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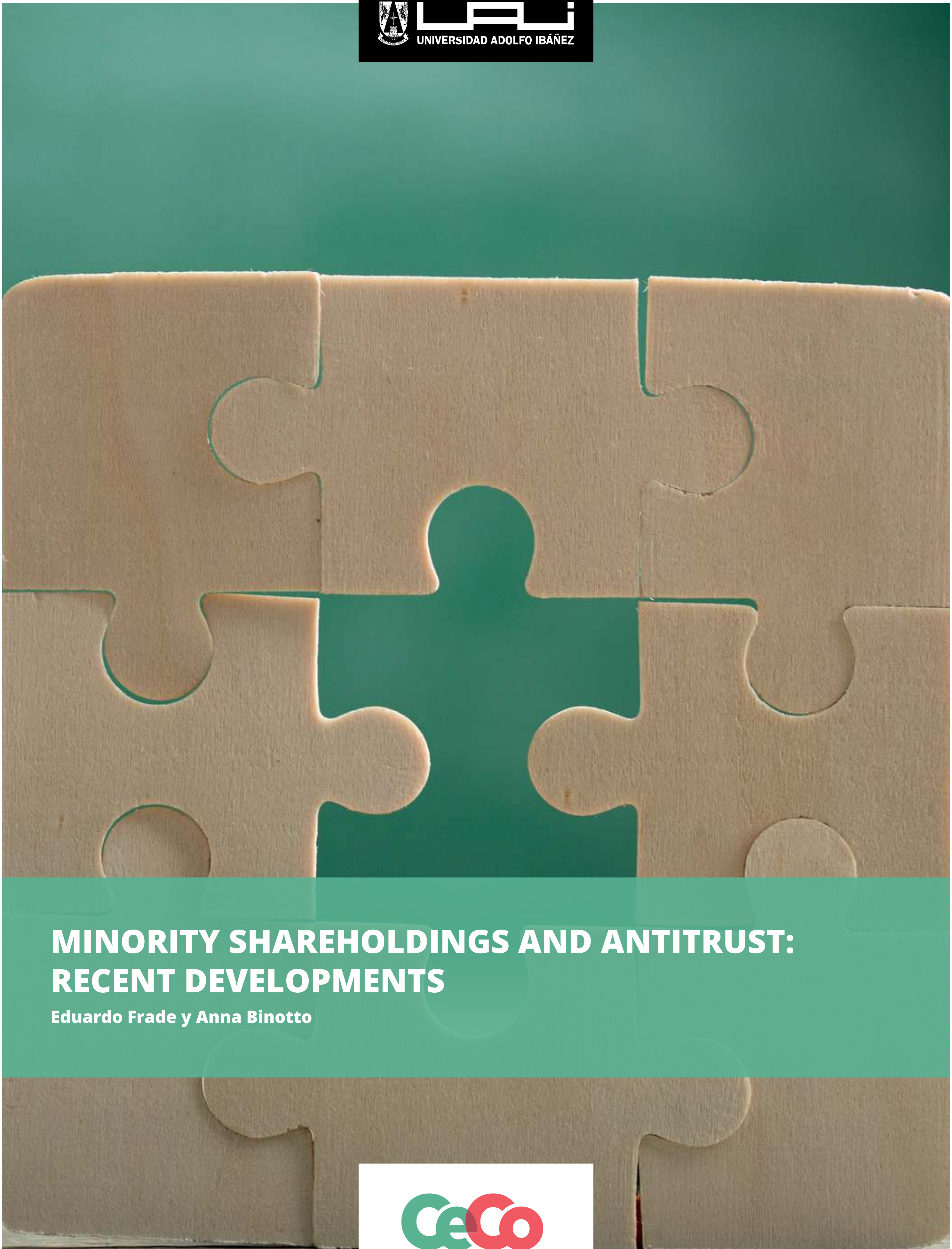

MINORITY SHAREHOLDINGS AND ANTITRUST: RECENT DEVELOPMENTS

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Minority shareholdings and antitrust: Recent developments

Febrero 2021

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I. INTRODUCTION

This article addresses recent developments in the debate regarding potential antitrust effects of acquisitions of non-controlling minority stakes. We review the basic premises that indicate the potential sensitivities of minority shareholdings, as commentators and practitioners started to look pass usual cross-ownership among competing or vertically integrated firms and evaluate the specific sensibilities of investment structures of institutional investors and the spillovers of common ownership of companies across industries. We touch on which could be challenges once the theoretical debate unfolds into concrete cases and agency decisions. We conclude that, despite a reasonable amount of consensus regarding potential concerns related to non-controlling minority shareholdings held directly by rivals or commonly owned by institutional investors, the degree of such concerns is still variable, and there is not sufficient convergence as how to address the issue. We therefore envision that significant work may be developed to improve antitrust and economic technique that provides authorities with better means to assess cases and draw new regulations.

