Antitrust Chronicle

MEGA-MERGERS: SQUARING THE CIRCLE

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LETTER FROM THE EDITOR

Dear Readers,

Mergers have gained momentum in recent years. In FY 2015, 67 proposed mergers were valued at more than $10 billion. That is more than double the annual volume in 2014. We have witnessed an increased trend not only in the number of big mergers, but in the value thereof. As Bill Baer, former Assistant Attorney General for the Antitrust Division of the U.S. Department of Justice, put it in March 2016: "The merger wave is back. Big time."

This month, the Antitrust Chronicle (AC) brings you a special edition on recent developments in merger control with highlights featuring articles on mega-mergers in a variety of sectors, filings in different jurisdictions, due process and risk allocation in protracted investigations.

Some of the mergers featured in this month's AC that are given an in-depth analysis to different proposed mergers in pharma and telecommunications sectors. Additionally, two articles highlight the importance of merger negotiations as well as the contractual difficulties to come up with a robust deal that could also be cleared by competition agencies.

In our CPI Talks section this month, we present the interview with José María Marín, President of the Spanish Comisión Nacional de los Mercados y la Competencia, who will tell us more about the latest report on business models and the sharing economy, as well as other developments in the Spanish regime.

Finally, many of you took the opportunity to check out our recent panel in the CPI Briefing Room, coming this time from Singapore, entitled "What is the Role for Antitrust in ICT licensing disputes?" The panelists covered topics such as the limits to patent holders to seek injunctions, holdup problems, opportunistic licensee behavior and more. Thank you again to our wonderful panel of speakers. Short clips of the seminar will be soon available on our website.

We hope you enjoy reading this new issue of our AC magazine.

Thank you,
Sincerely,

CPI Team

CPI Talks...

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Interview with José María Marín, President of the Spanish Competition Authority, Comisión Nacional de los Mercados y la Competencia (CNMC its acronym in Spanish).

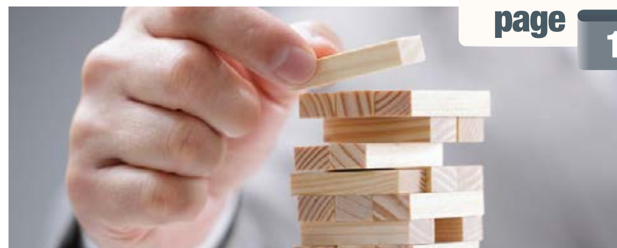
In this issue, CPI interviews President José María Marín about hot debated issues in Spain and Europe like new business models and the sharing economy, where the Spanish regulator recently released a thorough study on these subjects. We question Jose María about the preliminary findings, the likely opposition the CNMC faced by the government and lobbyists and whether this report benefited from mutually exchanged of ideas with other European regulators.

In addition, we asked Jose María about the CNMC's priorities for the next year, main challenges ahead and other issues. Do not miss this interesting interview.

Think Again—Allocating Antitrust Risk in a Climate of Protracted Investigations

By Brian Burke & John Fedele

This article addresses the concept of "antitrust risk" before highlighting recent, high-profile transactions that have been subjected to antitrust investigations by the U.S. Antitrust Agencies and discussing several factors that contribute to the lengthening of antitrust investigations. In addition, it examines provisions that parties have used to allocate risk, and considers whether different approaches to allocating risk may be warranted in light of today's review periods.



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An Examination of the Proposed Teva-Allergan Merger

By William S. Comanor & Diana L. Moss

The proposed Teva-Allergan merger joins the largest generic pharmaceutical company in the world, Teva Pharmaceuticals, with an important rival that is currently the third largest in world-wide generic sales. This article evaluates the competitive effects of the merger and its implications for consumer welfare in the United States. These effects could be large since generic sellers introduce a critical measure of competition into pharmaceutical markets and play an important role in making prescription drugs affordable. Limiting the competitive discipline introduced by generic sellers could have substantial adverse consequences.

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Mega-Mergers: Key Considerations to Take to Get your Deal Through

By Nikolaos Peristerakis, Tom McGrath & Fay Zhou

While there appears to be a consensus among regulators and practitioners that "big is not necessarily bad" when it comes to merger transactions, mega-mergers will attract much more intense scrutiny, both on antitrust and non-antitrust grounds, by regulators that increasingly cooperate with each other, often at a very granular level.

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Antitrust Risk Re-assessment in Newly Concentrated Markets: Practical Ways to Preserve Freedom from Investigation

By Samantha Mobley & Grant Murray

This article explores what sorts of compliance precautions a company can consider when it finds itself in a highly concentrated market and may be more vulnerable to complaints and investigation. It provides practical suggestions on how to deal with information exchange and trade associations to play a bigger role, joint ventures and consortia/sub-contracting with competitors, price signaling, collective dominance, and market investigations.

Multisided Platforms, Dynamic Competition and the Assessment of Market Power for Internet-based Firms

By David S. Evans

This paper describes the new economics of multi-sided platforms by showing how new technologies have turbocharged this business model and led to online mobile platforms anchored by websites and mobile apps. In addition, it examines the implications of the online multi-sided platform business model for the analysis of market power for attention seekers.

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The Ad Hoc Approach to Telecommunications Mergers: The Public Interest Compromised?

By Warren Grimes

It is difficult to find consistency in the U.S. Justice Department's ("Antitrust Division") responses to the wave of telecommunications mergers. AT&T was barred from purchasing T Mobile. Comcast was warned not to acquire Time Warner Cable. Other comparably sized mergers have been given the green light, albeit some with conditions, including Comcast's purchase of NBC Universal and AT&T's acquisition of Direct TV. The Antitrust Division's differing decisions may be rationally and perhaps persuasively explained. Case-by-case analysis is, after all, the best way of dealing with the horizontal and vertical intricacies of this vital industry. Or is it?

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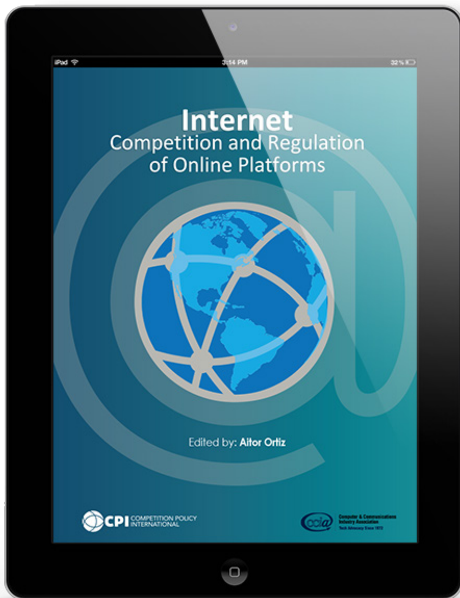
CPI Spotlight

CPI is delighted to announce the prompt release of our new eBook,



Internet: Competition and Regulation of Online Platforms

Currently, there is a robust debate on how to police a relatively new economic actor: the online platform. As competition regulators and policymakers have this debate, it has become increasingly clear that the basics of online competition and how companies compete is not widely understood. In this eBook, authors explore Internet business models and the economic phenomena associated with them. Furthermore, contributors examine competition law concepts and regulatory approaches to these new actors.

Available soon at CPI and Amazon

Announcements

On June 2, if you are in Brussels you cannot miss the cutting edge conference "Navigating the New Matchmakers Economy: The Role of Antitrust and Regulation".

At this luncheon event, Dr. Evans, who has done pioneering work on the new economic science of multisided platforms and worked with many of the world's leading matchmakers, will explain what the new matchmaker economy means to you, whether you are an executive, investor, entrepreneur, or government official.

Following Dr. Evans's presentation we will hear from two leading officials who are addressing matchmakers—platforms—in competition policy intervention and advocacy, Madame Qing Li from China and Commissioner Ortiz from Spain.

After the presentations Dr. Delgado and Dr. Zhang, from Global Economics Group in Madrid and Beijing respectively, will organize a discussion with the speakers and take interventions from the audience.

WHEN - Thursday, June 2, 2016 from 12:30 PM to 2:00 PM (CEST)

WHERE - Silken Berlaymont Brussels - 11 Boulevard Charlemagne, 1000 Bruxelles, Belgium

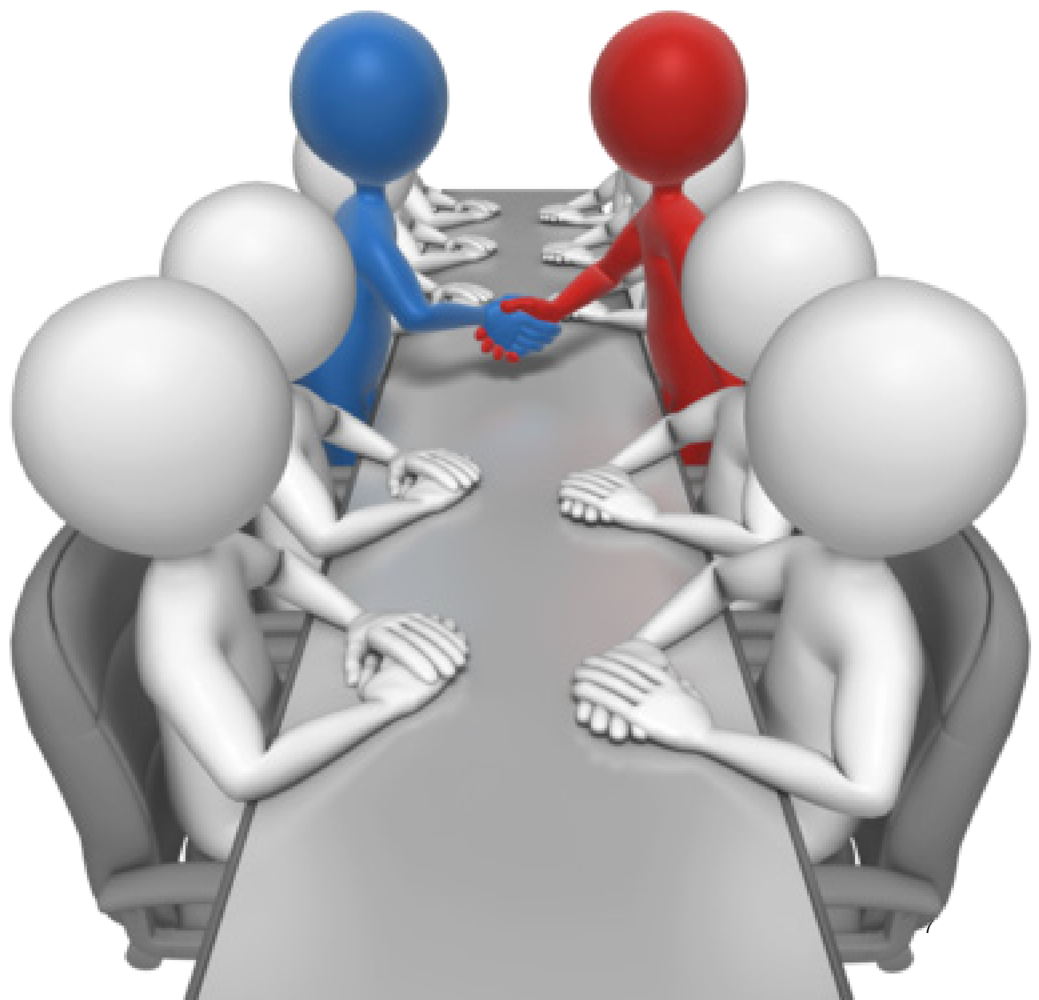
REGISTER AT:

www.eventbrite.com/e/navigating-the-new-matchmaker-economy-the-role-of-antitrust-and-regulation-luncheon-tickets-25353425779?aff=es2

What is Next?

This section is dedicated to those who cannot wait to know what CPI is preparing for you for the next month. Spoiler alert!

In June, the Antitrust Chronicle will be devoted to collusive behavior and common issues surrounding this matter. In other words, tacit collusion, leniency programs, settlements in hybrid cases, corporate vs individual investigations and much more. This issue will offer our readers a perfect balance of economic and legal arguments to ascertain whether agencies' approaches are right or wrong when it comes to the analysis of collusive conduct.



CPI TALKS...
JOSÉ MARÍA MARÍN

The CNMC just released its preliminary findings on the market study on new business models and the sharing economy. Some of the preliminary conclusions are groundbreaking, suggesting almost a complete deregulation of the markets for passenger road transport and tourist accommodation. Please tell us more about the goals this report aimed to achieve and in doing so try to answer the following questions:

Most of the recommendations target public administrations in order to ensure better regulation (eliminate barriers). Do you think these will be achieved at regional and national level?

The CNMC pioneered an analytical approach to the sharing economy and new business models in order to open a necessary debate on how we are going to deal with the profound changes that our economies are experiencing. With the digitalization of the economy new models of business are blooming and things are changing at a rapid pace. We cannot stop these changes from happening. We have to adapt our regulation in order to benefit from this innovation. Those who adapt better to the new environment will reap the fruits in the future. And this adaptation should cover all levels of the administration.

Obviously, all changes generate winners and losers and the public sector has to soften the cost that our societies have to bear as a consequence. But blocking or delaying the entrance of the new models of shared economy will result in higher costs to society. At the same time, the government should help accelerate the adaptation of our economies. One possible reaction is to act as if these changes were not here to stay, and to continue conducting business as usual, or even try to resist the change. It seems to me that this is the wrong decision. However, this does not mean that we have to completely deregulate. I'd rather talk about adapting the pieces of regulation that were designed for a 20th Century economy that worked in a completely different environment.

At the same time, strategies should be designed to soften the negative impacts on some groups of society. I am quite optimistic about our capacity to adapt. Uncertainty is high, the present moment is full of challenges but advances in technology can help us build better societies and we have to take advantage of this opportunity.

These recommendations affect regulated markets with strong lobbyist that will try to strike them down. Do you think these vested interests will prevail over the consumers' interests?

I hope not. And I think they will not be able to prevail on the long term. But they can slow the adaptation process and negatively affect the distribution of wealth and economic growth. To avoid this risk the best guarantees are strong institutions that defend public interests above particular interests. We at the CNMC are working for the people and we have a clear view of what our role must be.

When competition authorities evaluate regulatory barriers they always have in mind the benefits for consumers. However, the government may give more weight to the likely effect of deregulation in jobs, taxes and eventually votes. Did the CNMC face opposition or strong views from other governmental offices when it published these recommendations?

The CNMC has a clear mandate and focuses on protecting certain public objectives and promoting competition in the market. In any case, we try to balance our view with other social and political targets that are equally legitimate, and we take them into account. We try to explain our point of view and support it with a rigorous legal and economic background.

Of course we face opposition from different groups in both the private and public sectors. Our legal framework gives us very useful tools to face regulation that limits competition and the CNMC has already used it to take to court regional and national regulations in the hosting and transport sectors that do not favor the development of new technologies. New technologies destroy some jobs but also create new opportunities. We would still be riding horses if the transport industry of the 19th century had resisted the transformation brought about by the arrival of combustion engines. The current situation is not that different.

The new regulatory framework we defend is perfectly compatible with making sure taxes are paid and that labor's rights are protected. I think that new technologies could help shift some parts of the underground economy towards the formal economy and –among other things– could increase the protection of workers, as many activities linked to the digital economy are increasingly carried out through online platforms and can therefore be easily tracked by the authorities while they were completely invisible not so long ago.

This is the first comprehensive study in Europe about sharing economy released by a competition authority. How did your colleagues in Europe receive this report? Did you partner with some of them? Did you consult or ask for their opinions?

The CNMC is very active in international organizations and we have worked hard to give publicity to our report and get feedback from the European Union, OECD and ICN and other competition authorities, such as the Federal Trade Commission. We circulated our preliminary findings and asked for commentaries from foreign authorities. We are in permanent dialogue with the EU Commission and our European partners, and believe me when I say that we have obtained many benefits from this exchange, benefits that I like to think were mutual.

Another pioneering initiative conducted by CNMC is the creation of a database containing information about the interest groups or lobbyist in Spain, mirroring the efforts made by the European Parliament at a European level. Even though registration is not mandatory, the advantages for these groups of doing so clearly outweigh the disadvantages. Why create this database? What are the benefits of this register if we compare to the previous situation?

In the last general elections the Spanish voters conveyed a clear message about the need for change. They demanded a deep regeneration of public institutions and we at least got the message. We firmly believe in independent and transparent institutions, and we consider that it is very positive for everyone to make transparent who we talk to and what we talk about with them. Furthermore, we believe that our relations with interest groups should follow very clear ethical rules. That is why we launched our register, following the EU existing framework. And we have complemented this initiative with other measures such as opening to the public the President's and other Board member's appointments, and also the establishment of a confidential internal procedure to denounce abuses aimed at defending our employees –and thus the institution– from potential political interference. We believe in these objectives and therefore are implementing a strategy to improve our transparency, so that our institution is strengthened and people's demands are satisfied.

Spain has spent more than 3 months with an interim government and this will continue

for a few months more. Although the CNMC is an autonomous entity, has this lack of political certainty affected the normal activities of the regulator in any way? For instance, in terms of financial resources.

Of course it affects us. We would prefer to have a Government and a Parliament even if we are kept out of the political cycle by the legislation. We have not faced any financial problems up to now. However, it seems clear to me that we are in urgent need of wider autonomy to manage our human resources. To gain this necessary autonomy we will have to wait for the next Government.

The CNMC was created in October 2013, two and a half years ago, uniting in one entity five different sector regulators and the competition watchdog. In your opinion, what are the biggest successes the institution has achieved and what are still the biggest challenges ahead?

The biggest success is that we kept doing our job with efficiency and without any interruptions. The day we arrived at the new institution we had many pressing practical problems, such as making sure that everyone would be paid at the end of the month. A merger is always a complex process and this one was specially complicated by the lack of time to get things ready. So we are very satisfied with this result.

It is also important that we are increasingly taking advantage of synergies between our different units, and that the public perception of our work is quite positive. Our "customers", the citizens, generally consider that we are doing a good job. In any case, there is still much to be done in terms of building a common culture for the whole institution, and there is still much to be gained from a more fluent collaboration between different units. That is our next challenge.

What are the CNMC's priorities for this year?

There are several main priorities for the CNMC in 2016. First, we will keep fighting cartels with all the tools we have. And in this respect we will especially focus on bid rigging cartels, which are particularly harmful for society, in close cooperation with the public administration. Second, we will assess the performance of the leniency program after 8 years of experience and many cartels dismantled thanks to it. We want to improve its effectiveness and promote public awareness of its existence, especially among firms and managers. Third, there are two new instruments that we would like to bring to bear in the fight against cartels: the prosecution of managers directly involved in the illicit behavior of their firms, and the use of the prohibition to take part in public procurement bids as a punishment for anticompetitive infringements. Besides, we will closely monitor some industries like pay TV, broadband services, football broadcasting rights, agriculture, digital economy and financial services.

What is the current status of the new guidelines to impose fines? Could this uncertainty have an impact on their deterrence effect?

There are no actual new sanctioning guidelines as such, but we have certainly been developing and improving a new system to set fines for competition infringements in accordance with the new jurisprudence created by the Supreme Court since January 2015. However, the lack of guidelines does not result in under-deterrence but simply in a certain –albeit unwanted– lack of predictability, which sometimes reduces but in other occasions increases the level of actual deterrence. We are carrying out an assessment of our fines in the past and it will hopefully help us move closer to the optimal level of fines in the near future.

As far as we know the CNMC has started to assign individual responsibilities for competition infringements. What are the effects of this measure so far? Can we expect more steps in this direction?

Yes, as I mentioned before, this is one of our priorities for the near future. Some of the first cases, which go against firm managers in cases of anticompetitive infringement, are already in the pipeline, and we expect this new development to increase the deterrence of our competition enforcement and to provide new incentives for them to personally apply for the leniency program.

THINK AGAIN—ALLOCATING ANTITRUST RISK IN A CLIMATE OF PROTRACTED INVESTIGATIONS

BY BRIAN BURKE & JOHN FEDELE[1]

"Now the time has come. There are things to realize." The Chambers Brothers (Time Has Come today)

I. INTRODUCTION

The potential for substantive antitrust scrutiny can complicate and substantially delay negotiations for any proposed merger or acquisition agreement. In today's climate of antitrust enforcement, protracted investigations can negate the effect of terms negotiated and agreed to by parties in pursuit of certain downside protection against the occurrence of unhappy consequences during the period after signing and before any closing. As a result, parties may want to consider a different approach to allocating antitrust risk.

To be sure, the interest in preventing undesirable post-signing occurrences is not limited to antitrust matters. Negotiating mutually agreeable provisions that govern both a buyer's and a seller's conduct between signing and closing in any proposed transaction has long presented challenges. Particular circumstances for given transactions drive each party's approach. Counsel for each side attempts to identify any potential pitfalls and proposes provisions to protect their respective client's interests. But the longer the period between signing and closing, the greater the opportunity for the agreed terms potentially

1 Brian Burke is a partner, and John Fedele is an associate in the Washington, D.C. office of Baker & McKenzie LLP. The opinions expressed in this article reflect the authors' personal views and do not necessarily reflect those of their Firm or any Firm client.

to be inoperative to the detriment of one or both parties. In particular, enhanced and more aggressive antitrust enforcement in the United States and increasingly throughout the world is having this effect.

This article briefly addresses the concept of "antitrust risk" before highlighting a few recent and high-profile transactions that have been subjected to prolonged antitrust investigations by the U.S. Antitrust Agencies and discussing several factors that may contribute to the lengthening of U.S. antitrust investigations. Following that, it examines several provisions that parties traditionally have utilized to allocate antitrust risk, and considers whether different approaches to allocating antitrust risk may be warranted in light of today's protracted review periods.

A. "Antitrust Risk"

At its essence, the term "antitrust risk" refers to the risk that one or more antitrust authorities around the world will condition their clearance decision[2] on receipt of some commitment from the buyer, usually a divestiture[3] of some sort, or will refuse to clear the proposed acquisition altogether on the basis of antitrust concerns. Notably, the nature and extent of this "risk" often is not readily apparent or easily agreed upon in advance and it is susceptible to misjudgment.[4] Even when the parties agree, however, on the amount and type of "antitrust risk" presented by a proposed transaction, their respective tolerance for assuming some or all of it is a complicated calculus requiring consideration of multiple, interrelated factors—*e.g.* how long will parties have to pursue clearance; how much effort the parties have to exert in responding to antitrust investigatory requests; what, if any, commitment will be required in relation to an antitrust authority's remedial demands.

The relative bargaining position of the parties can have a significant influence on the agreed terms addressing the allocation of any perceived antitrust risk presented by a proposed transaction. But, in the current enforcement environment, it seems that parties are more frequently encountering situations where their expectations regarding the anticipated level of antitrust scrutiny and the time table for closing the transaction are misaligned. This misalignment creates the opportunity for intervening events to alter the dynamics of the transaction and allow for the parties' interests in pursuing the transaction to diverge—encouraging, for example, the seller to consider alternative purchasers or the buyer to "run out the clock" on the transaction until its termination rights have ripened without either party breaching their obligations under the transaction agreement. Anecdotally, the increased activity by so-called "activist investors" in publicly traded companies to obtain influence over company management through board representation or otherwise also can have some effect on the structure and form of proposed transactions as well as the result of any antitrust review, depending upon the views of any activist investors.[5]

B. Recent Transactions

Calendar year 2015 saw a record-setting level of merger activity, surpassing $5 trillion for the first time ever.[6] And the U.S. Antitrust Agencies were very active in the area of merger enforcement—initiating several litigation challenges.[7] Bill Baer, former Assistant Attorney General for the Antitrust

2 Antitrust authorities may affirmatively "approve" or "authorize" notified transactions in certain jurisdictions. In the United States, notified transactions simply receive "clearance" to close but are not affirmatively authorized or approved as lawful.

