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High Tech Mergers Handle With Care

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The Broader Implications of Merger Remedies in High Technology Markets

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The Broader Implications of Merger Remedies in High Technology Markets

D. Daniel Sokol[1]

I. INTRODUCTION

Merger remedies are an area of increasing complexity around the world. They are also an area of increased focus by competition authorities both with regard to process (particularly coordination) and substance. The recent ICN merger working group workshop held in New Delhi, India focused on the question of merger remedies across jurisdictions.

Mergers in high technology (high tech) markets remain an area in which there seems to be unsettled law and policy in a number of jurisdictions and where remedies for the same behavior may lead to different outcomes. This essay examines what makes high tech mergers distinct relative to other mergers. It then examines the distinctive remedies (or lack thereof) that agencies may undertake to address competitive concerns in high tech markets. A number of cases suggest that competition authorities should undertake a more nuanced view of how high tech markets work in their merger remedies and, by implication, dominance cases—especially considering the dynamics of the particular case before them.

II. WHY MERGER CONTROL GENERALLY

Merger control seeks to weigh the potential pro-competitive impact of a merger, such as through price reductions or increased quality, against potential anticompetitive effects. The danger of a particular merger is that the merged firm will exercise market power that it did not possess pre-merger or will allow a firm with market power to enhance its market power post-merger and reduce consumer welfare.

III. MERGER CONTROL IN TECHNOLOGY MARKETS

In the high-tech setting, agencies must be particularly careful to analyze the market and the facts to ensure that merger control does not reduce the incentives of firms to innovate or chill investment decisions that would lead to enhanced innovation.[2] Merger control potentially collides with technological innovation because of certain characteristics of high tech markets. These markets are ones in which there is rapid technological change and innovation. The innovation can be in new products, services, and/or platforms.

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[2] Thomas Cotter summarizes the potential trade off as "The obvious problem, once we accept the principle that any conduct that threatens some harm to innovation or creativity (no matter how speculative) properly could give rise to antitrust liability, is knowing where to stop." Thomas F. Cotter, *Innovation and Antitrust Policy, in* THE OXFORD HANDBOOK OF INTERNATIONAL ANTITRUST ECONOMICS, VOLUME 2 147 (Roger D. Blair & D. Daniel Sokol eds. 2014). Similarly, Carl Shapiro provides a roadmap for undertaking this analysis through the lenses of contestability, appropriability, and synergies; Carl Shapiro, *Competition and Innovation: Did Arrow Hit the Bull's Eye?*, *in* THE RATE AND DIRECTION OF INVENTIVE ACTIVITY REVISITED (Josh Lerner & Scott Stern eds. 2012).

As high tech markets change rapidly, market power may be transient.[3] The idea of the ephemeral nature of market power has its origins in Schumpeter's views on creative destruction.[4] Due to the nature of technological change, firms compete for a market through innovation and other strategies that are highly disruptive to existing markets. This is competition *for* the market rather than competition *in* the market. In these circumstances, prediction is more complex and difficult. Should there be no clear theory of harm and no facts to support such a determination, aggressive intervention risks chilling procompetitive innovation. In some cases the best remedy may be no remedy. This has been the case across the United States, Europe, and other leading jurisdictions in a number of transactions.

A. Network Effects May be Different in Technology Markets

In many high tech markets, network effects play an important role.[5] Oftentimes these effects arise because of complementarities, where a user can reach additional users the more users that are on the network (such as mobile telephony). Although network effects may be particularly strong in old economy networks, new economy networks may behave differently. Network effects may not exist in all high tech markets. The internet may be one such example.[6] However, it is not the only one.

One case in which the network effects were found to be insubstantial was in *Microsoft/Skype*. In that merger, the Commission cleared the merger in phase I between a conglomerate firm (Microsoft) and Skype, a firm that "provided internet-based communications services and software enabling instant messaging and voice and video communications."[7] The General Court upheld the Commission's decision because network effects proved not to matter due to the dynamics of the industry—short innovation cycles and free products. The General Court noted, "the existence of network effects does not necessarily procure a competitive advantage for the new entity."[8]

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[3] Renata B. Hesse, Deputy Assistant Att'y Gen. for Criminal & Civil Operations, U.S. Dep't of Justice, Remarks as Prepared for the Conference on Competition & IP Policy in High-Tech. Indus.: At the Intersection of Antitrust & High-Tech: Opportunities for Constructive Engagement, (Jan. 22, 2014), http://www.justice.gov/atr/public/speeches/303152.pdf.

[4] JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 83 (3d ed. 1950). *See* also Jonathan B. Baker, *Beyond Schumpeter vs. Arrow: How Antitrust Fosters Innovation*, 74 ANTITRUST L.J. 575, 587 (2007); ("As a general rule, competition does not just lead firms to produce more and charge less; it encourages them to innovate as well.").

[5] *See* generally Daniel F. Spulber & Christopher S. Yoo, *Antitrust and the Economics of Networks*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ANTITRUST ECONOMICS, VOLUME 1 (Roger D. Blair & D. Daniel Sokol eds. 2014).

[6] *Id.* at 385 ("Because the Internet is a network of networks, it is often said to exhibit network economic effects, although upon closer inspection the constantly increasing returns to scale may be limited to specific networks, such as social networks, rather than the Internet itself.").

[7] General Court Press Release, No 156/13, Luxembourg, 11 December 2013, Judgment in Case T-79/12, Cisco Systems Inc. and Messagenet SpA v Commission, *available at* http://curia.europa.eu/jcms/upload/docs/application/pdf/2013-12/cp130156en.pdf.

[8] Judgment in Case T-79/12, Cisco Systems Inc. and Messagenet SpA v Commission, 11 December 2013 at ¶76, *available at* http://curia.europa.eu/juris/liste.jsf?num=T-79/12.

The Commission's thoughts regarding network effects not necessarily conferring an advantage also came up in the recent *Facebook/WhatsApp* clearance. In that clearance, the Commission explained that that "while network effects exist in the market for [messaging] apps, in the present case, on balance, they are unlikely to shield the merged entity from competition from new and existing consumer communications apps."[9] The rationale for this was due to:

1. the Commission finding that messaging apps were a "fast-moving sector"[10] with low switching costs; therefore, "any leading market position even if assisted by network effects is unlikely to be incontestable.";[11]
2. the usage of one particular messaging app did not "exclude the use of competing [messaging] apps by the same user;" in this context, multi-homing was common and facilitated by the "ease of downloading a consumer communications app."[12]; and
3. the users of messaging apps "are not locked-in" to a given network.[13]

B. Market Definition is Not Always Clear and Even When It Is, High Market Shares are not Fatal

Traditionally, antitrust considers market power to be a basis for potential antitrust liability in the merger context.[14] Consequently, market definition remains a key way that authorities around the world undertake a market power inquiry.[15] Yet, in some high tech markets, market definition is not always clear. Indeed, traditional measures like market share may not be appropriate measurements in analyzing a given market.

Returning to the example of *Microsoft/Skype*, the General Court found that switching costs were low, explaining that "the network effects to which the concentration might give rise would be diluted by the fact that users tend to communicate in small restricted circles and use a range of operators."[16] Those factors demonstrated the ease with which user groups could switch to other communications services even though the General Court acknowledged a market share of over 90 percent.[17]

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[9] Case COMP/M.7217, *Facebook/WhatsApp*, at ¶135.
[10] *Id.* at ¶132
[11] *Id.*
[12] *Id.* at ¶133.
[13] *Id.* at ¶134.
[14] Lawrence J. White, *Monopoly and Dominant Firms: Antitrust Economics and Policy Approaches, in* THE OXFORD HANDBOOK OF INTERNATIONAL ANTITRUST ECONOMICS, VOLUME 1 (Roger D. Blair & D. Daniel Sokol eds. 2014).
[15] *See* e.g., U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines (2010) § 4, *available at* http://www.justice.gov/atr/public/guide lines/hmg-2010.pdf ("The measurement of market shares and market concentration is not an end in itself, but is useful to the extent it illuminates the merger's likely competitive effects."); European Comm'n, Guidelines on the Assessment of Horizontal Mergers Under the Council Regulation on the Control of Concentration Between Undertakings, 2004 O.J. (C 31) 5, ¶14 ("Market shares and concentration levels provide useful first indications of the market structure and of the competitive importance of both the merging parties and their competitors."), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2004:031:0005:0018:EN:PDF.
[16] Cisco, *supra* note 7 at ¶52.
[17] *Id.*

The General Court explained that a market share presumption, even with a 90 percent market share, is not dispositive in high tech markets.[18] The Court reasoned that within "such a dynamic context, high market shares are not necessarily indicative of market power."[19] Similarly, in *Canon/Iris*, the Commission found a market share of up to 90 percent in some markets but also cleared the transaction without any remedies.[20] In yet another such example, the Commission unconditionally approved *ARM/Giesecke & Devrient/Gemalto*.[21] In that transaction, under a narrow market definition the parties would have held a 70-80 percent market share.[22] However, the Commission found that barriers to entry were low.[23]

C. Interoperability

Interoperability between platforms and applications is a common concern within network industries. Interoperability was an issue that both *Microsoft/Skype* and *Intel/McAfee* addressed**.** The European General Court in *Microsoft/Skype* dismissed the interoperability issues. It made clear that free products did not create consumer harm because prices were not likely to increase and noted, "the fact that the services are offered free of charge is a relevant factor in assessing the market power of the new entity."[24] Any increase in prices seemed unlikely. Further, the General Court explained that Cisco's "reasoning is based not only on future and uncertain events, but also disregards the possibility that competitors of the new entity will adjust their marketing and technological strategies to anticipate and counteract a possible foreclosure strategy."[25]

The decision in *Microsoft/Skype* contrasts with that of *Intel/McAfee*. In *Intel/McAfee*, Intel, the world's largest computer chip firm, sought to acquire a security software company. The FTC cleared *Intel/McAfee* unconditionally. However, the EC sought access remedies in the same transaction.[26] Intel was required to disclose interoperability information to rival security software vendors (royalty free) and provide such vendors with related assistance.[27] The Commission also required that, as a design function, Intel not favor McAfee on its chips or degrade its performance on other chips.[28]

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[18] *Id.* at ¶73 ("The fact that the services are offered free of charge is a relevant factor in assessing the market power of the new entity. In so far as users expect to receive consumer communications services free of charge, the potential for the new entity to set its pricing policy freely is significantly restricted. The Commission rightly observes that any attempt to make users pay would run the risk of reducing the attractiveness of those services and of encouraging users to switch to other providers continuing to offer their services free of charge.").

[19] *Id.* at ¶ 69.

[20] Case COMP/M.6773 - *Canon/ I.R.I.S.*

[21] Case No COMP/M.6564 - *ARM/ GIESECKE & DEVRIENT/ GEMALTO/ JV*.

[22] *Id.* at ¶65.

[23] *Id.* at ¶71 ("competitors would have the ability to develop alternative TEE solutions which, provided they are GlobalPlatform compliant, will interoperate with such ecosystem of trusted applications.").

[24] Cisco, *supra* note 7 at ¶73.

[25] *Id.* at ¶121.

[26] Case COMP/M.5984—Intel/McAfee, Comm'n Decision at 63 (Jan. 26, 2011), *available at* http://ec.europa.eu/competition/mergers/cases/decisions/m5984_20110126_20212_1685278_EN.pdf.

[27] *Id.* at ¶63-64.

[28] *Id.* at ¶65.

