

## Innovation Competition

The novel theory of harm in the *Dow/DuPont* merger and its application in the scope of Article 101 and 102 TFEU

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### Abstract

The dissertation deals with the interrelation between competition and innovation incentives.

Innovation has long been considered one of the main drivers of economic and social welfare. It is also an important parameter of competition. In the recent *Dow/DuPont* merger decision ("**Dow/DuPont Decision**")<sup>1</sup>, the European Commission ("**Commission**") based a far-reaching remedy on a theory of harm relating to the general innovation capacity of the two merging parties independent of identifiable products or research and development activities. The Commission's theory of harm was widely considered to be novel.

The dissertation consists of two parts. First, it analyzes the innovation competition approach in the *Dow/DuPont* Decision and how it fits into the existing legal framework. Second, those findings are transferred to restrictive agreements within the meaning of Article 101 TFEU and the abuse of a dominant position according to Article 102 TFEU.

In the first part of the dissertation, the *Dow/DuPont* Decision is put into context within the concept of the internal market, innovation and competition aspects in the Treaties. The underlying rationale of the *Dow/DuPont* Decision is classified and it is analyzed whether it is in line with fundamental principles of European merger control. There is a special emphasis on the treatment of outweighing factors and efficiencies.

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<sup>1</sup> Commission Decision of 27.3.2017, C(2017) 1946 final, OJ C 353, 20.10.2017, p. 9-19, Case M.7932, *Dow/DuPont*.

The second part deals with the question of whether the novel theory of harm in *Dow/DuPont* may not only be used in merger settings but also with respect to cooperation or abuse of dominance.

With respect to Article 101 TFEU, the dissertation analyzes the application of the Commission's theory in the setting of research and development cooperation and technology transfer. It draws conclusions on the application of the innovation competition concept in cooperation settings in general.

The dissertation also transfers the rationale developed in the *Dow/DuPont* Decision to abuse of dominance settings. It explains how the theory of harm in *Dow/DuPont* can be incorporated into the framework of Article 102 TFEU and addresses necessary adjustments.

Finally, the interrelationship between merger policy and Article 101 and 102 TFEU is examined. The rationale in the *Dow/DuPont* Decision is classified in terms of the differences and commonalities of the three pillars of European competition law.