3 The FTC and the Antitrust Division, as well as most other non-U.S. Antitrust Authorities—including the European Commission—prefer that any competitive concerns identified in investigations of proposed mergers be addressed through structural remedies, which include the divestiture of assets necessary for a divestiture buyer to replace the competition lost as a result of the transaction. See, e.g. https://www.ftc.gov/system/files/attachments/negotiating-merger-remedies/merger-remediesstmt.pdf and https://www.justice.gov/sites/default/files/atr/legacy/2011/06/17/272350.pdf.

4 See, e.g. http://www.nytimes.com/2015/04/25/business/media/comcast-time-warner-cable-deal.html?_r=0 (quoting Comcast officer as stating "[t]his is not that complicated a deal from an antitrust or a regulatory perspective" at the time of Comcast's proposed combination with Time Warner, which was abandoned in April 2015 due to antitrust and other regulatory scrutiny).

5 See, e.g. http://www.bloomberg.com/news/articles/2015-12-10/dow-chemical-dupont-a-merger-that-activist-investors-can-love (describing influence of activist investors on the structure of the proposed $120 billion combination of Dow Chemical and DuPont).

6 See, e.g. http://www.prnewswire.com/news-releases/dealogic-data-shows-2015-ma-volume-surpasses-5-trillion-300197391.html.

7 See, e.g. FTC Calendar Year 2015 Stats and Data (noting six filed merger cases) (available at https://www.ftc.gov/node/943403).

Division of the U.S. Department of Justice, put it this way in his March 2016 testimony before a U.S. Senate Subcommittee:

> The merger wave is back. Big time. Global merger and acquisition volume has reached historic levels in terms of number, size and complexity. In FY 2015, 67 proposed mergers were valued at more than $10 billion. That is more than double the annual volume in 2014. Last year 280 deals were worth more than $1 billion, nearly double the number from FY 2010.[8]

Going further, Baer testified that some recent strategic transactions amount to "merger overreach" that "never should have made it out of the boardroom."[9] Debbie Feinstein, the Director of the Federal Trade Commission's ("FTC") Bureau of Competition, recently expressed a similar view, stating: "There are deals that come to us that we're surprised to see, and we're surprised that people are surprised that we think that they are problematic."[10] Those views have been manifested through enforcement decisions, including litigated cases, and extended review periods conducted by both federal antitrust agencies. During the Obama administration, the U.S. Antitrust Agencies have reportedly blocked or prevented more than twice as many transaction as were similarly derailed during the first seven years of the George W. Bush administration—32 versus 10.[11] To illustrate, the table below lists some recent high-profile transactions that have received or are receiving close scrutiny from either the FTC or the Antitrust Division.

With respect to the "antitrust risk" shifting provisions and their relationship to the antitrust review timeline for the above transactions, the AB Electrolux/General Electric transaction bears particular attention. General Electric ("GE") exercised its right to terminate the proposed $3.3 billion sale of its appliance business to Electrolux at its earliest opportunity on December 7, 2015, just before the end of the trial in the Antitrust Division's attempt to block the transaction. After expending substantial resources to endure more than one year of antitrust review and rather than learn the trial's result, GE chose to invoke its right to the $175 million reverse break-up fee the agreement reportedly obligated Electrolux to pay to GE. [12] As a result, Electrolux not only incurred the obligation to pay the reverse break-up fee, but lost the opportunity to hear whether the parties' arguments in defense of the combination would succeed, potentially allowing the transaction to close. The Electrolux management expressed disappointment in GE's decision, [13] and its Chief Executive Officer resigned shortly thereafter.[14] Just over five weeks after terminating the agreement, GE announced an agreement to sell its appliance business to Haier Group for $5.4 billion, or $2.1 billion more than its proposed sale to Electrolux.[15]

The Electrolux/GE transaction is just one recent example of where the parties' respective interests in completing the transaction diverged at some point during the period after the agreement was signed. From reports, it seems that the protracted antitrust review was not expected—apparently due to reliance upon the Antitrust Division's decision to clear Whirlpool's 2006 acquisition of Maytag.[16]

FTC		Antitrust Division	
Transaction	Announced/Status	Transaction	Announced/Status
Sysco/US Foods	December 2013 / abandoned June 2015	Applied Materials / Tokyo Electron	September 2013 / abandoned April 2015
Staples / Office Depot	February 2015/Abandoned May 2016	Comcast/Time Warner	February 2014 / abandoned April 2015
Ball/Rexam	February 2015 / review pending	AB Electrolux/General Electric	September 2014 / abandoned December 2015
Anthem/Cigna	July 2015 / review pending	Halliburton/Baker Hughes	November 2014 / abandoned May 2016
Aetna/Humana	July 2015 / review pending	Charter/Time Warner	May 2015 / Settled April 2016

8 Statement of Bill Baer, Assistant Attorney General, Antitrust Division, before the U.S. Senate Subcommittee on Antitrust, Competition Policy and Consumer Rights of Committee on the Judiciary, at p. 6 (March 9, 2016) (available at https://www.judiciary.senate.gov/imo/media/doc/03-09-16%20Baer%20Testimony.pdf)

9 Id. at 6.

10 http://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=789716&siteid=191&rdir=1

11 http://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=784461&siteid=191&rdir=1.

12 http://www.wsj.com/articles/ge-terminates-sale-of-appliance-business-to-electrolux-1449474391.

13 Id.

14 http://www.wsj.com/articles/electrolux-ceo-mcloughlin-quits-a-month-after-collapse-of-ge-deal-1452497627.

15 http://www.wsj.com/articles/chinas-haier-to-buy-ge-appliance-business-for-5-4-billion-1452845661.

16 http://www.law360.com/articles/674839/doj-sues-to-block-3-3b-electrolux-ge-unit-tie-up.

The point is that the likely scope and duration of any antitrust review along with the intensity of the potential opposition to the transaction by competent antitrust authorities can be difficult to predict, particularly in the current, more aggressive enforcement environment.

II. CONTRIBUTING FACTORS

The precise reasons for extended substantive antitrust reviews by the U.S. Antitrust Agencies cannot be generalized. As is frequently the case in legal matters, the facts and circumstances involved in any particular transaction inform the duration of the antitrust review period. That being said, there are a few worthwhile observations to make regarding potential contributing factors.

At the outset, recall that President Obama pledged to "reinvigorate antitrust enforcement" during his 2008 campaign. While some may dispute whether he has fulfilled this promise, there unquestionably were some notable actions taken by the leadership at both the Antitrust Division and the FTC following Obama's 2008 election to strengthen their respective litigation capabilities. Both agencies invested heavily in litigation resources, bringing in highly experienced litigators from private practice to ensure they had the ability to win at trial.

A speech by Joseph Wayland, then Acting Assistant Attorney General for the Antitrust Division, delivered in 2012 entitled "Litigation in the Antitrust Division" captures this point well.[17] In that speech, Wayland highlighted how significantly the Division's approach to litigation had changed during his tenure—*e.g.* pointing out a change to the Division's case management system "to ensure that litigation issues are considered at a very early stage in both our merger and non-merger investigations"[18] and the importance of making "early strategy decisions during the investigative process to enable [the Division] to win cases."[19] Moreover, Wayland characterized the Division as becoming "more aggressive in using the parties[' evidence] to put on [the Division's] cases."[20] Wayland was the lead attorney in the Division's successful 2011 challenge of H&R Block's proposed acquisition of TaxACT—the first contested merger challenge victory for the Division in nearly a decade.

This is not to suggest that the additional litigation capabilities added by the Antitrust Division and the FTC have led the agencies to make questionable enforcement decisions. But when those capabilities are coupled with a procedure where litigation strategy is a required consideration "early" in the merger review process, a more adversarial posture may be perceived by the targets of the investigation, which can result in a longer and more deliberate review process.

Apart from the enhanced litigation capabilities, the nature and size of the transactions under review certainly can affect the length of the investigatory period. Larger/more complex deals can have numerous and varied product and/or geographic overlaps, which can take longer to investigate. When there are multiple larger transactions being reviewed, the resources of the U.S. Antitrust Agencies can become stressed to the point where attention may have to be prioritized. Potentially, work on the smaller or more recently notified transactions would be slowed, which would prolong the overall investigatory process for such transactions.

Similarly, multinational transactions can raise potential competitive concerns in the United States as well as other jurisdictions. Today's climate of greater coordination between antitrust enforcers across jurisdictions not only during the investigation but also possibly upon fashioning an appropriate remedy[21] certainly can extend the antitrust review period beyond what might otherwise occur.

The investigatory procedure also can

17 https://www.justice.gov/atr/file/518906/download.

18 Id.at 6.

19 Id. at 7.

20 Id. at 9.

21 See, e.g. United States and European Union Antitrust Agencies Issue Revised Best Practices for Coordinating Merger Reviews, (Oct. 14, 2011) (revised best practices include "greater emphasis on coordination among the agencies at key stages of their investigations, including the final stage in which agencies consider potential remedies to preserve competition.") (available at https://www.justice.gov/opa/pr/united-states-and-european-union-antitrust-agencies-issue-revised-best-practices-coordinating); and "Cooperation, Convergence, and the Challenges Ahead in Competition Enforcement," Assistant Attorney General Bill Baer (Sept. 29, 2015) (citing the DOJ's recent coordination on merger remedies with the EU in the investigation of GE's acquisition of Alstom) (available at https://www.justice.gov/opa/speech/assistant-attorney-general-bill-baer-delivers-remarks-ninth-annual-global-antitrust).

contribute to a prolonged review process. The Hart-Scott-Rodino Act[22] ("HSR Act") established the framework under which proposed transactions are to be reviewed by the FTC and the Antitrust Division. That statutory framework provides that if the agencies believe that a notified transaction warrants additional scrutiny after conclusion of the initial review period—typically 30 days—then the reviewing agency can issue a request for additional information and documents (a so-called "Second Request"). The issuance of a Second Request extends the statutory review period until 30 (or 10, if the acquisition is out of bankruptcy or structured as an all-cash tender offer) days after both parties have substantially complied with the Second Request.

The ordinary practice at the U.S. Antitrust Agencies, however, is to approach the parties soon after issuing a Second Request to discuss a "timing agreement."[23] Timing agreements can include a number of different provisions from one transaction to the next, but a critical component is that they remove the transaction from the timing framework provided under the HSR Act.[24] Stated differently, parties consent to an extended post-Second Request compliance review period in any "timing agreement." Of course, the parties do not have to enter into any "timing agreement" but the refusal to enter into a timing agreement can create a more adversarial relationship with agency staff—*i.e.* they may take a more rigid approach on certain investigatory issues (*e.g.* requests to narrow the scope of the Second Request) than they would otherwise in an effort to prevent the parties from more quickly complying with the Second Request. In any transaction, parties must weigh the pros and cons of entering into a "timing agreement." Any negotiation regarding the scope of, as well as compliance with, a Second Request, whether a "timing agreement" is in place or not, can take a substantial amount of time.

Related to the investigatory procedure, the U.S. Antitrust Agencies recently have been taking a lot of time to evaluate the sufficiency of potential divestiture packages and to approve proposed divestiture purchasers. Once the investigating agency deems a proposed transaction to be problematic, any divestiture proposal offered by the parties must be evaluated to ensure that it is sufficient to replace the competition lost by the notified transaction as well as the commercial viability of the assets to be divested—including the quality of the experience and business plan put forth by the proposed divestiture purchaser. This evaluation can take time and may result in the investigating agency insisting on an expanded divestiture package.[25] A few recent instances of failed divestitures[26] have heightened interest at both agencies to take extra care in navigating the divestiture—approval process. Indeed, Debbie Feinstein stated recently that finding an acceptable divestiture buyer may be more challenging (and time consuming) than it has been in the past, particularly in consolidated or consolidating industries.[27]

22 15 U.S.C. § 18a (2012).

23 Both the Division and the FTC initially announced their positions on timing agreements in 2006—offering enticements to parties in return for agreeing to an alternative review schedule—principally a capped number of documentary custodians each party will have to search for material that may be responsive to the Second Request. See Reforms to the Merger Review Process, Announcement by Deborah Platt Majoras, Chairman, FTC (Feb. 16, 2006) (available at https://www.ftc.gov/sites/default/files/attachments/merger-review/mergerreviewprocess.pdf); and Merger Review Process Initiative, United States Department of Justice Antitrust Division, at 1 (Dec. 14, 2006) (available at https://www.justice.gov/sites/default/files/atr/legacy/2006/12/15/220237.pdf).

24 See, e.g. Division Model Process & Timing Agreement (available at https://www.justice.gov/atr/merger-review-process-initiative-model-pta-letter). The U.S. Antitrust Agencies have not published statistics regarding the content or number of timing agreements entered into since announcing their positions on timing agreements.

25 For example, the Antitrust Division insisted that Anheuser Busch InBev divest the entire U.S. business of Grupo Modelo in its 2013 acquisition—not just the overlapping assets. See https://www.justice.gov/opa/pr/justice-department-reaches-settlement-anheuser-busch-inbev-and-grupo-modelo-beer-case.

26 Approximately one year after the FTC's approval of a divestiture prior to clearing the combination of Hertz and Dollar Thrifty the divestiture buyer declared bankruptcy, and the divestiture assets were purchased out of bankruptcy by entities not subject to the FTC's review or approval. Similarly, the FTC approved a divestiture of a number of stores to smaller grocery store chain prior to clearing the combination of Albertsons and Safeway, but several months later the divestiture purchaser declared bankruptcy and the FTC was forced to permit Albertsons to buy back some of the divested stores.

27 See http://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=790136&siteid=191&rdir=1. Feinstein observed that private equity firms are likely to play a more significant role in divestiture sales where there are a limited number of acceptable strategic purchasers (i.e. those already participating in the relevant market), a more frequent occurrence in increasingly consolidated

The recently abandoned transaction between Halliburton and Baker Hughes is illustrative. Halliburton proposed a divestiture package of up to $7.5 billion, but the proposal was not accepted by the Division because it would not have sufficiently replaced the competition lost as a result of the transaction. David Gelfand, Deputy Assistant Attorney General for the Division, commented that "I think [no viable remedy was available]. The reason is the anticompetitive effect spread across so much of the business, there was no way to divest individual, freestanding businesses without divesting the entire company."[28] Gelfand summed up the Division's position as follows: "Our policy on remedies is, you have to be able to address the competitive issues raised by the transaction. If parties want to roll the dice and see if they can convince us, that's their prerogative, but they should understand that we're ready to litigate these cases."[29]

Another factor that can contribute to an extended investigation is the increasingly significant role econometric analysis plays in merger investigations. The Division and the FTC jointly issued an update to the Horizontal Merger Guidelines in 2010.[30] The 2010 Guidelines largely reflect the pre-existing practices at the agencies, but they stress the use of econometric analysis more than the prior version of the Guidelines.[31] Indeed, economists played an important role in drafting the 2010 Guidelines.[32] Both agencies have a very capable staff of economists who work in tandem with agency staff attorneys. The volume of data required to conduct econometric analyses can be substantial, and performing the analysis can be complicated. Additionally, given the significant weight that can be given to econometric analysis in any antitrust investigation, parties typically retain their own economists to perform econometric analysis—perhaps, even most frequently, before producing the requisite data to the investigating agency. More to the point, the collection of the requisite data, the preparation and evaluation of (potentially) dueling econometric analysis can be very time consuming.

None of the factors addressed here can be pointed to as the sole cause behind the prevailing protracted U.S. antitrust review periods. But in combination they represent conditions that can explain and even justify why merger investigations by the U.S. Antitrust Agencies of certain transactions have taken and are taking longer than they may have previously.

III. TRADITIONAL ANTITRUST RISK-SHIFTING PROVISIONS

There are several tools that parties have traditionally used to allocate between themselves the risk that a transaction will be challenged or blocked by a U.S. Antitrust Agency or non-U.S. competition authority. This would include provisions where the parties anticipate that their proposed transaction may only be permitted to proceed with substantial modifications to the structure of the transaction or other concessions. Several such provisions are addressed here.

A. "Hell or High Water" Provisions

Perhaps the simplest form for allocating antitrust risk is the so-called "hell or high water" provision, which provides that the buyer will take all necessary steps to complete the transaction and address any objections raised by any antitrust authorities. Such steps can include agreeing to any divesture required by the reviewing antitrust agency or agreeing to other types of behavioral remedies imposed as a means of restoring competition lost as a result of the transaction. With the exception of a transaction where no remedy

markets. Feinstein stated further that private equity firms can be legitimate buyers of divestiture assets provided that they have viable business plans. The vetting process for these buyers—including this business-plan review—may contribute to prolonging the merger-clearance process.

28 See http://www.law360.com/competition/articles/791567?nl_pk=147463b6-7c6a-4741-8d61-398281916e4b&utm_source=newsletter&utm_medium=email&utm_campaign=competition

29 Id.

30 See U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines (2010) (available at https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf).

31 Carl Shapiro, "The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years," 77 ANTITRUST L.J. 701, 704 (2010) (noting that the 2010 Guidelines reflected "ongoing changes in Agency enforcement practice and advances in economic learning.").

32 Id. (author Shapiro, former Deputy Assistant Attorney General for Economics, Antitrust Division, DOJ, notes that he was a member of the joint DOJ/FTC Horizontal Merger Guidelines working group, as were Dr. Joseph Farrell, Director of the Bureau of Economics at the FTC at the time, and Howard Shelanski, then Deputy Director for Antitrust at the FTC Bureau of Economics).

short of blocking the transaction is capable of addressing the potential anticompetitive effects, the buyer bears the entire risk of opposition from the U.S. Antitrust Agencies and/or non-U.S. competition authorities.

While these types of provisions provide sellers a great deal of protection, nominally at least, few buyers are willing to agree to a straight-forward/unqualified "hell or high water" provision—particularly in the current climate of increased aggression by the U.S. Antitrust Agencies, including the refusal to accept substantial divestiture proposals from parties to resolve perceived antitrust concerns.[33]

More typically what happens is that the separate components of "antitrust risk" are negotiated separately. The parties generally agree on each bearing something less than the absolute obligation required by a "hell-or-high water" provision. Even where a seller is fortunate enough to obtain a "hell or high water" commitment, the provision, by itself, may not provide the deal certainty the seller is seeking.

Stated differently, a pure "hell or high water" provision would require the purchaser to pay the seller the agreed consideration for the target business irrespective of whether the buyer would ever be permitted to take possession or control of the target assets by competent antitrust authorities. This, in effect, would represent a "reverse break-up fee" (discussed below) of 100 percent of deal value, where the more typical average for such fees falls in the range of 3-5 percent of total deal value.[34] And, again, in today's climate of more aggressive antitrust enforcement even non-risk averse purchasers almost certainly would be unwilling to agree to a naked "hell or high water"/100 percent reverse break-up fee provision.

B. Reverse Break-Up Fees

A reverse break-up fee[35] is paid by the buyer to the seller in the event that an agreed transaction does not close. From an antitrust perspective, the primary purpose of the reverse break-up fee is to compensate the seller for the time and effort spent in support of a transaction that is ultimately not consummated because of objections from antitrust regulators, as well as any damage done to the value of the target business during the pendency of antitrust review. The reverse break-up fee is also intended to incentivize the buyer to aggressively pursue obtaining all government approvals necessary to close a transaction. This implicitly assumes that the reverse break-up fee is set at an amount higher than the cost incurred by the buyer to comply with any remedy demand by the reviewing agency.

Other issues that may be presented are the conditions placed on the seller to obtain the reverse break-up fee. In some cases, a buyer may want assurances that the failure to obtain antitrust clearance for the proposed transaction is not a result of the seller failing to fulfill its obligations to comply with any investigative demands issued to the seller during the course of an antitrust investigation. While typically this concern is addressed through a "best efforts" or cooperation provision that sets forth the steps that each party must take to address agency concerns, respond to agency inquiries and ultimately secure the ability to close the transaction, some buyers may seek to condition payment of the fee on the seller having sufficiently fulfilled its "best efforts" obligations. Notably, any dispute over whether any agreed reverse

33 The FTC's refusal to accept Sysco and U.S. Foods' offer to divest 11 distribution centers to the third-largest broadline food distributor in the U.S.—Performance Food Group—is an example of the challenges that parties have faced when attempting to resolve agency concerns with proposed remedies. A federal district court ultimately sided with the FTC's argument that the divesture proposal was insufficient. See https://www.ftc.gov/news-events/press-releases/2015/07/following-syscos-abandonment-proposed-merger-us-foods-ftc-closes. Similarly, as referenced, the Division rejected several settlement proposals from Halliburton as part of its failed effort to secure clearance for its proposed acquisition of Baker Hughes. See http://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=761680&siteid=191&rdir=1. Indeed, U.S. Attorney General Loretta Lynch stated that Halliburton's proposed divestitures fell "well short" of preserving competition. See http://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=783640&siteid=191&rdir=1.

34 See, e.g. Houlihan Lokey, 2014 Transaction Termination Fee Study (available at https://www.hl.com/uploadedFiles/11_Blogs/Fairness_and_Solvency_Opinions/2014-hl-transaction-termination-fee-study.pdf. The reverse break-up fees have been trending higher in percentage and total dollar terms for larger targets where antitrust concerns are present. See, e.g. http://us.practicallaw.com/6-516-1589.

35 A "break-up fee," by comparison, is paid by the seller to the buyer and is intended to protect the buyer—primarily by deterring third-party bidders or other post-signing conduct by the seller that prevents the deal from closing.

break-up fee must be paid would be determined under principles of contract law.

In addition, where payment of a reverse break-up fee is at stake, buyers may seek sole control over engaging with the relevant antitrust agencies. Because the buyer faces the prospect of paying a potentially hefty penalty if the transaction does not receive antitrust clearance, it may want to ensure that the antitrust review proceeds in a manner that it believes presents the best prospect for success.

There are several high-profile examples of reverse break-up fees being paid in recent years following a failure to receive required antitrust clearance. Perhaps the most well-known reverse break-up fee payment was paid following the termination in 2011 of an attempt to combine two of the largest providers of wireless communication services, which involved a payment of approximately $5 billion, or roughly 15 percent of the total purchase price.

Payment of a similarly large break-up fee was involved in Halliburton's proposed acquisition of Baker Hughes. Under the terms of the agreement, Baker Hughes was to receive a $3.5 billion reverse break-up fee—approximately 10 percent of the total $35 billion deal value[36]—if the transaction did not close due to antitrust concerns.