D. Linkage Between Merger Control and Dominance Investigations

Behavior that merger control addresses through remedies (or lack thereof) also provides insight as to theories of harm and of remedies in dominance cases involving high tech markets. The nature of high tech markets suggests that caution may be necessary before intervening in a high tech case as much on the conduct side as on the merger side. The FTC closing statement in the Google investigation explained:

> Product design is an important dimension of competition and condemning legitimate product improvements risks harming consumers. Reasonable minds may differ as to the best way to design a search results page and the best way to allocate space among organic links, paid advertisements, and other features. And reasonable search algorithms may differ as to how best to rank any given website. Challenging Google's product design decisions in this case would require the Commission—or a court—to second-guess a firm's product design decisions where plausible procompetitive justifications have been offered, and where those justifications are supported by ample evidence.[29]

The United States is not the only jurisdiction that has identified the risk of intervention in high tech cases. The recent *Tencent* decision by the Chinese Supreme People's Court ("SPC") is instructive. The SPC found no dominance despite a market share of greater than 80 percent because of the fast moving nature of the internet, the free (or low price) nature of the product, the lack of switching costs, and the significant user multi-homing.[30]

The risk of harming consumers should drive decisions rather than third-party claims strategically pushed by competitor firms in high tech markets. This strategic misuse of antitrust by competitor firms remains a concern for both mergers and dominance cases.[31]

IV. CONCLUSION

On substantive issues, many of the same concerns that mergers in the high tech sector raise also arise in dominance cases. Competition authorities should review facts carefully and understand particular markets before intervening. That all high tech markets (i) may not have significant network effects that impact competition, (ii) may not have traditional defined markets, and (iii) may not justify structural presumptions of significant market share leading to market power all suggest that competition authorities should be careful in identifying potential anticompetitive conduct and crafting appropriate remedies.

With investigations across numerous high tech companies in the United States, Europe, Latin America, and Asia, competition authorities need to be particularly aware of the stakes of

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[29] Statement of the Federal Trade Commission Regarding Google's Search Practices, In the Matter of Google Inc. FTC File Number 111-0163 January 3, 2013, *available at* http://www.ftc.gov/sites/default/files/documents/public_statements/statement-commission-regarding-googles-search-practices/130103brillgooglesearchstmt.pdf.

[30] *See* generally, David S. Evans & Vanessa Yanhua Zhang, *The Qihoo v. Tencent Landmark Decision, Qihoo 360 v Tencent: First Antitrust Decision by The Supreme Court*, CPI Asia Column (Oct 21, 2014).

[31] *See* e.g., D. Daniel Sokol, *The Strategic Use of Public and Private Litigation in Antitrust as Business Strategy*, 85 S. CAL. L. REV. 689 (2012); R. Preston McAfee & Nicholas V. Vakkur, *The Strategic Abuse of Antitrust Laws*, 1 J. Strategic MGMT. EDUC. 3 (2004); William J. Baumol & Janusz A. Ordover, *Use of Antitrust to Subvert Competition*, 28 J.L. & ECON. 247 (1985).

investigations and decisions in rapidly evolving markets. Merger control, including remedies both taken and not taken, offers a number of suggestions as to thinking through case selection and remedies for dominance cases.

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A Comparative Analysis of the Use of Merger Remedies in Technology Industries

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A Comparative Analysis of the Use of Merger Remedies in Technology Industries

Scott Sher & Kellie Kemp[1]

I. INTRODUCTION

Antitrust regulators reviewing technology mergers frequently are confronted with complicated issues related to remedies. Indeed, merger remedies in technology markets often involve regulation of the merging parties' post-merger conduct as opposed to so-called "structural" remedies such as the sale of physical assets or intellectual property. Although structural relief historically has been the preferred remedy to resolve anticompetitive mergers, non-structural relief may be more appropriate in many technology mergers that are vertical in nature, involve transfers of intellectual property rather than accumulation of physical assets, or raise complex network effects issues.

Remedies involving non-technology mergers often are easier to administer than those in technology mergers, as the divestment of an "autonomous, on-going business unit"[2] often is a relatively straightforward task in non-technology industries: an airline merger can be resolved with the divestiture of airport slots; a retail or supermarket merger can be resolved with the divestiture of brick-and-mortar locations in a geographic region. These are options not always available as remedies in technology company mergers.

Confronted with difficult questions, antitrust agencies around the world are dealing with remedies in technology markets differently. This paper explores the varying approaches to technology remedies taken by the U.S. antitrust agencies, the European Commission, and MOFCOM in China, using case studies within each jurisdiction to explore how general principles play out in actual technology market mergers.

II. THE U.S. AGENCIES' APPROACH TO REMEDIES IN TECHNOLOGY MARKETS

The U.S. antitrust agencies (the Federal Trade Commission ("FTC") and Department of Justice ("DOJ")) recognize that technology industries often exhibit unique characteristics, particularly considering the nascent, dynamic, and growing nature of many such markets.[3] But

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[1] Scott Sher is a partner and Kellie Kemp is an associate at Wilson Sonsini Goodrich & Rosati, PC in Washington, DC. The authors would like to thank Franklin Rubinstein and Jeff VanHooreweghe for their insightful comments, additions, and edits.

[2] Richard Feinstein, *Negotiating Merger Remedies, Statement of the Bureau of Competition of the Federal Trade Commission*, Federal Trade Commission (Jan. 2012), http://www.ftc.gov/tips-advice/competition-guidance/merger-remedies.

[3] For example, the agencies have recognized that technology markets present concerns not usually as pivotal in more traditional industries; for example, the prevention of "harm to innovation"—an often "overlooked" yet "decisive factor" in enforcement decisions in high tech industries. *See* Renata B. Hesse, Deputy Assistant Att'y Gen. for Criminal & Civil Operations, U.S. Dep't of Justice, Remarks as Prepared for the Conference on Competition & IP Policy in High-Tech. Indus.: At the Intersection of Antitrust & High-Tech: Opportunities for Constructive

these unique characteristics have not lead to decreased antitrust enforcement; indeed, the agencies emphasize that they "can and do[] enforce the antitrust laws in fast-moving high-tech markets."[4] Nor have these unique characteristics lead necessarily to unique remedies. The U.S. agencies continue to seek structural remedies (*i.e.*, divestitures of assets) in mergers raising horizontal competition concerns and behavioral remedies (*e.g.*, firewalls or confidentiality restrictions) in mergers raising vertical concerns—an approach the agencies tend to follow in more traditional industries.[5]

Yet, the DOJ's 2011 *Policy Guide to Merger Remedies* recognized the ongoing shift in enforcement from the strong preference for structural remedies to a more balanced analysis, emphasizing that:

> [t]he Division's focus is on effective relief for the particular merger presented. In certain factual circumstances, structural relief may be the best choice to preserve competition. In a different set of circumstances, conduct relief may be the best choice. In still other circumstances, a combination of both conduct and structural relief may be appropriate.[6]

The 2011 Policy Statement identified several different kinds of conduct remedies that may be effective in preserving competition—including firewalls, non-discrimination and anti-retaliation provisions, mandatory licensing, transparency provisions, and prohibitions on certain contracting practices.[7] As described below, these types of provisions are most effective in technology mergers.[8]

Engagement, (Jan. 22, 2014), http://www.justice.gov/atr/public/speeches/303152.pdf; *see also* Comm'r Julie Brill, *Merger Enforcement in High-Tech Markets*, *Skadden Arps/Compass Lexecon Symposium* (Jan. 28, 2013), http://www.ftc.gov/sites/default/files/documents/public_statements/merger-enforcement-high-tech-markets/130128skaddenhightechmarkets.pdf; Comm'r Joshua D. Wright, *Evidence-Based Antitrust Enforcement in the Technology Sector*, 3(1) CPI ANTITRUST CHRON. (Mar. 2013), https://www.competitionpolicyinternational.com/assets/Free/WrightMar-13Special.pdf.

[4] Brill, *supra* note 3, at 5; *see also* Hesse, *supra* note 3.

[5] Dir. Richard Feinstein, *Negotiating Merger Remedies, Statement of the Bureau of Competition of the Federal Trade Commission*, Federal Trade Commission (Jan. 2012), http://www.ftc.gov/tips-advice/competition-guidance/merger-remedies; *see also Antitrust Division Policy Guide to Merger Remedies, Department of Justice Antitrust Division*, *U.S. Dep't of Justice* (June 2011), http://www.justice.gov/atr/public/guidelines/272350.pdf; Comm'r Edith Ramirez, FTC Behavioral Remedies, Federal Trade Commission (Nov. 17, 2011), http://www.americanbar.org/content/dam/aba/publications/antitrust_law/at311550_fall_forum_panel_5.authcheckdam.pdf. The oft-cited exception to this approach is In the Matter of Evanston Northwestern Healthcare Corp., No. 9315, 2008 FTC LEXIS 62 (F.T.C. 2008), in which the FTC held the acquisition would substantially lessen competition in managed care organizations ("MCOs"). Although the merger was horizontal, the FTC concluded that in this "highly unusual case," divestiture would be too costly and risky, and instead imposed a conduct remedy that required Evanston to "establish separate and independent negotiating teams—one for Evanston Hospital . . . and another for Highland Park." *See* Comm'r Tom Rosch, *In the Matter of Evanston Northwestern Healthcare Corp.*, Opinion of the Commission on Remedy, Docket No. 9315, http://www.ftc.gov/sites/default/files/documents/cases/2008/04/080428commopiniononremedy.pdf.

[6] *Antitrust Division Policy Guide to Merger Remedies*, *supra* note 5.

[7] *Id.* at 13.

[8] Ariel Ezrachi, *Under (and Over) Prescribing of Behavioural Remedies*, (Univ. of Oxford Centre for Competition Law and Policy, Working Paper No. (L) 13/05, 2013), at 4, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=913773.

Where a remedy is required, the U.S. antitrust agencies resolve nearly all anticompetitive horizontal mergers with a structural remedy, sometimes in conjunction with behavioral relief provisions to effectuate the primary structural relief. In technology markets, structural relief can be a straightforward tool in resolving horizontal concerns where a particular division or business line can be sold or an intellectual property ("IP") portfolio licensed.[9] Also, especially in software markets, structural relief can be effectuated in the form of a license, as opposed to divestment. In such cases, the license can be exclusive (even as to the licensor), or can allow the licensor to retain some rights to use the intellectual property, if retaining those rights is necessary to achieve some of the efficiencies of the transaction.[10]

A review of the remedies imposed by the U.S. agencies in recent technology mergers is instructive. Examples of horizontal mergers involving structural remedies (including licensing remedies) in technology markets include:

- *CoreLogic/DataQuick (2014)*: CoreLogic, a leading residential property information and analytics provider, acquired rival DataQuick Information Systems.[11] Prior to the acquisition, CoreLogic licensed to DataQuick certain national assessor and recorder bulk data that allowed DataQuick to sell a competitive product. The FTC concluded the parties had substantial overlap in the residential property information market and, as a condition of clearance, required that CoreLogic license the national assessor data to third party Renwood Realty Trac to enable the firm to "step into the shoes" of DataQuick and become an effective competitor.[12] The FTC also mandated that CoreLogic provide Renwood with customer and data management information, and waive employment and customer contract provisions to allow Renwood to hire and retain former DataQuick employees and customers.[13]
- *Nielsen/Arbitron (2013)*: Nielsen Holdings, a consumer insights provider, acquired Arbitron, a media and marketing research firm, in an effort to expand its understanding of the U.S. consumer's daily media consumption.[14] The FTC challenged the acquisition on the basis of its horizontal overlap in the *future* market for national syndicated cross-platform audience measurement services, concluding that, in absence of the merger, the products eventually developed by each company would compete directly against one another.[15] The FTC ultimately required Nielsen to license to comScore, Inc. certain

[9] *Id.* at 2.

[10] *Antitrust Division Policy Guide to Merger Remedies*, *supra* note 5.

[11] *CoreLogic to Acquire Marshall & Swift/Boeckh and Dataquick Information Systems for $661 Million* (July 1, 2013), *available at* http://www.corelogic.com/about-us/news/corelogic-to-acquire-marshall-swift-boeckh-and-dataquick-information-systems-for-$661-million.aspx.

[12] FTC Decision and Order, *In the Matter of CoreLogic, Inc.*, (May 20, 2014), http://www.ftc.gov/system/files/documents/cases/140521corelogicdo.pdf.

[13] *Id.*

[14] *Nielsen Acquires Arbitron* (Sept. 30, 2013), *available at* http://www.nielsen.com/content/corporate/us/en/press-room/2013/nielsen-acquires-arbitron.html.

[15] FTC Final Decision and Order, *In the Matter of Nielsen Holdings and Arbitron Inc.*, FTC No. 131 0058, (Feb. 28, 2014), http://www.ftc.gov/system/files/documents/cases/140228nielsenholdingsdo.pdf.