II. GROWING ATTENTION TO MINORITY SHAREHOLDINGS

Minority shareholdings could be broadly defined as the investments made by parties which are insufficient to grant them controlling rights over the targeted company. Corporate law scholars and practitioners commonly advocate for the protection of minority investors and dispersed capital structures. Those investments are mostly supported as important to promote the development of capital markets and to constrain the extraction of rent from controlling shareholders, resulting in relevant implications to shareholder democracy, better corporate governance structures and, more broadly, to economic development[1].

Much attention has been drawn to the antitrust repercussions of minority investments, especially when investors and investees are competitors or vertically related companies. The discussion has especially been related to the investors' potential to exercise relevant influence in the conduction of business activities and in the design of the competitive strategies of their investees even without a majority stake in the companies'

1 See, for example, Ronald J. Gilson, "Controlling Shareholders and Corporate Governance: Complicating the Comparative Taxonomy", *Stanford Law and Economics Olin Working Paper* 309 and *Columbia Law and Economics Working Paper* 281 (August, 2005), 12; Lucian A. Bebchuk and Mark J. Roe, "Path dependence in Corporate Ownership", *Stanford Law Review* 52 (1999), 127-170.

capital stock. Access to sensitive information from a competitive standpoint, and even an eventual decrease of rivalry due to convergent financial interests derived from the corporate stake are also relevant discussion topics.

The OECD, for example, has long studied the theme. In a 2008 Policy Roundtable, the organization had already identified that minority shareholdings between competing firms could affect competition, either through the reduction of the incentives to compete (unilateral effects), or through the creation or strengthening of incentives to collude (coordinated effects)[2].

The Organization did point out, however, that there was substantial divergence among jurisdictions as how to assess those potential competitive effects, most notably in the context of merger reviews (i.e., especially in the acquisition of non-controlling stakes). According to its original survey, the OECD indicated that many merger regimes were still limiting merger review to acquisitions that resulted in a change of control; whereas others would review acquisitions of minority shareholdings, but still with very variable thresholds[3].

Following developments in this area, in 2014 the European Commission submitted for public consultation a potential revision of its merger regulation that could include the possibility to review acquisitions of non-controlling minority shareholdings, though the Commission ended up not promoting relevant changes to the regulation, and maintained the acquisition of controlling stakes as its standard criteria[4]. In the opposite direction, two years prior, Brazil's Administrative Council for Economic Defense (CADE) issued regulation[5] which determined that parties should submit for pre-merger approval acquisitions of stakes that represented as low as 5% of a company's capital, in certain instances. The variety of thresholds concerning minority acquisitions across different jurisdictions is wide[6].

Over the years, a specific type of minority shareholding started to raise the attention of antitrust scholars and authorities. Once direct shareholdings begun to greatly give place to investments through intermediaries, one could notice a shift in the distribution of capital, that transformed economies from then-called "dispersed" structures of corporate ownership, into a scene with massive participation of institutional investors, such as mutual funds, insurance companies, pension funds and endowments. In the US, in particular, scholars noticed that an overwhelming amount of corporate shares across industries was held by investment vehicles managed by three index funds and exchange-traded funds – BlackRock, Vanguard and State Street[7].

In recent times, considerable work has been published to address the potential anticompetitive effects of the parallel ownership of stock, especially by institutional investors, in competing firms – also regarded as "common ownership". Common ownership differs from what antitrust authorities identified as "cross-ownership" or "partial ownership", i.e., the situation in which a competitor acquired stock in a rival company[8].

2 OECD, *Policy Roundtables: Minority Shareholdings* (2008), https://www.oecd.org/competition/mergers/41774055.pdf.

3 OECD, *Minority Shareholdings*, 10.

4 See documents available at https://ec.europa.eu/competition/consultations/2014_merger_control/index_en.html.

5 Regulation CADE no. 02/2012.

6 Eduardo Frade Rodrigues, "Merger Notification Policies Toward Minority Shareholdings", in *International Cooperation and Competition Enforcement*, eds. Vinicius Marques de Carvalho, Carlos E. J. Ragazzo and Paulo Burnier da Silveira, (Wolters Kluwer, 2014).