Note too that reverse break-up fees need not be a fixed amount. Certain agreements have incorporated an escalating component into the break-up fee provision, whereby the fee is increased if the buyer has not closed the transaction before a specific date or metric. For example, in Akorn's 2013 acquisition of Hi-Tech Pharmacal the amount of the reverse break-up fee increased from approximately $41 million to $48 million if the buyer exercised an option to extend the termination date by one month.[37]

Setting the amount of the reverse break-up fee requires careful consideration of multiple factors. A seller must consider the amount that would be required to compensate it for the damage done to its business by a protracted antitrust review or an abandoned transaction—*e.g.* lost business, personnel losses, etc.[38] This can be a difficult calculus and certain sellers may determine that no amount, short of the total consideration, would be sufficient. Likewise, buyers must consider what amount of reverse break-up fee may be sufficient simultaneously to encourage an otherwise hesitant seller to enter into the agreement but low enough to offer an economical escape in the event of uneconomical (from the buyer's perspective) remedy demands by an investigating antitrust agency. In today's enforcement climate, this calculus is more complicated.

C. Obligations to Litigate

Another common risk-shifting provision sets forth the parties' respective obligation to litigate to defend the transaction should the reviewing antitrust agency decide to challenge the proposed transaction in court. The obligation can vary from no obligation to litigate, litigation through a preliminary-injunction hearing or a merits trial or defense through all available stages of appeal. The incentives of the parties to a transaction in setting the obligation's parameters may be influenced by the other agreed "risk shifting" provisions. For example, a significant divestiture commitment may substantially reduce the likelihood of litigation such that the parties are less concerned about the impact of a potential litigation challenge.

Sellers typically want to ensure that buyers will sufficiently commit themselves to a transaction such that they will not walk away from a deal once litigation is threatened or initiated by the investigating U.S. Antitrust Agency. This desire is frequently in tension with a buyer's desire to have the ability to abandon a transaction and to control the strategic direction of obtaining clearance to proceed with a transaction—*i.e.* buyers also may desire some cost/timing certainty.

In order for any provision obligating the parties to litigate to be meaningful, parties must make sure that termination provisions are aligned with the scope of the litigation obligation. Any litigation will be preceded by the initial review period and the Second Request investigatory period, which takes several months and perhaps a year or more, as well as pre-hearing discovery period.

36 If Either Halliburton or Baker Hughes Call Off Deal, It Would Be Costly, Michael J. De La Merced, N.Y. Times, Nov. 18, 2014 (available at http://dealbook.nytimes.com/2014/11/18/call-the-whole-thing-off-for-either-halliburton-or-baker-hughes-it-would-be-costly/?_r=0).

37 See Akorn Inc. Form 10-Q, filed Nov. 12, 2013.

38 See, e.g. http://www.wsj.com/articles/office-depot-cites-delayed-staples-tie-up-for-earnings-shortfall-1461670987?tesla=y (Office Depot citing the protracted antitrust review of its proposed combination with Staples for missed earnings target).

Without alignment, the effect of the litigation commitment may be nullified by a protracted antitrust investigation. Put another way, a commitment to litigate until a “final and non-appealable order,” for example, will have little effect if the agreement’s longstop date is 12 months from the date the agreement is signed because there almost certainly will not be enough time to complete even the initial trial or preliminary-injunction hearing within a 12-month period.

D. Circumscribed Divestiture Obligations

Where a buyer is unwilling to accept an unlimited divestiture commitment required to resolve any antitrust concerns of the U.S. Antitrust Agencies, limited divestiture commitments can be made. There are various measures by which a divestiture commitment can be limited.

On the end of the spectrum where the buyer assumes more risk, the buyer’s obligation to divest can be limited by whether the divestiture would have a material adverse effect on the business of the combined company. Alternatively, the obligation to divest can also be based on whether the divestiture would have a material adverse effect on just the business of the acquiring company or the target. Relying on “material adverse effect” provisions can, however, create some ambiguity in precisely what is required of a buyer. While there may be advantages to this ambiguity, for example, if one is concerned that greater specificity might serve as a signal to the reviewing agency about the specific antitrust concerns the parties have regarding the proposed transaction, this ambiguity can also lead to disputes between the parties.

One potential solution to this problem is to have more clearly delineated limitations on what a buyer is obligated to divest. The divestiture obligation may identify specific assets or business lines, or can also be limited by a specific metric. For example, the cap on divestitures might be a specific number of facilities, a predetermined total asset value or the amount of revenues or EBITDA generated by the business to be divested. The more specific the provision the greater the risk of highlighting the area of potential concern for the reviewing antitrust agency.

Separately, the agreement may impose no obligation on the buyer to make any divestitures or commitments in order to secure requisite antitrust clearances but, instead, leave the decision solely up to the discretion of the buyer.

Once again, the parameters for any divestiture-obligation provision can be affected by other agreed risk-shifting provisions—*e.g.* the timing of the investigation, the time within which the buyer must propose and agree to the divestiture and whether the occurrence of an “overbroad”/“excessive” remedy demand by the investigating agency nullifies or triggers other antitrust-risk-shifting obligations, like payment of a reverse break-up fee.

E. Ticking Fee

Another way to incentivize a buyer to conclude any antitrust investigation and obtain the requisite clearance decisions as quickly as possible as well as to compensate a seller for enduring an extended antitrust review is the payment of a “ticking fee.” Under a ticking-fee provision, the buyer agrees to an increase in the consideration payable to a seller as the time period between signing and closing (or satisfaction of conditions to closing, like obtaining required antitrust clearances) passes certain triggers. Such triggers could include, for example: issuance of a “Second Request” by the reviewing agency and failure to comply with that Second Request within a specified period of time; and extension of the “drop-dead date” in order to address antitrust concerns.

A recent example of the use of a ticking fee was in Cypress Semiconductor Corp.’s (“Cypress”) bid for Integrated Silicon Solutions Inc. (“ISSI”). Cypress was in a competitive bidding situation with Uphill Investment Co. (“Uphill”) to acquire ISSI. ISSI’s management, however, had concerns that an acquisition by Cypress would be subject to lengthy review by the U.S. Antitrust Agencies. To assuage those concerns, Cypress agreed to divest ISSI’s static random-access memory business if necessary to close the transaction. In addition, Cypress included in its proposal a $0.10-per-share ticking fee for every three months it took to get regulatory approval, up to $0.20 a share.[39] Ultimately, ISSI elected to accept Uphill’s offer despite Cypress’ proposal including the possibility of an increased transaction value.[40]

A ticking fee tied to payment of the trans-

39 “Uphill Investment Ups Bid to $730M for Integrated Silicon,” June 23, 2015 (available at http://www.law360.com/articles/671184/uphill-investment-ups-bid-to-730m-for-integrated-silicon).

40 “ISSI Shareholders Approve Acquisition by Uphill Investment,” June 29, 2015 (http://www.bloomberg.com/news/articles/2015-06-29/issi-shareholders-approve-acquisition-by-uphill-investment).

action's consideration will only be invoked if the transaction ultimately closes. If the transaction is blocked or abandoned based upon antitrust concerns then the ticking fee provision would be nullified. Alternatively, as referenced, there can be a "ticking" component added to the reverse break-up fee.

F. Buyer Pays Expenses

Where a seller is concerned about the financial impact of an extended antitrust investigation, another risk-shifting mechanism available to the parties is a requirement that the buyer pay the seller's costs for responding to any antitrust investigatory requests, including legal fees. The parameters for any such provision can vary to exclude certain categories of costs, and they could include all of the seller's transaction costs—*i.e.* not just those associated with obtaining antitrust clearances. In return for such a commitment from the buyer, sellers typically are required to consult with the buyer with respect to, if not before, the retention of antitrust counsel, consultants and experts. Additionally, buyers frequently insist on a provision explicitly granting them sole control over the antitrust defense strategy if they are going to be responsible for all expenses.

G. Termination Rights

Another provision by which parties allocate antitrust risk is through the setting of a date after which the parties may terminate the transaction, assuming certain conditions have not been met. One of the most common conditions that permits a party to invoke the right to terminate the agreement after a date certain is failure to obtain required antitrust clearance.

When the parties expect scrutiny from antitrust regulators, selection of an appropriate termination date is an important consideration. As a general matter, shorter termination dates may allow the parties to avoid the expense of complying with a Second Request or litigating with the FTC or the Antitrust Division. Longer termination dates allow for greater flexibility, including preserving the possibility for litigation and subsequent appeals.

In today's climate, the challenge is in accurately predicting the length of time that will be required to conclude any antitrust investigation successfully. This can be particularly challenging and time consuming when a transaction requires premerger notification in multiple jurisdictions and coordination is required. Moreover, the U.S. Antitrust Agencies can point to the fact that the termination provisions agreed to by the parties at the outset can simply be extended by mutual agreement in order to facilitate the completion of any antitrust investigation. While such extensions certainly have been done, there also have been several instances where the parties' respective interest in agreeing to any extensions may not be aligned. Parties should independently consider both possibilities from the outset in order to avoid or (at least) to confront knowingly that potential downside in the future.

IV. ALLOCATING RISK IN TODAY'S U.S. ANTITRUST ENFORCEMENT CLIMATE

Practical considerations having nothing to do with potential antitrust concerns prevent parties from allowing for an indefinite period between signing and closing a proposed transaction. A buyer's financing commitments, for example, can have a substantial influence on the deadline for closing, *i.e.* the transaction's "long stop" or "drop dead" date. Nevertheless, the potential for antitrust scrutiny can derail any transaction's closing timeline. Understanding this and appreciating that the aggressive posture of the U.S. Antitrust Agencies will better enable parties to consider alternative antitrust risk-shifting provisions that are informed by and function well with the parties' respective termination rights as well as the agreed schedule for closing.

For transactions with greater flexibility in the closing schedule, parties may wish to consider relying on the occurrence of milestones as the transaction progresses rather than fixed time periods or dates in their agreements. Depending upon the structure, this may enable decisions to be made (and consequences determined) at some point after the required antitrust filings have been made and, therefore, enable the parties to be more informed regarding the expected timeline, likelihood and expenses for obtaining the required antitrust clearances. The provisions can run to the benefit or detriment of either party—depending upon their respective views of and tolerances for the antitrust risks presented.

Such milestones could include, for example: the issuance of a Second Request, the parties' substantial compliance with a Second Request, the initiation of litigation by an investi-

gating U.S. Antitrust Agency, the completion of a merits trial or preliminary injunction hearing and the pursuit of any appeals following an initial litigation result. And with the occurrence of each selected milestone certain rights or obligations may be triggered—*e.g.* an increase in the consideration for the transaction or the reverse break-up fee, a right to terminate the agreement unilaterally, an obligation to cover the other parties' transaction expenses, an increase in any divestiture commitment for the buyer, a decrease in the divestiture commitment by the buyer. Alternatively, the transaction timeline simply could be automatically extended after the occurrence of each milestone or could be structured around the milestones without reference to any particular date.

Once again, it is important to recall that provisions allocating antitrust risk between the parties to any proposed transaction that raises antitrust issues will be reviewed closely by the U.S. Antitrust Agencies. And those provisions may highlight or signal an antitrust concern that was not otherwise apparent and/or provide leverage to the investigating agency in the negotiating of any settlement.

The negotiating dynamics for each transaction are different and will determine the agreed framework for allocating any perceived antitrust risk. Nevertheless, the potential for intervening events following the execution of a transaction agreement to affect the import of the provisions agreed to at signing and intended to provide for some downside protection to one or another party should be recognized. Traditional antitrust risk-shifting provisions will continue to be deployed but parties should think strategically and creatively regarding what adjustments may be advisable in order to accommodate increasingly unpredictable and lengthy antitrust review periods.

AN EXAMINATION OF THE PROPOSED TEVA-ALLERGAN MERGER

BY WILLIAM S. COMANOR[1] & DIANA L. MOSS[2]

I. INTRODUCTION

The proposed merger joins the largest generic pharmaceutical company in the world, Teva Pharmaceuticals, with Allergan, an important rival that is currently the third largest in worldwide generic sales. In this comment, we evaluate the competitive effects of the merger and its implications for consumer welfare in the United States.[3] These effects could be large since generic sellers introduce a critical measure of competition into pharmaceutical markets and play an important competitive role in making prescription drugs affordable. Limiting the competitive discipline introduced by generic sellers could therefore have substantial adverse consequences.

Both of the merging parties are the product of previous mergers. Teva's past includes mergers with Copley Pharmaceuticals (August 1999), Novophram (February 2000), SICOR, Inc. (January 2004), IVAX Pharmaceuticals (July 2005), Barr Pharmaceuticals (December 2008),

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3 We are very grateful to F.M. Scherer for his many helpful comments and suggestions. Much of the source material and data provided here came originally from him. Many thanks also to AAI Research Fellow, Kyle Virtue, for valuable research assistance.

and Cephalon Inc. (October 2014). These mergers contributed to elevating Teva to its current leading position in the generic pharmaceutical industry.

In contrast, Allergan was largely a branded pharmaceutical company before its merger with Actavis in 2015. However, Actavis' position as a generic drug supplier was also enhanced by earlier mergers. These include Watson Pharmaceuticals (October 2012), Warner Chilcott (October 2013), Forest Labs (July 2014), and Furiex Pharmaceuticals (July 2014).

The position of the merging companies is evident in the table below, which shows world-wide generic market shares for the ten leading companies in 2014:[4]

Global Market Share for the 10 Leading Generic Pharmaceutical Companies (2014)

Firm	Market Share (%)
Teva	12.2%
Novartis (Sandoz)	11.5%
Actavis (Allergan)	8.9%
Mylan	8.8%
Sun Pharmaceuticals	6.0%
Aspen Pharmacare	4.1%
Hospira	3.6%
Sanofi	3.2%
Fresenius	3.1%
Lupin	2.7%
Top 10 firms	64.6%

As indicated by these data, upon completion of the proposed merger, the merged firm will control over 21 percent of the world-wide generic business. At the same time, the industry as a whole is relatively un-concentrated and includes a number of important firms.

For sales within the United States, the Food and Drug Administration ("FDA") received in 2014 a total of 1,473 Abbreviated New Drug Applications ("ANDAs") requesting the required authorization to produce and sell generic pharmaceuticals. Of these applications, Teva submitted 106 and Actavis (Allergen) submitted 214.[5] Together, the two companies accounted for 22 percent of all ANDAs filed. United States shares are thereby not much different from those reported on a worldwide basis.

II. COMPETITION IN GENERIC PHARMACEUTICAL MARKETS

Following the passage of the Hatch-Waxman Act in 1984, a new industry evolved which became separate and distinct from the branded pharmaceutical industry. It arose specifically from revised FDA regulatory requirements. Rather than requiring a New Drug Application ("NDA"), in which safety and efficacy would need to be demonstrated, merely an ANDA was now required where the essential requirement would be to demonstrate that the generic firm's product was "bioequivalent" to an established one. Critically, this abbreviated task was much less costly than that imposed by an NDA, with the cost falling to under $1 million by the early 1990s.[6]

Under the new regulations, generic suppliers entered many pharmaceutical markets and prices declined sharply. For example, with only a single generic entrant, the average generic price would be roughly 60 percent of the branded price.[7] However, additional entrants would often appear, and prices would decline further. Although branded prices were largely set by demand-side factors, primarily the therapeutic value of the

4 Top 10 Generic Drug Manufacturers World-wide Based on Market Share in 2014, Statista, www.statista.com/statistics/314595/ (last visited Jan. 28, 2016).

5 Food & Drug Admin., Activities Report of the Generic Drug Program (FY 2014), FDA.gov, http://www.fda.gov/Drugs/DevelopmentApprovalProcess/HowDrugsareDevelopedandApproved/ApprovalApplications/AbbreviatedNewDrugApplicationANDAGenerics/ucm427830.htm (last updated Dec. 23, 2014).

6 David Reiffen & Michael R. Ward, Generic Drug Industry Dynamics, 87 Rev. Econ. & Stat. 37, 38 (2005).

7 This finding applies to the years between 1976 and 1987. See Richard E. Caves et al., Patent Expiration, Entry, and Competition in the U.S. Pharmaceutical Industry, 1991 Brookings Papers on Econ. Activity. Microeconomics 1, 35.

product,[8] generic prices for most drugs were determined by supply-side factors. Production costs were particularly important, although it is estimated that it required eight or more rivals to drive prices down to production costs.[9]

Not only did the number of generic rivals selling the same molecule affect price levels but also it impacted rates of price increase. In a still unpublished study, Dave and Hartzema examine commercial claims data from January 2008 to June 2013 to identify a sample of 1,120 pharmaceutical agents available as generic drugs during the entire 5½-year period.[10] Dividing their sample into four nearly equal sized groups based on HHI values,[11] calculated in terms of the relative numbers of prescriptions dispensed of a drug, they report substantially higher average price increases where seller concentration was higher and fewer firms were present.

As compared with generally stable prices for generic products in the least concentrated quadrant, Davis and Hartzema report an average increase of 60 percent in the highest group over the 5½-year study period, and smaller price increases in the two intermediate groups.[12] Strikingly, for fully half of the drugs included in their sample, the associated initial HHI values exceeded 5000, which can be reached when there are two equal sized sellers–a virtual duopoly.

Dave and Hartzema point out that supply limitations (*i.e.* drug shortages) do not account for their findings. On testing whether the higher prices associated with fewer rivals could have resulted from supply limitations, they find that generic products with smaller numbers of sellers had fewer rather than more periods of drug shortages.[13] With smaller numbers of firms selling a molecule and the resulting higher prices, the opportunity costs of not filling orders are increased, and fewer such periods were present. Although higher prices often follow from restricted supply conditions, that factor does not confound the authors' finding that the presence of fewer sellers was associated with increasing generic prices.

A contributing factor to the lack of sufficient rivals for many pharmaceutical products, and thereby increased prices, is the presence of regulatory lag. According to the president of the Generic Pharmaceutical Association, the median FDA review time for ANDA approval in 2011 was 31 months. This lag was 31 months in 2012, and increased to 36 months in 2013 and an estimated 42 months in 2014.[14] He also stated "At the industry's best estimate, current fiscal year median approval times [for 2015] will be 48 months–the slowest it has ever been."[15] This factor contributed to the presence of fewer rivals available to compete for sales of drugs whose patents could no longer block entry.

III. DIRECT EFFECTS OF THE PROPOSED MERGER

In many cases, competitive effects pertain to individual pharmaceutical molecules. Even though there may be available alternatives, molecular entities often have different therapeutic effects on different patients,[16] so for some patients, there is little therapeutic overlap. For others, however, relevant markets are broader and can include more than a single molecule. For this reason, we examine the direct competitive effects of the proposed merger in terms of both particular molecules and limited therapeutic markets.

On both accounts, the proposed merger threatens to increase market concentration. Based on data from 2006 to the present, there were 67 direct molecule overlaps between Teva and Allergan (Actavis) in that both parties sold the same generic drugs.[17] Turning to more broadly

8 Z. John Lu & William S. Comanor, Strategic Pricing of New Pharmaceuticals, 80 Rev. Econ. & Stat. 108 (1998).

9 Reiffen & Ward, supra note 6, at 37–49.

10 C.V. Dave & A.G. Hartzema, Prices and Generic Medications, and its Association with Industry Consolidation, Presentation at the International Conference on Pharmacoepidemiology & Therapeutic Risk Management (Aug. 22–26, 2015).

11 HHI values are a standard measure of seller concentration. They are obtained by summing the squared market shares of all sellers in the relevant market. For example, with two sellers in a market, each with a 50% market share, the HHI equals (50x50) x 2 = 5000.

12 Supra note 10 at tbl.1.

13 Id. at 9.

14 Ralph G. Neas, President, Generic Pharm. Ass'n, Statement at the FDA Public Meeting on GDUFA (June 15, 2015), at http://www.gphaonline.org/gpha-media/press/statement-by-ralph-g-neas-president-and-ceo-gpha-on-the-june-15th-fda-public-meeting-on-gdufa.

15 Id.

16 Qiang Ma & Anthony Y. H. Lu, Pharmacogenetics, Pharmacogenomics, and Individualized Medicine, 63 Pharmacological Rev. 437 (2001).

17 These data include products originally sold by companies acquired by Teva or Allergan so that the Teva data includes those drugs sold earlier by Barr and Ivax

stated therapeutic areas, and employing the therapeutic area definitions contained in the Physician's Desk Reference ("PDR"), we find there were 59 direct therapeutic overlaps between the two companies.[18] Lists of both overlapping molecules and therapeutic areas are contained in the Appendices.

IV. INDUSTRY-WIDE COMPETITIVE EFFECTS

Under the Hatch-Waxman regulatory structure, competitive effects are broader than represented by data on product overlaps. Equally important are conditions within which early generic entry can and will occur. We therefore consider such conditions as well.

A significant element of this regulatory structure is the "Paragraph IV" route, as specified by the Hatch-Waxman Act.[19] On filing an ANDA, generic entrants can wait until existing patents, if any, on the drug have expired. Or alternatively, generic entrants can take the Paragraph IV route to gain quicker FDA approval and entry. However, a Paragraph IV filing "automatically counts as patent infringement"[20] to which the branded company holding the patent can respond with an infringement suit. If the patent holder does not bring an action within forty-five days, the ANDA is accepted and the generic entrant can proceed. However, if a suit is brought, the FDA must withhold approving the ANDA for a period of up to 30 months, or until questions of patent validity or infringement are resolved.

Although generic entry is then postponed while litigation proceeds, the Hatch-Waxman Act provides a special incentive for generic manufacturers to follow this route and challenge questionable patents. If successful, a first-to-file prospective entrant taking the Paragraph IV route is granted a six-month period of exclusivity during which the FDA will approve no additional ANDA. As Justice Breyer observed "[i]f the first-to-file generic manufacturer can overcome any patent obstacle and bring the generic to market, the 180-day period of exclusivity can prove valuable, possibly 'worth several hundred million dollars.'"[21]

What this regulatory provision emphasizes is the importance of potential competition in this regulatory structure. For any particular molecular agent, competition begins with the first entrant, who can potentially lead a parade of followers. However, the regulatory framers were concerned that generic entry could be blocked by the presence of weak patents on the existing branded products and sought to encourage legal challenges. The statute thus sought to encourage generic entry by offering the Paragraph IV route to generic entry and rewarding successful challenges in the form of a six-month period of generic exclusivity.[22]

In this structure, the first company to file an ANDA plays a significant role, and particularly those who take the Paragraph IV route. To be sure, not all first entrants pursue this route but those that do have important competitive implications.[23] Under the current regulatory regime, it is essential that there remain large generic companies who can both pay high litigation costs and assume the associated risks.

V. PROSPECTIVE EFFECTS OF THE PROPOSED MERGER ON PARAGRAPH IV ENTRY

Teva and Allergan (Actavis) are both frequent participants in the Paragraph IV process, as indicated by the available data included in the appendix on first-mover ANDA applications since 2006. These data include applications containing Paragraph IV certifications. Between 2006 and the present, Teva, including the firms it had

Corp. and the Allergan/Actavis data include products sold earlier by Watson Pharmaceuticals, Warner Chilcott, Forest Labs and Furiex.