Arbitron assets to allow the company to replicate Arbitron's efforts in developing a national syndicated cross-platform audience measurement service.[16]

Yet, divestiture may not always fully resolve the competitive concerns of a merger, and may even defeat the pro-competitive efficiencies that would have resulted from the combination, particularly where a merger occurs between parties that: (i) operate at different levels of a supply chain (a "vertical merger"), (ii) compete in a networked market, or (iii) derive their market power primarily from IP assets.[17] When fashioning appropriate relief in technology markets, the agencies must consider the importance of network effects and IP, and evaluate whether the relief preserves, for example, merger efficiencies and the companies' incentives to innovate. The examples below are instructive:

- *Google/ITA (2011)*: In this vertical merger, the DOJ alleged that Google would have the incentive to deny or degrade access to ITA Software's airfare pricing and shopping systems ("P&S systems") to rival flight search competitors.[18] Recognizing that the merger would generate significant pro-competitive effects, the DOJ allowed the transaction to proceed but required Google to continue to license ITA's software to other companies, and erect a firewall to prevent Google from viewing sensitive competitive information in order to eliminate the likelihood of future discrimination.[19] Google also agreed to establish a formal process for customer and competitor complaints and submit to government monitoring for five years.
- *Comcast/NBC Universal (2011)*: The DOJ and Federal Communications Commission ("FCC") had concerns that this joint venture for Comcast and NBCU programming assets would enable Comcast to harm online video distributors ("OVDs")—viewed by Comcast as a competitive threat to its cable business—by denying them content from the joint venture.[20] The DOJ and FCC required Comcast to make available to OVDs the same package of broadcast and cable channels available to traditional video programming distributors on reasonable terms. The DOJ settlement also established a commercial arbitration procedure to resolve licensing disputes between the joint venture and OVDs, while the FCC Order allowed Comcast's satellite and telephone competitors to invoke FCC arbitration procedures to resolve program access and retransmission consent

[16] *Id.* Commissioner Joshua Wright filed a Dissenting Opinion, rejecting the FTC's theory that a merger could present competitive concerns in a market that did not yet exist. Commissioner Wright argued that the Commission overstepped its mandate in an attempt to "fix[]… perceived economic welfare-reducing arrangements." Dissenting Statement of Comm'r Joshua D. Wright, *In the Matter of Nielsen Holdings N.V. and Arbitron Inc.*, FTC No. 131-0058 (Sept. 20, 2013), at 6, http://www.ftc.gov/sites/default/files/documents/public_statements/dissenting-statement-commissioner-joshua-d.wright/130920nielsenarbitron-jdwstmt.pdf.

[17] Ezrachi, *supra* note 8, at 4; *see also* Robert Pitofsky, Former Chairman, Prepared Remarks at the Antitrust, Tech. & Intellectual Property Conference, Berkeley Center for Law and Technology: Antitrust and Intellectual Property: Unresolved Issues at the Heart of the New Economy (Mar. 2, 2001), http://www.ftc.gov/public-statements/2001/03/antitrust-and-intellectual-property-unresolved-issues-heart-new-economy.

[18] Final Judgment, *United States v. Google, Inc. & ITA Software, Inc.*, Case No. 1:11-cv-00688, (D.C. Oct. 5, 2011), http://www.justice.gov/atr/cases/f275800/275897.pdf.

[19] *Id.*

[20] *Justice Department Allows Comcast-NBCU Joint Venture to Proceed with Conditions* (Jan. 18, 2011), *available at* http://www.justice.gov/atr/public/press_releases/2011/266149.htm.

disputes. The DOJ and FCC additionally required Comcast to give other companies' content equal treatment under any of its broadband offerings, and prohibited Comcast from unreasonably discriminating in the transmission of an OVD's lawful network traffic to a Comcast broadband customer.[21]

- *Live Nation/TicketMaster (2009)*: Live Nation, a concert venue operator and promoter with a developing ticket sales line, merged with primary ticketing service TicketMaster.[22] The merger involved a horizontal overlap in primary ticketing services, and a vertical combination that could increase the combined entity's power in the concert management industry. The DOJ resolved the horizontal and vertical concerns with a "hybrid" structural and behavioral package, requiring LiveNation to license its ticketing platform to third party AEG and divest its ticketing division to Comcast-Spectator. The DOJ also prohibited LiveNation from (i) retaliating against venue owners that contracted with a rival for primary ticketing services, (ii) bundling or tying primary ticketing services and concert management services, or (iii) using ticketing data in their non-ticketing businesses.[23]

III. THE EUROPEAN COMMISSION'S APPROACH TO REMEDIES IN TECHNOLOGY MARKETS

Like the United States, the European Commission ("EC" or "Commission") views structural remedies (or "commitments")[24] as generally the best method for remedying horizontal overlaps, and even some vertical or so-called "conglomerate" combinations that would otherwise be anticompetitive.[25] The Commission affirms that structural commitments are desirable in

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[21] *Id.*

[22] Christine A. Varney, Assistant Att'y Gen., U.S. Dep't of Justice, Remarks as Prepared for the South by Southwest: The TicketMaster/LiveNation Merger Review and Consent Decree in Perspective (Mar. 18, 2010), http://www.justice.gov/atr/public/speeches/263320.htm.

[23] Final Judgment, *United States v. Ticketmaster Entm't, Inc.*, Case No. 1:10-cv-00139, (D.C. Jul. 30, 2010), http://www.justice.gov/atr/cases/f260900/260909.htm. Another example of a deal that was resolved with a hybrid remedy is the merger between *Costar & Loopnet*, where the FTC required Costar to divest Loopnet assets to resolve its competitive concerns in the market for commercial real estate listings, and also required Costar to refrain from suing customers who chose to list with any other provider of online commercial real estate listings, a tactic that Costar previously had engaged in to impede its competitors from attracting new customers. Decision and Order, *In the Matter of CoStar Group, Inc., Lonestar Acquisition Sub, Inc., & LoopNet, Inc.*, FTC No. 1110172 (Aug. 30, 2012), http://www.ftc.gov/sites/default/files/documents/cases/2012/08/120830costardo.pdf.

[24] If the Commission is concerned that a merger may significantly affect competition, it will accept from the parties "commitments," i.e. offers to make certain modifications to the transaction to guarantee continued competition, rather than impose remedies upon the parties. *See* "Merger Control Procedures," European Commission, http://ec.europa.eu/competition/mergers/procedures_en.html.

[25] Commission notice on remedies acceptable under Regulation 139/2004 and under Regulation 802/2004 (2008) OJ C 267/1, ¶17 ("Divestiture commitments are the best way to eliminate competition problems resulting from horizontal overlaps, and may also be the best means of resolving problems resulting from vertical or conglomerate concerns"). *See also* OECD Policy Roundtable, Remedies in Merger Cases, DAF/COMP(2011) 13, at 234 ("commitments which are structural in nature . . . are, as a rule, preferable from the point of view of the Merger Regulation's objective"); 1-5 Competition Law of the European Community §5.17 ("As a general matter, the Commission prefers structural commitments that involve the divestiture of viable, stand-alone businesses, provided that "the new commercial structures resulting from them will be sufficiently workable and lasting to ensure that the significant impediment to effective competition will not materialise.").

many cases because they are often more "effective"[26] and "easier" to implement than behavioral remedies,[27] and do not "require on-going monitoring measures."[28]

The EC does recognize the utility of non-structural commitments, and provides that a conduct remedy can be used where it is "at least equivalent in its effects to a divestiture.[29] Indeed, the EC has been more liberal than the U.S. agencies in applying non-structural remedies to technology mergers, in part perhaps because of the EC's more collaborative commitments process, which allows the merging parties to craft the relief that would remedy a combination's anticompetitive effects,[30] and also because of the Commission's strong consideration of competitor complaints throughout the investigation.[31]

Nevertheless, the Commission emphasizes the many risks associated with behavioral remedies—including ongoing supervision requirements and implementation difficulties,[32]—and even in technology markets structural commitments remain the most common method for remedying horizontal combinations, as exemplified by the following recent mergers:

- *Syniverse Holdings/MACH (2013)*: The two companies were the two largest providers of Data Clearing ("DC") services and Near Trade Roaming Data Exchange ("NRTRDE") services, which enable consumers to use their mobile phones while travelling abroad. The Commission conditionally approved the transaction with Syniverse's commitment to divest MACH's DC and NRTRDE services in the EEA. The divestiture would include

[26] *Antitrust: Commitment Decisions – Frequently Asked Questions* (Mar. 8, 2013), *available at* http://europa.eu/rapid/press-release_MEMO-13-189_en.htm.

[27] *ECN Recommendation on the Power to Impose Structural Remedies*, European Competition Network (Nov. 20, 2013), http://www.concurrence.public.lu/fr/agenda/2013/Reunion-directeurs-generaux-26-et-27-novembre-2013/ECN-recommendation-on-the-power-to-impose-structural-remedies.pdf.

[28] *Working Party No. 3 on Co-operation & Enforcement: Remedies in Merger Cases*, Directorate for Financial and Enterprise Affairs Competition Committee, European Union (June 28, 2011), http://ec.europa.eu/competition/international/multilateral/2011_jun_remedies.pdf; *see also Best Practice Guidelines: The Commission's Model Texts for Divestiture Commitments & the Trustee Mandate under the EC Merger Regulation*, European Commission (Dec. 5, 2013), http://ec.europa.eu/competition/mergers/legislation/best_practice_commitments_trustee_en.pdf.

[29] *Id.*

[30] Alexander Italianer, Director Gen., European Commission, Legal certainty, proportionality, effectiveness: the Commission's practice on remedies at the Charles River Associates Annual Conference (Dec. 5, 2012), http://ec.europa.eu/competition/speeches/text/sp2012_07_en.pdf.

[31] *See* "Antitrust and General Correspondence," *available at* http://ec.europa.eu/competition/contacts/antitrust_mail.html. ("The Commission encourages citizens and firms to inform about suspected infringements of competition rules."); *see also* Edward T. Swaine, *Competition, Not Competitors' Nor Canards: Ways of Criticizing the Commission*, 23 U. PA. J. INT'L ECON. L. 597, 625 ("Another very important difference between the U.S. and EU approaches is the far greater importance attached to competitors by the European Commission during the course of its merger investigations . . . ." (alteration in original)); DG Competition Best Practices on the conduct of EC merger control proceedings (Jan. 20, 2004), http://ec.europa.eu/competition/mergers/legislation/proceedings.pdf.

[32] Working Party No. 3 on Co-operation and Enforcement: Remedies in Merger Cases, *supra* note 27; *see also* Frank Maier-Rigaud, *Behavioral versus Structural Remedies Under EU Law*, UCL Centre for Law, Econs. & Society, London (Nov. 13, 2013), http://www.ucl.ac.uk/cles/events/materials/13-11-13-maier-rigaud.pdf.

MACH's proprietary software, operational assets, dedicated personnel and infrastructure, and contracts with Mach's top customers, among other commitments. [33]

- *Thermo-Fisher/Life Technologies (2013)*: The EC concluded that the acquisition would create anticompetitive horizontal overlaps in the production and supply of (i) media and sera for cell culture, (ii) gene silencing products, and (iii) polymer-based magnetic beads.[34] The EC granted clearance with significant structural remedies, requiring Thermo Fisher to divest its media and sera business (excluding single use technologies where the parties' activities did not overlap); its gene modulation and silencing business; and its polymer-based magnetic beads business.

Despite the heightened operating costs associated with behavioral remedies, the Commission has been more willing than the U.S. agencies to accept their use to support structural commitments and also as stand-alone relief—even for mergers that were granted unconditional clearance by the U.S. antitrust agencies.[35] The "flexibility and reversibility" of behavioral remedies make them ideal tools for "dealing with changing market realities," especially the case in technology markets and networked industries,[36] as demonstrated by the following cases:

- *Intel/McAfee (2011)*: While the FTC cleared without conditions Intel's proposed acquisition of McAfee, an antiviral software designer, the EC did not. Although the parties were active in complementary product markets, the EC determined other companies might suffer from either a lack of interoperability between their security solutions and Intel CPUs, or from technical tying between Intel's CPUs and McAfee's security solutions.[37] The EC imposed a series of behavioral remedies requiring Intel to: (1) ensure the interoperability of the merged entity's products with those of competitors, (2) ensure competitor access to all information necessary to use functionalities of Intel's CPUs and chipsets in the same way as those functionalities used by McAfee, (3) refrain from hampering the operation of competitors' security solutions on Intel CPUs or chipsets, and (4) refrain from hampering the operation of McAfee's security solutions on personal computers containing CPUs or chipsets sold by Intel's competitors.[38]
- *Hutchison/ Telefonica Ireland (2014)*: The EC raised concerns regarding Hutchison 3G UK, Ltd.'s proposed acquisition of Telefonica's Ireland Division that the merger would lead to higher prices in the "relatively small" Irish mobile telecommunications network market.[39] In this case the Commission imposed a hybrid remedy, with both structural and

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[33] Mergers: Commission clears Syniverse's acquisition of MACH, subject to conditions (May 29, 2013), *available at* http://europa.eu/rapid/press-release_IP-13-481_en.htm.

