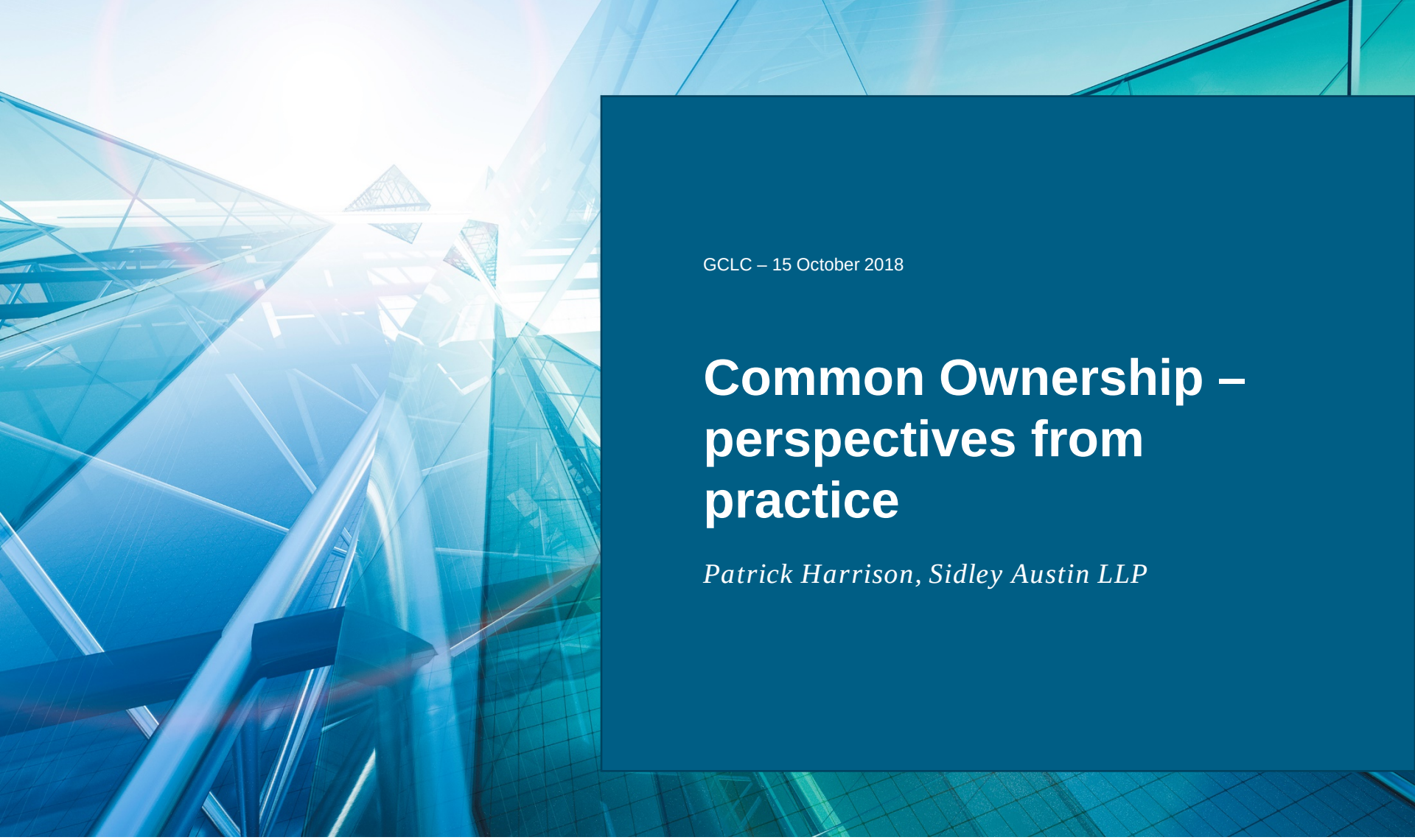

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Common Ownership – perspectives from practice

Patrick Harrison, Sidley Austin LLP

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Little doubt Common Ownership could be “a thing” for Commission