7 Edward B. Rock and Daniel L. Rubinfeld, "Common Ownership and Coordinated Effects", *Antitrust Law Journal* 83, No. 1 (2020), 202.

8 Tilman Kuhn and Cristina Caroppo, "5 Things You Need to Know About the Debate: Whether 'Common Ownership' of Competitors by Institutional Investors Raises Antitrust Concerns", *Informaconnect* (March 15, 2019), https://informaconnect.com/5-things-you-need-to-know-about-the-debate-whether-common-ownership-of-competitors-by-institutional-investors-raises-antitrust-concerns/.

The works of Azar, Schmalz and Tecu[9] and Azar Raina and Schmalz[10] investigated, respectively, the American airline and banking industries, proposing that common ownership could be related to significant average price increases across the sectors. Anton, Ederer, Gine and Schmalz[11] suggested that industries where common ownership is present witnessed a change in management compensation, rewarding managers based on the performance of the sector as a whole, rather than their individual firm level success. Einer Elhaugue argued that antitrust agencies should investigate concentrated markets with high horizontal shareholding to tackle increasing levels of industry concentration[12]. Fionna Scott-Morton, Eric Posner and Glenn Weyl proposed significant antitrust intervention, calling for antitrust agencies review acquisition of any minority shareholdings in concentrated markets, as well as regulatory action that limits common ownership[13].

The buzz surrounding common ownership was not overlooked by authorities, even in jurisdictions such as the European Union, where minority shareholdings were not usually reviewed as a relevant antitrust issue. A central example was the Commission's 2017 review of the Dow/Dupont case (Case No M.7932), in which it specifically assessed the issue of minority shareholdings and common ownership, dedicating a full Annex to evaluate the effect of common shareholding on market shares and concentration measures. The Commission was particularly interested in the distribution of equity holders in the agrochemical industry, especially among BASF, Monsanto, Dow, Dupont, and Bayer. In the following year, the European Commission again investigated potential concerns related to common ownership in the agrochemical industry upon assessing the Bayer/Monsanto merger (Case No M.8084). In that opportunity, the Commission stated that "'passive' investors acknowledge that they exert influence on individual firms with an industry-wide perspective"[14-15]. In September 2020, the European Commission issued a report entitled "Common Shareholding in Europe", in which it provided a thorough analysis of the common capital structure in various economic sectors, such as oil & gas, electricity, mobile telecoms, trading platforms, and beverages. The report was not primarily focused on antitrust implications of common ownership or particular theories of harm, but it did provide a relevant background for addressing an issue that has been on the authority's radar for a while.

It is clear that, despite not a novel theme, the issue of antitrust implications of acquisitions of non-controlling minority shareholdings is increasingly under the spotlight of commentators, practitioners, and competition authorities.

9 Jose Azar, Martin C. Schmalz and Isabel Tecu, "Anticompetitive Effects of Common Ownership", *Journal of Finance* 73 N°4 (2018).

10 Jose Azar, Sahil Raina and Martin C. Schmalz, "Ultimate Ownership and Bank Competition", *SSRN* (May 4, 2019), https://ssrn.com/abstract=2710252 or http://dx.doi.org/10.2139/ssrn.2710252.

11 Miguel Anton *et al.*, "Common Ownership, Competition, and Top Management Incentives", *Ross School of Business Paper* 1328 / *European Corporate Governance Institute (ECGI) - Finance Working Paper* 511/2017 (November 13, 2020).

12 See, for example, Einer Elhauge, "How Horizontal Shareholding Harms Our Economy - And Why Antitrust Law Can Fix It", *Harvard Business Law Review* 10, No. 2 (forthcoming Summer 2020); and "The Causal Mechanisms of Horizontal Shareholding", *Ohio State Law Journal* 82, No. 2 (2021).

13 Eric A. Posner, Fiona M. Scott Morton and Eric Glen Weyl, "A Proposal to Limit the Anti-Competitive Power of Institutional Investors", *Antitrust Law Journal, Forthcoming* (March 22, 2017), https://ssrn.com/abstract=2872754.

14 Case No M.8084 - *Bayer/Monsanto*, 42.

15 Other relevant cases discussing the relevance of minority shareholding to competition assessment include Cases IV/M.343 – *Société Générale de Belgique / Générale de Banque*, M.3330 – *RTL*/M6; and M.4336 – *MAN / Scania*.