18 This figure indicates the number of therapeutic areas as defined in the PDR that include generic drugs sold by both merging parties. In some cases, they include products containing the same API, while in others, APIs are different but have similar therapeutic indications.

19 Fed. Trade Comm'n, Generic Drug Entry Prior to Patent Expiration: An FTC Study 1–10 (July 2002), available at https://www.ftc.gov/sites/default/files/documents/reports/generic-drug-entry-prior-patent-expiration-ftc-study/genericdrugstudy_0.pdf.

20 FTC v. Actavis, Inc., 133 S. Ct. 2223, 2235 (2013) (internal quotation marks omitted).

21 Id. at 2229 (citation omitted).

22 The FTC Report, supra, emphasized this objective: "The 180-day marketing exclusivity provision was intended to increase the economic incentives for a generic company to be the first to file an ANDA containing a Paragraph IV certification and get to market." Fed. Trade Comm'n, supra note 19, at vi.

23 Between 1998 and 2000, approximately 20 percent of all generic applications sought entry prior to patent expiration. Id. at ii. Of course, this percentage understates the percentage of first-movers pursing this objective.

acquired, had first ANDA status for 131 drugs – the largest number of any generic company. There were also 67 first filings by Actavis, which included those by its acquisition of Watson Laboratories. Only Mylan Pharmaceuticals had more first filings than Actavis at 87.[24] Removing the independent decision-making of one of the merging parties would therefore likely eliminate a significant source of Paragraph IV filings and therefore competitive challenges.

This presents a unique problem of market definition: it relates to the willingness of firms to challenge patented drugs whose protection is either dubious or drawing to an end. Unlike cases of product overlap, it is more difficult to identify those firms in advance, but we can still observe the set of firms from which they are drawn. From this limited set, the proposed merger eliminates an important member. To be sure, this consideration can be recast into terms of most likely potential entrants seeking to enter more narrowly defined markets. Earlier antirust actions did just that.

VI. ANTITRUST PRECEDENTS

Consider the Falstaff-Naragansett beer merger case of 1974.[25] In that decision, the Supreme Court held:

> The District Court should therefore have appraised the economic facts about Falstaff and the New England market in order to determine whether in a realistic sense Falstaff could be said to be a potential competitor…so positioned on the edge of the market that it exerted beneficial influence on competitive conditions in that market.[26]

In *Falstaff*, that beneficial influence was that if the incumbent firms raised their prices too much, Falstaff would enter and drive prices down. In regard to generic drugs, the relevant market is not the sale of beer in a geographic area but instead the set of drug products whose patents are questionable or drawing to an end so that more rapid generic entry would lead to lower consumer prices and enhanced consumer welfare.

A more recent case concerns one of the merging parties here. In its 2013 *Actavis* decision the Court ruled that a principal infirmity of "a reverse payment settlement with the first filer… 'removes from consideration the most motivated challenger, and the one closest to introducing competition.'"[27] In this passage, Justice Breyer identifies the first mover generic company as the one most likely to introduce competition into the relevant market. That factor is equally relevant for the merger at issue here.

VII. A CAUTIONARY CONCLUSION

A common response to the presence of product overlaps between merging parties is to require product divestitures in the belief that competitive issues could be resolved. However, that solution is not sufficient in this case. In the generic drug industry, brands and patents are not present and thus cannot be exchanged. All that can really be divested is the relevant ANDA. But that value is fleeting, and it is unlikely that potential buyers would pay much for the right to be a late mover into a generic market where prices decline with each additional entrant.

As Caves, Whinston and Hurwitz emphasized in an earlier study, "generic drug companies make money by being the first to enter after patent expiration."[28] What is lost in a possible divestiture is the earlier entrant with a presumably stronger market position; while what is gained is a later entrant in a far weaker market position. What a recipient gains may not therefore be worth much. In such circumstances, a divestiture remedy for the competitive issues raised by this merger is not likely an effective option.

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24 Food & Drug Admin., supra note 5.

25 United States v. Falstaff Brewing Corp., 410 U.S. 526 (1973).

26 Id. at 533.

27 FTC v. Actavis, Inc., 133 S. Ct. 2223, 2235 (2013) (internal quotation marks omitted).

28 Caves et al., supra note 7, at 37.

Appendix A
First Filings and ANDAs Since January 1, 2006

Rank	Company	First-Filed ANDAs	Total ANDAs
1	Teva Pharmaceutical Industries	131	439
2	Mylan	87	703
3	Allergan (Actavis)	67	368
4	Apotex, Inc.	43	329
5	Roxane Laboratories, Inc.	43	123
6	Dr. Reddy's Laboratories	42	260
7	Novartis (Sandoz)	41	273
8	Sun Pharmaceutical Industries, Inc.	30	433
9	Par Pharmaceutical	27	115
10	Lupin Pharmaceuticals Ltd.	24	241
11	Perrigo Company	24	33
12	Aurobindo Pharma Ltd.	22	424
13	Glenmark Pharmaceuticals Ltd.	20	169
14	Torrent Pharma, Inc.	15	151
15	Hospira	14	110
16	Ranbaxy	14	0
17	Pharmaforce Inc.	13	3
18	Akorn	11	55
19	Anchen Pharmaceuticals, Inc.	11	53
20	Zydus Pharmaceuticals (USA), Inc.	9	198
21	Impax Laboratories, Inc.	9	80
22	Novel Laboratories, Inc.	9	51
23	Bedford Laboratories	9	22
24	Amneal Pharma.	7	150
25	Paddock Laboratories, Inc.	7	35
26	Tolmar, Inc.	7	14

SOURCES:

Food & Drug Admin., *Approved Drug Products with Therapeutic Equivalence Evaluations* (35th ed. 2015), *available at* http://www.fda.gov/downloads/Drugs/DevelopmentApprovalProcess/UCM071436.pdf; *ANDA (Generic) Drug Approvals*, Food & Drug Admin., http://www.fda.gov/Drugs/DevelopmentApprovalProcess/HowDrugsareDevelopedandApproved/DrugandBiologicApprovalReports/ANDAGenericDrugApprovals/ (last visited Jan. 26, 2016).

NOTES:

[1] Companies are ranked by the number of first filings. Only companies with seven or more first filings are included in this chart. There are 129 additional companies with six or fewer first filings. The complete list is on file with AAI.

[2] ANDAs and first filings made by Actavis or Watson Pharmaceuticals are attributed to Allergan due to Allergan's recent merger activity. Similarly, because Teva acquired IVAX Pharmaceuticals in 2005 and Barr Pharmaceuticals in 2008, their ANDAs and first filings are attributed to Teva in this table. There may be additional merger activity not accounted for in this data.

Appendix B
Molecule Overlaps Between Teva and Allergan

ACITRETIN
ALBUTEROL SULFATE
ALBUTEROL SULFATE; IPRATROPIUM BROMIDE
ALENDRONATE SODIUM
AMLODIPINE BESYLATE
AMLODIPINE BESYLATE; BENAZEPRIL HYDROCHLORIDE
AMPHETAMINE ASPARTATE; AMPHETAMINE SULFATE; DEXTROAMPHETAMINE SACCHARATE; DEXTROAMPHETAMINE SULFATE
BICALUTAMIDE
BUDESONIDE
BUPRENORPHINE HYDROCHLORIDE
BUPRENORPHINE HYDROCHLORIDE; NALOXONE HYDROCHLORIDE
CABERGOLINE
CELECOXIB
CLONIDINE
CLOPIDOGREL BISULFATE
CLOZAPINE
DEXMETHYLPHENIDATE HYDROCHLORIDE
DIVALPROEX SODIUM
DOCETAXEL
DONEPEZIL HYDROCHLORIDE
DORZOLAMIDE HYDROCHLORIDE
DORZOLAMIDE HYDROCHLORIDE; TIMOLOL MALEATE
DROSPIRENONE; ETHINYL ESTRADIOL
DULOXETINE HYDROCHLORIDE
DUTASTERIDE
EPIRUBICIN HYDROCHLORIDE
ETHINYL ESTRADIOL; LEVONORGESTREL
ETHINYL ESTRADIOL; NORETHINDRONE
ETHINYL ESTRADIOL; NORETHINDRONE ACETATE
FINASTERIDE
GALANTAMINE HYDROBROMIDE
GEMCITABINE HYDROCHLORIDE
GRISEOFULVIN, MICROSIZE
GUANFACINE HYDROCHLORIDE
HYDROCHLOROTHIAZIDE; IRBESARTAN
IBUPROFEN; OXYCODONE HYDROCHLORIDE
IRBESARTAN
IRINOTECAN HYDROCHLORIDE
LAMOTRIGINE
LEVALBUTEROL HYDROCHLORIDE
LEVETIRACETAM
LEVOFLOXACIN
LEVONORGESTREL
METHYLPHENIDATE HYDROCHLORIDE
METRONIDAZOLE
MORPHINE SULFATE
MOXIFLOXACIN HYDROCHLORIDE
OXALIPLATIN
OXYMORPHONE HYDROCHLORIDE
PANTOPRAZOLE SODIUM
PIOGLITAZONE HYDROCHLORIDE
PRAMIPEXOLE DIHYDROCHLORIDE
PRAVASTATIN SODIUM
QUETIAPINE FUMARATE
RALOXIFENE HYDROCHLORIDE
RAMELTEON
RISPERIDONE
SILDENAFIL CITRATE
SIMVASTATIN
SUMATRIPTAN SUCCINATE
TOPIRAMATE
TOPOTECAN HYDROCHLORIDE
TRANDOLAPRIL
TRETINOIN
VALACYCLOVIR HYDROCHLORIDE
VANCOMYCIN HYDROCHLORIDE
ZOLPIDEM TARTRATE

Source:
Food & Drug Admin., *Approved Drug Products with Therapeutic Equivalence Evaluations* (35th ed. 2015), *available at* http://www.fda.gov/downloads/Drugs/DevelopmentApprovalProcess/UCM071436.pdf.

Appendix C
Therapeutic Category Overlaps Between Teva and Allergan

5-HT1B/1D AGONIST (TRIPTANS)
ACE INHIBITOR
ACE INHIBITOR/CALCIUM CHANNEL BLOCKER (CCB) (DIHYDROPYRIDINE)
ACETYLCHOLINESTERASE (ACHE) INHIBITOR
ALPHA-ADRENERGIC AGONIST
ALPHA1 ANTAGONIST
ALPHA2 AGONIST
ANGIOTENSIN II RECEPTOR BLOCKER (ARB)
ANGIOTENSIN II RECEPTOR BLOCKER (ARB) / THIAZIDE DIURETIC

ANTHRACYCLINE
ANTIANDROGEN
ANTICHOLINERGIC/BETA2 AGONIST
ANTIDEPRESSANT
ANTIDIABETIC
ANTIFUNGAL
ANTIHISTAMINE
ANTIMICROTUBULE AGENT
ANTINEOPLASTIC
ANTIPLATELET AGENT
ATYPICAL ANTIPSYCHOTIC
BETA2 AGONIST
BISPHOSPHONATE
CALCIUM CHANNEL BLOCKER (CCB) (DIHYDROPYRIDINE)
CALCIUM CHANNEL BLOCKER (CCB)/HMG-COA REDUCTASE INHIBITOR (STATIN)
CARBONIC ANHYDRASE INHIBITOR
CARBONIC ANHYDRASE INHIBITOR/NONSELECTIVE BETA BLOCKER
CNS STIMULANT
CORTICOSTEROID
COX-2 INHIBITOR
DOPAMINE RECEPTOR AGONIST
ESTROGEN/PROGESTOGEN COMBINATION
FLUOROQUINOLONE
H1 ANTAGONIST
HMG-COA REDUCTASE INHIBITOR (STATIN)
IMIDAZOLE ANTIBIOTIC
IMIDAZOPYRIDINE HYPNOTIC
MEGLITINIDE
MELATONIN RECEPTOR AGONIST
NON-ERGOT DOPAMINE AGONIST
NSAID
NUCLEOSIDE ANALOGUE
OPIOID ANALGESIC
ORGANOPLATINUM COMPLEX
PARTIAL OPIOID AGONIST
PHENYLTRIAZINE
PHOSPHODIESTERASE-5 (PDE-5) INHIBITOR
PROGESTIN CONTRACEPTIVE
PROSTAGLANDIN ANALOGUE
PROTON PUMP INHIBITOR (PPI)
PYRROLIDINE DERIVATIVE
RETINOID
SELECTIVE SEROTONIN REUPTAKE INHIBITOR (SSRI)
SULFAMATE-SUBSTITUTED MONOSACCHARIDE ANTIEPILEPTIC
SULFONYLUREA (2ND GENERATION)
TOPOISOMERASE I INHIBITOR
TRICYCLIC GLYCOPEPTIDE ANTIBIOTIC
TYPE I AND II 5 ALPHA-REDUCTASE INHIBITOR (5-ARI) (2ND GENERATION)
TYPE II 5 ALPHA-REDUCTASE INHIBITOR (5-ARI)
VALPROATE COMPOUND

Source:

Food & Drug Admin., *Approved Drug Products with Therapeutic Equivalence Evaluations* (35th ed. 2015), *available at* http://www.fda.gov/downloads/Drugs/DevelopmentApprovalProcess/UCM071436.pdf; PDR.net, http://www.pdr.net/ (last visited Jan. 27, 2016).

MEGA-MERGERS: KEY CONSIDERATIONS TO TAKE TO GET YOUR DEAL THROUGH

BY NIKOLAOS PERISTERAKIS, TOM MCGRATH & FAY ZHOU[1]

I. OVERVIEW

Mergers and Acquisitions ("M&A") activity surged last year, with a significant uptick of mega-mergers: over 70 mergers worth more than $10 billion were announced in 2015, with a combined value of more than double that seen in 2014.[2] Most of these deals were cross-border, strategic deals between significant industry players.

Getting very large, global M&A transactions through the regulatory process is an extremely complicated endeavor. Failure to assess properly the antitrust risk and manage the regulatory clearance and remedies process can be very expensive. Ultimately, a disconnect between the parties and the agencies about the scope of the problem or the required remedy can result in a blocked transaction. Last month, the Halliburton/Baker Hughes deal was called off after the US Department of Justice ("DoJ"), which had continually rejected increasingly rich remedies offers, filed a lawsuit to block the transaction. Baker Hughes emerged with a $3.5 billion reverse break fee.

Many factors come into play when mapping out a merger clearance strategy:

- The number of mandatory suspensory jurisdictions has exploded in the last 20 years, and

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1 Counsel and Partners respectively at Linklaters in Brussels, New York and Beijing. The authors would like to thank Antonia Sherman, Lauren O'Brien, Jennifer Baker, Xi Liao and Sinziana Ianc for their valuable contribution.

2 There was a 32 percent increase in global deals compared to 2014, representing a total of $4.7 trillion of announced deals worldwide during 2015 and the strongest annual period to our knowledge with a 42 percent increase in value from 2014. Source: Thomson Reuters, Mergers and Acquisitions Review Full Year 2015.

the regulators in many of these regimes have achieved a level of self-confidence and expertise to thoroughly examine proposed transactions;

- The increased cooperation between regulators on a global basis, which can facilitate merger review, but can also create additional complexity, especially in cases in which the antitrust issues raised and/or the remedies required are global in scope;
- The closer substantive scrutiny that mega-mergers attract, partly because of their outsized impact on the domestic economy but also because regulators feel pressure from politicians, customers and the media, who may question whether the regulators have got the review right; and,
- Political (non-antitrust) considerations. In several countries, regulators also explicitly address public interest considerations as part of their review, and many others implicitly take political considerations into account.

So, what are the parties to a mega-merger going to do? To borrow a phrase from the Boy Scouts: be prepared. Long before the ink is dry on the signature pages of the transaction documents, the parties must:

1. Determine where merger control filings are required, and whether there are any voluntary jurisdictions where a merger control filing is advisable (Section 2: Where and when to file);
2. Establish early on a strategy both for the antitrust defense of the case on a global basis as well as the remedies strategy, against the backdrop of the closer substantive scrutiny and increased cooperation among regulators (Section 3: Establishing and implementing an antitrust strategy on a global basis); and,
3. Prepare solutions for the political and public interest issues that will arise for certain jurisdictions that incorporate a public interest test in their merger control regimes (Section 4: Non-antitrust considerations political and public interest).

II. WHERE AND WHEN TO FILE: NO JURISDICTION LEFT BEHIND?

There are approximately 130 jurisdictions with merger control regimes, the vast majority of which (over 100) have mandatory pre-closing filing regimes. In addition, some jurisdictions have filing deadlines, and breaching those deadlines can result in heavy fines.

The jurisdictional assessment is in many instances very complex and involves parameters well beyond the mere turnover information. Despite the International Competition Network's ("ICN") recommendation to have objective merger control thresholds based on turnover, many jurisdictions still rely on market share thresholds or combinations of turnover/asset and market share thresholds, which in some instances vary depending on the deal structure.

As a result, in many cases parties have to carry out their pre-merger filing analysis based on imperfect information. It is not uncommon for the parties to have to postpone the finalization of the filing analysis until after the deal has been announced.

Traditionally, the global "gateway" jurisdictions, such as the European Union ("EU"), United States ("U.S.") and China have always been given top priority, as a result of their economic importance. Other jurisdictions could be of crucial importance to the deal in question and may involve a less experienced and less efficient review, resulting in obtaining clearance taking longer than expected. Review time may also depend on the varied market structures around the world. As a result, the selection and priority of filings becomes an exercise in triage. This said, there are some rules of thumb that help guide the prioritization:

A. Global "gateway" jurisdictions: EU, US, China

These are the global jurisdictions that are typically of huge economic importance in the vast majority of mega-mergers. Each of these jurisdictions has the power to hold up the global closing. If filings are triggered, it would be unimaginable for the merging parties to close absent U.S., EU, and, more recently, China clearance. Indeed, failure to obtain approval in even one of the jurisdictions is sufficient to collapse the entire global merger. GE/Honeywell, a merger that was proposed more than 10 years ago, is one of these rare situations where the merger was cleared by the DoJ but blocked by the European Commission.[3]

A key strategic consideration is whether

3 http://uk.practicallaw.com/4-101-5292.

and to what extent the EU, U.S. and China review process should be aligned. In practice this often proves to be very difficult, given that the U.S. system is very different from a procedural standpoint compared to the EU merger review process. The MOFCOM merger review process is closer to the EU, but significant differences remain in terms of the timing.

In practice, very often the U.S. is the first to clear the transaction, while the EU is still in the pre-notification process. This can in some cases increase the risk of divergent outcomes. An extreme example of that scenario is the Oracle/Sun Microsystems case, where the final notification starting the Phase I clock was only filed to the European Commission a few days after the DoJ had cleared the transaction. Despite the DoJ clearance, the Commission had serious doubts about the transaction and only agreed to clear the transaction after a protracted Phase II investigation.

While there are procedural differences remain substantial, the common denominator of all three gateway jurisdictions is that they are aggressive enforcers.

- The European Commission, under the new Commissioner with responsibility for competition, Margrethe Vestager, has shown that it will continue to take a tough stance on mergers. Since Vestager took office in 2014, there has been one prohibition decision [Hutchison/O2], two mergers abandoned after the Commission rejected the parties' commitments[4] and 34 decisions with remedies.
- In the US, the Federal Trade Commission ("FTC") and the DoJ are aggressive enforcers. Many in the media and the business community believe that enforcement has increased under the Obama administration and, certainly, there are more court challenges and deals that are altered through consent decrees. Attorney General Loretta Lynch told the American Bar Association in April that this is because more transactions are being notified and those transactions are larger, more complex and strategic in nature. Others believe that the Obama administration has made a conscious effort to make merger activity more difficult. While the cause is debatable, there have been several high-profile challenges such as Halliburton/Baker Hughes, GE/Electrolux (which ended when GE exercised its right to terminate while the court proceedings were under way), and Sysco/US Foods (where the parties abandoned the transaction after a judge sided with the FTC and granted a preliminary injunction).
- China's Ministry of Commerce ("MOFCOM") has emerged as the third global "gateway" authority alongside EU and the U.S. given its economic importance, the large number of the cases reviewed by MOFCOM, and, most significantly, the fact that MOFCOM does not shy away from pursuing an independent path in terms of theories of harm and imposition of remedies, even in cases where the EU or the U.S. have concluded that there are no substantive concerns.[5] MOFCOM has continued to develop its own theories of harm and remedy measures. For example, conglomerate effects theory is a notion that is generally not recognized in the U.S. and (in recent years) is treated with skepticism in the EU. However, MOFCOM seems to be more receptive to this controversial theory. To date, it has imposed remedies in two cases[6] and prohibited one case[7] based on conglomerate effects, and MOFCOM appears to have set out no clear parameters for the application of this theory of harm. MOFCOM has also developed unconventional behavioral remedies, although it has reiterated that it has no particular preference for any single type of remedy. For example, the unique hold-separate remedies, which effectively require parties to remain independent

4 Mondi/Walki Assets (M.7566) and TeliaSonera/Telenor/JV (M.7419). In the latter case, it was reported that the Commission had not been satisfied with commitments offered by the parties. http://ec.europa.eu/commission/2014-2019/vestager/announcements/competition-telecom-markets_en

5 There is at least one case in which MOFCOM concluded that the transaction raised substantive concerns despite the fact that the EU Commission had reached the opposite conclusion. In Panasonic/Sanyo MOFCOM found competition concerns in the Ni-MH battery market for automotive applications, a global product market which had been "cleared" in the European Commission's review as not giving rise to competition concerns. In contrast, MOFCOM imposed a divestment remedy in relation to Panasonic's motor Ni-MH battery plant in Japan and also required the company to reduce its shareholding in a car battery joint venture. See Panasonic/Sanyo (M.5421).

6 Merck/AZ Electronic Materials (2014) and Walmart/Niuhai (2012).

7 Coca-Cola/Huiyuan (2009).

until MOFCOM consents (even after the transaction closes), have been imposed in four cases in China but are not often seen in other parts of the world.

- Many global deals have been delayed due to protracted Chinese merger review. The $35 billion Glencore/Xstrata deal is one such example, receiving conditional approval from MOFCOM in April 2013, more than a year after its initial notification. The parties were forced to push back the date for completion numerous times after having to re-file and undertake several rounds of remedies negotiations with MOFCOM. There are numerous similar examples of global deals delayed due to protracted MOFCOM investigations.

B. Jurisdictions that have notification deadlines

Another category of jurisdiction that the parties should prioritize is comprised of those that still have filing deadlines.

Notwithstanding that the ICN recommends against filing deadlines where there is a mandatory suspensory regime,[8] there are still more than 30 jurisdictions that impose filing deadlines, and many of them still impose a bar on closing, including Albania, Ecuador, India, Japan, Russia and South Korea.

In some cases, the filing deadlines are extremely tight, and render compliance with the deadlines very challenging, given the significant amount of formal requirements typically associated with the filings in these jurisdictions. For example:

- Ecuador has a filing deadline of only 8 calendar days from the signing of the deal (or announcement of public offer);
- Paraguay has a filing deadline of 10 days from signing; and,
- Serbia has a filing deadline of only 15 calendar days.