[34] Mergers: Commission clears acquisition of Life Technologies by Thermo Fisher, subject to conditions (Nov. 26, 2013), *available at* http://europa.eu/rapid/press-release_IP-13-1167_en.htm.

[35] Ezrachi, *supra* note 8.

[36] *Id.*

[37] Mergers: Commission clears Intel's proposed acquisition of McAfee subject to conditions (Jan. 26, 2011), *available at* http://europa.eu/rapid/press-release_IP-11-70_en.htm.

[38] *Id.*

Mergers: Commission clears acquisition of Telefónica Ireland by Hutchison 3G, subject to conditions (May 28, 2014), *available at* http://europa.eu/rapid/press-release_IP-14-607_en.htm.

conduct components. Hutchison agreed to divest up to 30 percent of the merged network capacity to two mobile virtual network operators ("MVNOs") for between 5-10 years at a fixed price and bandwidth.[40] The two MVNOs would have occasion to become full MNOs in the long term through H3G's commitment to divest five blocks of spectrum at a future date. The parties also committed to continuing an existing network sharing arrangement with Eircom, the third-largest MNO in the market, and maintain the necessary technical assistance and ancillary services as needed.[41]

IV. THE EVOLVING APPROACH TO REMEDIES IN CHINA

It is still too early in China's enforcement of its Anti-Monopoly Law ("AML") to make any conclusive observations on how China's antitrust agency (the Ministry of Commerce, MOFCOM) "traditionally" approaches remedies in technology mergers. But it is certain that MOFCOM has been very active in seeking remedies from merging technology companies since the AML was first adopted in 2008.[42]

Indeed, MOFCOM has made its presence well-known in the antitrust community, in part due to its novel approach to the remedies it has imposed in technology mergers.[43] Many of the remedies imposed include requirements that have never before been sought by other antitrust agencies around the world, making it a minefield of unpredictability. MOFCOM has imposed—seemingly without restriction—exceptional remedies deemed inferior and too difficult to administer by other jurisdictions; for example, (i) hold separates, (ii) pricing restrictions, (iii) investment requirements, (iv) sale restrictions, and (v) monitors designed to assure that the parties comply with the agency's often expansive and complicated remedial demands.[44] Below is a summary of the more significant remedies sought in technology mergers in recent years:

- *Thermo Fisher/Life Technologies (2014)*: Both the FTC and EC imposed divestment requirements upon Thermo Fisher, yet MOFCOM additionally mandated that Thermo-Fisher commit to reduce catalog prices for certain products by one percent each year for the next ten years, without lowering discount rates offered to Chinese distributors, and also honor existing supply contracts or, at the partner's option, offer a perpetual, non-exclusive technology license for those products.[45] The U.S. antitrust agencies, as well as the EC, consider pricing restrictions to be an inferior remedy, because they do not cure the anticompetitive concentration but merely dampen its effect.[46] Additionally, all of the

[40] *Id.*

[41] *Id.*

[42] Competition Policy and Enforcement in China, The US-China Business Council (Sept. 2014), *available at* https://www.chinabusinessreview.com/sites/default/files/AML%202014%20Report%20FINAL_0.pdf.

[43] *Id.*

[44] Scott Sher & Daniel Kane, *Recent Enforcement Decisions Involving Technology Mergers and Acquisitions at MOFCOM*, 10(2) CPI ANTITRUST CHRON., at 3 (Oct. 2014), *available at* http://www.wsgr.com/publications/PDFSearch/sher-1014.pdf.

[45] *The Ministry of Commerce Conditionally Approves the Acquisition of Shanghai Lifei Information & Technology Company by Thermo Fisher Scientific Inc.*, (Jan. 20, 2014), *available at* http://english.mofcom.gov.cn/article/newsrelease/significantnews/201401/20140100465371.shtml.

[46] Sher & Kane, *supra* note 44.

DOJ, FTC, and EC would hesitate to impose such contract and sale restrictions and thereby become embroiled in the day-to-day business of the merging entities.

- *Microsoft/Nokia (2014)*: Microsoft's $7.2 billion acquisition of Nokia's handset division—a move that would allow the tech giant to begin manufacturing smart phone devices,[47] received unconditional clearance from both the U.S. and EC regulators.[48] Yet, the deal faced resistance from Chinese authorities, who determined the merger "would have a greater impact" on the Chinese market than on U.S. or EU markets.[49] MOFCOM required that Microsoft and Nokia honor existing fair, reasonable, and nondiscriminatory ("FRAND") terms for all standard essential patents ("SEPs"); prohibited Microsoft from seeking injunctive relief against alleged infringers in China; and demanded that Microsoft not sell any patents within the Nokia portfolio for a period of five years.[50] As with pricing restrictions, other agencies predominately consider sale restrictions to require an impermissible intrusion into and monitoring of the business affairs of the parties.
- *Western Digital/Hitachi (2011)*: the FTC required Western Digital to divest to Toshiba Corporation the Hitachi 3.5" drive manufacturing and IP assets in response to competitive concerns regarding overlap in desktop hard drives (and particularly with the concurrent acquisition of Samsung's hard drive business by Seagate).[51] Although the FTC (and EC) were satisfied with the divestiture, MOFCOM required behavioral remedies disfavored in other jurisdictions; for example, MOFCOM imposed a "hold separate" to maintain the perception of competition between Western Digital and Hitachi, even after the merger already closed. The United States and EC, on the other hand, only utilize "hold separates" as an interim post-decision measure to ensure the buyer does not degrade the assets before sale.[52] MOFCOM's hold separate was far more expansive and required that Hitachi and Western Digital continue to compete despite Western Digital's acquisition of Hitachi's hard-disk drive business—a highly unusual remedy and something that the U.S. and EC antitrust would not require. Indeed, the hold separate in this transaction, as well as a similar one to resolve MOFCOM's concerns with the MStar/MediaTek merger,[53] has been in effect for two years, maintaining the artifice of

[47] *Microsoft Officially Welcomes the Nokia Devices and Services Business*, (Apr. 25, 2014), *available at* http://news.microsoft.com/2014/04/25/microsoft-officially-welcomes-the-nokia-devices-and-services-business/.

[48] *Justice Clears Microsoft's Purchase of Nokia's Mobile Business* (Dec. 2, 2013), *available at* http://online.wsj.com/articles/SB10001424052702304854804579234191181632558; *see also* Commission Clears Acquisition of Nokia's Mobile Device Business by Microsoft, European Commission (Dec. 4, 2013), *available at* http://europa.eu/rapid/press-release_IP-13-1210_en.htm.

[49] *The Ministry of Commerce Holds a Special Press Conference on Anti-monopoly Work*, (Apr. 11, 2014), *available at* http://english.mofcom.gov.cn/article/newsrelease/press/201404/20140400554324.shtml.

[50] *Id.*

[51] FTC Action Preserves Competition in the Market for Desktop Hard Disk Drives Used in Personal Computers, (Mar. 5, 2012), *available at* http://www.ftc.gov/news-events/press-releases/2012/03/ftc-action-preserves-competition-market-desktop-hard-disk.

[52] Sher & Kane, *supra* note 44.

[53] MOFCOM similarly imposed a "hold separate" to remedy the merger between rivals Mediatek Inc. and MStar Semiconductor, requiring that MStar's LCD TV control chip business remain an independent competitor from Mediatek. *See MOFCOM Announcement No. 61 of 2013 on Approval of Decision on Anti-monopoly Review*

competition between Hitachi and Western Digital, even though Western Digital owns the Hitachi assets.

V. CONCLUSION

Technology mergers present issues not often present in combinations occurring in more traditional industries, and jurisdictions around the globe are dealing with such challenges differently. Merging parties should bear in mind differences between these jurisdictions when contemplating future mergers and acquisitions, as the remedy strategy presented by each jurisdiction can play a role in the ultimate success of a deal.

Against Concentration of Undertakings on the Merger of MStar Semiconductor, Inc. (Cayman) by Media Tek. Inc. with Additional Restrictive Conditions, *supra* note 49.

COMPETITION POLICY INTERNATIONAL

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The Real Threat Posed by Global Merger Enforcement Divergence

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The Real Threat Posed by Global Merger Enforcement Divergence

Adam J. Di Vincenzo [1]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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Merger Remedies in Transnational Mergers: When Less is More

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Merger Remedies in Transnational Mergers: When Less is More

Ana Paula Martinez & Mariana Tavares de Araujo[1]

In the current context of increasing global mergers and complex vertical arrangements, antitrust authorities all around the world are faced with the challenge of designing remedies to, on the one hand, allowing a given transaction to go forward while, on the other, also preventing competitive harm from taking place.

The traditional approach of imposing structural remedies in horizontal transactions and conduct-based remedies in vertical integrations is being replaced by a growing inclination towards hybrid solutions. Scholars and the business community argue for behavioral or hybrid solutions based on claims that structural remedies are not necessarily the most effective response for an antitrust issue[2] and, therefore, "competition authorities should be (…) creative in devising remedies,"[3] which is one of the guiding principles in conceiving merger remedies according to the OECD. Brazil is one example of a jurisdiction that has been making efforts to introduce "alternative" remedies to address potentially adverse effects arising from a merger.

While desirable in a textbook world, and also worth of praise for the effort to ensure proportionality in antitrust intervention, in practice creativity in devising merger remedies can very easily lead to conflicting decisions in global deals. Imagine a transaction that raises competition concerns in three jurisdictions. It would be very difficult, if not impossible—especially in cases involving relevant markets broader than local—to ensure consistent solutions across different jurisdictions. One agency could follow a traditional clear-cut approach—ordering the divestment of an autonomous ongoing business—while, at the same time, a second authority could prefer to set price bands for the products offered by the merged entity and a third

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[2] *See*, *e.g.,* P. Papandropoulos & A. Tajana, *The Merger Remedies Study—In Divestiture We Trust?* 8 EUR. COMPETITION L. REV. 443 (2006).

[3] OECD, Merger Remedies, DAF/COMP(2004)21, Background Note, *available at* http://www.oecd.org/daf/competition/mergers/34305995.pdf.

could choose to establish minimum production levels and/or order compulsory licensing of relevant patents.

Even assuming an unlikely scenario where authorities would cooperate throughout their respective investigations, it would be very difficult to avoid endless combinations of remedies that ultimately would be impossible for the parties to comply with. As a principle, it is more important that authorities identify competition concerns that would result post-merger under a given theory of harm than to be overly ingenious in crafting the remedy.[4] The burden to devise remedies that may address concerns by multiple authorities should be on the merging parties. And, from a practical standpoint, that is also the only way through which remedies would be consistent and could possibly be implemented throughout the globe.

Under Brazil's new suspensory regime, CADE has already adopted hybrid or conduct-based remedies in a number of horizontal mergers. For example, in the Videolar/Innova case, a three-to-two merger in the market for polyethylene and plastic resins, CADE cleared the transaction subject to the parties (i) maintaining the same pre-merger output level, (ii) investing in research and development to foster competition in the market, and (iii) licensing for free and on a non-exclusively basis the relevant patents for a 5-year period.[5]

Another example is the Oxiteno/American Chemical deal, which created a monopoly in Brazil for sodium laureth sulfate, cleared by CADE subject to the merged entity charging a specific range of prices for the five years following the clearance.[6]

Finally, when reviewing the KPMG/BDO acquisition, in the market for auditing services, CADE approved the transaction with restrictions that included a 24-month ban on KPMG from engaging in other transactions through which it would gain access to clients with over BRL 300 million turnover.[7] After this period, KPMG will need to file all transactions involving clients with turnover greater than BRL 300 million.

The solutions above can of course be superior to clear-cut structural remedies. But they should be the result of a negotiation process considering a range of different solutions, rather than being imposed on the parties. As long as all the competition concerns are duly addressed by the parties, the authorities will also have gained with such an approach.