III. MINORITY SHAREHOLDINGS AND RELATED ANTITRUST CONCERNS

Antitrust sensibilities and the risk of creating or strengthening the incentives for investor and investee to engage in anticompetitive behavior are related to several factors. First is the possibility of influencing the decision-making process of competitors, or to exert "material" or "relevant influence" over them. Second is the possibility of accessing commercially sensitive information that is shared with stockholders and would not be publicly available otherwise. Third is the mere concomitant financial interest in the performance of one or more competitors.

As previously mentioned, those factors can result in the creation of both unilateral and coordinated effects to competition. The first are related to reduction of incentives to compete given the cross or common shareholding among rival firms; the latter to the creation of mechanisms that enable the alignment of competitive strategies and facilitate monitoring of collusive structures, tacit of explicit.

The mechanisms related to minority shareholdings that can promote such effects in the agents' competitive behavior are various[16]. Most notably, there are the political rights essential to shareholding, such as a voting interests and the right to assign members to a company's supervisory board[17]. That is particularly the case of investors that have special voting of vetoing rights (provided for, e.g., by shareholders agreements) or a general ability to actively influence decision making, that render them essential to the process of definition of competitively relevant matters, such as pricing, levels of output, investments in capacity and innovation, among others. Those are normally regarded as "active shareholdings" and are usually regarded as enabling the exercise of material or relevant influence.

But also, the ways investors relate with their investees exceed the possibility to vote for or veto resolutions on corporate boards and constitute the so-called "passive investments" (i.e., generally those that are *not* connected to special political rights). Passive investments are those through which investors are not able to directly influence the investee's activities by voting or vetoing.

Nonetheless, even passive investments have generated discussions due to their possible effects over competition. Some find that holding a mere financial interest in the rival's performance could lead to either the lack of unilateral incentives to compete, or the incentive to promote parallel competitive strategies, in order to benefit from the collective performance of two competing firms, as opposed to having one of your investees losing profits or market shares.18 Some note as well that passive investments may also give rise to antitrust concerns by allowing investors to access some level of sensitive information from a rival firm, even though they are not able to actively influence the direction of the investee's activities.

There are some that even indicate that the access of competitively sensitive information could render a passive investment active[19]. Recent investigations on common ownership have argued that passive investments do not necessarily entail passive strategies of ownership. According to the European Commission's opinion on Dow/Dupont, investigations supposedly showed "passive" shareholders that construct diversified portfolios and that tend not to buy and sell shares for the purpose of influencing managerial decisions, such as mutual

16 See, for example: Eduardo Frade Rodrigues, *O direito societário e a estruturação do poder econômico*, (São Paulo: Singular, 2016).

17 As highlighted, for example, by OECD, *Minority Shareholdings*.

18 Ariel Ezrachi and David Gilo, "EC Competition Law and the Regulation of Passive Investments Among Competitors", *Oxford Journal of Legal Studies* 26, No. 2 (2006).

19 OECD, *Minority Shareholdings*.

and hedge funds, can still actively engage in discussions with the investee's management and board and influence the companies' long-term strategies[20]. The Commission also highlighted the existence of empirical investigations showing that so-called "passive" mutual funds "influence firms' governance choices, and [...] exert their influence through their large voting blocs"[21]. Finally, the Commission stated that "minority shareholders can have more control than their equity share suggests"[22].

But triggering of anticompetitive effects arising from cross or common ownership is not trivial and relies on multiple and distinct factors, including structural aspects of the market (such as concentration levels, barriers to entry, product or service differentiations, the amount of vertical integration, levels of information transparency, etc.). It is neither exempt from criticism. That is especially the case regarding the potential unilateral effects created or strengthened through minority shareholdings. Rock and Rubinfeld, for example, have indicated to be "unconvinced" that unilateral effects are serious enough to justify broad reforms or changes in antitrust analysis, despite acknowledging that coordinated effects could require increased antitrust scrutiny, especially in the context of investigating anticompetitive conducts[23].

Indeed, the lack of a "clear-cut theory of harm or structural consensus"[24] on the subject poses significant challenges for authorities to incorporate a thorough assessment of minority shareholdings into concrete case law. More specifically, one could question whether cross (and, even more, common) ownership should be addressed under merger review or conduct investigation and, in the case of the latter, if authorities should be particularly concerned "when investors acquire minority shareholdings or when portfolio companies merge with competitors"[25].

