INDUSTRIES WITH COMMON SHAREHOLDINGS

Oligopoly theory does not provide clear benchmarks or methodologies to predict whether, and to what degree, oligopolistic competitors may engage in highly vigorous, versus moderate or soft competition. The common shareholdings literature suffers from the same lack of clarity. The intensity of competition in any particular oligopolistic market, with or without common shareholders, at any particular point in time requires a fact-specific, in-depth inquiry.

There is now widespread consensus in industrial organization economics that horizontal mergers between competitors give rise to economic welfare concerns when a transaction is likely to preserve or enhance the ability of firms to exercise market power. In general, merger reviews begin by defining relevant markets and then considering market concentration plus various other factors in order to assess competitive effects. When determining whether a merger would allow market power to be exercised, the critical comparisons are (i) the expected industry concentration and future behaviour of the merging parties after, versus in the absence of, the merger; and (ii) whether other firms within or outside the relevant market are likely to respond in a manner that limits the ability of the merging parties to exercise market power.

Market Definition

The literature on common shareholdings focuses on concentrated oligopolistic industries. Relatively little attention is paid 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 involve numerous specific products and geographic areas. When assessing a merger between firms with common shareholders, there is no basis for abandoning 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.

A relevant market 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 a 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 where not all were active, and there were various markets in which additional competitors were present.¹³

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 exercised include:

- *Market Shares and Concentration* – The common shareholdings literature makes considerable use of the Modified HHI (“**MHHI**”) “”measure that has been derived from the theoretical work of O’Brien and Salop.¹⁴ However, as with the traditional HHI measure of concentration, 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. While the MHHI measure may provide directional indications regarding mergers that warrant in-depth review, it would not be appropriate as a “likely challenge” or “presumption of anti-competitive effects” threshold. It is also important to recognize that calculation of MHHIs can be an extremely resource-intensive exercise, since it requires detailed information regarding all the shareholders (including affiliation relationships between them) of all the competitors in each relevant market.
- *Competitive Vigor of the Party Being Acquired* – This factor (which is sometimes framed in terms of whether one of the merging parties is a “maverick” that inhibits coordinated market power effects) can be relevant in an analysis that takes common shareholdings into account, depending on the

¹³ *Dow/Dupont*, at parts V.4 – V.6.

¹⁴ O’Brien and Salop, *Partial Ownership; Dow/Dupont*, Annex 5, at part 6.2.

pre-merger ownership of the firm being acquired. If there are significant common shareholdings between the acquiree and other competitors in a relevant market, the common shareholdings theory would predict that the acquiree would not be a vigorous pre-merger competitor. A merger is unlikely to enable incremental market power to be exercised if one of the merging parties is not providing significant competitive discipline in the market.

- *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 extent of common shareholdings between the merging parties and each competitor in a relevant market is theoretically a relevant consideration in assessing whether that competitor is likely to attempt to undercut or to accommodate a post-merger attempt to exercise market power.
- *Buyer Power* – Merging parties’ customers may have sufficient countervailing power to resist an attempt to exercise market power (although it is important to consider whether such power is applicable broadly across the customer group or only to one or more specific purchasers). If the relevant buyers are publicly-traded companies, it is theoretically possible that common shareholdings between the merging parties and such buyers could affect the likelihood of an attempt being made to exercise market power (or, potentially, the likelihood that such buyers would respond by way of threatening or exercising their countervailing buyer power).¹⁵
- *Entry and Other Supply Responses* – Even if the competitors to the merging parties or their customers are not likely to discipline attempts to exercise market power, various types of supply-side responses may do so. Such responses may

¹⁵ There is no *a priori* reason why common shareholdings would only be taken into account in respect of competitors but not suppliers or customers.

include firms which are not close competitors to the merging parties adopting repositioning strategies, firms in adjacent product or geographic markets expanding into the relevant market, greenfield entry by a new firm and innovation that will affect future competition in the market place: All of these supply responses in theory may be affected by the degree of common shareholdings between the firms that have the ability to undertake such supply responses and the merging parties (as well as other existing competitors in the market in question). This may be a resource-intensive inquiry.

- *Mechanisms by which Accommodating Responses Occur* – In evidence-based merger review systems, 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 a remedial order in respect of a specific merger transaction. Evidence-based decision-making should require that the competition authority have some basis for concluding that:
 - (i) the merged firm would implement the price increases that are expected to be unilaterally profitable from the perspective of the institutional common shareholder(s); and
 - (ii) existing competitors, customers with buyer power and firms that are in a position to provide a supply response would choose to accommodate a post-merger exercise of market power rather than respond competitively.

The common shareholdings literature hypothesizes three main mechanisms by which the incentives of institutional investors with common shareholdings to prefer soft competition may be implemented and acted upon by the company management of the companies in which they have invested:¹⁶

¹⁶ See OECD Note at paras. 51-80.