In this sense, credit should be given to the Brazilian antitrust authority in view of its efforts to be open and flexible when dealing with transactions that require remedies in multiple

[4] *See* Norway's Contribution to the OECD Merger Remedies Report, op. cit., p. 213: "To what extent competition authorities should be creative may also be an issue for debate. If authorities see that a new approach to remedies can restore competition in a market, they should of course indicate the possibility to the parties. However, the main role of competition authorities should be to explain as clearly as possible the harms to competition that arise from a concentration. The creativity with respect to finding solutions should primarily rest with the parties."

[5] Merger Case No. 08700.009924/2013-19 (Videolar S.A., Lirio Parisotto, Petróleo Brasileiro S.A. e Inova S.A.), cleared in April 2014.

[6] Merger Case No. 08700.004083/2012-72 (American Chemical I.C.S.A. and Oxiteno S.A), cleared in November 2013.

[7] Merger Case No. 08012.002689/2011-41 (BDO Auditores Independentes, BDO Consultores Ltda., and KPMG), cleared in October 2013.

jurisdictions. Three cases deserve the attention of international practitioners: In Mach/Syniverse[8] and Ahlstrom Corporation/Munkjö AB,[9] global transactions also subject to the review of the European Commission, CADE accepted the same scope of the divestiture package offered abroad, allowing for an effective divestiture process. More recently, in the review of the Lafarge/Holcim merger,[10] filed before 20 jurisdictions, although the case involved locally-defined markets (and, therefore, local packages in terms of scope) CADE was open to considering the uniform concept proposed by the parties before key authorities reviewing the case.

As merger review evolves around the globe, challenges facing practitioners and enforcers alike tend to get more intertwined. The transition of merger remedies' design into a mature set of practices is an ongoing process—and, as in any such transitions, it will not be without turmoil, especially considering the number of jurisdictions that have only recently adopted merger systems.

[8] Merger Case No. 08700.006437/2012-13 (Syniverse Holdings, Inc. and WP Roaming III S.A.R.L.), cleared in April 2013. Mach/Syniverse was filed under the old law and involved the market for roaming technology to mobile operators. CADE was concerned over the elevated concentration that would arise from the transaction in the markets of GSM data clearing and Near Real Time Roaming Data Exchange. The parties, then, offered commitments to divest a significant part of Mach's assets that adequately addressed CADE's concerns and the transaction was subsequently cleared.

[9] Merger Case No. 08700.009882/2012-35 9 (Munksjö AB and Ahlstrom Corporation), cleared in April 2013. The Ahlstrom Corporation/ Munkjö AB case was also filed under the former statute. CADE took the view that the transaction would lead to a high concentration in the markets for abrasive paper backings and pre-impregnated décor paper lines with no possibility of new entrants to compete with the incumbents (see Case No. 08700.009882/2012-35). To address the agency's competition concerns, the parties proposed the divestiture of Ahlstrom's assets in these two markets.

[10] Merger Case No. 08700.007621/2014-42 (Lafarge S.A. and Holcim, Ltd.), cleared in December 2014.

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Expanding EU Merger Control to Non-Controlling Minority Shareholdings: A Sledgehammer to Crack a Nut?

Nicholas Levy[1]

I. INTRODUCTION

In July 2014, the European Commission (the "Commission") issued a White Paper[2] and a Staff Working Document[3] confirming its intention to propose expanding the jurisdictional scope of the EU Merger Regulation[4] ("EUMR") to capture the acquisition of non-controlling minority shareholdings.[5] This article considers two questions: (1) has the case for change been persuasively made; and (2) are the modalities of the Commission's proposal appropriate?

II. THE EUMR

The EUMR has from the outset applied only to lasting changes of control. As a result, only minority shareholdings that confer control or "decisive influence"[6] are currently subject to pre-closing, mandatory review under the EUMR. Determining whether a given minority shareholding confers "decisive influence" is fact-specific and depends on a range of considerations, including the governance rules of the company in question, the rights attached to the minority shareholding, the size of other shareholdings, and the likelihood that a given minority shareholding will represent a majority of votes cast at annual general meetings. Depending on the magnitude of the shareholding, the associated governance rights, and the composition of the remaining shareholder base, non-controlling minority shareholdings may confer "decisive influence," even if they do not confer *de jure* control.[7]

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[2] COM(2014) 449, European Commission White Paper, Towards more effective EU merger control, July 9, 2014 ("White Paper").

[3] SWD(2014) 221, Commission Staff Working Document, "Towards more effective EU merger control" (July 9, 2014) ("Staff Working Document"). This document updated its 2013 predecessor, SWD(2013) 239, Commission 2013 Staff Working Document, "Towards more effective EU merger control" (June 25, 2013) ("2013 Staff Working Document"). References in this article to the Staff Working Document are to the 2014 version unless otherwise indicated.

[4] Council Regulation No 139/2004 EC [2004] OJ L24/1 (the "EUMR").

[5] The Staff Working Documents refer to non-controlling minority shareholdings as "structural links." The terms are used interchangeably in this article.

[6] EUMR, Articles 3(1) and 3(2).

[7] As a practical matter, shareholdings as low as 19 percent have been found to confer "decisive influence." *See*, e.g., Case IV/M.258 *CCIE/GTE* Commission decision of September 25, 1992.

III. ARTICLES 101 AND 102

The EU Courts have confirmed the application of Articles 101 and 102 to the acquisition of non-controlling minority shareholdings and/or the exercise of rights attached to such shareholdings.

- As to Article 101, the Court of Justice held in *Philip Morris* that structural links resulting from agreements between companies may serve as an instrument for influencing the commercial conduct of either or both companies, so as to restrict or distort competition in the market(s) in which they carry on business in violation of Article 101.[8] The Court recognized that such links may affect the incentives of an acquirer to compete with the target firm.[9]
- As to Article 102, the Court of Justice held, also in *Philip Morris*, that the creation of structural links could constitute an abuse of a dominant position provided "the shareholding in question results in effective control of the other company or at least in some influence on its commercial policy."[10] The Commission subsequently found in a case involving the acquisition by Gillette, the dominant producer of disposable razors, of a 22 percent share in a competitor, Wilkinson Sword, that Gillette had abused its dominant position by acquiring "some influence" over Wilkinson Sword and should therefore dispose of its equity stake.[11]

The Staff Working Documents recognize that Articles 101 and/or 102 may apply to non-controlling minority shareholdings, but suggest that legal and practical difficulties limit their application, which presumably accounts for the paucity of cases in recent years.[12] As to Article 101, the Commission accepts that "structural links may fall under Article 101 TFEU," but suggests that "it is unclear under which circumstances a structural link may constitute an 'agreement' having the object or effect of restricting competition within the meaning of Article 101 TFEU, in particular if the structural link is built up by the acquisition of a series of shares via the stock exchange."[13] As to Article 102, the 2013 Staff Working Document considers that it "would allow the Commission to deal with the competitive harm which may arise from structural links only in very narrow circumstances."[14] This is broadly correct, as Article 102 applies only to the abuse of a pre-existing dominant position.

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[8] Cases 142/85 and 156/84 *British American Tobacco Company Limited and R.J. Reynolds Industries Inc. v European Commission* [1987] ECR 4487 ("*Philip Morris*"), ¶¶37–38.

[9] *Philip Morris*, *Id.* ¶¶50–51.

[10] *Philip Morris*, *Id.* ¶65.

[11] Case No. IV/33.440 *Warner/Lambert/Gillette*, Commission decision of November 10, 1992 (1993 OJ L116/21).

[12] Following *Philip Morris*, the Commission opened a number of investigations (*see*, e.g., Case No. IV/34.857 *BT/MCI*, Commission decision of July 27, 1994 (1994 OJ L223/36); and Case No. IV/34.410 *Olivetti/Digital*, Commission decision of November 11, 1994 (1994 OJ L309/24)). In recent years, however, the Commission has not sought to apply Articles 101 or 102 to structural links.

[13] White Paper, *supra* note 2, ¶40; 2013 Staff Working Document, *supra* note 3 p. 6; and Staff Working Document, ¶62.

[14] White Paper, *Id.* ¶40; and 2013 Staff Working Document, *Id.* p. 6.

Notwithstanding their putative limitations,[15] Articles 101 and 102 represent an established legal basis that could be used to challenge structural links in situations where one party has a dominant position and/or there is evidence of an anticompetitive agreement or concerted practice. The situation is therefore different from that addressed by the last major reform of the EUMR, when the substantive test was expanded to permit the Commission to challenge concentrations that gave rise to unilateral effects, but fell short of single firm or collective dominance and would not therefore have been caught by the dominance test in the original form of EUMR adopted in 1989. Such transactions risked escaping review altogether and, since the recasting of the substantive test in 2004, the Commission has challenged a number of concentrations that could not readily have been pursued under the dominance test, including *UPS/TNT*, a 4-to-3 merger that was prohibited in 2013.[16] By contrast, Articles 101 and 102, together with national merger control rules that apply to non-controlling minority shareholdings, ensure that anticompetitive effects rising from most (even if not all) structural links may today be potentially subject to antitrust review in the European Union.

IV. THEORIES OF HARM

There are five principal theories of harm concerning the acquisition of non-controlling minority shareholdings. Upon examination, however, it will only rarely be possible to predict to the requisite evidentiary standard that the acquisition of such shareholdings will significantly lessen effective competition. This is in part because, as explained further below, several of these theories of harm are based on predictions about future conduct that are ill-suited to *ex ante* merger control.

The first theory is based on unilateral effects in the form of reduced incentives to compete—a minority shareholder may have less incentive to compete with the target firm if it believes it will benefit from the target's improved performance.[17] In practice, however, the acquirer of a minority shareholding will have strong incentives to compete with the target firm as it gains all the profits from its own business, but only a share of the target firm's profits.

The acquirer may therefore be expected to compete less vigorously with the target firm only where: (a) it is able to predict the relationship between demand and price; (b) it is confident that, by raising prices for its own products, it will benefit the target firm and not instead divert sales to rivals (or encourage new entry); (c) it is able to predict the extent to which it will recoup revenues lost through lower sales of its own products; and (d) it is confident that the benefit it secures by increasing the target firm's sales will outweigh the profits it would otherwise have secured itself. These conditions will be met only in exceptional circumstances. More usually, the diversion ratio will be unknown, the information available to the acquirer of the minority

[15] *See*, e.g., A. Ezrachi & D. Gilo, *EC Competition Law and the Regulation of Passive Investments Among Competitors*, 26(2) OXFORD J. LEG. STUDIES 338–344 (2006).

[16] Case COMP/M.6570 *UPS/TNT Express*, Commission decision of January 30, 2013 (not yet published).

[17] 2013 Staff Working Document, *supra* note 3, Annex I, ¶4; and Staff Working Document, ¶50.

shareholding will be incomplete and unreliable, and the impact on both companies' revenues and profits will be uncertain and unpredictable.[18]

The General Court considered, but rejected, a variant of this theory in connection with Aer Lingus' appeal of the Commission's determination that it lacked jurisdiction over Ryanair's minority shareholding in Aer Lingus. Aer Lingus had contended that "a minority shareholding in a competitor undertaking in a duopoly inherently distorts competition because the company with such a shareholding has less incentive to compete with a company in whose profitability it is interested."[19] The Court excluded this "theoretical argument" on the facts: competition had actually increased between Ryanair and Aer Lingus following Ryanair's acquisition of its minority shareholding.[20] The Court therefore determined that the "bounds of the powers invested in the Commission" under the EUMR:

> would be exceeded if it were accepted that the Commission may order the divestment of a minority shareholding on the sole ground that it represents a theoretical economic risk when there is a duopoly, or a disadvantage for the attractiveness of the shares of one of the undertakings making up that duopoly.[21]

Notwithstanding the General Court's findings in *Aer Lingus*, together with the reasons outlined above as to why the conditions required to support this theory of harm may seldom arise in practice, this first theory nevertheless represents the strongest case for the existence of a "gap" in the existing legal framework, as unilateral effects of the kind envisaged could not readily be caught by Articles 101 or 102 and this theory of harm does not require any prediction to be made as to future conduct.