IV. DEVELOPMENTS AND DEBATES FOR ANTITRUST POLICY

Despite divergences regarding the degree to which minority shareholdings, either in face of cross or common ownership, may generate anticompetitive concerns, there seems to be wide recognition that it can indeed do so under certain circumstances, although there is open debate on which circumstances exactly can trigger this. It remains particularly unclear which should be the trigger for antitrust intervention, for example, in merger review, and how to assess such a merger.

Regulation varies across jurisdictions regarding the threshold applicable to qualify an acquisition as a transaction of mandatory antitrust approval. Some adopt 5% criteria, as is the case of Brazil[26], 10%, as adopted in Japan, 15%, as is the case of South Korea and the UK (where an acquisition of 'material influence' standard also applies), 20%, as is applied in Canada, 25%, as is the case of Germany and Austria, or 35%, as is

20 See Case M.7932 - *Dow/Dupont*. Decision by the European Commission of 27.3.2017, 838.

21 Case M.7932 - *Dow/Dupont*, 840.

22 Case M.7932 - *Dow/*Dupont, 847.

23 Rock and Rubinfeld, "Common Ownership and Coordinated Effects", 203. The authors argue that "[u]ntil there is a clear theoretical or empirical analysis of the competitive effects of common ownership, if any, the legal analysis will be unable to define a reasonable line" to incorporate common ownership into merger review cases (at p. 250).

24 Kuhn and Caroppo, "5 Things You Need to Know About the Debate".

25 Kuhn and Caroppo, "5 Things You Need to Know About the Debate".

26 When the acquisition involves competitors or vertically related companies; otherwise, the criteria is 20%. (Resolution CADE n. 2/2012).

the case of Mexico[27]. It is also unclear whether the concerns rest specifically in regard to common ownership – calling, therefore, for stricter rules applicable to institutional investors – or if cross-ownership (and thus all minority acquisitions among competitors, or vertically related firms) should also be better addressed.

As Tilman Kuhn and Cristina Caroppo indicated[28], while US agencies initially rejected to make relevant changes to their merger review regulations, general calls for stricter merger control and concerns with increasing levels of industry concentration may generate political pressure to provide alternatives to merger review, that enable authorities to challenge minority acquisitions that can lessen competition or raise antitrust harm. A compromise in this direction sometimes mentioned is the establishment of safe harbor thresholds, currently absent in US regulation.

When it comes to the design of merger notification criteria that are effective in preventing anticompetitive effects arising from acquisition of stock, the wide variety of divergent rules seems to be proof that this is not a trivial task, especially upon balancing the need to lessen unnecessary burdens both to the competition authorities and to the parties that engage in transactions, particularly international M&As with multijurisdictional effects. In fact, aside from the triggering threshold, a relevant variable is the sort of merger review procedure in place, whether a self-assessment system, where authorities request the notification of transactions, a "transparency system", in which parties file a short information notice, or a full "notification system", in which parties provide the authority with detailed information[29].

Going beyond the mere revision of notification thresholds, there is also growing concern and crescent debates on the content of the analysis. As recent EU cases showed – most notably Dow/Dupont (2017) and Bayer/Monsanto (2018) - minority shareholdings may significantly impact traditional merger review procedures and require different approaches.

In Bayer/Monsanto, for example, the Commission acknowledged that usual measures of concentration (e.g., HHI index and market shares) presume that firms are fully independent. In the presence of common ownership, on the other hand, those concentration measures were indicated as "likely to underestimate the level of the concentration of the market structure and, thus, the market power of the parties"[30]. As a result, the decision considered the existence of common ownership as an "element of context in the appreciation of possible significant impediments to effective competition", though expressly noting that "the debate regarding common shareholdings is relatively recent and not yet entirely settled"[31]. In Dow/Dupont the Commission also indicated that common analysis applied to assess rivalry could be reviewed in cases involving common ownership.

The recent developments in Europe strengthen the perception that minority shareholding, especially in structures of common ownership by institutional shareholders, will probably be addressed on future merger review, particularly in concentrated markets. That could even lead to more complex merger review procedures, with potential reviews of investment histories and strategies, or at least to an analysis of common shareholders as an 'element of context' that potentially magnifies anticompetitive concerns raised

27 Eduardo Frade Rodrigues, "Merger Notification Policies Toward Minority Shareholdings".

28 Kuhn and Caroppo, "5 Things You Need to Know About the Debate".

29 Eduardo Frade Rodrigues, "Merger Notification Policies Toward Minority Shareholdings".

30 Eduardo Frade Rodrigues, "Merger Notification Policies Toward Minority Shareholdings", 43.

31 Eduardo Frade Rodrigues, "Merger Notification Policies Toward Minority Shareholdings", 765.

by other elements of the investigation[32]. That meant that, despite highlighting its potential implications to merger review, the Commission did not, as presented by Thomas Wilson, "formulate a stand-alone unilateral or coordinated effects theory of harm with regard to common ownership (and it would, given the state of the debate, be unclear what that theory of harm would exactly be)"[33].