- *Shareholder Votes* – While institutional investors can influence company management through shareholder votes, however, votes typically occur in respect of broad governance matters (e.g. elections of directors, appointments of auditors, approvals of major strategic transactions) and rarely involve day-to-day or even major issues of competitive strategy.
- *Direct Communications* – Meetings or other direct communications with senior management and/or directors of one or more competing firms are a less transparent mechanism than shareholder votes and could allow for more detailed communications regarding significant aspects of competitive strategy. However, this mechanism involves potentially significant risks to both the institutional investors and the firms if the discussion leads to understandings between such investors and the managements of two or more firms that could make the parties subject to a “hub-and-spoke” conspiracy that may be subject to significant penalties under the competition / antitrust laws in various jurisdictions.¹⁷ 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 sub-set of institutional shareholders which have the common shareholdings.
- *Compensation Incentives* – Compensation systems which encourage management personnel to focus on industry profitability instead of the company’s own profitability could lead to accommodating rather than competitive responses (if the major firms in an oligopoly all followed a similar approach). However, such systems could raise potential fiduciary duty issues for company directors and officers. In addition, management’s theoretical incentives could well be in tension with similar incentives to not

¹⁷ See the discussion of competitor agreement laws under in note 2 above.

injure publicly-traded customers and/or suppliers whose shareholders include common institutional investors.

The common shareholdings literature generally focuses on the interactions between senior management and shareholders. However, if competition agencies raise common shareholding theories of harm in actual cases, the merger review process will likely also need to consider whether there is any evidence of the transmission mechanism by which the senior management who are assumed to be responding to the interests of common institutional shareholders would implement instructions or incentives to compete softly to the relevant lower level managers responsible for pricing and other dimensions of competition) in specific relevant product and geographic markets.

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 (i.e. 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.¹⁸ However, if an industry has significant pre-merger common shareholdings, it may be extremely difficult to establish that there has been material incremental change in:

- the ability or incentives of institutional investors to influence management to compete more softly (or that management will choose to do so on its own), and/or
- the likelihood that other competitors and potential supply responders would adopt accommodating responses when they have been competing vigorously.

¹⁸ The future non-merger scenario is often approximated by the pre-merger market conditions, although such an approach is only valid if it is reasonable to expect that the future is likely to resemble the past.

The common shareholdings literature predicts that such an ownership structure would already be leading to such behavior by the common shareholders, the merging parties, the other competitors and the potential supply responders, and that it would be expected to continue absent the merger. It would therefore be necessary to focus on whether the nature or extent of the unilateral anti-competitive behaviour and/or the accommodating behavior would 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.

In order to conduct a reliable assessment of the extent to which common shareholdings are likely to result in less competitive behaviour by individual firms, considerable evidence regarding the existing behaviours of these firms will be required. More specifically, this would appear to require competition authorities to undertake potentially time-consuming and burdensome processes to gather evidence regarding:

- the extent to which the merging parties were providing meaningful competitive discipline on each other pre-merger, notwithstanding their partial common shareholder populations;
- the likelihood that the remaining publicly-traded competitors with partial common shareholders are going to become more accommodating than they were pre-merger;
- the likelihood that one or more firms that were going to reposition / expand / enter / innovate in the absence of the merger will choose not to do so as a result of the merger; and/or
- the extent to which there are competitors, buyers with countervailing power, or supply responders, without common shareholders, that would provide competitive discipline on attempts to exercise an incremental level of market power post-merger.

The European Commission did not fully address these issues in *Dow/Dupont*. In Annex 5 of the decision, it set out a detailed summary of the theoretical and empirical literature

about the potential market power effects of common shareholdings (albeit with little of the critical commentary that has emerged in response thereto). However, due to procedural issues arising in the Statement of Objections process, it concluded that it could not base its decision on MHHs and the common shareholdings analysis.¹⁹ 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”.²⁰

In doing so, the Commission avoided undermining its own primary theories of harm. Had it placed greater reliance on the degree of industry concentration attributed to common shareholdings, it would have introduced significant internal contradictions into its competitive effects analysis:

- On one hand, the main bases for the Commission’s conclusion that there would be anti-competitive effects in various agro-chemical markets were that Dupont and Dow were important current sources of competitive discipline on each other, and also that they were important competitors in innovation and new product development.²¹
- Yet at the same time, the Commission asserted that the degree of common shareholdings between the merging parties and the other major global agro-chemical competitors was substantial.²²
- No explanation was provided as to how the aggressive current competition findings and the expected innovation / new product competition findings could be reconciled with the significant common shareholdings between Dow and Dupont (and other 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

¹⁹ *Dow/Dupont*, Annex 5, at paras. 74-79.