The second theory of harm concerns the possibility that the acquirer of a minority shareholding will have the ability and incentive to influence the strategic direction of the target firm. In practice, the rights attached to a minority shareholding will (absent specific veto rights) only rarely confer influence over strategic decisions. Where they do, other shareholders, that by definition together exercise control, will presumably have strong incentives to veto any policy that favor the acquirer of the minority shareholding at the expense of the target firm (or that could damage the target firm).[22]

Practical application of this theory also requires an agency to predict how the acquirer of a minority shareholding is likely to vote its shares, how the remainder of the shareholders are likely to vote their shares, and to determine to the requisite standard of proof that competition would be significantly reduced. As the Court has found in respect of conglomerate effects,[23] the

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[18] *See*, e.g., OECD Policy Roundtable, pp. 36–38 which identifies "real-world" factors that may in practice render unlikely the possibility of anticompetitive effects. *See* too F. E. González-Díaz, *Minority Shareholdings and Creeping Acquisitions: The European Union Approach*, FORDHAM COMP. L. INST. 423 (B. E. Hawk, ed. 2012).

[19] Case T-411/07 *Aer Lingus Group plc v Commission* [2010] ECR II-03691 ("*Aer Lingus*") ¶74.

[20] *Aer Lingus*, *Id.* ¶74.

[21] *Aer Lingus*, *Id.* ¶76.

[22] *See* D. O'Brien & S. Salop, *Competitive Effects on Partial Ownership: Financial Interest and Corporate Control*, 67 ANTITRUST J. 559-614, p. 581 (2000).

[23] Court of Justice has held that the quality of evidence produced by the Commission is "particularly important" as the "chains of cause and effect [may be] dimly discernible, uncertain, and difficult to establish." Case C-12/03 P *Commission v. Tetra Laval* [2005] ECR I-978 ("*Tetra Laval*"), ¶44 (speculative theories as to future

Commission cannot safely make reliable predictions about future conduct. More typically, hypothesized conduct of this kind will emerge only over time, rendering *ex ante* review difficult or ineffective and suggesting that Articles 101 or 102 may be more effective legal instruments.

The third theory is premised on the notion that a non-controlling minority shareholding may increase the risk of tacit collusion.[24] Although it is widely accepted that structural links may be relevant to determining whether coordinated effects are likely,[25] such links represent only one element among many considered in coordinated effects cases,[26] are less important to determining whether tacit collusion is feasible than the criteria identified by the Court in *Airtours*[27] and set out in the Horizontal Merger Guidelines,[28] and typically increase the risk of coordinated effects only where they involve or lead to the exchange of confidential information. Not only is it difficult to predict *ex ante* that confidential information will be communicated, but any exchange of such information between competitors may be subject to Article 101, rendering review under the EUMR unnecessary.

As to the fourth theory, that a minority shareholder may be in a position to induce the target firm to discriminate against rivals so as to favor the minority shareholder,[29] vertical relationships have only exceptionally led to Commission intervention in recent years, and are most unlikely to raise concerns in the case of non-controlling minority shareholdings. Although the Commission has in the past required the sale of a minority shareholding to address a concern of this kind, that case involved the acquisition of "decisive influence."[30] It is unlikely that the Commission would be able to substantiate a vertical concern of this kind other than in exceptional cases. Correspondingly, where a minority shareholding involves firms in a vertical relationship, there may be efficiencies, including a reduction in the level of double marginalization.[31]

Finally, it has been suggested that the acquisition of non-controlling minority shareholdings may deter market entry, including by hindering third-party access to the equity of the target.[32] In practice, this situation may arise only rarely given the possibility under many national laws for takeover bids to be structured in such a way as to allow minority shareholders to be "squeezed out." In any event, it will generally be difficult to prove to the requisite

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conduct must be based on "sufficiently convincing evidence" and any "analysis of the future position must … be particularly plausible"). *See* Case T-5/02 *Tetra Laval v. Commission* [2002] ECR II-4381, ¶162.

[24] White Paper, *supra* note 2, ¶35; 2013 Staff Working Document, *supra* note 3, Annex I, ¶8; and Staff Working Document, ¶58.

[25] *See* Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the control of concentrations between undertakings ("Horizontal Merger Guidelines"), (2004/C 31/03), ¶48 ("structural links such as cross-shareholding or participation in joint ventures may also help in aligning incentives among the coordinating firms").

[26] *See* Joined Cases C-68/94 and C-30/95 *France and Others v. Commission* [1998] ECR I-1375, ¶221; Case T-102/96 *Gencor v. Commission* [1999] ECR II 753, ¶¶273 and 275–76; and Horizontal Merger Guidelines, *Id.*, ¶48.

[27] Case T-342/99 *Airtours plc v. Commission* [2002] ECR II-2585 ("*Airtours*"), ¶62.

[28] Horizontal Merger Guidelines, *supra* note 25, ¶41.

[29] Staff Working Document, *supra* note 3, ¶60; and 2013 Staff Working Document, Annex I, ¶11.

[30] *See* Case COMP/M.5406 *IPIC/MAN Ferrostaal*, Commission decision of March 13, 2009, ¶36.

[31] 2013 Staff Working Document, *supra* note 3, Annex I, ¶82.

[32] *Id.* ¶15.

evidentiary standard that, at the time a non-controlling minority shareholding is acquired, another bid is probable, likely to succeed, and likely to strengthen competition. Demonstrating that competition may be significantly harmed because a non-controlling minority shareholding impedes a takeover bid will therefore be difficult to predict *ex ante* other than in highly exceptional circumstances.

In short, non-controlling minority shareholdings will only rarely raise competition concerns. In particular, it will only exceptionally be possible for an agency to predict anticompetitive harm to the requisite legal standard at the time a minority shareholding is acquired. The "gap" in the EUMR's jurisdictional ambit is therefore slender. As a result, any expansion of the EUMR should be narrowly framed to avoid imposing unnecessary or disproportionate costs.

V. THE 2001 GREEN PAPER

In 2001, the Commission considered expanding the jurisdictional scope of the EUMR to capture non-controlling minority shareholdings.[33] It recognized at the time that such shareholdings may have a structural impact, but identified difficulties in defining the types of transactions that would be subject to mandatory notification.[34] Following a consultation process, the Commission decided against amending the EUMR, noting that "only a limited number of [acquisitions of minority shareholdings] would be liable to raise competition concerns that could not be satisfactorily addressed under Articles [101] and [102 TFEU]."[35]

Various considerations counseled against expanding the EUMR at that time, including (i) difficulties associated with defining the types of transactions that would be subject to EU jurisdiction, (ii) policy arguments concerning the sufficiency of evidence about the competitive effects of non-controlling minority shareholdings, (iii) existing possibilities open to the Commission to examine structural links under Articles 101 and 102, (iv) concern about "unnecessarily burdening the European Commission's service and the parties involved in these types of transactions, which in most cases are pro-competitive or competitively neutral,"[36] and (v) the existence of national merger control laws in Germany and the United Kingdom that were sufficiently broad to capture non-controlling minority shareholdings. In this author's view, these considerations remain equally valid today.

VI. THE *RYANAIR/AER LINGUS* CASE

The Commission's proposal to expand the EUMR's jurisdictional scope has its origins in a long-running dispute between two Irish airlines, Ryanair and Aer Lingus, that arose out of Ryanair's minority shareholding in Aer Lingus. In 2007, the Commission prohibited Ryanair's

[33] *Commission Green Paper, "Review of Council Regulations (EEC) No 4064/89," December 11, 2001 ("Green Paper").*

[34] *Id.* ¶109 ("[I]t appears doubtful whether an appropriate definition could be established capable of identifying those instances where minority shareholdings and interlocking directorships would warrant such treatment [i.e., the *ex ante* control of the EUMR]").

[35] *Id.* ¶109.

[36] OECD Policy Roundtable Concerning Minority Shareholdings (2008), Paper DAF/COMP(2008)30 ("OECD Policy Roundtable"), p. 40.

acquisition of Aer Lingus.[37] Following that decision, Aer Lingus asked the Commission to order Ryanair to divest a 29 percent minority shareholding acquired by Ryanair in anticipation of a full bid for Aer Lingus. The Commission determined that, because Ryanair had not acquired control over Aer Lingus, it could not order the divestment of Ryanair's minority shareholding. On appeal, the General Court upheld the Commission's determination that it lacked jurisdiction under the EUMR to order the divestiture of a non-controlling minority shareholding, finding that:

> the concept of [a] concentration cannot be extended to cases in which control has not been obtained and the shareholding at issue does not, as such, confer the power of exercising decisive influence on the other undertaking, but forms part, in a broader sense, of a notified concentration examined by the Commission and declared incompatible with the common market following that examination, without there having been any change of control.[38]

The position under the EUMR may be contrasted with that in certain other jurisdictions, including Germany,[39] the United Kingdom,[40] and the United States,[41] where the applicable merger control laws apply to the acquisition of non-controlling minority shareholdings. Between 10 and 15 percent of transactions challenged by the German Federal Cartel Office have involved non-controlling minority shareholdings.[42] By contrast, the U.S. agencies have only rarely challenged transactions involving the acquisition of non-controlling minority shareholdings.[43] In the United Kingdom (which has a voluntary regime), the incidence of such shareholdings being

[37] Case COMP/M.4439 *Ryanair/Aer Lingus*, Commission decision of June 27, 2007.

[38] Case T-411/07 *Aer Lingus Group plc v. Commission* [2010] ECR II-03691 ("*Aer Lingus*"), ¶65.

[39] German merger control law applies to acquisitions of at least 25 percent of the shares (capital or voting rights) in another undertaking (§ 37 (1) No. 3 lit. b Act against Restraints of Competition ("ARC")), and other transactions enabling one or several undertakings to directly or indirectly exercise a "competitively significant influence" on another undertaking (§ 37 (1) No. 4 ARC). The German courts have clarified that, in the case of shareholdings below 25 percent, there must be "plus factors" that put the acquirer of the minority shareholding in a similar position as a 25 percent shareholder.

[40] U.K. merger control rules apply to acquisitions that confer "material influence." "Material influence" is "presumptively" assumed to exist for shareholdings of 25 percent or more (because such shareholdings "generally enable the holder to block special resolutions"). The U.K. agencies may also examine "any case where there is a shareholding of 15 percent or more in order to see whether the holder might be able materially to influence the company's policy." Material influence may exceptionally extend to shareholdings of less than 15 percent, but in practice such acquisitions are likely to be examined only "where they concern one business taking a stake in a direct competitor." *See* Enterprise Act 2002, s 26(3), and OFT, Mergers: Jurisdictional and Procedural Guidance, June 2009, ss 3.19-3.20.

[41] Clayton Antitrust Act 1914, s 7, prohibits acquisitions of "the whole or any part" of a corporation's stock or assets if "the effect of such an acquisition may be substantially to lessen competition." The U.S. Supreme Court has found violations in acquisitions involving shareholdings as low as 20 percent.

[42] *See* J. P. Schmidt, *Germany: Merger control analysis of minority shareholdings—A model for the EU?* 2 COMPETITION L.J., 208 (2013), who estimates that, between 1990 and 2010, acquisitions of non-controlling minority shareholdings represented around 10 percent of all notified transactions in Germany.

[43] *See* F. E. Gonzalez-Diaz, *Minority shareholdings and creeping acquisitions: the European Union approach*, FORDHAM COMP. L. INST. 423 (B. E. Hawk, ed. 2012), who estimates that, of the 15,000 transactions notified to the U.S. antitrust agencies between 2001 and 2010, fewer than 10 involved partial ownership concerns; and *see* too 2013 Staff Working Document, *supra* note 3, Annex II, ¶75-90.

challenged has been low,[44] although two of the most prominent recent U.K. merger decisions, *BSkyB/ITV* [45] and *Ryanair/Aer Lingus*, [46] involved minority shareholdings that the U.K. Competition Commission ordered should be partially divested.

VII. THE EUROPEAN COMMISSION'S PROPOSAL

In March 2011, then-Commissioner Almunia disclosed that the Commission was considering a proposal to expand the EUMR to cover non-controlling minority shareholdings.[47] In October 2011, the Commission announced a study to examine the case for reform[48] and, in June 2013, the Commission published a Staff Working Document, soliciting comments on either a mandatory "notification" system or a "selective" system where the Commission would have the possibility to assert jurisdiction over "problematic" cases.[49] In July 2014, following a consultative process that was largely critical of the Commission's proposed expansion of the EUMR,[50] the Commission published a White Paper advancing specific proposals for a "targeted" mandatory notification system.[51]

A. Has the Case for Change Been Persuasively Made?

The 2013 Staff Working Document identified "at least" 53 merger cases in which structural links were relevant for its competitive assessment, out of which 20 "led to or strengthened competition problems."[52] Upon examination, however, these 20 cases, which represent less than 0.5 percent of the 6,000 concentrations notified since 1990, do not represent a compelling case for change.