Some of the relevant authorities take a very aggressive approach towards the enforcement of mandatory filing deadlines. In February 2016, the Competition Commission of India handed down an order fining General Electric 50 million rupees (EUR 666,000) for missing the filing deadline for its merger with Alstom in 2014. General Electric failed to file with the Indian authority within the 30calendar day deadline following its announcement of the deal to India's Securities and Exchange Board in May 2014 and did not file a notification until November later that year. It defended its decision arguing that, at the time of the announcement, the parties had not yet reached a final binding agreement and, therefore, no filing requirement was triggered. However, this was rejected by the Competition Commission, which stated that the "timeline for filing commences from the date of public announcement". The fine constitutes the largest domestic penalty imposed on a company for failure to comply with India's merger control regime.[9] This aggressive approach ignores the commercial realities involved in deals like this, where there can be a significant amount of time between the announcement of the intention to enter into a deal, and the negotiation and signing of a legally binding agreement.

Regardless of whether these filing deadlines are desirable according to the ICN, the merging parties still need to meet them, highlighting the need to frontload as much of the merger control work as possible. Often, India will be the first jurisdiction where the merger is notified, even if it is not key to the transaction, and the India filing will need to be consistent with whatever arguments or statements the parties intend to make in the gateway jurisdictions. The extreme formalities (notarization/apostilization requirements) imposed by the Indian merger control review process further complicate the challenge of meeting the 30-day filing deadline in India.

C. Other mandatory pre-closing jurisdictions

For other mandatory pre-closing jurisdictions, priority is typically given to jurisdictions that have particular importance for the parties' business operation, i.e., jurisdictions in which either the target or the acquirer have assets or business operations and need to maintain a good relationship with the local antitrust authorities. The relative importance of each of these jurisdictions can vary considerably depending on the deal in question.

In some instances, the law is unclear whether the scope of the bar on closing is global or local and it will be very difficult to implement local carve-outs that will be acceptable both to the regulators

8 ICN, Recommended Practices for Merger Notification and Review Procedures, page 6.

9 http://globalcompetitionreview.com/rss/news/article/40938/

(from a legal perspective) and the parties (from a commercial perspective).

D. Voluntary jurisdictions

Typically, voluntary jurisdictions such as Australia, Chile, New Zealand, Singapore, the United Kingdom and Venezuela are not on the list of priority jurisdictions. However, if a transaction has a particularly high profile, or raises significant competition issues, the parties may very well decide to include the jurisdiction in question on their list of priority jurisdictions. Despite being voluntary regimes, the regulators in many of these jurisdictions still have the power to impose far-reaching remedies or even issue orders preventing the parties from closing the transaction. As a result, in certain cases, purely voluntary jurisdictions might also be given priority.

III. ESTABLISHING AND IMPLEMENTING AN ANTITRUST CLEARANCE STRATEGY ON A GLOBAL BASIS

A crucial part of the parties' pre-signing preparation is to determine the likely worst outcome, the odds of this outcome coming to pass, and in what time frame. The buyer has to decide whether the deal will still make sense in light of the antitrust risk. This assessment is crucial to the allocation of antitrust risk in M&A agreements, which are the result of lengthy commercial negotiation processes between the principals and their lawyers.

Even if there is consensus among the parties that the deal is feasible from an antitrust standpoint, the timing for the antitrust clearances plays a crucial factor for many reasons. The parties are typically under pressure to close the transaction, whether because of financing arrangements that may expire, shareholders of the seller that want their pay-out, or simply because they want to prevent their competitors from poaching their customers or employees.

Against this background, in some cases the parties have agreed to establish a "fix-it-first" or "upfront" remedy strategy, consisting in offering remedies upfront to resolve the antitrust issues, without going through a protracted antitrust investigation. However, identifying the remedies that will be sufficient to get the deal through is not an easy exercise.

This strategy has been successfully implemented in Holcim/Lafarge, where the parties submitted a remedy offer to the European Commission at the same time as formal notification of the transaction was made in order to pre-empt any competition concerns.[10]

However, the upfront remedy strategy is not always successful. Indeed, there are many examples of mega-mergers that have been either abandoned or made subject to very far-reaching remedies that virtually undo the merger synergies in the jurisdiction in question.

- **No remedy possible.** In extreme cases, the authorities will conclude that the merger must be blocked, and that there is no possible remedy. For example, in Sysco/US Foods, the FTC's view was that Sysco and US Foods were the only companies that could serve restaurants and other businesses, such as group purchasing organizations and foodservice companies that have locations nationwide. Similarly, in Halliburton/Baker Hughes, the DoJ challenged the merger on the basis that it would reduce the number of oil services suppliers from 3 to 2 in a large number of markets in the U.S. [11] Hutchison/O2 represents the latest development in the mobile telecoms consolidation saga in Europe and the decision reflects the Commission's even harder stance in 4 to 3 mergers in Europe.[12]
- **No suitable buyer for divested business.** In other cases, the remedies package might be sufficient but the authorities may conclude that there is no suitable divestiture buyer. This was the case with the failed merger between Tokyo Electron and Applied Materials, the world's two largest semiconductor manufacturers, an industry where innovation is key. After an 18-month process, the parties were unable to overcome the DoJ's view that there was no suitable buyer to ensure continued innovation.
- **Remedies eliminate all synergies.** In some cases, the remedy is so extreme that it eliminates all synergies in the jurisdiction in question. In Ball/Rexam, Ball agreed to divest the

10 Commission Decision M.7252 of 15.12.2014 - Holcim/Lafarge.

11 http://www.ft.com/cms/s/0/a6389b4e-0fe0-11e6-839f-2922947098f0.html

12 https://www.competitionpolicyinternational.com/eu-senior-officials-reject-hutchison-bid-for-telefonicas-o2/

entire overlap in the European Economic Area ("EEA"), consisting of ten "can body" plants and two "can end" plants to a single approved purchaser, in order to obtain clearance from the European Commission. The divestment package encompassed the majority of Ball's metal packaging facilities in the EEA.[13] In this case, the deal would only make sense for the buyer with regard to synergies realized outside the jurisdiction in question. In the proposed acquisition of GE's appliance business by Electrolux, the DoJ rejected at least two remedies offers, and Electrolux chose to litigate rather than expand their remedies proposal.

- When establishing the antitrust and remedies strategy for the merger, the parties will have to take two key factors into account in their antitrust risk assessment: (i) the closer substantive scrutiny that mega-mergers will inevitably face from regulators on a global basis; and (ii) the increased cooperation among regulators.

A. Closer substantive scrutiny

Theoretically, the value of the transaction should not affect the regulators' substantive assessment. In practice, however, mega-mergers attract a lot of interest from regulators, competitors, customers, suppliers as well as the media and other stakeholders. This can complicate merger review in two significant ways.

First, authorities will extensively examine the available quantitative and qualitative (internal documents) evidence under the traditional theories of harm. The U.S. and EU authorities and agencies in, for example, Canada and Australia, have developed sophisticated forensic capabilities and will request huge amounts of data and documents from the parties, and, if necessary, from third parties.

Second, more jurisdictions reviewing a transaction allows greater room for more "unconventional" theories of harm. Typically, the more unconventional theories of harm are often based on the scale of the merged entity and the inherent belief that the bigger size and higher earnings of the merged entity will somehow put its competitors at a competitive disadvantage.

Even though many of these theories have been discredited to a large extent in the U.S. and EU by conventional economic theory (big is not necessarily bad), they can still re-appear in the context of mega-mergers. In addition, there is a significant "spillover" risk of these theories being exported to other authorities with a lower evidentiary burden, which can rely on these theories to take sometimes very drastic measures.[14]

B. Increased cooperation among regulators

Regulators increasingly coordinate with each other, and regularly ask for waivers to exchange not only information, but also documents. This cooperation often starts in the early stages of the investigation, when the competition authorities are likely to proactively request the waivers, which are, in principle, given.

This is further exacerbated by the fact that the EU and the U.S. have very broad authority to obtain documents from parties and rely extensively on internal documents during the merger review process. The U.S. authorities can issue second requests, which call for the production of millions of pages of documents, while the European Commission may decide to make document requests with specific keywords, in the same way as it does in the antitrust enforcement of cartel practices. Accordingly, the parties should assume that any smoking guns uncovered by the U.S. or the European Commission will be shared with regulators in other jurisdictions.

Recent examples of close global cooperation among regulators include:

- **Halliburton/Baker Hughes:** this merger was investigated by the European Commission, the DoJ, and regulators in Brazil and Australia. The merger has been challenged by the DoJ, but would likely also have been challenged by the European Commission had the parties not abandoned the transaction.
- **GE/Alstom:** this deal was investigated by the European Commission and the authorities in Brazil, Canada, China, Israel, South Africa and Switzerland. While the DoJ and European Commission focused on different issues, the remedies were aligned to address both EU and U.S. concerns.
- **GlaxoSmithKline/Novartis oncology:** the

13 Commission Decision M.7567 of 15.01.2016 - Ball/Rexam.

14 For example, MOFCOM's prohibition of Coca-Cola's acquisition of Huyian juice company was primarily based on portfolio effects concerns (see: http://www.lexology.com/library/detail.aspx?g=5b6d0580-e4ae-45b1-b379-f3cf35575b9c).

case involved close cooperation between the FTC, European Commission, Canada, China, Australia, Brazil, Pakistan, and numerous others. The parties were able to negotiate the same remedy with the FTC and European Commission, which was then relied upon by other regulators.

Accordingly, it is mission-critical to establish the substantive defense of the case long before signing, which also means plotting out a remedies strategy on a global basis so that communications with the authorities are consistent between jurisdictions. In particular, the parties must take care to ensure that the substantive arguments in one jurisdiction will not undercut the strategy in another.

IV. NON-ANTITRUST CONSIDERATIONS: POLITICAL AND PUBLIC INTEREST[15]

Mega-mergers attract a huge amount of attention from the media, which can result in a large amount of controversy. For example, the combination of competitors in the consumer goods and services sectors often attracts thunderous denouncements by politicians and other stakeholders, such as in the proposed transactions involving cable providers Time Warner Cable and Comcast; wireless telecom rivals AT&T and T-Mobile, and airlines USAir and American Airlines. While many jurisdictions have established tests for assessing the impact of a proposed merger on competition, negative comments from politicians and the media are not helpful to the parties' defense. The parties need to consider whether there will be any political fallout, and, if so, how to address it, by involving lobbyists, public relations professionals, or, if dealing with a foreign country, their own country's diplomats. CEOs may be required to appear before legislatures or the antitrust agencies. Other jurisdictions have cultural requirements, such as Canada, or foreign investment control regimes (e.g. Canada, U.S., Australia and Russia).

In some less sophisticated jurisdictions, antitrust authorities are required to take into account public interest considerations as part of the merger review. Public interest considerations are also included in the merger control regimes of some EU jurisdictions, but this is very exceptional and limited to specific sectors.[16]

The public interest test in certain emerging jurisdictions is loosely defined, leaving a lot of discretion for authorities, but also a greater margin for negotiation by companies.

In China, the Anti-Monopoly Law explicitly requires MOFCOM to take into account, in addition to competition concerns, "[t]he effect of the concentration on national economic development."[17] There is no detailed guidance on how to interpret this clause, but we understand that in practice it covers industry policy considerations.[18] Industry policy concerns, however, appear to come into play in MOFCOM's merger review process less frequently nowadays. MOFCOM now reviews filings using predominantly the simplified procedure, under which MOFCOM no longer proactively consults

15 While we have not considered foreign investment regimes (such as CFIUS in the US and FIRB in Australia) for this article, we note that these rules can also act as a bar to receiving clearance for mega mergers. There are several examples of global deals that have collapsed as a result of the application of foreign investment rules. In November 2010, Canada said that it would not approve a EUR 38.6 billion purchase of Potash Corporation of Saskatchewan by BHP Billiton, a large Australian mining company. The transaction was blocked in order to keep control of an important natural resource. The underlying legal basis is the Investment Canada Act, which requires companies to show a "net benefit" to Canada. Similarly, in March 2009, the Deputy Prime Minister and Treasurer of Australia rejected the takeover proposal by China Minmetals of Oz Minerals Ltd. The transaction was blocked on grounds of national security.

16 United Kingdom (national security, media plurality, stability of the UK financial system), Ireland (media plurality) and Germany (where public interest concerns which outweigh competitive restrictions might very exceptionally permit the clearance of a merger).

17 Article 27(5) of the Chinese Anti-Monopoly Law.

18 This feature is reflected in some of MOFCOM's remedy decisions. For example, in Walmart/Niuhai (2012), MOFCOM required, inter alia, (i) unless having obtained its own license to conduct value-added telecommunication services ("VATS") business, No 1 Store (operated by the target, Niuhai) shall not offer any platform services to third parties; and (ii) Walmart shall not provide VATS in cooperation with Shanghai Yishiduo via a so-called Variable Interest Entity. These remedies seem to focus on industry policy concerns and foreign investment approval requirements for the telecom sector. Under the relevant telecom regulations, Walmart as a foreign company is prohibited from conducting VATS business without a VATS license. MOFCOM appeared to seek to ensure such foreign investment restriction is followed (by imposing remedy (i)) and is not circumvented by contractual arrangements (by imposing remedy (ii)).

with other regulatory agencies, thereby reducing the likelihood of interventions by industry policy issues.

In South Africa[19] the public interest grounds are explicitly limited to: employment, the effect of the merger on a particular industrial sector or region; the ability of small businesses or firms controlled by historically disadvantaged persons to become competitive; the ability of national industries to compete in international markets.

Countries like Botswana[20], Namibia[21], Kenya[22], Swaziland[23] and Zambia[24] have obviously drawn inspiration from the South African regime. Their public interest test includes, but is not limited to socio-economic and socio-political aspects such as employment, promoting international competitiveness and exports as well as supporting small undertakings, particularly those controlled by historically disadvantaged persons.

In Tanzania[25], mergers are not, as such, subject to a public interest test. However, if the transaction parties consider that the public benefits of the merger outweigh the competition harm, they can apply for an authorization with view to the public benefit of the merger.

In these jurisdictions, the public interest test can lead to results that have very little to do with consumer welfare, and more to do with protecting the local economy. Some of these commitments include:

- Maintaining the same number of employees for certain periods of time;
- The obligation to provide support, including professional trainings, outplacement support and counselling to retrenched employees;
- The obligation to maintain existing supply agreements and manufacturing plants post merger;
- Investing to support farmers, small retailers, local manufacturing, local suppliers, jobs and/or the reduction of harmful alcohol use; and,
- Locally producing raw materials instead of importing them.

V. CONCLUSION

While there appears to be a consensus among regulators and practitioners that "big is not necessarily bad" when it comes to merger transactions, mega-mergers will attract much more intense scrutiny, both on antitrust and non-antitrust grounds, by regulators that increasingly cooperate with each other, often at a very granular level.

Against this background, it is essential for the parties and their advisors to establish and implement a game plan early on, both for the antitrust and public interest defense of the case. This game plan should involve not only the traditional antitrust defense of the case, but also the elaboration of the suitable remedies, identification of suitable buyers, and early engagement with all key regulators and stakeholders across the globe. This may seem like a tall order, but failure to do so can be a very expensive exercise for the management and shareholders of one or even both parties to the transaction.

19 Section 12A(3) of Competition Act of 1998.
20 Section 59(2) of Competition Act 17 of 2009. The consideration of public interest grounds is not mandatory in Botswana.
21 Section 47(2) of Competition Act 2 of 2003. In Namibia, trade unions have the right to intervene in merger proceedings.
22 Section 46(2) of Competition Act 12 of 2010.
23 Section 17(2)(h)(I and (iii)) of Competition Commission Regulations Notice of 2010.
24 Section 31 of the Competition and Consumer Protection Act 24 of 2010.
25 Section 13(I)(b) of Competition Act 8 of 2003.

ANTITRUST RISK RE-ASSESSMENT IN NEWLY CONCENTRATED MARKETS: PRACTICAL WAYS TO PRESERVE FREEDOM FROM INVESTIGATION

BY SAMANTHA MOBLEY & GRANT MURRAY[1]

I. INTRODUCTION

Securing merger control clearance is a prime antitrust concern for parties undertaking "mega mergers." Significant resources will be focused on understanding and addressing regulatory concerns and the process may become protracted and public, especially where risk-shifting provisions—such as hell or high-water clauses or reverse break-up fees—lead the buyer to do everything in its power to get clearance on the right terms.

But the antitrust issues may not end with merger control clearance. Transactions leading to, or enhancing, a high degree of market concentration can mean that companies or a sector remain in the antitrust spotlight.

Indeed, a recent report by the Council of Economic Advisers[2] (which advises the U.S. President on economic policy) expressed concerns that competition is being eroded in many industries across the United States including as a result of increased consolidation. The Council favored increased governmental involvement, including antitrust enforcement by the DOJ and FTC.

Not long after, President Obama issued an

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2 https://www.whitehouse.gov/sites/default/files/page/files/20160414_cea_competition_issue_brief.pdf.

executive order[3] requiring all executive agencies and departments to take steps to address competition concerns. By May 15, executive agencies are to submit a report to the Director of the National Economic Council which includes a list of actions each can "potentially take." The report will also include any specific anticompetitive practices the executive agency has observed and the authorities it has available to take further action.

Risk-assessments are a well-known and well-trusted tool in the sphere of competition law compliance.[4] This article explores what sorts of compliance precautions a company can consider when it finds itself in a highly concentrated market and may therefore be more vulnerable to complaints and investigation.

It provides practical suggestions on how to deal with information exchange and trade associations (where an enlarged company may expect (and be expected) to play a bigger role; joint ventures and consortia/sub-contracting with competitors; price signaling; collective dominance; and market investigations.

While there is no need for companies in concentrated markets to be over-cautious about antitrust, a few additional legal checks and balances may preserve a company's commercial freedom and freedom from investigation.

II. A TENDENCY TOWARDS OLIGOPOLY

Most markets tend towards oligopoly over the longer term. Markets may consolidate when winners rise to the top (thanks to efficiencies and innovation) and losers are forced to exit. Consolidation may also result from M&A activity which can be intensive, with sectors sometimes experiencing a boom of high profile acquisitions.

This does not necessarily imply that competition is impaired. A concentrated "sector" is not necessarily the same as a concentrated "market." Even in highly concentrated markets, there may be effective competition. A low number of firms on the market might disguise the fact that intense competition is actually playing out between those firms. This is sometimes the case in the pharma sector where the total number of firms active in a particular product market may be small and constant—but where the identity of those firms changes over time, as one firm "wins" the market, only to be supplanted in the future by a rival with a superior product.

Highly concentrated markets can of course give rise to competition issues. Consolidation could mean that a firm obtains market power—whether on its own or, in some jurisdictions, collectively. Tight oligopolies can display characteristics which are more conducive to cartel conduct or at the least tacit coordination where firms are able to predict their rivals' future behavior and align to that expectation, without colluding. Similarly, in a more concentrated market, practices which might have been borderline or even benign in competition terms may begin to attract the attention of competition authorities.

The oligopoly issue is not new. Textbooks are replete with cases and observations on how competition agencies have tried to tackle it, often with a degree of creativity. European reforms in 2004 sought to ensure jurisdiction over "non-coordinated" effects, including where a merger might impair competition without leading to the emergence of a firm with a paramount market position. Many countries use legal presumptions to flip the burden of proof when companies adopt parallel behavior (so that companies and not the agency have to show innocence). The notion of "collective dominance" is familiar to many jurisdictions (even if the notion of "abuse" of collective dominance is less clear).

An emerging concern is that the European Commission is becoming more aggressive when assessing mergers that result in high levels of concentration. In some sectors (*e.g.* pharma), the Commission has started to look at the impact of a merger on R&D efforts despite the fact they are at a very early "pipeline" stage. The Commission has also expanded the category of "non-coordinated" effects to enable it to intervene in relation to mergers of companies that are not each other's closest competitors, but merely close competitors—and even to mergers between parties that are not close competitors, but where one of the parties is an "important competitive force."

In some quarters, allegations have been made that traditional antitrust rules are not "fit for

3 https://www.whitehouse.gov/the-press-office/2016/04/15/executive-order-steps-increase-competition-and-better-inform-consumers.

4 http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2013/ICC-Antitrust-Compliance-Toolkit/.

purpose" and that the agencies should do more, lest they let consumers down.[5] These assertions are unlikely to have prompted agency action—though they have certainly been heard and relayed by high ranking competition officials.

In any event, seemingly innocuous conduct in oligopolistic markets remains a focal point for competition agencies. The European Commission is currently investigating price signaling between competitors[6] and has treated information exchange between competitors as serious cartel conduct—even though the information may be about pricing factors (as opposed to price) and the people involved were not responsible for pricing within their companies.[7]

The U.S. DOJ's Antitrust Division is currently looking into allegations of collusion between airlines.[8] Although the allegations are undefined, they are thought to relate to public statements by airline executives. This probe comes on the heels of fast-paced consolidation in the sector. Since 2008, four mergers have reduced eight big airlines to four.

III. HIGHER CONCENTRATION IS CONDUCIVE TO COLLUSION

Enhanced agency scrutiny of compliance with existing rules is practically guaranteed. An in-house lawyer may find themselves stuck in the middle of the oligopoly problem: the inability of agencies to differentiate between unilateral conduct (independent actions/reactions) and coordinated behavior which offends the rules. Some regions, *e.g.* Eastern Europe seem more suspicious than others of parallel conduct. In certain sectors that risk may be greater.

Higher concentration means that contacts with competitors (*e.g.* information exchange) are more likely to have an impact on the market. Practices that were not thought to be risky or were borderline may now be prioritized by the agencies. Companies in newly concentrated markets cannot avoid every risk. There is no need to be overcautious—but they should pay additional, scrupulous attention to avoid creating risk.

One area for extra vigilance and perhaps additional housekeeping rules is trade association activity—not least where an enlarged company may expect (and be expected) to play a bigger role. A company's legal department could require notification before the company becomes a member of a new association. Approvals could be required before individuals join or attend formal/informal subgroups where the case law suggests that people might sometimes become desensitized to the risks. Social activities connected with trade associations have also been shown to be fertile ground for collusion. If this is a risk, an enhanced compliance program could require a brief report on every social contact (with details of who was there, when and why).

Contacts with ex-colleagues are a common source of problems. If this is a risk, then the company could impose a short "quarantine period" during which contact with any ex-colleague would requires pre-approval—and perhaps also special training, *e.g.* if they were spouses/golf partners, etc. This may be a particular risk where a transaction has required divestments as a condition of merger control clearance. In those circumstances, employees might find themselves in the same room with a former colleague who now works for an important competitor.

Joint ventures with competitors are another area to consider. In highly concentrated markets, it makes sense to conduct a review of all joint ventures with competitors. That would consider where they are located; what they do; how they actually operate in practice. If the event of a complaint, competition authorities will look closely at whether the parent companies have taken steps to manage the flow of any competitively sensitive information. Rules/guidance on this topic should be in place for nominated directors and any secondees.

In markets characterized by bids/tenders, it will be important to involve the company's legal department in the discussion (and vetting) of possible sub-contracting arrangements and consortia bidding scenarios whenever competitors

5 https://www.washingtonpost.com/posteverything/wp/2015/10/28/the-next-president-should-break-up-some-big-companies/ http://www.wsj.com/articles/wave-of-megadeals-tests-antitrust-limits-in-u-s-1445213306.