²⁰ *Ibid.*, at para. 81.

²¹ *Ibid.*, at parts V.6 and V.8.

²² *Ibid.*, Annex 5.

the merging parties and the other major competitors identified in that analysis.

In summary, where there are significant common shareholdings between the merging parties and their major competitors in an oligopolistic industry, the common shareholdings literature predicts that the merging parties would not be providing aggressive competitive discipline on each other's prices or other non-price dimensions of competition. Thus any finding of anti-competitive harm would have to be based on a determination that the elimination or reduction of some small amount of pre-merger competition nonetheless meets the applicable materiality standard in the legal test for challenging a merger transaction. The counter-intuitive implication for merger review processes is that, in general, there will be less reason to be concerned about a merger when there are already significant common shareholdings in an industry than mergers between competitors where there are little or no pre-existing common shareholdings.

INVESTMENTS BY INSTITUTIONAL SHAREHOLDERS

Reviewability of Acquisitions of Small Shareholdings

As the OECD has noted, many jurisdictions do not subject minority shareholdings to merger control, and those that do typically have a minimum voting share threshold (e.g. 15%-25%) or a material influence threshold.²³ Thus acquisitions of small shareholdings such as the 1%-5% levels of concern in the common shareholdings literature usually are not subject to review.

The addition of a notification requirement for the levels of share ownership that are of concern in the common shareholdings literature (e.g., 1%-5%, or possibly lower, voting interests of individual shareholders) would represent a major expansion of the scope of merger control in any such jurisdiction. Even if the regular financial (usually turnover) thresholds were maintained, lowering the minimum shareholding to the level where such small voting shares interests are acquired could generate reviews for an enormous volume

²³ OECD Note, at paras. 7-15.

of capital markets transactions. There is no easy way to limit the notification requirement to common shareholdings in competing firms, let alone to concentrated oligopolistic industries, because these concepts are not definable in objective, administrable filing thresholds.²⁴ Such reviews would have significant resource consequences for the reviewing agency, not just the institutional investors and the companies they are investing in.

Designing a notification regime for acquisitions of small voting equity positions would also give rise to a number of other challenges. For example:

- (i) Would transactions that have already been completed all be grandfathered?
- (ii) What level of incremental share purchases would be caught (e.g. suppose an investor proposes to increase its stake in a firm from 3% to 4%)?
- (iii) How would review processes be applied to day-to-day buying and selling of shares in public markets (i.e. to transactions which are not subject to take-over bid timing rules and which would be incompatible with even short no-close review periods)?

Substantive Review

The relevant markets for analysis of a new share purchase by a particular institutional investor would be those in which the company whose shares are being acquired competes with one or more of the other companies in which that same shareholder already has investments. As noted above, since most merger control regimes define relevant markets more narrowly than the “oligopolistic industry” concept which is discussed in the common shareholdings literature, there may be numerous relevant markets and they may be characterized by varying degrees of common shareholdings between the merging parties

²⁴ Clear and objective filing thresholds are vitally important to provide certainty for parties contemplating transactions and their advisors, as well as for competition agencies: See International Competition Network, *Recommended Practices for Merger Notification and Review Procedures*.

and other competitors, as well as varying levels of competition from privately-held or other firms that do not have any common shareholders.

With respect to competitive effects, any single acquisition of a new common shareholding by a single institutional investor may have relatively little impact on overall industry concentration, even under MHHI measures that are designed to reflect the aggregate concentration resulting from common shareholdings.

It will be similarly important to assess whether or not other competitive effects factors (e.g. impact on behaviour of the target, effectiveness of remaining competition, countervailing buyer power and the likelihood of supply responses) are impacted in any material way by a particular acquisition of a small shareholding. For example:

- *Impact on the Behaviour of the Target Firm* – If there are already other common shareholdings between the target firm and other competitors in the industry, will the emergence of an additional common shareholder have any material incremental effect on the target firm’s pricing or other competitive behaviour? Alternatively, if the investment constitutes the first time that the target firm becomes subject to a common shareholding, will the position of this one institutional investor be significant enough to impact the target firm’s behaviour?
- *Effectiveness of Remaining Competition* – If significant existing common shareholdings are already leading to an exercise of market power in the market, will the additional common shareholding have any material effect? Alternatively, if market power is not already being exercised as a result of common shareholdings, what is it about the new common shareholding that would be expected to result in market power being exercised in the future?
- *Buyer Power* – Does the new common shareholding materially reduce the ability or incentives of customers to exercise countervailing buyer power?

- *Supply Responses* – Does the new common shareholding materially reduce the likelihood that potential supply responders would discipline attempts to exercise market power?

