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# The Real Threat Posed by Global Merger Enforcement Divergence

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> Some significant differences exist between the approaches of the United States and the European Community in the enforcement of their antitrust laws. We should, however, keep the impact of those differences in perspective. They are too great to ignore, but not so great as to jeopardize either most trans-Atlantic business activity or trans-Atlantic antitrust enforcement cooperation.
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> FTC Chairman Tim Muris, December 21, 2001[2]

Chairman Muris' observation nearly 13 years ago holds true today. In today's world, where nearly 100 enforcement regimes are empowered to seek remedies for international transactions, it is inevitable that competition laws and practice in one jurisdiction differ from another. In the context of the U.S. and EU regimes, Chairman Muris noted that while the antitrust and competition laws of separate jurisdictions "share many fundamental precepts and goals," there are always differences "that matter to businesses and antitrust enforcers alike." Given the range of values and policy goals that persist across jurisdictions, a degree of divergence is not only expected, but may be unavoidable.

A more obvious form of divergence is the differing legal standards that may apply to a transaction that is subject to review by authorities in multiple jurisdictions. While competition laws employ distinct formulations, the laws of virtually all jurisdictions direct antitrust enforcers to review the impact of a proposed transaction on competition and consumer welfare. In the United States, European Union, and Canada, the exclusive aim of the applicable antitrust and competition laws is to promote competition and consumer welfare. The International Competition Network's Recommended Practices for Merger Analysis advise that enforcers "should focus exclusively on identifying and preventing or remedying anticompetitive mergers . . . [and] should not [use merger control] to pursue other goals."

Nevertheless, substantive merger control laws in a number of jurisdictions incorporate a range of policy aims beyond competition and consumer welfare. For example, Article 27 of China's Anti-Monopoly Law ("AML") explicitly directs China's Ministry of Commerce ("MOFCOM") to consider the impact of a transaction on consumers, "other business operators,"

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[2] Merger Enforcement in a World of Multiple Arbiters, Prepared Remarks of Timothy J. Muris, Chairman, Federal Trade Commission Before Brookings Institution Roundtable on Trade Investment and Policy (Dec. 21, 2001).

"market access and technological progress," and "national economic development."[3] AML Article 31, added in 2011, provides that MOFCOM must also investigate any national security implications of proposed transactions as part of its "competition" review. China's AML, both by its terms and as applied in practice, protects "total welfare," including but not limited to "consumer welfare."[4] Similarly, South Africa's Competition Act requires the Competition Commission to consider a merger's impact on "employment," the competitiveness of "small businesses" or "firms owned by historically disadvantaged persons," and "the ability of national industries to compete in international markets."[5]

Competition laws that incorporate broader mandates have resulted in diverging remedies. The employment mandate of South Africa's Competition Commission has led to the imposition of unique remedies, such as commitments to provide employees impacted by a transaction with counseling, assistance, and training.[6] MOFCOM has imposed merger remedies to ensure the supply of important inputs to China's internal producers.[7] Such remedies are well outside the norm of what merging parties typically face in the United States, Canada, and many other jurisdictions. These practices have also created a degree of friction between enforcers. DOJ Assistant Attorney General Bill Baer recently remarked that enforcers must

> seek broad international consensus on the principle that enforcement decisions be based solely on the competitive effects and consumer benefits of the transaction . . . being reviewed . . . [and ensure merger enforcement is] not used to promote domestic or industrial policy goals, protect state-owned or domestic companies from foreign competitors, or create leverage in international trade negotiations.[8]

However, despite persistent and meaningful differences between some legal regimes, there exists a remarkable degree of consensus, particularly when it comes to remedies. To address horizontal issues—competitive harm that arises from the elimination of actual or potential competition between the merging parties—structural remedies are the preferred approach in a large majority of jurisdictions. Structural remedies include the divestiture of an ongoing business, subsidiary, or even groups of assets to a third-party buyer.

Across jurisdictions, the goal of a horizontal merger remedy is to provide a new entrant with the means to effectively compete with the merged firm, thereby restoring any competition

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[3] Anti-monopoly Law of the People's Republic of China, Ch. IV (Concentration of Business Operators), *available at* http://www.china.org.cn/government/laws/2009-02/10/content_17254169.htm.

[4] D. Daniel Sokol, *Merger Control under China's Anti-Monopoly Law*, at 6-7 SSRN Working Paper (Jan. 27, 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2207690.

[5] Republic of South Africa, Competition Act (no. 89 of 1998, as amended) § 12A (3).

[6] Janine Simpson, *Recent Trends in Merger Conditions Imposed by South African Competition Authorities*, Modaq (Nov. 20, 2013), *available at* http://www.mondaq.com/x/273156/Antitrust+Competition/Recent+Trends+In+Merger+Conditions+Imposed+By+South+African+Competition+Authorities.

[7] For example, MOFCOM has imposed remedies in recent years based on trade policy rather than competition or antitrust concerns. For example, in Glencore/Xstrata (copper, zinc, and lead concentrates) and Uralkali/Silvinite (potassium chloride products), MOFCOM required the merging parties to enter supply agreements and maintain certain commercial practices designed to ensure China-based customers continue to receive a reliable and sufficient supply of the merged firms' products. *See generally*, Fei Deng & Cunzhen Huang, *A Five Year Review of Merge Enforcement in China*, ANTITRUST SOURCE, 10-12 (Oct. 2013).