6 http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39850.

7 Judgment of the Court (Second Chamber) on March 19, 2015, Dole Food Company Inc. and Dole Fresh Fruit Europe v. European Commission ECLI:EU:C:2015:184.

8 http://www.wsj.com/article_email/justice-department-probes-airlines-for-collusion-1435775547-lMyQjAxMTA2MTAzMzAwMjMxWj.

are involved. It may also make sense to think laterally about any other "joint" industry activity. Government lobbying for example may be common in an industry but treated differently according to applicable competition laws.

Indirect contacts with competitors should also be considered. A number of competition authorities are looking at price signaling. To head this off, companies may wish to enhance pre-approval processes for management speeches, analyst briefings and any other public presentation which could touch on commercial matters, especially pricing.

Steps should be taken to avoid giving an incorrect impression to the market and authorities that collusion underpins business decisions which were in fact taken unilaterally. The not insurmountable challenge is to develop a process which enables a company's legal department to trace how pricing decisions are made both generally and on specific bids so that the independence of the process can be demonstrated if challenged. This could initially focus on the countries which tend to be most skeptical about parallel conduct.

IV. NEW CONCENTRATION = NEW RULES

Additional competition rules may start to apply to a company (and its competitors) because of an altered market structure. For example, a number of countries have presumptions/deeming-provisions relating to collective dominance (which might be met because of a merger between third parties). In addition, some countries may have a low presumption for single-firm dominance.[9] There seems to be no international consensus on how a position of collective dominance can be abused (individually or collectively) but what is clear is that conduct which can be taken to target new entrants is very risky.

Companies with material positions in countries with deeming-provisions should consider whether their sector is likely to be an enforcement priority, including because of a realistic prospect of customer complaints. Companies should consider the impact of these laws on their compliance program: pricing, refusal to deal, exclusivity, discrimination, etc.

Companies also need to be alert to the bigger picture. Many countries around the world have "market study" powers, allowing their competition authorities to investigate a sector thoroughly—despite there being no allegation of any individual wrongdoing. These investigations always prove to be time consuming and expensive for companies. They can also lead to outcomes (*e.g.* divestment) which may not be possible under generally applied competition enforcement powers. Companies need to be on guard for suggestions by the competition agency/government or by third parties (customers, suppliers) that the sector is displaying "market failure" symptoms, *e.g.* public restrictions of competition; customer inertia; information asymmetry between customers and suppliers, etc.

V. FREEDOM FROM INVESTIGATION

High(er) concentration gives rise to a greater vulnerability to complaints and investigation. This is not a reason to be over-cautious. But additional legal checks and balances may preserve a company's commercial freedom and freedom from investigation.

Arranging a brainstorm with the company's antitrust team on where enhanced risks may lie and what mitigation steps can be put in place is a sensible move. Some of the outcomes may be simple and yet avoid unnecessary pain in the future. For example, companies need to get the terminology straight: how should internal documentation (a major part of every investigation these days) describe the company's market position in a way that is accurate but will not need justification in another context? Deeper thinking will need to take place about how compliance efforts should change to address some of the areas outlined above.

Internal procedures are also crucial. Companies in newly concentrated markets should enhance internal processes so that any escalated complaints are reviewed by the company's legal department early. Some complaints should raise serious red flags, *e.g.* failure to bid or discrimination to prevent market entry.

The company's legal department may also want to consider whether to carry out a post-

9 Germany, China, Russia, Indonesia, Taiwan and Vietnam have deeming-provisions for collective dominance. Brazil is an example of a major jurisdiction with a relatively low market share presumption of singe firm dominance (20 percent).

merger "health check." It is notoriously difficult to spot the most serious antitrust violations as part of due diligence but an intensive audit after a deal has closed can help identify areas for follow up (whether with the seller or a competition authority).

Looking ahead, another consideration for a company in a highly concentrated market is that there may be more consolidation to come. From a merger control perspective, there may be an advantage in being the first to move—before the agencies decide that enough concentration is enough.

MULTISIDED PLATFORMS, DYNAMIC COMPETITION AND THE ASSESSMENT OF MARKET POWER FOR INTERNET-BASED FIRMS

DAVID S. EVANS[1]

I. INTRODUCTION AND SUMMARY

Many online businesses operate multi-sided platforms that help different types of participants get together and enter into value-increasing exchanges. Facebook, for example, makes it possible for friends, businesses, advertisers and developers to interact with each other. This business model has ancient roots going back at least as far as the village matchmaker. Many traditional businesses, such as newspapers and shopping malls, use this model. New technologies, particularly mobile and the cloud, however, have turbocharged the multi-sided platform business model. Online platform businesses are forming at a rapid clip and disrupting not only traditional industries but relatively new ones as well.[2]

Online multi-sided platforms pose a challenge for competition policy analysis. Some have become large national or global enterprises quickly. Competition authorities are, quite properly, vigilant about making sure that these successful firms adhere to sound competition-law principles. In making economically reliable assessments,

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2 See David S. Evans and Richard Schmalensee, *Matchmakers: The New Economics of Multisided Platforms* (Boston, MA: Harvard Business School Press, 2016) Available at Matchmakers.

however, competition authorities, as well as courts, should account for three features of these online platforms that set them apart from many other businesses in evaluating the market power held by these platforms.

First, the demands by the different groups of participants served by multi-sided platforms are interdependent. As a simple mathematical matter, that interdependency renders standard formulas wrong, at least without significant modifications.[3] In particular, a price increase, or quality decrease, to one group of participants reduces the demand not only by that group but also by the other groups who then have fewer participants with which to interact. That does not mean that an online platform could not have market power, only that the analysis needs to consider these interdependencies and the resulting feedback effects.

Second, many online businesses make the platform "free" to one group of participants, or even subsidize those participants, and earn profits from the other groups of participants who they do charge.[4] Although the basic concepts of competition policy analysis apply to free prices, many of the traditional tools used for competition policy analysis, such as the SSNIP test, do not work, without significant modification, as a straightforward mathematical matter. Most importantly, the existence of a group of customers who are served for free highlights the importance of considering the other interdependent sides in assessing market power. The platform is ordinarily making participation "free" for a group because that group is very important for attracting paid participants. Anything that deters "free" users from participating—such as a decrease in quality—also reduces the incentives for the paid users from participating as well.

Third, online platforms often engage in constant incremental innovation as they seek to obtain advantages over rivals to attract participants on multiple sides and are subject to episodic, but increasingly frequent, disruptive innovation in which new, or seemingly different, firms attract their customers away. This dynamic competition is particularly important for "attention" platforms for which competition is designed to attract the attention of users, which is then resold to marketers, including advertisers, who want to persuade those users to buy things. An attention seeker is under constant threat that someone will come up with an entirely clever new way to grab people's attention. For competition policy analysis, this means that market power analysis needs to consider the constraints imposed by dynamic competition and in new products and services that may appear very different than the firm under investigation.

Courts and competition authorities have come to recognize these points as they have had the chance to analyze online platforms and absorb the teachings of the new economic literature on multi-sided platforms. Although it did not involve online businesses, the European Court of Justice recognized that the analysis of competitive effects, and therefore implicitly the exercise of market power, needed to consider the linkages between the separate sides of multi-sided platforms.[5] The Chinese Supreme People's Court concluded that dynamic competition among platform businesses, including one seeking and selling attention, limited market power.[6] Antitrust regulators, including those in the European Union and United States, approved Microsoft's acquisition of Skype and Facebook's acquisition of WhatsApp because they recognized how fluid market boundaries and dynamic competition would discipline the market power of the merged entities.[7]

3 See David S. Evans, "The Consensus among Economists on Multisided Platforms and Its Implications for Excluding Evidence That Ignores It," *Competition Policy International,* April 13, 2013. Available at http://ssrn.com/abstract=2249817 or http://dx.doi.org/10.2139/ssrn.2249817

4 See Evans and Schmalensee, *Matchmakers*, Table 2.1, and the detailed discussion in Chapter 7.

5 *Groupement des cartes bancaires v. European Commission*, Judgement of the Court, September 11, 2014, available at: http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d0f130d57c17cb5e4cdc4d5f8196c74dd814db12.e34KaxiLc3eQc40LaxqMbN4Oc3iSe0?text=&docid=157516&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=293160; Federic Pradelles and Andreas Scordamaglia-Tousis, "The Two Sides of the Cartes Bancaires Ruling: Assessment of the Two-Sided Nature of Card Payment Systems Under Article 101(1) TFEU and Full Judicial Scrutiny of Underlying Economic Analysis," *Competition Policy International Journal,* Autumn 2014, Volume 10 Number 2.

6 David Evans and Vanessa Zhang, "Quhoo 360 v Tencent: First Antitrust Decision by the Supreme Court," October 21, 2014, https://www.competitionpolicyinternational.com/qihoo-360-v-tencent-first-antitrust-decision-by-the-supreme-court.

7 *Case No Comp/M.6281 - Microsoft/Skype*, Office of the Publications of the European Union, July 20,

None of these judgments or decisions suggests that competition authorities should let their guard down when it comes to online platforms. Taken together, however, with the new economics of multi-sided platforms and the growing body of evidence on the dynamics of online competition over the last two decades, these judgments and decisions do indicate that courts and competition authorities should exercise caution, and adjust their tools, in analyzing market power for online platforms.

This paper describes the new economics of multi-sided platforms in Section II. Then it shows in Section III how new technologies have turbocharged this business model and led to online mobile platforms anchored by websites and mobile apps. Section IV examines the implications of the online multi-sided platform business model for the analysis of market power for attention seekers. Section V offers some concluding observations.

II. THE NEW ECONOMICS OF MULTI-SIDED PLATFORMS

Although multi-sided platforms have ancient roots economists came to understand them as an important and distinct type of businesses in 2000 when a now classic paper by Rochet and Tirole began circulating.[8] Soon after, economists began exploring the implications of the new economics of multi-sided platforms for antitrust issues.[9] As this work has become mainstream, courts and competition authorities have gradually absorbed the new learning and applied it to cases.

A. Fundamentals of Multi-Sided Platforms

A multi-sided platform is called "multi" because it provides a way for two, or more, types of participants to get together. It is called a "platform" because it typically operates a physical or virtual place that enables these different types of agents to interact. Each "side" of the platform consists of the participants who have the option of using the platform to connect. A shopping mall is a physical platform. It provides a place where shoppers and stores—the participants on the two sides—can connect. A ride-sharing app is a virtual platform. It uses cloud-based software, accessed through Internet-connected mobile phones, to match up drivers and passengers who are the participants on the two sides.

Multi-sided platforms typically reduce frictions that get in the way of economic agents finding each other, interacting and exchanging value on their own. Buyers and sellers, for example, could find each other in a variety of ways. A marketplace, such as Flipkart in India, makes it easier for them to find each other through posting tools for sellers and search tools for buyers. It also makes it easier for them to engage in a transaction through the use of electronic payment methods and with confidence through Flipkart's Replacement Guarantees and Seller Protection Fund.[10] Multi-sided platforms also create value by increasing the odds that participants will find counterparties that generate value for value. An online dating site, such as eHarmony, secures many women and men thereby increasing the likelihood that people will find someone they would like to date and perhaps even marry.

Multi-sided platforms face a chicken-and-egg problem when they start as a result of what they are trying to accomplish. Consider a platform that is in the business of getting Type As together with Type Bs. Type As may not want to consider the platform unless they know it has attracted Type Bs, but Type Bs may not want to consider the platform unless they know it has attracted Type As. The platform has to figure out a way to get both types of participants on board, in sufficient numbers, to provide value to either. When YouTube started, it had trouble persuading people to upload videos since no one was coming to the site to watch them and trouble persuading people to come to the site to view videos since there were few videos to watch.[11]

2011, http://ec.europa.eu/competition/mergers/cases/decisions/m6281_924_2.pdf and *Case No COMP/M.7217 – Facebook/WhatsApp*, Office of the Publications of the European Union, March 10, 2014, http://ec.europa.eu/competition/mergers/cases/decisions/m7217_20141003_20310_3962132_EN.pdf.

8 Jean-Charles Rochet & Jean Tirole (2001) "Platform Competition in Two Sided Markets," Working Paper, November 26, 2001. An earlier version was in circulation in 2000.

9 David Evans, "The Antitrust Economics of Two-Sided Markets," *Yale Journal of Regulation,* Summer 2003, http://ssrn.com/abstract=363160.

10 Flipkart, "Returns and Cancellations" available at http://www.flipkart.com/s/help/cancellation-returns; Flipkart, "Seller Hub: Getting Started" available at https://seller.flipkart.com/slp/faqs.

11 For a detailed discussion of how they solved this problem see Evans and Schmalensee, *Matchmakers*,

Typically, Type As value a platform if it has more Type Bs and vice versa.[12] There are, in economic terminology, positive indirect network effects and positive feedback effects. A platform that gets more Type As becomes more attractive to more Type Bs, which in turn makes it more attractive to more Type As, and so forth. These positive feedback effects drive platform growth. YouTube persuaded more people to upload videos, more people came to watch those videos, which got people more interested in uploading videos, and that in turn attracted more traffic to the site.[13]

Positive indirect network effects can give bigger platforms economic advantages. These are often limited in practice, however, by platform congestion, or other diseconomies of scale and by platforms differentiating themselves on one or more sides. In most countries, there are several competing payment card networks despite the positive feedback effects between cardholders accepting merchants and despite scale economies in operating the network. Mobile money platforms—where mobile phones are used to send and receive money and provide other financial services—are evolving in the same way. More than 20 mobile wallet providers have started in India.[14] Based on the experience of countries in Africa, where the mobile money markets are more mature, we would expect that, in the long run, the market will have several competing providers.[15]

Multi-sided platforms differ fundamentally from the traditional firms described in economic textbooks and business school courses. Traditional firms typically buy inputs, they make products and they sell those products to customers. They operate along linear supply chains. And since they do not have customers with interdependent demands, they are single-sided. Multisided platforms sell participants in each group access to the participants in each other group. As a result, the customers are the main inputs into providing the platform service. A typical retail store, which is a single-sided firm, buys products from wholesale distributors or manufacturers and then sells them to customers. A shopping mall, which is a two-sided firm, recruits stores for its mall, and recruits shoppers to come to its mall, and provides a platform where the stores get access to the shoppers and the shoppers get access to the stores.

B. Pricing Structures and Strategies

The fact that the demand for one group depends on the demand by the other group has interesting implications for how multisided platforms price their services. Platforms have to choose prices that balance these demands. Higher prices for Type As would discourage them from participating in the platform. That would deter Type Bs from participating in the platform since they would have access to fewer Type A participants. In fact, it may make sense to price very low to one group of participants because the other group will pay a high price for access to them. That, in fact, is the secret behind advertising-supported media as we show below.

It could even make sense to subsidize one group by charging them a price less than the incremental cost of serving them, including letting them use the platform for free, or even giving them rewards for participating. Economists have shown that, as a matter of theory, platforms may be able to maximize profits by subsidizing one side of the platform in this way and that many platforms have done just that.[16] A popular restaurant reservation site in the U.S., OpenTable, does not charge people to make reservations with its site and it gives them rewards that they apply to reduce the cost of their meals. Although "free" is popular for online platforms, it is by no means universal. Dating sites, such as Trulymadly in India and FarmersOnly.com in the U.S., charge men and women the same. They contrast with nightclubs which, in the U.S., have "Ladies Night Free" pricing.

C. Advertising-Supported Platforms

Some multi-sided platforms connect consumers and advertisers. This might seem odd since in

Chapter 5.

12 As we discuss below ad-supported platforms may have positive externalities in one direction—advertising value more viewers but viewers may not value more advertising.

13 Importantly, positive feedback effects work in reverse as we discuss below. The loss of users on one side leads to losses of users on the other side and so on. Positive feedback effects in reverse can result in a death spiral.

14 See, http://letstalkpayments.com/wallet-wars-in-india-intensifies-with-uber-and-others-being-the-battlefield/

15 See GSMA, *State of the Industry: Mobile Financial Services for the Unbanked: 2014*. Available at *http://www.gsma.com/mobilefordevelopment/wp-content/uploads/2015/03/SOTIR_2014.pdf*

16 See Evans and Schmalensee, *Matchmakers*, Table 2.1.

many cases consumers do not like advertising. They even spend money to avoid it by buying DVRs that make it easy to skip over ads and paying for alternative sources of media, such as Pay TV, or ad-free versions of services, such as Spotify Premium.

These platforms, however, have figured out ways to connect consumers and advertisers in ways that make both groups better off. They typically offer valuable content to persuade consumers to come of their platforms where these consumers are exposed to advertising messages. Meanwhile they persuade advertisers to pay for reaching these consumers. The viewers are the subsidy side of the platform and the advertisers are the money side. So long as the advertisers are willing to pay more for delivering messages to these consumers than the platform spends on content the advertisers benefit, the consumers benefit and the platform makes money.[17]

One can think of ad-supported platforms as buying eyeballs—usually by paying with valuable content—and selling those eyeballs to advertisers. The Internet has made that far easier as we see next.

III. ONLINE MULTI-SIDED PLATFORMS

Online platforms have become more common and prominent participants in domestic economies, and some have rapidly become global players. Many of these online platforms provide free content or services to people to attract their "attention" and then charge advertisers for delivering messages to these people. These attention seekers engage in dynamic competition in which they are constantly introducing new ways of attracting attention, and copying methods used by others, to persuade people to come to their platforms. Smart mobile phones have accelerated the pace of dynamic competition, the frequency of disruptive innovation, for online platforms.

17 In fact this advertising supported media is a clever way of solving the following exchange problem. Rahul would pay $20 to meet Aditya. Aditya doesn't like Rahul and would pay $5 to avoid him. Still there is room for trade and an intermediary can make Aditya and Rahul both better off. The intermediary pays Aditya $12 to meet Rahul and charges Rahul $14 for the introduction. Aditya is ahead $7 (-$5+$12), Rahul is ahead $6 ($20-$14), and intermediary earns a profit of $2 (-$12+$14). In the case of advertising, instead of paying $14, the media property provides entertainment or other content that Aditya values at $14.

A. The Technology Revolutions Behind Online Platforms

Several mutually reinforcing technologies, and the businesses the make those technologies available, have made multi-sided platforms increasingly powerful methods for reducing frictions and creating valuable new services, on a global basis.

1. The PC-Web-Browser Revolution

The first wave of innovation launched the web-economy in the mid-1990s. The Internet provided a physical network and standards for connecting computers around the world, the Web provided a framework and software technologies for creating and linking content on those computers, and the web browser provided an application for personal computers that enabled people to consume Web content.

Businesses could use these technologies to provide content and services on websites. The cost of doing so was relatively low since it involved writing software, using server computers and the small fees for connecting to the Internet. And the company could reach an entire country immediately and much of the world. Almost all the content, data and processing work resided in the cloud and consumers accessed it through using a browser on their Internet-connected personal computers.

The number of web-based businesses and Internet traffic exploded following the launch of the commercial Internet in the 1990s. A number of global online platforms emerged such as Amazon, eBay, Facebook, Google, PayPal and Yahoo. This growth was made possible by the development and expansion of increasingly fast broadband delivered over fixed wires such as coaxial cable, fiber optic line or even a copper wire.

2. The Mobile-App Revolution

Mobile phones were in widespread use in the U.S. and other countries by the late 1990s. Cellular networks, however, were not able to carry enough data fast enough for people to use the Internet from their mobile phones. Innovations in cellular technology starting in the mid-1990s increased the potential capacity and speed of cellular networks and mobile devices for making better use of these faster more capacious broadband technologies. Anticipating

the roll out of mobile broadband, a number of companies started investing in developing various components of smart phones, including modem and processing chips, operating systems and handsets in the early to mid-2000s.

Innovations by Apple and Google, in particular, have led to the spread of smart mobile phones around the world, enabling billions of people to consumer Internet-based services and millions of businesses to provide mobile-app based services to them. Apple introduced the iPhone, which consisted of a powerful computer, a mobile operating system and a standard set of applications including a mobile browser in June 2007. Google invested in developing a mobile operating system, Android, which it ran as an open-source project, and developing and organizing an ecosystem of handset makers, mobile network operators and other technology partners. It introduced the first Android phone in October 2008.[18] Apple and Google also stimulated the production of mobile apps by providing software tools for developing apps for their operating systems, creating a quality certification process for these apps and creating "app stores" that provided centralized places for developers to distribute apps and for users to download them on their mobile devices.

Smart mobile phones changed the online game in a number of ways. As they became widely adopted, millions of apps became available for them and faster and more capacious mobile broadband networks were rolled out around the world. People could access the Internet anywhere and anytime using smartphones running on mobile broadband networks. More people could do that because mobile phones and data plans were much cheaper than buying PCs and fixed broadband connections. Businesses could reach billions of people by developing mobile apps and distributing them in apps stores. Apps could exploit the GPS capabilities of phones, which make it possible to know where individuals are in physical space. This, together with the related development of the "Internet of Things" is leading to the deep integration of the online and physical worlds.

3. The Movement from PCs/Browsers to Mobile/Apps

Businesses that want to provide online services, and consumers who want to consume online services now have several choices. App developers can develop websites that people can visit from browsers on their PCs or from their mobile devices. They can develop mobile apps that people use on their mobile phones or mobile browser-apps that try to mimic these apps. Different businesses have adopted different approaches depending on the content and services they provide. Consumers have, however, shifted their use dramatically from PCs to mobile devices and from using websites to using apps.

In the U.S. between 2008 and 2015, the proportion of time spent online using mobile devices increased from 12.7 percent to 54.6 percent. Commerce has moved dramatically from PCs to mobile. Americans made 57 percent of their online purchases from mobile devices in 2014 compared with likely none before 2010.[19] On Thanksgiving Day, November 26, 2015, around 60 percent of U.S. website visits were made from mobile devices in the U.S.[20] Advertising has moved to mobile in response. Facebook earned 78 percent of its global advertising revenue from mobile in 2015Q3[21] compared with 14 percent in 2012Q3.[22] These trends are expected to continue.[23]

On mobile devices people typically access Internet-based services using mobile apps rather than using websites with their mobile browser. Mobile apps accounted for nearly 90 percent of the time Americans spend using either mobile apps or browsers on their mobile devices.[24] As a

18 Kent German, "A Brief History of Android phones," August 2, 2011, http://www.cnet.com/news/a-brief-history-of-android-phones/.

19 David Murphy, "IBM: Christmas Day Sales Up 8.3 Percent, Mobile Purchases up 20.4 Percent," PC Magazine, December 26, 2014, http://www.pcmag.com/article2/0,2817,2474217,00.asp.

20 Hiroko Tabuchi, "Black Friday Shopping Shifts Online as Stores See Less Foot Traffic," *New York Times*, November 27, 2015, http://www.nytimes.com/2015/11/28/business/black-friday-shopping-shifts-online-as-stores-see-less-foot-traffic.html?_r=0.