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[44] Of the approximately 400 transactions investigated in the United Kingdom since 2008, fewer than 10 have involved non-controlling minority shareholdings, of which the majority involved situations where the shareholdings in question conferred a right to board representation.

[45] *British Sky Broadcasting Group PLC/ITV PLC*, Competition Commission Final Report (December 14, 2007) ("*BSkyB/ITV*").

[46] *Ryanair Holdings plc and Aer Lingus Group Plc*, Competition Commission Final Report (August 28, 2013). Confirmed on appeal by the Competition Appeal Tribunal (*1219/4/8/13 Ryanair Holdings PLC v Competition and Markets Authority* [2014] CAT 3). Confirmed on appeal by the Competition Appeal Tribunal (*1219/4/8/13 Ryanair Holdings PLC v Competition and Markets Authority* [2014] CAT 3).

[47] J. Almunia, "EU Merger Control has Come of Age, Merger Regulation in the EU after 20 Years," co-presented by the IBA Antitrust Committee and the European Commission, Brussels, March 10, 2011, (Commission Press Release SPEECH/11/166).

[48] *See* Provision of Data on the Importance of Minority Shareholdings in the EU, Invitation to Tender, October 27, 2011 (COMP/2011/029).

[49] 2013 Staff Working Document, *supra* note 3, p. 6. Two possible "selective" systems were identified: (1) a "self-assessment" system in which companies would be under no obligation to file a notification, but the Commission would reserve the right to investigate; and (2) a "transparency" system that would require companies to file a short information notice in situations involving a "*prima facie* problematic structural link." *Id.*, pp. 8–9.

[50] SWD(2014) 217, Commission Staff Working Document, Impact Assessment "Towards more effective EU merger control" (July 9, 2014) ("Impact Assessment") ¶78 ("During the public consultation, respondents across all groups of stakeholders, expressed concerns that the proposed reform would greatly increase the administrative burden which they face, and that this would be disproportionate given the low number of problematic acquisitions of minority shareholdings").

[51] *Id.* ¶¶94-98.

[52] 2013 Staff Working Document, *supra* note 3, Annex II, ¶12.

- Three of the cases cited involved minority shareholdings that were extremely small (less than 10 percent) and should not therefore be subject to merger review on any basis.[53]
- In a further three of the cases cited, the Commission found (or came close to finding) that the minority shareholding in question conferred control or "decisive influence."[54] Acquisitions conferring control would presumably have been reportable in their own right under EU or national merger control rules.
- In six of the cases cited, the minority shareholdings under review raised concerns about the exchange of confidential information and the coordination of commercial policies,[55] which could presumably have been dealt with under Article 101. Article 101 could also potentially have been applied in those cases where the concern identified related to networks of controlling and non-controlling shareholdings in concentrated markets.[56]
- Virtually all of the 20 cases concerned pre-existing structural links that were addressed in the context of the Commission's review of reportable concentrations. These are not therefore examples of non-controlling minority shareholdings that escaped antitrust scrutiny. The Staff Working Document observes that, had these minority shareholdings been acquired after the concentrations in question had been approved, the Commission might have lacked jurisdiction to review them under the EUMR. This is possible. However, national merger control rules might have applied and/or the Commission might have been in a position to invoke Articles 101 and/or 102.

The 2013 Staff Working Document acknowledged that "there is currently only limited empirical literature on the effects of structural links,"[57] but presented little evidence that any of the 91 transactions it considered to "potentially merit competition scrutiny"[58] have, in fact, caused competitive harm. Accordingly, even if one accepts the theoretical existence of a "gap" in the EUMR's scope of application, there is little evidence of non-controlling minority shareholdings being associated with anticompetitive harm in the European Union today.

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[53] *See* Case COMP/M.1940 *Framatome/Siemens/Cogéma/JV*, Commission decision of December 6, 2000 (9.3 percent shareholding); Case COMP/M.4150 *Abbott/Guidant*, Commission decision of April 11, 2006 (4 percent shareholding); and Case COMP/M.5096 *RCA/MAV Cargo*, Commission decision of November 25, 2008 (5.7 percent shareholding).

[54] *See* Case COMP/M.833 *Coca-Cola Company/Carlsberg A/S*, Commission decision of September 11, 1997, ¶62; Case COMP/M.1453 *AXA/GRE*, Commission decision of August 4, 1999, ¶24; and Case COMP/M.5406 *IPIC/MAN Ferrostaal AG*, Commission decision of March 13, 2009, ¶36.

[55] *See* Case COMP/M.1080 *Thyssen/Krupp*, Commission decision of July 2, 1998, ¶33; Case COMP/M.1673 *VEBA/VIAG*, Commission decision of June 13, 2000, ¶106 Case COMP/M.2567 *Nordbanken/Postgirot*, Commission decision of November 8, 2001, ¶55; Case COMP/M.3653 *Siemens/VA Tech*, Commission decision of July 13, 2005, ¶222; Case COMP/M.4150 *Abbott/Guidant*, Commission decision of April 11, 2006, ¶57; and Case COMP/M.4153 *Toshiba/Westinghouse*, Commission decision of September 19, 2006, ¶92.

[56] *See* Case COMP/M.1383 *Exxon/Mobil*, Commission decision of September 29, 1999, Annex II; and Case COMP/M.167 *VEBA/VIAG*, Commission decision of June 13, 2000, ¶4.

[57] 2013 Staff Working Document, *supra* note 3, Annex I, ¶23.

[58] 2013 Staff Working Document, *Id.*, ¶97. Of these 91 transactions, "43 […] were likely to have an EU dimension and fall under the Merger Regulation if the latter were to cover structural links."

B. Are the Modalities of the Commission's Proposal Practicable and Proportionate?

The Commission's proposal has three main objectives: (a) to "capture the potentially anti-competitive acquisitions of non-controlling minority shareholdings;" (b) to "avoid unnecessary and disproportionate administrative burdens on companies;" and (c) to "fit with the merger control regimes currently in place at both the EU and national level."[59] The Commission estimates, optimistically perhaps, that its proposal would entail "light and tailor-made review"[60] and would apply to only 20-30 transactions a year, corresponding to around 7-10 percent of merger cases currently examined annually by the Commission.[61]

In designing a new system, the Commission had various options, including whether to propose a mandatory or a voluntary system and whether to establish jurisdiction on the basis of "bright line" rules (*e.g.*, a simple shareholding threshold) or more complex criteria. As explained below, the proposal advanced in the White Paper represents among the more complex and burdensome of the various possible options available to the Commission: It envisages a mandatory system (albeit one in which the Commission would "target" its resources on problematic transactions) that would be applicable to shareholdings as low as 5 percent and would establish jurisdiction by reference to various fact-specific criteria. The principal elements of the Commission's proposal are summarized below:

- The acquisition of non-controlling minority shareholdings would be subject to mandatory notification where they create "competitively significant links." This concept has two elements: (a) the determination of whether the companies in question operate in horizontally or vertically related markets, and (b) the assessment of whether the acquired structural link is "significant."[62]
- EUMR jurisdiction would arise automatically in respect of the acquisition of shareholdings above 20 percent.[63] In respect of shareholdings between 5 and 20 percent, jurisdiction would be found in the event of "additional elements." Three examples of "additional elements" are given: (a) where a shareholding confers a *de facto* blocking minority, (b) where a shareholding confers a right to representation on a target's board, and (c) where a shareholding confers rights of access to commercially sensitive information.[64]
- Notification would be mandatory. Companies would be required to submit a short notice following which there would be a 15-day standstill provision during which time the acquired shareholding could not be voted and the Commission could decide whether to

[59] Staff Working Document, *supra* note 3, ¶¶67-70; and White Paper, *supra* note 2, ¶62. *See* too C. E. Mosso, Acting Deputy Director-General for Mergers, DG COMP, "EU Merger Control: The Big Picture," speech delivered at the Sixth Annual GCR Conference, Brussels, November 12, 2014, p. 8, *available at* http://ec.europa.eu/competition/speeches/text/sp2014_06_en.pdf.

[60] Commission Press Release IP/14/801 of July 9, 2014.

[61] Staff Working Document, *supra* note 3, ¶85; and Impact Assessment, *supra* note 50, ¶46.

[62] White Paper, *supra* note 2, ¶¶46-47; and Staff Working Document, *supra* note 3, ¶¶78 and 89.

[63] White Paper, *Id.* ¶47; and Staff Working Document, *Id.* ¶89.

[64] White Paper, *Id.* ¶47; and Staff Working Document, *Id.* ¶92.

investigate, national agencies could consider a referral request, and potential complainants could decide whether to come forward.[65] If the Commission decided to open an investigation, the normal review periods would apply.[66] If it decided not to investigate, the Commission would nevertheless retain the possibility to open an investigation for up to 4-6 months.[67]

Any proposal to extend the ambit of the EUMR necessarily involves balancing potential benefits against likely costs. This calculus is in part a function of the modalities of the system adopted by the European Union: the clearer the jurisdictional thresholds, the easier they are to apply, and the more targeted their scope of application, the stronger the case for reform. The Commission's proposal is unsatisfactory because, notwithstanding the slender "gap" in the EUMR's current scope of application, the White Paper envisages a complex, cumbersome, and uncertain process that is inconsistent with the "bright line" jurisdictional thresholds that have served the EUMR well from the outset. Four principal observations may be made:

First, the Commission has, for the first time since the EUMR's adoption, proposed a jurisdictional test that is based on substantive criteria, namely the determination of whether there are "competitively significant links." The Commission's proposals would add a level of complexity that would make it difficult for many companies to comply with their obligations under the EUMR. Individual cases might well require lengthy pre-notification discussions on market definition and the extent of competitive overlap necessary to satisfy the test, resulting in delay and uncertainty.

Experience over the past 25 years shows that a wide array of definitional and other issues have arisen concerning the interpretation of the application of the existing revenue-based jurisdictional thresholds. Given the complexity of the proposed new thresholds, it would take time and effort to develop practicable rules. At a minimum, detailed guidance would be required as to the circumstances in which a competitive relationship would be sufficiently "significant" to establish EUMR jurisdiction.

Second, leaving aside the question of whether acquisitions of 5 percent shareholdings should be subject to *ex ante* merger control review, the 5-20 percent plus "additional factors" test proposed by the Commission would be difficult to apply and, therefore, problematic. The "additional factors" test seems to be modeled on the "competitively significant influence" test found in Chapter VII of the German Act Against Restraints of Competition. It is widely acknowledged that this feature of German law has led to confusion and an absence of legal certainty that has taken many years to address, and is even today not free of controversy.

Particularly difficult issues may be anticipated in respect of the proposal that shareholdings less than 20 percent be subject to review where they confer a "*de facto*" blocking minority, as it can in practice be difficult to determine whether a given minority shareholding is capable of conferring such powers. While there may be situations where this determination can be made easily (*e.g.*, where there are only a few large shareholders), in many cases it will not be

[65] White Paper, *Id.* ¶43; and Staff Working Document, *Id.* ¶¶105-107.

[66] White Paper, *Id.* ¶51; and Staff Working Document, *Id.* ¶109.

[67] White Paper, *Id.* ¶51; and Staff Working Document, *Id.* ¶102.

straightforward.[68] Any system that required investors (for purposes of determining jurisdiction) to make similar types of assessments across the European Union could raise complex legal and factual issues under a wide range of national corporate governance rules.

Third, the procedural aspects of the Commission's proposal are heavy-handed. The White Paper envisages a 15-day waiting period, in part to avoid undermining the suspensory effect of various national rules to which transactions might be subject should the Commission decline to investigate. Since minority shareholdings do not involve the integration of competing businesses, their acquisition can, in most cases, be unwound without undue difficulty. Further, the Commission recognizes that, therefore, largely most such shareholdings do not raise concerns. A stand-still requirement is unnecessary. The envisaged 4-6 month limitation period during which the Commission could review any completed acquisitions is similarly unnecessary and unduly long.