[8] International Antitrust Enforcement: Progress Made; Work to Be Done, Bill Baer, Remarks as Prepared for Delivery at the 41st Annual Conference on International Antitrust Law and Policy (Sept. 12, 2014).

lost through the merger. Although there are notable exceptions, enforcers around the world generally resist non-structural conduct remedies—such as price commitments—as a remedy to a horizontal problem.[9] Likewise, enforcers generally apply a broader array of remedies to vertical mergers that raise competitive concerns, such as commitments not to discriminate against competitors, grant licenses, or enter long-term supply agreements.

Thus, while divergence persists, it is the exception rather than the rule. Moreover, to the extent legal and policy differences are driven by statutory mandates reflecting diverse cultural and political values, any attempt to make enforcement priorities uniform throughout the world might be a futile endeavor, at least in the near term. A more realistic approach would be to identify those forms of divergence that pose the greatest threat to the effective and efficient administration of global merger control.

So which divergence problems relating to remedies pose the greatest challenge to the international merger control system? Standing alone, the imposition of a remedy in one jurisdiction is not inherently problematic simply because other enforcers have cleared a deal or imposed different remedies, so long as there is a sound legal and factual basis for the decision. In addition to varying mandates, enforcers are often confronted with different facts calling for different approaches to the same deal. For example, merging parties may compete in some jurisdictions but not others, or a remedy may be justified by varying market conditions, competitive conditions, regulations, or other factors.

The potential for conflict and disruption is heightened where a remedy imposed by an enforcer in one jurisdiction has marketplace consequences in another. For example, an enforcer may demand that merging parties divest assets or businesses located outside its borders, thereby impacting the competitive landscape in a foreign jurisdiction. This occurred in the context of Anheuser-Busch InBev's purchase of Grupo Modelo, which the U.S. Department of Justice ("DOJ") initially opposed in federal district court because of the proposed merger's alleged anticompetitive impact on the U.S. beer market. In settling the litigation, DOJ and the parties negotiated a remedy that included the sale of Grupo Modelo's Piedras Negras Brewery, located in Mexico, to Constellation Brands (a U.S.-based firm). The divested brewery manufactured beer for domestic consumption in Mexico as well as beer for export to the U.S. market. The sale of the brewery not only impacted U.S. commerce by equipping a new competitor with export manufacturing assets, but also may have introduced new competition into Mexico's beer market.[10]

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[9] In the United States, the DOJ's Policy Guide to Merger Remedies states that the DOJ "will pursue a divestiture remedy in the vast majority of cases involving horizontal mergers." Likewise, the EC's policy is that "[d]ivestiture commitments are the best way to eliminate competition concerns resulting from horizontal overlaps." The Canadian Competition Bureau, Brazil's CADE, and others also have explicit policies favoring structural remedies in horizontal mergers.

[10] Press Release, ABInBev, *Anheuser-Busch InBev Announces Agreement with DOJ and Filing of Proposed Final Judgment with Court* (Apr. 19, 2013), *available at* http://www.abinbev.com/press_releases/hugin_pdf%5C557340.pdf; Press Release, Constellation Brands, *Constellation Brands Receives DOJ Clearance to Proceed with Acquisition of Group Modelo's U.S. Business* (Apr. 19, 2013), *available at* http://www.cbrands.com/news-media/constellation-brands-receives-dojclearance-proceed-acquisition-grupo-modelos-us-business.

While it appears the divestiture may have increased competition in both Mexico and the United States in that case, one could envision a hypothetical scenario in which a conflict between jurisdictions might have occurred. In the same example, assume that Constellation Brands owned other breweries that manufactured beer for the Mexican market, Grupo Modelo was its only competitor in Mexico, and the only way Grupo Modelo (or InBev) could compete in Mexico was by continuing to own the Piedras Negras Brewery. In this hypothetical, the DOJ's proposed divestiture may still address the alleged competitive problem in the United States because it would give Constellation a means of exporting to the United States. However, in this hypothetical, selling the brewery to Constellation would also result in Grupo Modelo exiting the Mexican beer market—eliminating Constellation's only rival in Mexico.

This is an extreme example and one that is unlikely to occur, but it illustrates a scenario where divergence could be disruptive if enforcers act without being mindful of the potential ripple effects of their actions. Two competition enforcers following the same "consumer welfare" standard could reach different conclusions regarding the merits of a given remedy. And a remedy imposed by one enforcer could unintentionally interfere with competition prerogatives in the other enforcer's backyard.

This hypothetical illustrates the importance of close coordination between enforcers during the course of their reviews. On this front, enforcers around the world have made substantial progress over the past decade and now regularly consult each other during the course of their merger investigations. However, there is still work to be done. In particular, while bilateral cooperation agreements between antitrust enforcers facilitate communication, they lack standards for deciding how and under what circumstances conflicting remedies may be resolved.

For example, the U.S.-EU Merger Working Group's "Best Practices on Cooperation in Merger Investigations" acknowledges the need to avoid conflict while promoting communication and transparency during merger reviews, but lacks concrete standards for deciding how best to address remedy proposals that may have disparate impacts on competition in their respective jurisdictions. Further thought and development of such standards could help avoid conflicts that will almost certainly arise as global mergers continue to proliferate.

In short, the pursuit of policy aims beyond preserving competition is one form of divergence, but it is unrealistic to expect competition agencies to ignore mandates imposed by the laws they are directed to enforce. In the long run, this may change as governments throughout the world amend their competition laws to focus solely on competition and consumers. But in the near term, enforcers may do better to focus on consensus standards for addressing conflicts that may arise when remedies impact multiple jurisdictions differently. Doing so would not only increase transparency and predictability for merging parties, but also enable the more rational and efficient administration of complex multi-jurisdictional merger investigations.