21 Facebook Inc., "10-Q for Period Ending September 30, 2015," p. 40.

22 Facebook Inc., "10-Q for Period Ending September 30, 2012," p. 27.

23 Chantal Tode, "M-Commerce Sales to Reach $142B in 2016: Forrester," Mobile Commerce Daily, October 8, 2015, http://www.mobilecommercedaily.com/mcommerce-sales-to-reach-142b-in-2016-forrester; Matthew Hobbs, "Internet Advertising," 2015, http://www.pwc.com/gx/en/industries/entertainment-media/outlook/segment-insights/internet-advertising.html.

24 Simon Khalaf, "Seven Years into the Mobile Revolution: Content is King … Again," Flurry Insights,

result, the proportion of time people spend online using mobile apps has increased from what was likely a very low level in 2008 to 54 percent in 2015.[25] This share is likely to increase further as the shift from PCs to mobile continues and as the shift from browser-based to mobile app-based delivery continues.[26]

Many countries have had low penetration of PCs and fixed broadband because of their early stages of economic development. The adoption of smart mobile phone and mobile broadband are increasing rapidly in those countries because it is cheaper, and even more rapidly in the faster growing ones. More than 90 percent of Facebook's Indian users[27] and 60 percent of Amazon's Indian users[28] access it through mobile devices. In 2014, leading Indian e-commerce companies, including Flipkart and Snapdeal, derived the majority of their gross merchandise value from mobile devices.[29]

A. Overview of Online Multi-Sided Platforms

The development of online technologies has made it cheaper and easier to reduce frictions through multi-sided platforms and to do so over large geographic areas. The Internet makes it possible to connect participants over wide geographic areas and in principle from around the world. Software programs running on high-speed computers in the cloud provide powerful technologies for finding good matches and consummating exchanges. Mobile has extended these capabilities throughout the day and throughout physical space.

Almost immediately after web commerce became viable in the mid-1990s, entrepreneurs started using the new technologies to start multi-sided platforms. Not everyone chose a multi-sided model. Amazon, for example, started with a typical retail model in which it bought wholesale products, initially books, and sold them to people through its online store. Many, though, used a multi-sided approach often because it was the only way to provide the product or service. eBay started an online marketplace for buyers and sellers, Match.com started an online matchmaker for men and women and Yahoo started an online portal that used content to attract viewers and then attracted advertisers who wanted to reach those views.

Many of the established platforms followed the shift from the PC-browser-centric model to the mobile-app centric model. Entrepreneurs, however, discovered that the mobile-app centric model provided new opportunities. Uber, for example, has built a business that connects drivers and riders in real-time and in physical space using mobile apps.

Tables 1 and 2 provide an overview of online multi-sided platforms based on their presence in the U.S., which reflects global platforms, and India, which reflects domestic platforms and global ones. In each country we have selected 20 platforms. We include the largest ones based on the number of times over the space of a month people clicked on pages on those sites ("pageviews"). That is a particularly useful measure for content-oriented sites. We have erred on the side of showing diversity of online platforms and the table is not intended to be an accurate summary of the economically most important online platforms. In each case we summarize the multi-sided business model and the extent to which one side receives service for free.

As these tables show online platforms are highly diverse. However, they often have several of

August 26, 2015, http://flurrymobile.tumblr.com/post/127638842745/seven-years-into-the-mobile-revolution-content-is; https://www.comscore.com/Insights/Presentations-and-Whitepapers/2015/The-2015-US-Mobile-App-Report.

25 comScore, "The 2015 U.S. Mobile App Report," September 22, 2015, https://www.comscore.com/Insights/Presentations-and-Whitepapers/2015/The-2015-US-Mobile-App-Report.

26 Total time spent on digital media using mobile apps increased at a compound annual growth rate of 38 percent per year between 2013 and 2015, compared to 7 percent for desktops and 24 percent for mobile browsing. The share for mobile apps increased from 43 percent to 54 percent over this period, an increase of 11 percentage points, or a compound annual growth rate of 12 percent. Data are not available back to 2008.

27 BGR, "90% of Facebook's 132 million users from India come from mobile phones," September 27, 2015, available at http://www.bgr.in/news/90-of-facebooks-132-million-users-from-india-come-from-mobile-phones/

28 Ashwini Gangal, "'Over 60 per cent of our traffic comes through mobile': Manish Kalra, Amazon India," August 28, 2015, http://www.afaqs.com/interviews/index.html?id=469_Over-60-per-cent-of-our-traffic-comes-through-mobile-Manish-Kalra-Amazon-India

29 BGR, "Smartphone shopping to contribute up to 70 percent of total revenue in online shopping: Experts," November 30, 2014, available at http://www.bgr.in/news/smartphone-shopping-to-contribute-up-to-70-percent-of-total-revenue-in-online-shopping-experts/.

Table 1: Summary of Most Frequented Platforms in the US

Webpage	Category	Page Views in November 2015	Free participants	Paid participants
FACEBOOK.COM	Social Media - Social Networking, Social Media	122,298,603	People and many app developers	Advertisers and some app developers
GOOGLE.COM	Search/Navigation	75,325,987	Searchers and websites	Advertisers
YOUTUBE.COM	Entertainment - Multimedia, Entertainment	38,899,360	Video uploaders and viewers	Advertisers
YAHOO.COM	Portals	25,612,235	Viewers	Advertisers
AMAZON.COM	Retail	11,490,679	Buyers do not pay Amazon MarketPlace	Sellers pay Amazon for sales and advertising
BING.COM	Search/Navigation	9,080,541	Searchers and websites	Advertisers
CRAIGSLIST.ORG	Directories/Resources - Classifieds, Directories/Resources	8,964,010	Viewers and many listers of ads	Certain categories of listers for ads
MSN.COM	Portals	8,483,598	Viewers	Advertisers
EBAY.COM	Retail	6,197,320	Buyers do not pay eBay	Sellers pay eBay for sales and advertising
AOL.COM	Portals	5,363,234	Viewers	Advertisers
ESPN.COM	Sports	3,492,807	None	Viewers pay and advertisers pay
SWAGBUCKS.COM	Services - Coupons, Services	3,131,420	People	Advertisers/marketers
LINKEDIN.COM	Social Media - Social Networking, Social Media	2,722,905	People for basic service	Advertisers and people for premium service
PAYPAL.COM	Business/Finance - Personal Finance, Business/Finance	2,043,564	Receivers of funds	Senders of funds
GROUPON.COM	Services - Coupons, Services	1,966,864	People do not pay Groupon	Groupon is paid by businesses for marketing and advertising services
IMGUR.COM	Social Media	1,892,345	Uploaders of pictures and viewers of them	Advertisers
ANSWERS.COM	Directories/Resources - Reference, Directories/Resources	1,881,808	People looking for information	Advertisers
TWITTER.COM	Social Media - Social Networking, Social Media	1,675,644	People who send and read tweets	Advertisers
INDEED.COM	Career Services and Development - Career Resources, Career Services and Development	1,406,674	People looking for jobs	Employers advertising jobs
CNN.COM	News/Information - General News, News/Information	1,362,865	Viewers	Advertisers

Source: comScore

the following features that are relevant for antitrust analysis. First, they are all based on software. They can add new features and introduce new products and services, by modifying or adding software code and related databases. That is much different than physical platforms. Second, the marginal cost of participants to software-based platforms running in the cloud is virtually zero. That increases the normal tendency of multi-sided platforms to allow a group of participants to use the platform for free. Third, dynamic competition is more intense for online platforms because technological change has reduced the capital cost of starting a platform and the software-based nature of these platforms makes it easier for platforms to offer new products and services in competition with other platforms.[30] Fourth, dynamic competition is also more intense for online platforms because the participants have lower switching costs, and face less lock-in, than on physical platforms where they often have to make costly sunk-cost commitments to the platform. Fifth, online platforms are in the midst of a massive technological shift resulting from the move of consumers from the PC-browser to the mobile-app centric way of using online services.[31] These points are especially true one of the largest categories on online platforms.

C. Online Attention Seekers

30 *Case No Comp/M.6281 - Microsoft/Skype*, Office of the Publications of the European Union, July 20, 2011, http://ec.europa.eu/competition/mergers/cases/decisions/m6281_924_2.pdf ; "FTC Notifies Facebook, WhatsApp of Privacy Obligations in Light of Proposed Acquisition," *Federal Trade Commission*, April 10, 2014, https://www.ftc.gov/news-events/press-releases/2014/04/ftc-notifies-facebook-whatsapp-privacy-obligations-light-proposed; and *Case No COMP/M.7217 – Facebook/WhatsApp*, Office of the Publications of the European Union, March 10, 2014, http://ec.europa.eu/competition/mergers/cases/decisions/m7217_20141003_20310_3962132_EN.pdf.

31 See Hemant Bhargava, David S. Evans and Deepa Mani, "The Move to Smart Mobile and its Implications for Antitrust Analysis of Online Market In Developed and Developing Countries," Forthcoming.

Table 2: Summary of Most Frequented Platforms in India

Company	Category	Free participants	Paid participants
Google.com	Search/Navigation	Searchers and websites	Advertisers
Facebook.com	Social Media - Social Networking, Social Media	People and many app developers	Advertisers and some app developers
Youtube.com	Entertainment - Multimedia, Entertainment	Video uploaders and viewers	Advertisers
Amazon.com	Retail	Buyers do not pay Amazon MarketPlace	Sellers pay Amazon for sales and advertising
Yahoo.com	Portals	Viewers	Advertisers
Flipkart.com	Retail	Buyers do not pay Flipkart MarketPlace	Sellers pay Flipkart for sales and advertising
Indiatimes.com	News/Information - General News, News/Information	Viewers	Advertisers
Linkedin.com	Social Media - Social Networking, Social Media	People for basic service	Advertisers and people for premium service
Twitter.com	Social Media - Social Networking, Social Media	People who send and read tweets	Advertisers
Snapdeal.com	Retail	Buyers do not pay Snapdeal MarketPlace	Sellers pay Snapdeal for sales and advertising
Stackoverflow.com	Q&A Website	People looking for information related to computer programming	Advertisers
Ebay.in	Retail	Buyers do not pay eBay	Sellers pay eBay for sales and advertising
Ndtv.com	News/Information - General News, News/Information	Viewers	Advertisers
Jabong.com	Retail	Buyers do not pay Jabong MarketPlace	Sellers pay Jabong for sales and advertising
Rediff.com	Portals	Viewers	Advertisers
Quikr.com	Directories/Resources - Classifieds, Directori	Viewers and many listers of ads	Certain categories of listers for ads
Naukri.com	Employment Recruiting	People for basic service	Advertisers and people for premium service
Pinterest.com	Social Media - Social Networking, Social Media	Viewers	Advertisers
imdb.com	Entertainment - Movies, Entertainment	Viewers	Advertisers
shopclues.com	Retail	Buyers do not pay Shopclues MarketPlace	Sellers pay Shopclues for sales and advertising

Source: http://www.alexa.com/

At is has turned out, many online platforms make money primarily by helping businesses sell things to consumers through advertising and marketing.[32] As we discussed above, the way they do this is simple but clever. They provide reasons for consumers to come visit them by offering engaging content or services valued by consumers. Consumers typically do not pay for obtaining the content or services. They are free in that sense. But consumers are receiving value by coming to these platforms. In that sense the real price of participating in the platform is even better than free, it is negative, so that platform is paying consumers to come visit. Once they have gotten consumers to spend time of the platform they allow businesses to present advertising or other marketing messages to consumers. They charge businesses for this and that is how they cover their costs and make profits.

Online attention seekers compete to get the attention of consumers and then sell portions of that attention to businesses that aren't able to get it easily on their own. They seldom make any money directly from providing content or services to consumers. Recognizing this is important for understanding the dynamics of competition. Entrepreneurs compete to come up with clever ideas for attracting eyeballs—say by inventing tweeting or pinning—not so they can charge people for clever content or services they are providing but so they can sell access to those eyeballs to advertisers. Attention seekers may come up with ways to differentiate themselves from the standpoint of attracting consumer attention and selling advertising. But overall they are competing to attract a limited pool of attention and advertising and marketing budgets to reach those consumers.

32 David Evans, "Attention Rivalry Among Online Platforms," Journal of Competition Law & Economics, May 14, 2013, Volume 9 Issue 2:313-357, http://jcle.oxfordjournals.org/content/9/2/313.abstract.

Now consider the five features that we highlighted above.

Attention seekers are all built on software platforms. They do not have printing presses, cable networks or radio towers. When they want to add features to the platforms they hire software engineers to write code. They can often make changes quickly and roll those changes out globally. It took about 5 months, for example, for Facebook to develop Facebook Messenger which is one of the leading apps for smartphones.[33]

The marginal cost of another participant on an attention seeker is essentially zero. Google does not incur any significant out of pocket cost when a person conducts another search or when it puts another search ad on a search results page. That is true for virtually all attention seekers with the exception of some, such as Pandora, which have to pay for the content they deliver.

The capital cost of starting an attention seeker is low and that has intensified dynamic competition. That is more so true now as a result of mobile apps. The founders of WhatsApp had to write software code so that messaging app would work for Apple and Android phones and for the cloud-based service those apps were connected with.[34] Once they did that they had a platform that could provide messaging services globally to an unlimited number of users with the addition of some cheap server capacity. Many other mobile messaging apps have started. They compete with older messaging PC-based messaging apps as well as the new mobile-based ones.

It is easy for consumers to reduce the amount of attention they provide one platform, or drop it altogether, and increase the amount of attention they provide another platform. Since the platforms are free they can use as many as they want and switch their attention depending upon the relative attractiveness to spending time on one or the other. The consumer bears no cost from shifting time from looking at Yahoo to looking at Flipboard. While some online platforms involve some cost of switching in practice it does not limit people from doing so. In the case of social networks, Americans switched from Friendster to MySpace and then from MySpace to Facebook.[35] People in other countries, such as Brazil and India, switched from Orkut to Facebook.[36]

Finally, the shift of consumers from looking at websites with their browsers to using apps on their mobile phones has resulted in dramatic changes in attention seeking platforms. There has been a dramatic increase in the amount of online attention available as a result of people being able to go online with their mobile devices for much more of the day. The opportunities for connecting businesses with consumers have also changed now that people carry mobile phones all the time and in particular when they go shopping. Search is one of the attention-seeking businesses that is undergoing disruption as a result of this.[37] Search engines index websites and allow people to find things on those websites. But now an enormous amount of online activity is happening with mobile apps. At this point, it is unclear how people will be able to find app-based content and which companies will ultimately succeed in doing so. Apple, Facebook and Google are among the companies that are trying to figure this out.[38]

What should be clear from the discussion so far is that multi-sided platforms are governed by different rules than traditional linear businesses and that competition among online platforms is often more intense and more dynamic than among physical platforms. Both points have important implications for antitrust analysis.

IV. MARKET POWER ANALYSIS OF ONLINE ATTENTION SEEKERS

Economists typically assume that the

33 Facebook, "Building Facebook Messenger," August 12, 2011, available at https://www.facebook.com/notes/facebook-engineering/building-facebook-messenger/10150259350998920/.

34 One estimate is that it would cost about $250,000 and take about nine months to build a robust version of an app like WhatsApp. See Courtney Boyd Myers, "How much does it cost to build the world's hottest startups?" TNW News, December 2, 2013. Available at http://thenextweb.com/dd/2013/12/02/much-cost-build-worlds-hottest-startups/#gref

35 Evans and Schmalensee, *Matchmakers*, Chapter 9.

36 Elena Trost, *Social Media Marketing in BRIC Countries* (Zurich, Lit Verlag GmbH & Co., 2013), Chapter 3.

37 Erin Griffith, "Facebook, Google and the battle for mobile intent," September 8, 2015, available at http://fortune.com/2015/09/08/facebook-google-mobile-search-advertising/

38 Erin Griffith, "Facebook, Google and the battle for mobile intent," September 8, 2015, available at http://fortune.com/2015/09/08/facebook-google-mobile-search-advertising/

demand for a product depends on the price of that product, the price of substitute products and the price of complementary products. The demand for a particular brand of beer, for example, depends on the price of that brand, the prices of other kinds of beer and other alcoholic beverages and perhaps the demand for nuts, chips and other things that people eat with beer. Most economic theories relied on an antitrust analysis, such as those involving predatory pricing and economic tools, such as SSNIP tests, are based on this model of product demand.

All of those factors are relevant for considering the demand for product and services provided by multi-sided platforms. But those standard factors do not include the most critical factor that drives the demand for platforms. The demand by members of one group of customers, say Type A, depends, roughly speaking, on the participation of the other group of customers, say Type B, in the platform.[39] To avoid being mathematically wrong and unreliable, economic models and tools must account for the interdependent demand and consider all sides of the platforms. The fact that the demands by the various groups of platform participants are interdependent also means that analyses that focus on one group of participants in isolation are not correct as a straightforward mathematical matter.[40]

Antitrust analysis needs to examine the platform overall taking these interdependencies into account.[41] Generally, that requires treating the platform as a whole, rather than focusing on one group of customers or another, or at least carefully considering the inter-linkages between these groups. Platform competition tends to force overall prices down and reduces the profits the platform can earn. Typically, though, it does not force prices down to incremental costs for all, or even any, sides of the platform. Even with competition, platforms may choose to subsidize one side of the platform and make profits for other sides of the platform.

The magazine business, for example, is highly competitive yet most magazines subsidize readers; the cover price for the magazine often does not cover printing and distribution costs let alone the cost of the content that attracts readers. In fact, competition to attract participants to the platform can result in greater subsidies to one side. For example, in the U.S., competition among payment card networks apparently resulted in bidding up payments (called interchange fees) to banks that issue cards to consumers.[42] As a result, evidence that price is greater than incremental cost on one side provides no meaningful evidence that the platform has market power and evidence that the platform charges a price less than marginal cost on another side provides no meaningful evidence that the platform is engaging in predatory pricing. The analyst needs to look at the platform overall to assess market power and predation. In practice, it often makes sense to look at pricing and competition on both sides but then accounting for the interdependencies.

This section applies these general prin-

39 More precisely, platform customers care about the likelihood that they will be able to enter into valuable exchange on the platform; we are using the number of potential trading partners as a short-hand for describing all of the characteristics of one side of the platform that affects the demand by the other side.

40 David Evans and Richard Schmalensee, "The Antitrust Analysis of Multi-Sided Platform Businesses," January 30, 2013, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2185373; Roger Blair and Daniel Sokol, eds., Oxford Handbook on International Antitrust Economics, Oxford University Press, 2015; University of Chicago Institute for Law & Economics Olin Research Paper No. 623. Available at SSRN: http://ssrn.com/abstract=2185373; David Evans, "The Consensus Among Economists on Multisided Platforms and its Implications for Excluding Evidence that Ignores It," *Competition Policy International*, (April 13, 2013). Available at SSRN: http://ssrn.com/abstract=2249817 or http://dx.doi.org/10.2139/ssrn.2249817.

41 In *Cartes Bancaires v. European Commission*, the European Court of Justice concluded that to analyze competitive effects it was necessary to consider the two interlinked sides of the platform. See *Groupement des cartes bancaires v. European Commission*, Judgement of the Court, September 11, 2014. In, *Qihoo 360 v. Tencent*, the Chinese Supreme People's Court found that it was necessary to consider platform competition in evaluating market power. See, David Evans and Vanessa Zhang, "Quhoo 360 v Tencent: First Antitrust Decision by the Supreme Court," October 21, 2014, https://www.competitionpolicyinternational.com/qihoo-360-v-tencent-first-antitrust-decision-by-the-supreme-court; Charles Rivers Associates, "Qihoo v. Tencent: economic analysis of the first Chinese Supreme
Court decision under Anti-Monopoly Law" February 2015, available at http://www.crai.com/sites/default/files/publications/China-Highlights-Qihoo-360-v-Tencent-0215_0.pdf

42 OECD, "Competition and Payment Systems," June 28, 2013, http://www.oecd.org/competition/PaymentSystems2012.pdf.

ciples to the analysis of market power for online attention seekers, which is one of the most important categories of online platforms.

A. Free and Feature Competition

Traditional antitrust analysis assesses market power by considering whether the firm can increase price profitably. That approach does not make any economic or business sense for online attention seekers. The business is based on paying consumers to use the platform and charging advertisers for access to those consumers. An exercise of market power over consumers could involve increasing the price to them but, more likely, would involve reducing the quality of the content and services the platform is providing to attract their attention.[43] Whether that reduction in quality is profitable depends on the extent to which it would decrease the attractiveness of the platform to advertisers. A platform could consider reducing its expenditures on quality improvements by $1 million. Whether this is profitable depends on whether the lower quality would reduce the amount of advertising, given the lower attention it attracts, by less than $1 million.

This highlights the importance of feature and quality competition. Online attention seekers do not compete based on price. Therefore, to assess market power, one needs to assess the extent to which a lower provision of quality would divert attention to other online platforms. In considering that diversion there is no business or economic reason to limit the inquiry to online platforms that provide the same service. It is an empirical question whether consumers would turn their attention to completely different services.

In practice market power analysis for online attention seekers can consider substitution possibilities by considering a small but significant increase in price or a small but significant decrease in quality. Either one reduces the value of the platform for users and could induce switching. The SSNIP, however, must consider small absolute increase in price since a percentage increase is undefined when the initial price is zero. The Chinese Supreme People's Court, in *Qihoo 360 v. Tencent*, decided that the SSNIP evidence was not relevant and considered informally how consumers would react to small but significant decreases in quality ("SSNDQ") of the instant message products under consideration.[44]

Since attention makers make virtually all of the revenue and profit from advertisers, the other issue concerning market power is whether they can take actions that increase the price of advertising above competitive level. The analysis of that question needs to consider the extent to which advertisers can get the attention of consumers in other ways and the extent to which the online platform offers some consumer attention, perhaps based on demographic profiles or the context in which they've captured that attention, for which there are limited substitutes.

Free pricing, however, shouldn't be analyzed in isolation. In fact, the existence of consumers being offered something for nothing is almost always an indication that the business is a multi-sided platform. That means that the demand by consumers on the "paid side" is linked to the demand by consumers on the "free side" to the demand. The SSNIP and SSDNQ analyses should account for the interdependencies of demand for taking a holistic approach, and considering the platform overall, or by carefully considering the linkages in demand and their implications for competitive constraints.

B. New Entry, Cross-Category Entry and Feature Competition

Market power analysis needs to consider the ease of entry and of feature competition for online attention seekers. As discussed above, the capital cost of entry for online attention seekers is low. The main difficulty is attracting consumers to the platform with persuasive content and services. Importantly, though, the analysis needs to at least consider the impact on the platform of entry by completely different services. For example, suppose Facebook reduced its investment in the quality of its social networking platform. It could lose advertising revenue in part because that increases the likelihood that consumers will more likely to shift attention to "the next new thing"—not necessarily to a social network—and that will cost the company advertising revenues. In addition, market power analysis needs to consider

43 The decision by online attention seekers to charge fees is quite rare even for ones that are highly successful. Some online newspapers have tried paywalls with mixed success.