In summary, in many cases the issues of causation and materiality of changes resulting from any single acquisition of a common shareholding are likely to make it very difficult for competition authorities to conclude that a purchase of a small voting interest by a single institutional shareholder would meet the statutory test for an anti-competitive merger. In addition, it is far from clear that this type of complex intervention would be a good use of scarce enforcement resources.

Regulatory Approaches

Any approach which focuses on individual transactions on a go-forward basis will be limited in its effectiveness because of the vast pre-existing common shareholdings by multiple institutional investors in some concentrated oligopolies. There would also appear to be a degree of arbitrariness from focusing only on small future transactions.

Posner *et al* have proposed that individual investors not be allowed to hold more than 1% of the market share in an oligopolistic industry (measured indirectly by summing their proportionate interest in the market share of each competitor they are invested in), unless:

- (i) they restrict their shareholdings to a single effective competitor in the industry (defined so as not to include small fringe players), or
- (ii) they operate only as a “passive investor” (which is defined to require (1) no communications at all with company management, (2) mirror voting of their shares in proportion to the voting of other shareholders so that they have no influence in any corporate governance decision (which is tantamount to not exercising their voting rights), and (3) committing “to own and trade stocks

only in accordance with clear non-discretionary public rules, such as matching an index as closely as possible”).²⁵

Posner *et al* contend that such a regime could be implemented by the US antitrust enforcement agencies through the issuance of policy guidance.²⁶ However, they acknowledge that antitrust authorities would have to prepare and regularly update lists that define oligopoly industries. Leaving aside potentially serious substantive, jurisdictional and transitional dislocation issues, their proposal is premised upon the ability of the US antitrust agencies to challenge completed transactions that fall below the HSR filing thresholds and to challenge past transactions without any limitation period restrictions. Such an approach would not be viable in most other jurisdictions.

As the OECD notes, several critiques have been expressed about this type of “hard limit on common ownership”, including that:

- current evidence is not sufficient to justify this type of *per se* rule;
- such a rule might effectively require large investment management firms to split up, resulting in costs and inefficiencies in capital markets;
- there would be significant monitoring and compliance burdens for investment firms and enforcement agencies;
- the proposed limits are overbroad and would interfere with many investments which do not result in actual anti-competitive effects; and
- limiting the exercise of voting rights in order to qualify for the passive investor exception could have negative corporate governance and capital markets implications.²⁷

²⁵ Posner *et al*, Power of Institutional Investors, at pp. 33-34.

²⁶ *Ibid* at pp. 34-35. Posner *et al* note that legislative amendments or the issuance of rules / regulations are alternatives to enforcement agency guidance. In this author’s view, major economic policy shifts of this nature should be designed and implemented using legislation, regulations or rule-making after shareholder consultation, rather than through administrative discretion.

²⁷ See OECD Note at para. 106 and sources cited therein.

At this point in time, the scope of the alleged competition policy problem from common shareholdings and the effect on overall economic welfare is not clear. The extent of the time and resources burdens — for merging parties, other market participants and competition authorities — are also not easy to quantify, but have the potential to be very significant. More comprehensive evidence of actual harm across a range of markets, as well as detailed cost/benefit analysis and consideration of broader implications for the operation of capital markets, would be important to determine whether extending merger control regimes or introducing regulatory constraints on small institutional shareholder investments would be an appropriate intervention in capital markets.²⁸

CONCLUDING OBSERVATIONS

The burgeoning common shareholdings literature is putting a spotlight on the possibility of sub-optimal levels of competition between public companies in concentrated oligopolies. However, it is important to differentiate between soft competition and exercises of market power which result from the phenomenon of common shareholdings and those which result from conscious parallelism in oligopolistic industry structures.

Existing merger control frameworks will likely be of only limited utility for identifying and remedying mergers where competition concerns arise from the presence of common shareholdings (and where a traditional analysis focused on the merging parties would not have done so) or problematic incremental acquisitions of common shareholding positions by institutional investors. In both contexts, issues of causation and materiality are likely to limit severely the situations in which competition authorities could appropriately take action based on objective evidence and analysis. Moreover, the resource costs for agencies, merging parties and third parties are likely to be significant, casting doubt on whether the benefits of such reviews would exceed the costs. In an environment of scarce enforcement resources, even greater caution is warranted as many enforcement agencies are likely to have other areas where they can make larger contributions to improving economic welfare.

²⁸ For further discussion regarding the importance of corporate governance, capital market, financial regulatory and other broader policy considerations, see OECD Note at part 5.2 and para. 136.

Instead, heightened awareness of the possible application of competitor agreement laws — and the development of more rigorous compliance programs — within both institutional investors and public companies may be one of the most important practical steps that can be taken to reduce anti-competitive influences on company managements. In addition, it would be useful to establish a corporate governance principle that management compensation systems should be focused on company, rather than industry, performance. Major institutional investors should consider endorsing such a principle and encouraging all the companies in which they invest to implement it.