As mentioned above, that does not mean that commentators agree on the level of development and maturity of the economic (or legal) analysis that is employed to direct antitrust assessment in those cases[34]. At this point, few would disagree that minority shareholdings and cross and common-ownership are not itself a competition issue, but that they may pose antitrust concerns, depending on additional factors related to market structure and transaction-specific features, such as the parties involved, the amount invested, minority rights, alongside others. What does vary is the level of belief as to how big of a competition issue minority shareholding represents, and, consequently, which policy suggestions may be adopted to tackle it (or not).

One possibility is not to treat cross and common ownership as 'endemic' or commonly preoccupying, and therefore render it subject to control under the persecution of potential or effective anticompetitive behavior – either by assessing the existence of tacit or explicit collusion, or by identifying abuse of dominance and unilateral conducts. This is, explicitly or implicitly, the general chosen path of major antitrust authorities such as the US and the European Commission (that do not often impose mandatory merger control over non-controlling acquisitions). Another possibility would be assuming that minority shareholdings can indeed pose risks that are relevant enough so that authorities should be able to evaluate their competitive effects priorly, by means of merger control – that is the solution adopted in many jurisdictions, as discussed before. A third and more interventionist possibility is to address the issue through regulation, e.g., expressly forbidding certain actions by shareholders owning stock in rival firms, either directly or through common ownership by institutional investors. That would be, for example, the suggestion of Posner, Scott-Morton and Weyl[35], who proposed a limit of 1% interest that could be held in common ownership, or a limit in the number of companies from the same industry that an investor can invest in, accompanied by stricter corporate governance rules addressing, for example, conflict of interests or access to competitively sensitive information.

The level of intervention that antitrust could adopt to restrict the potential effects of common ownership is not, however, exempt of possible shortcomings. Aside from the fact that some still question the real severability of cross and common ownership and argue that authorities would still have to rely on additional competitive concerns to challenge or question a transaction that creates or strengthens such a structure, there are undeniable costs involved. Indeed, the balance of Type I and Type II errors is a relevant part of antitrust policy[36], and it involves not only the potential imposition of burdens to companies, that may be required to notify an unjustifiable great amount of transactions, but also requires significant efforts by agency bodies. In the authorities' perspective, as illustrated, for example, by the recent European Commission's

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32 On this prediction, see Gibson Dunn, "Common Shareholding and Competition in Europe", October 15, 2020, https://www.gibsondunn.com/common-shareholding-and-competition-in-europe/.

33 See Thomas Wilson, "Common ownership – where do we stand?", *Kluwer Competition Law Blog*, April 15, 2019.

34 Rock and Rubinfeld, "Common Ownership and Coordinated Effects".

35 Posner, Scott-Morton and Weyl, "A Proposal to Limit the Anti-Competitive Power of Institutional Investors".

36 See, for example, Frank Easterbrook, "Limits of Antitrust", *Texas Law Review* 63, No. 1 (1984) (arguing that false positives are commonly related to higher costs than false negatives, since the mechanisms of market correction would 'naturally' mitigate the latter, despite both Type I and Type II errors being inevitable).

experiences, taking cross and common ownership seriously entails conducting assessments that are more thorough and complex, especially in light of the current absence of a stablished theory of harm or available "techniques" to address such issues.

As concluding remarks, we could indicate that the issue of minority shareholding is back on the radar of antitrust scholars and competition authorities across the globe. Indeed, there are several ways to approach the potential sensitivities revolving the subject and, despite a reasonable level of consensus that *some* action should be taken to address it, it seems clear that there is no agreement as to *how, to which extent* and to *what expenses* this should be done. Even though there is much work being developed, especially in regard to cross-ownership and, more recently, common-ownership by institutional investors, economic and legal analyses on the field are still rather experimental – there is no clear path or determined theory of harm to be adopted by authorities or challenged by economic agents. It is a tricky subject with wide space for development and improvement, which would be interesting to see in the next few years.

Cómo citar este artículo:
Eduardo Frade y Anna Binotto , “Minority shareholdings and antitrust: Recent developments”,
Investigaciones CeCo (febrero, 2021),
http://www.centrocompetencia.com/category/investigaciones

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