- *Holcim/Lafarge* – 2014 – relevance of common ownership to divestment
- *Dow/Dupont* – 2017 – common ownership formed part of substantive analysis:
  - commentary re potential for common ownership to dampen incentives to innovate through R&D (para 2352)
  - Annex 5 to decision – 21 pages on *“the effects of common shareholding on market shares and concentration measures”*)
- Recent speeches by Commission officials/the Commissioner include:
  - Esteva-Mosso – UCL conference, 20th October 2017
  - Vestager – FIW Symposium, 16th February 2018
  - Laitenberger – WomenAT conference, 1st March 2018
  - Panhans – WomenAT conference, 1st March 2018
  - Vestager – Studienvereinigung Kartellrecht International, 12th March 2018

But is it a “shiny new thing”

Commission consultation on minority shareholdings vs. *Dow/Dupont*

- Commission's 2014-2015 consultation on EUMR made proposals in relation to acquisitions of non-controlling minority stakes

  "Why does the Commission want to have jurisdiction to review non-controlling minority shareholdings?

  […] In the European Union, Austria, Germany and the United Kingdom currently have competence to review acquisitions of minority shareholdings.24 In all three Member States, the NCAs have intervened against such acquisitions where they raised competition concerns. Many jurisdictions outside the EU, such as Canada, the United States and Japan, are also competent to review similar structural links under their respective merger control rules."

- Focused on cross-shareholdings – e.g. *Ryanair/Aer Lingus, ITV/BSkyB* – rather than common ownership but Commission appears to see parallels
- Met with significant opposition and no reforms resulted. Is there a degree of frustration here?
- And could *Dow/Dupont* be a case of "foot-in-the-door" approach from Commission

Dow/Dupont

Para 2352: "the Commission is of the view that (i) a number of large agrochemical companies have a significant level of common shareholding, and that (ii) in the context of innovation competition, such findings provide indications that innovation competition in crop protection should be less intense as compared with an industry with no common shareholding."

- EC: 17 common shareholders *"collectively own around 21% of BASF, Bayer and Syngenta and around 29%-36% of Dow, Dupont and Monsanto"*
  - *17, not 3 or 4*
  - *Each of the 17 had different weightings of stakes across parties and rivals*
  - *No discussion of stakes in upstream or downstream players*
  - *Implied average stakes of 1-2%, not 30% (Ryanair/Aer Lingus) or 17.5% (ITV/BSkyB)*
- EC: Analysis of cross-shareholdings applies to common shareholdings
  - *Does it? Is Ryanair/Aer Lingus similar to xyz major fund holding 2% of each of a number of competitors? Differential tests for hub and spoke vs inter-competitor info exchange would suggest not*
- EC: Reference to lots of economic literature but only on one side of the debate
- EC: Reference to prior Commission consultation
  - But consultation came to nothing
- Likely to be used as "precedent" going forward - Commission official in March 2018: *"we can take it into account as an effect on the ground and in remedy scenarios it can come up"*

So where does that leave us in practice?

- Commission clearly looking into possibility of action/reforms
  - But reform to EUMR unlikely?
    - minority shareholder reforms met with resistance last time round, even when focused on cross-shareholdings
    - sensitive political issue – not just US funds/asset managers, also European asset managers/SWFs
    - timing in political cycle
  - Article 101 investigation?
  - Sector Inquiry?
- Commission also prepared to use common ownership not as independent theory of harm but as additional tool in examination of transactions under EUMR
  - *Dow/Dupont* = foot in door
  - Commission sentiment on academic debate seems to favour those who consider it an issue
  - Potentially relevant to remedy discussions (more buyer up-front?)

What would happen if the Commission sought to police common ownership through EUMR?

- Where would the line be drawn? What is notifiable - 5%, 10%, 20%?
- Would it be based only on acquirer's stakes, or also, per *Dow/Dupont*, on others' stakes? Are others' current stakes readily discernible in real time?
- If focus is on common ownership among competitors, how would that work? Whether firms compete not a jurisdictional issue at present

What would happen if the Commission sought to police common ownership through EUMR?

- Could necessitate lengthy investigations pre-investment (or pre-increase-in-investment)
  - compatible with trades in listed securities?
- Massive increase in notifications
  - impact on investor resources and efficiency (including legal costs)
  - impact on Commission
  - possibility of other jurisdictions following Commission's lead
- Chilling effect on investments in EU stocks?
- Benefits of common ownership (e.g. re corporate governance) lost/compromised

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