44 See, David Evans and Vanessa Zhang, "Quhoo 360 v Tencent: First Antitrust Decision by the Supreme Court," October 21, 2014, https://www.competitionpolicyinternational.com/qihoo-360-v-tencent-first-antitrust-decision-by-the-supreme-court.

entry from other categories. Because it is easy to change features through software online attention seekers can add features that mimic those of other very different attention seekers. Twitter and Pinterest have both recently introduced "buy buttons" that help businesses make sales on their platforms, like Amazon Marketplace, in addition to just advertising to those consumers. That feature competition is an example of dynamic competition which we turn to next.

C. Dynamic Competition

Dynamic competition has characterized online attention seekers for the last twenty years and shows no signs of abating. Attention seekers have no guarantee that they can hold onto consumers without engaging in persistent incremental feature and disruptive innovation. We see this in a variety of ways.

First, the relative importance of attention seekers changes dramatically over time.[45] Table 3 shows the 20 largest advertising-supported attention seekers by time spent on the webpage in 2002, 2007 and 2012. Pinterest (8) is a U.S. advertising-supported webpage, that users spent the most time visiting during September 2012, did not exist in September 2007, while several webpages were in the early stages of development including Facebook (1), Youtube (2), The Huffington Post (9) and Tumblr (10). This illustrates how quickly and dramatically the landscape for online advertising can change.

Second, successful attention seekers have declined and in some cases failed when they have not kept up, while new ones have risen quickly. Orkut was the dominant social networking site between 2005 and 2010 in India.[46] Facebook overtook it in July 2010.[47] MySpace had a similar experience in the U.S. where it was the largest between 2005 and 2009 and also displaced by Facebook.[48] Yahoo was a highly successful attention seeker for many years. While it still attracts a large number of pageviews, the market value of the portion of advertising-supported business is negligible according to various reports.[49]

Third, mobile apps have provided opportunities for the creation of new attention seekers and have reduced the relative importance of incumbent attention seekers. Facebook, for example, has become one of the largest online advertising platforms in the world through its success in attracting attention of mobile device users and selling that attention to advertisers. It now provides three of the ten mobile apps that attract the largest number of pageviews.[50] Traditional search advertising, while still important on mobile, is much less significant than it is on the web.

D. Market Shares as Indicia of Market Power

A number of commentators have pointed out that market shares must be used with care in assessing market power.[51] This advice is particularly sound when it comes to measuring market power on the consumer side of online attention platforms. In traditional markets, sound practice involves measuring market shares based on value to account for quality differences between products. It also makes sense to focus on price because it is an important dimension of competition. Most online attention seekers do not charge consumers for using the platform.

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45 See David Evans, "Attention Rivalry Among Online Platforms," Journal of Competition Law & Economics, May 14, 2013, Volume 9 Issue 2:313-357.

46 Sahil Shah, "Social Networking War in India: Facebook vs Orkut," January 25, 2011, https://www.techinasia.com/indian-social-networking-wars-facebook-vs-orkut-2

47 comScore, "Facebook and Orkut Growth in India," November 4, 2010. http://www.comscore.com/Insights/Data-Mine/Facebook-and-Orkut-Growth-in-India

48 Pete Cashmore, "MySpace, America's Number One," July 11, 2006, http://mashable.com/2006/07/11/myspace-americas-number-one/#tqA37Md.SgqA; Choloe Albanesius "Home/News & Analysis/More Americans Go To Facebook Than MySpace More Americans Go To Facebook Than MySpace," June 16, 2009, http://www.pcmag.com/article2/0,2817,2348822,00.asp.

49 Steven Levy, "Yahoo and Alibaba: Joined at the Balance Sheet," March 3, 2015, https://medium.com/backchannel/yahoo-and-alibaba-joined-at-the-balance-sheet-94b459233894#.cklylx3x3; Lawrence Meyers, "Yahoo Stock: Is YHOO Worth Nothing Without BABA?," September 21, 2015, http://investorplace.com/2015/09/yahoo-stock-yhoo-baba-alibaba/#.VnNaiPkrKM8.

50 comScore, "comScore Reports July 2015 U.S. Smartphone Subscriber Market Share," September 3, 2015

51 Louis Kaplow, "Market Definition, Market Power," May 2015, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2605179## ; Jonathan B. Baker and Timothy F. Bresnahan, "Economic Evidence in Antitrust: Defining Markets and Measuring Market Power," *Economic Evidence in Antitrust,* http://web.stanford.edu/~tbres/research/buccirossi_01_ch01_001-042.pdf; Howard H. Change, David S. Evans and Richard Schmalensee, "Assessment of the Relevant Market in Competition Matters," March 30, 2011.

Table 3: Top 20 US Advertising Supported Attention Seeker Websites in September 2002, 2007, and 2012, Ranked by User Time Spent on the Webpage

Domain	Description	Rank Sept-2002	Rank Sept-2007	Rank Sept-20
Facebook.com	Social Networking	-	-	1
Youtube.com	Video	-	-	2
Yahoo.com	Portal	1	1	3
Google.com	Search	3	3	4
Msn.com	Portal	2	2	5
Aol.com	Portal	4	4	6
Bing.com	Search	-	-	7
Pinterest.com	Online Pinboard	-	-	8
Huffingtonpost.com	News	-	-	9
Tumblr.com	Social Networking	-	-	10
Pandora.com	Music	-	-	11
Nfl.com	Sports	9	7	12
Cnn.com	News	14	5	13
Tagged.com	Social Networking	-	-	14
Foxnews.com	News	-	18	15
Nbcnews.com	News	-	-	16
Ask.com	Search	16	10	17
Fanfiction.net	Hobby/Interest	-	9	18
Cbssports.com	Sports	-	-	19
Mapquest.com	Maps	17	6	20
Weather.com	Weather	18	17	-
Cartoonnetwork.com	Entertainment	19	-	-
Foxsports.com	Sports	-	12	-
Nytimes.com	News	11	-	-
Mlb.com	Sports	-	13	-
About.com	Reference	-	19	-
Usatoday.com	News	-	20	-
Imdb.com	Movie Reference	-	16	-
Univision.com	Entertainment	-	15	-
Blackplanet.com	Social Networking	6	14	-
Livejournal.com	Blogging	13	-	-
Blogger.com	Blogging	-	11	-
Excite.com	Search	8	-	-
Iwon.com	Portal	10	-	-
Lycos.com	Search	5	-	-
Netscape.com	Software	7	-	-
Altavista.com	Search	20	-	-
Hotmail.com	Web Mail	-	8	-
Ezboard.com	Discussion	12	-	-
Asianavenue.com	Social Networking	15	-	-

Source: Compete.com, September 2002, September 2007, and September 2012

Price is therefore not available as a measure of quality differences and for that matter is not an important element of competition relative to the content and service subsidies.

Market shares are poor indicia of market power for online attention seekers in part because precise market boundaries are more difficult to establish. Narrow market definitions, confined to functional substitutes for the content or services provided by the platform, seldom make sense because consumers shift their attention fluidly among different platforms. That is not to say that a broad definition is appropriate either, since many platforms have some source of differentiation that

makes consumers more likely to give them their attention. To the extent market shares are used, they should be calculated using different plausible definitions of the relevant set of substitutes.

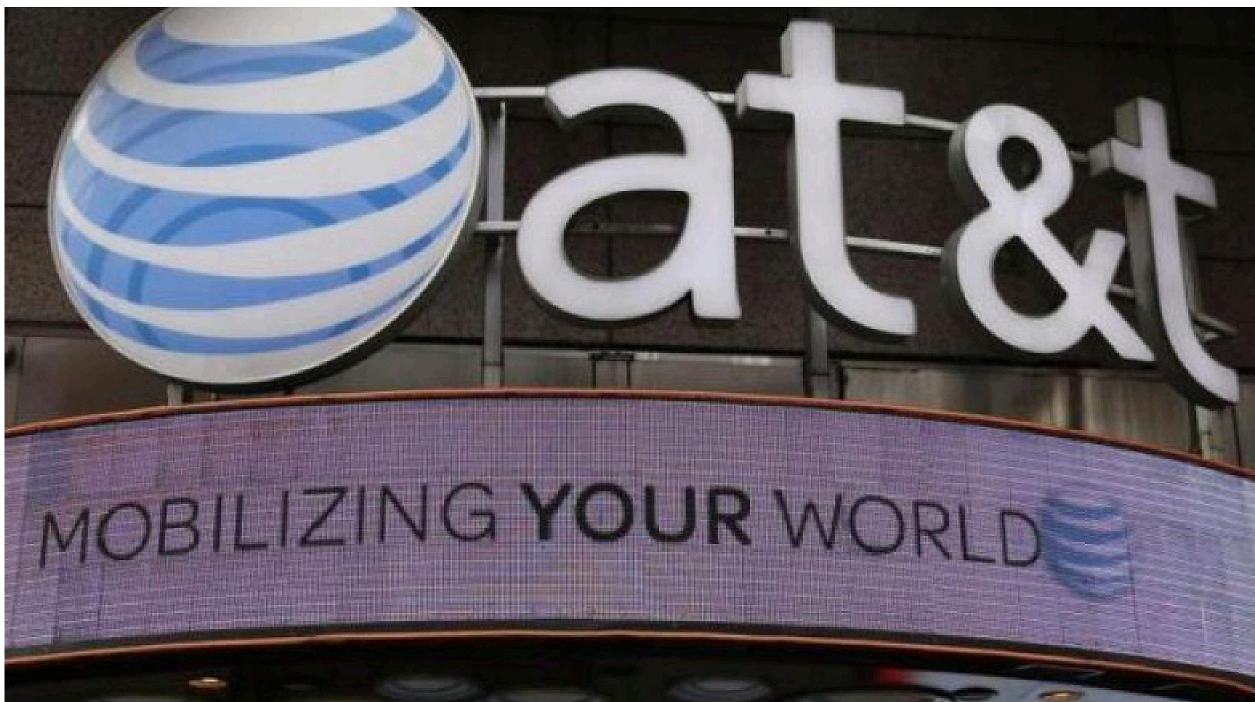
V. CONCLUSION

Multi-sided platforms comprise an increasingly large portion of the economy, in part as a result of the technological changes described above. Online multi-sided platforms are now behind waves of creative destruction. Protecting competition in this part of the economy is important and competition authorities should be commended for being vigilant in making sure that dominant platforms do not violate the competition rules and that rent-seeking incumbents do not stand in the way of innovative new platforms.

Antitrust analysis, however, needs to adjust the standard tools for assessing market power so that they are accurate, as a matter of economics and mathematics, for multi-sided platforms. That includes recognizing the important implications of interdependent demand, and interlinked sides, for platforms. Particular care should be given to online platforms, and especially online attention seekers, because of the importance of non-price competition, the pervasive use for zero prices and the role, at least for now, of intense dynamic competition.

THE AD HOC APPROACH TO TELECOMMUNICATIONS MERGERS: THE PUBLIC INTEREST COMPROMISED?

BY WARREN GRIMES[1]



I. INTRODUCTION

It is difficult to find consistency in the U.S. Justice Department's ("Antitrust Division") responses to the wave of telecommunications mergers. AT&T was barred from purchasing T Mobile. Comcast was warned not to acquire Time Warner Cable. Other comparably sized mergers have been given the green light, albeit some with conditions, including Comcast's purchase of NBC Universal and AT&T's acquisition of Direct TV. More mergers are in the works.

Each case has unique features. The Antitrust Division's differing decisions may be rationally and perhaps persuasively explained.[2] Case-by-case analysis is, after all, the best way of dealing with the horizontal and vertical intricacies of this vital industry. Or is it?

If the goal is to make competition work in providing consumers meaningful telecommunications choices and universal access, the Antitrust Division and the Federal Communications Commission must articulate clear goals and be resolute in implementing them. In particular, mergers must be judged by the unique conditions in this industry, with sensitivity to the importance of the industry to quality of life and the needs of consumers. Generalized merger guidelines are not adequate to protect competition in this vital indus-

1 Irving D. & Florence Rosenberg Professor of Law, Southwestern Law School.

2 *See* Assistant Attorney General Bill Baer, *Video Competition: Opportunities and Challenges*, Keynote Address at *Future of Video Competition and Regulation*, Duke Law School (Oct. 9, 2015), *available at* <http://www.justice.gov/opa/speech/assistant-attorney-general-bill-baer-delivers-keynote-address-future-video-competition>

try. Telecommunications-specific goals should be articulated in guidelines that are tested in public debate and, after implementation, guide industry firms, enforcers, and the courts in addressing telecommunications mergers.

Merger enforcement policy in the U.S. telecommunications industry has special importance because of the nation's commitment to minimize government control and regulation in the supply of vital telecommunications services. With the FCC on watch, no one could claim the U.S. telecommunications industry is unregulated. Still, more than most nations, telecommunications remains in the hands of private firms that make decisions relatively free of government interference. The intent is to let privately competing firms supply consumers with high tech choices when telephoning, texting, transmitting data, e-mailing, or obtaining video programming (by over-the-air broadcast, cable, or internet). This free market approach has succeeded in some cases—and failed miserably in others.

II. BRIEF HISTORY AND CURRENT STATUS

A bit of historical perspective is helpful. For traditional land-line telephone service, universal access was obtained only with the help of government subsidies needed to reach small town and rural customers. By the 1950s, this goal had been largely achieved, but customers dealt with a single regulated monopoly provider. With some delay, a similar model evolved for traditional cable television, where most consumers could obtain this service from a local monopolist provider by the 1970s. The monopoly model, even with some constraining regulation, offered only minimal consumer choice and generated substantial discontent.

Technology helped to generate competition for telephone service and was potentially helpful for cable as well. For example, by the 1970s, there was competition in providing long distance service for land-line customers. By the end of the 20th century, wireless cell phone service provided a meaningful alternative, to the point that it has displaced much of the demand for land-line service. Today, there is meaningful competition in cell phone services, thanks in part to maverick firms such as T Mobile that have given consumers choices in purchasing cell phone service, including relatively low cost and unbundled plans that allow the consumer to purchase a phone separately from a subscription plan.

The market mechanism has so far failed for two other telecommunications services: cable television and high speed internet access. Most urban consumers have a choice of two or three cable providers, but no meaningful choice in avoiding an elephantine bundle of 180 or more channels, only 18 of which the average subscribing household actually watches.

There are enormous costs to this forced bundling. The lack of choice means consumers pay more—lots more. The growing cost of the expanded basic bundle (already averaging roughly $100 per month) is attributable in significant part to expensive sports programming, which half or more subscribers do not watch. Even among sports enthusiasts, many are forced to pay for sports programming that they do not watch. Some analysts claim that bundling is an efficient way of delivering cable programming. That may be, but Canadian consumers with greater choices pay substantially less per month for cable programming. Using the Canadian system as a base, one estimate is that U.S. cable consumers overpay somewhere between $27 to $34 billion each year.[3]

A second cost of the bundling system is that cable customers, through no fault of their own, suffer blackouts of popular programming, with some of these blackouts lasting months or even years. In Southern California, the majority of fans of the Los Angeles Dodgers have, over the past two seasons, been unable to receive Dodger telecasts because of an intractable bundling dispute. Time Warner Cable owns the television rights to the games and insists that the telecasts be included in the expanded basic bundle at an additional cost of roughly $5 a month, notwithstanding that most cable consumers won't watch the games. Most cable distributors are willing to carry the games on an a la carte basis, but have refused to add to the unwieldy and very pricey bundle. Meanwhile, most Dodger fans, through no fault of their own, cannot watch the televised games. None of this could happen if forced bundling ceased.[4]

3 Warren Grimes, *The Distribution of Pay Television in the United States: Let an Unshackled Marketplace Decide,* 5 J. Int'l Media & Entertainment L. 1, 16-17 (2014).

4 Consumers also lack choice in buying cable boxes and continue to pay yearly fees averaging $231 per year to rent these units from the distributor. Consumer

For high speed internet access, the competitive situation is no better, a matter of special concern because internet streaming is increasingly chosen as a way around the pricey TV bundles. Even in urban areas, almost all consumers have only one or two choices for obtaining broadband access. Under the FCC's new high-speed internet standards, 70 percent of all broadband users have no choice or only one choice.[5] Although FCC Chairman Tom Wheeler has made internet availability a priority, as long as hard-wired connections are required the likelihood of a quick fix providing consumers meaningful competition is slim. Even for a consumer with two choices, tacit parallel supracompetitive pricing and look-alike offerings will continue to be the norm.

III. CREATING A MORE COMPETITIVE TELECOMMUNICATIONS INDUSTRY

So what would a more competitive telecommunications industry look like? Here are three goals that should guide telecommunications antitrust policy, including treatment of mergers.

A. There Should Be a Minimum of Four Providers for All Major Telecommunications Services.

This goal has been achieved for cell phone service and was within reach for cable TV. By approving the AT&T acquisition of Direct TV, the Government lost ground on this goal for cable. For high speed internet, where most consumers, if they have access at all, have only one provider that can meet the FCC's standards, creating meaningful choices and competition will be more difficult.

The government's conditions imposed on the AT&T acquisition of Direct TV were intended to generate more broadband access. The FCC and the Justice Department apparently concluded that, for the future, broadband access is more important than choice among cable providers. That may be correct. Competition, however, cannot be mandated. Assuming that AT&T promptly expands its broadband network as promised, it is still likely to be a monopolist or duopolist in most markets it serves, a condition unlikely to lead to aggressive price competition and varied low cost options.

The government may have given up a bird in the hand (competition in cable distribution) in pursuit of an elusive bird in the bush. Will the government enforcers continue to sacrifice competition in one telecommunications market for uncertain competitive benefits in another market? Shouldn't merger policy be designed to preserve competition in all significant markets? More access and more competition is needed in the market for broadband, but that goal should be independently and comprehensively addressed, not through ad hoc settlements in merger cases that compromise competition in other important markets.

B. Abusive Bundling Practices Should Be Prohibited.

Antitrust enforcers (and the FCC) have missed opportunities to prohibit the noxious bundling practices in cable TV, with the result that disgruntled subscribers have paid billions in overcharges over the past decades.[6] These bundling practices are under siege as many younger consumers vote with their wallets not to subscribe to cable TV.

The bundling system, however, may endure for some time yet, particularly since some of the same firms implicated in the bundling practices also control broadband access, the major alternative for streaming video programming. In addition, multi-product and vertically integrated firms bundle various telecommunications services (cable, cell phone, broadband) in ways that undercut consumer choice and harm equally efficient firms that lack integration potential.

C. Vertical Integration Issues Must Be Taken Seriously.

Antitrust analysts have long paid lip service to the axiom that effective competition is superior to regulation. Unfortunately, when assessing telecommunications mergers, the agencies have not been resolute in protecting the conditions needed for effective competition. An example is the 2011 Comcast acquisition of NBC Universal. The merger combined the largest cable and broadband distributor with NBC's very substantial video programming content. The vertical restraint issues involved in this transaction were quickly recognized. Content providers expressed concern that the combined entity would favor its own content in making distribution decisions. The

Reports, 12 (Nov. 2015).

5 Address of Assistant Attorney General Bill Baer, *supra* note 2.

6 Grimes, *supra* note 3.

agencies, however, gave the green light to the transaction, subject to conditions, including one that required Comcast not to "unreasonably discriminate" in providing broadband service to content providers.[7]

Did this condition provide meaningful protection? The twentieth century history of the Bell System's discriminatory favored treatment of the integrated firm's products and services ought to have been a strong warning. Two events since that 2011 merger suggest the futility of this sort of regulatory decree. The first is that Netflix, a major independent content provider, felt compelled to sign an expensive agreement with Comcast to ensure that Netflix customers continued to receive favorable internet access through the Comcast pipeline.[8]

The second is the FCC's decision to implement net neutrality regulations to ensure equal and non-discriminatory access. The Comcast acquisition of NBC Universal contributed to the support for regulation (Netflix and other content providers joined the push for net neutrality). That regulation, if it survives judicial review, will be less effective and more costly to implement than a regime in which distributors are barred from owning or controlling content. Had the Antitrust Division and FCC stood resolutely against vertical integration, there likely would be little need for broad-based net neutrality regulation.

IV. THE NEED FOR INDUSTRY SPECIFIC GUIDELINES

The idea of industry specific guidelines is not new. Although not specifically addressing mergers, the Antitrust Division and the FTC have already issued specialized guidelines for the healthcare industry. Other prime candidates for narrowly tailored guidelines are industries most affecting quality of life, including food and drink industries and telecommunications. Each of these industries involves the sale of essential products and services to consumers. Concentration levels in these industries are of greater concern not only because of quality of life issues but also because consumers typically cannot exercise countervailing power. Consider the steel industry, where many downstream customers are themselves large firms, such as the automobile industry. The countervailing power that could discipline steel prices is absent when products and services are sold directly to consumers.

The first set of antitrust guidelines came in 1968, under the leadership of former Assistant Attorney General Donald Turner. The Merger Guidelines Turner championed were intended to anchor antitrust law in economic principles, providing certainty and manageability for attorneys, enforcers, and counselors. Those goals have been elusive for a variety of reasons. Certainly one reason is that industry-specific conditions generate widely disparate anticompetitive concerns.

The Antitrust Division has substantial expertise and interest in competition in telecommunications services. The recent address of Assistant Attorney General Baer, focusing on the need for competition and neutrality among internet pipeline providers, is helpful.[9] But more is needed. The goal of achieving clarity and certainty would be fostered by guidelines specifically addressing telecommunications mergers and other related competition issues. Levels of concentration that may be tolerable in some industries are objectionable in an industry so vital to consumers. Vertical integration that may be relatively unproblematic outside telecommunications is troublesome when providers of popular content wield substantial leverage over distributors.

Guidelines, perhaps jointly issued by the FCC and the Justice Department, could also lessen the propensity of government enforcers to compromise away the public's strong interest in competition. Any merger investigation brings the intense involvement of agency staff on the one side and well-schooled attorneys for the merging parties on the other side (many of these attorneys are former agency staffers). Faced with conflict, there is a tendency for any Government official making enforcement decisions to compromise. An agency head may prefer a compromise solution rather than face the costs and risks of litigation. That tendency would exist, with or without specific industry guidelines. Nonetheless, if the agen-

7 Department of Justice Press Release, Justice Department Allows Comcast-NBCU Joint Venture to Proceed With Conditions (January 18, 2011), *available at* <www.justice.gov/opa/pr/justice-department-allows-comcast-nbcu-joint-venture-rpoceed-conditions>

8 *Comcast and Netflix reach Deal on Service*, N.Y. Times (Feb. 23, 2014), *available at* <http://www.nytimes.com/2014/02/24/business/media/comcast-and-netflix-reach-a-streaming-agreement.html?_r=0>

9 Address of Assistant Attorney General Bill Baer, *supra* note 2.

cy's guidelines address an issue with clarity and force, the impact of the merging parties' push for a compromise will be dulled. Enforcers will have increased resolve in adhering to competition values.

There will always be a need for case-by-case analysis of mergers. Merger enforcement, however, will strongly benefit from area-specific guidelines. Specific telecommunications antitrust guidelines could generate more competition, give the consumer more choices, and provide more clarity to industry participants than the current ad hoc approach to telecommunications mergers. Government regulation is clearly a second best choice, but the United States will continue to slide down the slippery slope toward more regulation unless there is a resolute antitrust telecommunications policy implemented by area-specific guidelines.

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