Finally, although the White Paper is silent on the topic, the implication of the Commission's proposal is that fines could be imposed for failure to notify reportable transactions. Given the issues that may in practice arise from interpreting and applying the proposed thresholds, this risks creating an unacceptable level of exposure, particularly given (i) the Commission's recognition that non-controlling minority shareholdings are less likely to raise concern than full mergers, (ii) its stated preference for a "light" system, and (iii) the possibilities that exist for unwinding such transactions relatively easily.

In short, the system proposed for reviewing the acquisition of non-controlling minority shareholdings does not meet the Commission's stated objective of minimizing the regulatory burden. This consideration is particularly important given the rare circumstances in which non-controlling minority shareholdings may be expected to raise antitrust concerns and the narrow "gap" in the existing legal framework given the scope for applying Articles 101 or 102. Accordingly, should the Commission maintain its determination to expand the EUMR's ambit, a voluntary system of the kind preferred by former Commissioner Almunia in 2012[69] and favored by the U.K. and other competition agencies would be better.[70] In addition, the applicable thresholds should be clear, predictable, and based on objective, readily ascertainable criteria.[71]

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[68] In *BSkyB/ITV* and *Ryanair/Aer Lingus*, for example, the U.K. Competition Commission conducted detailed inquiries in an effort to predict voting turnout, future voting patterns, and the types of decisions that could confer "material influence" under U.K. law. *BSkyB/ITV*, ¶¶3.45-3.55 and 6.25-6.38; and *Ryanair/Aer Lingus*, ¶¶4.16-4.27.

[69] J. Almunia, "Merger Review: Past Evolution and Future Prospects," November 2, 2012 (Commission Press Release SPEECH/12/773) ("My preliminary preference would be to go for a selective system and identify the cases which *prima facie* can raise competition problems rather than creating a system in which significant minority shareholdings would have to be notified in all instances").

[70] *See* response to 2013 Staff Working Document submitted by U.K. OFT and Competition Commission, "U.K. competition authorities' response to DG COMP's Consultation on Reform of the EUMR," of September 20, 2013, pp. 2-3 ("the U.K. competition authorities favour a voluntary notification system for structural links, allowing parties to self-assess … the U.K. competition authorities consider it is very important to implement the new system in such a way that it catches only the relatively few, yet problematic, cases. Any consideration of a mandatory pre-notification requirement should balance the need to be more active and thorough in conducting analysis of the impact of transactions on competition against the administrative and financial burden on the parties").

[71] *See*, e.g., A. Bardong, *Head of Merger Control Policy at the Bundeskartellamt, 'The German Experience*,' in *Merger control and minority shareholdings: Time for a change?* 3 CONCURRENCES 14-41 (D. Bosco et. al. eds.2011).

VIII. REMEDIES

The Commission's general preference has been for structural commitments, in particular divestitures that do not require medium- or long-term monitoring.[72] However, unlike acquisitions of control, where by definition the acquirer secures control of the target firm thereby eliminating competition between them, the principal theories of harm applied to non-controlling minority shareholdings are often based on predictions as to the future conduct. In this respect, the Commission has recognized that "competition concerns are more likely to be serious when a minority shareholding grants some degree of influence over the target firm's decisions"[73] or gives the non-controlling minority shareholder access to commercially sensitive information.[74] In such circumstances, behavioral remedies may well be sufficient, as "competition concerns arising from minority shareholdings can be alleviated not only by full divestiture, but also by non-structural remedies regarding voting rights and access to information."[75]

By way of example, where the theory of harm is that the acquirer of a non-controlling minority shareholding may have the ability and incentive to influence the target firm so as to lessen effective competition, any remedy that limited the acquirer's influence, including by limiting its corporate governance rights, could well remove the competitive concerns. Likewise, where the theory of harm is that the acquirer of a non-controlling minority shareholding may secure access to confidential information as a result of its shareholding, an undertaking not to seek or obtain such information should be sufficient. Similarly, where the theory of harm is that the acquirer of a non-controlling minority shareholding may have the ability and incentive to foreclose a target firm's downstream competitors from obtaining upstream inputs, an access remedy should be acceptable.[76]

Experience in Germany, which among national agencies in the European Union has been most active in investigating the acquisition of non-controlling minority shareholdings, suggests a readiness to accept behavioral remedies in appropriate cases,[77] although the general preference where such acquisitions have raised competition concerns has been to prohibit them[78] or to order

[72] Commission Notice on remedies acceptable under the Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (2008 O.J. C 267/1) ("Remedies Notice"), ¶17 ("Divestiture commitments are the best way to eliminate competition problems resulting from horizontal overlaps, and may also be the best means of resolving problems resulting from vertical or conglomerate concerns"). *See* also OECD Policy Roundtable, Remedies in Merger Cases, DAF/COMP(2011) 13, p. 234 ("commitments which are structural in nature … are, as a rule, preferable from the point of view of the Merger Regulation's objective").

[73] Staff Working Document, *supra* note 3, ¶52.

[74] White Paper, *supra* note 2, ¶46; and Staff Working Document, *supra* note 3, ¶¶58 and 92.

[75] Staff Working Document, *Id*., ¶57. *See* too Case COMP/M.4153, *Toshiba/Westinghouse*, Commission decision of September 9, 2006 (to address information sharing concerns arising from a 24.5 percent shareholding, Toshiba agreed to relinquish board representation and blocking rights in GNF).

[76] Remedies Notice, *supra* note 72, ¶¶61 *et seq*.

[77] *See*, e.g., 2013 Staff Working Document Annex II, pp. 10-14. *See*, e.g., B8-107/02 *EWE, E.DIS/ Stadtwerke Eberswalde*, Decision of the Bundeskartellamt of December 18, 2002 (EWE's and E.DIS's proposed acquisition of shareholdings in a downstream supplier, Stadtwerke Eberswalde, conditioned on a commitment giving Stadtwerke the sole right to appoint a chief executive officer and to independently enter into energy procurement contracts).

[78] *See*, e.g., B3-132/12 *Asklepios Kliniken/Rhön-Klinikum*, Decision of the German Bundeskartellamt of March 12, 2013; B8-67/09 – *EnBW/VNG*, Decision of the Bundeskartellamt of August 24, 2009; B8-67/09 – *EnBW/EWE*, Decision of the Bundeskartellamt of January 1, 2009; B8-93/07 *RWE/Stadtwerke Krefeld Neuss*, Decision of the

the divestiture of the acquired shareholdings.[79] Likewise, the tendency in the United Kingdom has been to order the divestiture of virtually all of the acquired shareholdings,[80] including in circumstances where, given the theories of harm at issue, behavioral remedies could well have been sufficient.[81] Accordingly, should the EUMR's jurisdictional scope be expanded to include acquisitions of non-controlling minority shareholdings, the Commission will hopefully be more open to accepting appropriate behavioral remedies than it is today.[82]

IX. GLOBAL CONSIDERATIONS

Over the past decade, many countries around the world have either adopted merger control regimes that are based on the EUMR or look to the Commission for guidance and inspiration on questions of policy and practice.[83] The proliferation of such regimes, together with the lack of harmonization in applicable jurisdictional, substantive, and procedural rules, has created a complex, burdensome,[84] costly, and occasionally bewildering landscape.[85] Moreover,

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Bundeskartellamt of October 23, 2007; B4-1002/06 *Remondis/ Schweriner Abfallentsorgungs- und Straßenreinigungsgesellschaft*, Decision of the Bundeskartellamt of December 22, 2006; B8-83/03 *RWE AG/Stadt Wuppertal*, Decision of the Bundeskartellamt of November 4, 2003; and B9-164/98 *HABET/Lekkerland,* Decision of the Bundeskartellamt of February 25, 1999.

[79] *See*, e.g., B8-27/04 *Mainova/AVG*, Decision of the Bundeskartellamt of July 22, 2004; B8-21/03 *E.ON/Stadtwerke Eschwege*, Decision of the Bundeskartellamt of September 9, 2003; B8-149/01 *E.ON/RAG Beteiligungs GmbH*, Decision of the Bundeskartellamt of February 26, 2002; and B8-109/01 E.*ON AG / BP p.l.c.*, Decision of the Bundeskartellamt of January 17, 2002. *See* too J. P. Schmidt, *Germany: Merger control analysis of minority shareholdings – A model for the EU?* 2 COMPETITION L.J. 208 (2013), who estimates that, between 2005 and 2012, of the 32 transactions prohibited in Germany, 4 or 12.5 percent involved the acquisition of non-controlling minority shareholdings. *See* also Impact Assessment, *supra* note 50, ¶46.

[80] In *BSkyB/ITV*, BSkyB was ordered to reduce its 17.9 percent shareholding in ITV to below 7.5 percent. *BSkyB and ITV plc*, Secretary of State for Business, Enterprise & Regulatory Reform Final Report (January 29, 2008). In *Ryanair/Aer Lingus*, Ryanair was ordered to divest all but 5 percent of its 29 percent shareholding in Aer Lingus. *Ryanair Holdings plc and Aer Lingus Group Plc*, Competition Commission Final Report (August 28, 2013). Confirmed on appeal by the Competition Appeal Tribunal (*1219/4/8/13 Ryanair Holdings PLC v Competition and Markets Authority* [2014] CAT 3). Under appeal to the Court of Appeal.

[81] In *Ryanair/Aer Lingus*, for example, where the principal theories of harm pursued by the U.K. Competition Commission concerned the possibility that Ryanair might prevent the sale of Aer Lingus slots at Heathrow airport or frustrate a merger with another airline, commitments not to act in this way should in principle have addressed the agency's concerns.

[82] *See*, e.g., Remedies Notice, *supra* note 72, ¶¶17 and 69, which distinguish between "divestitures, other structural remedies, such as granting access to key infrastructure or inputs on non-discriminatory terms, and commitments relating to the future behaviour of the merged entity" that are considered acceptable in only exceptional circumstances.

[83] *See*, e.g., N. Kroes, former Competition Commissioner, "Competitiveness—the common goal of competition and industrial policies" (2008) SPEECH/08/207 ("Our rules are working, and our European approach is setting the new global standards").

[84] Data computed by *Global Competition Review* show that close to 15,000 notifications were filed around the world in 2012, incurring delay and cost for thousands of transactions. *See* Global Competition Review, *Rating Enforcement: The Annual Ranking of the World's Leading Competition Authorities*, GCR 14 (June 2012).

[85] *See*, e.g., D. Cooperman, Senior Vice President, General Counsel and Secretary Oracle Corporation, Testimony before the U.S. Antitrust Modernization Commission (November 8, 2005); and J. W. Rowley QC and O. K. Wakil, *International Mergers: The Problem of Proliferation*, FORDHAM COMP. L. INST. 297–317 (B. E. Hawk, ed. 2007).

antitrust agencies in emerging market jurisdictions do not always apply merger control rules in the same way as their U.S. or EU counterparts.

Accordingly, there is a real risk that any expansion of the EUMR would be copied in more than 100 jurisdictions, including the 25 or so EEA countries that do not currently subject structural links to review under their applicable merger control rules. This could significantly increase the incidence of global merger control with the attendant costs and risk that pro-competitive investments and legitimate corporate transactions would be delayed or not pursued.

X. CONCLUSION

Any extension of the EUMR's scope of application to capture non-controlling minority shareholdings would represent a significant change that could materially increase the number of reportable transactions, thereby increasing compliance costs and regulatory uncertainty. Given the existing possibilities available to the Commission to apply Articles 101 and/or 102 to structural links, together with the existence of national merger control laws in the European Union that apply to the acquisition of non-controlling minority shareholdings, the burden rests on the Commission to demonstrate the existence of a material gap in the EUMR's scope of application.

Although there is theoretical support for the notion that structural links may in certain circumstances raise antitrust concerns, the available evidence is insufficient to justify the EUMR's expansion. Accordingly, in this author's view, the answers to the two questions framed at the outset—has the case for change been persuasively made and are the modalities of the Commission's proposal appropriate?—are "no" and "no." Should, however, the Commission decide to press ahead, a voluntary system based on clear and certain thresholds would be preferable to the proposal outlined in the White Paper.

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Yes We Can, But Should We? Merger Remedies During the First Obama Administration

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Yes We Can, But Should We? Merger Remedies During the First Obama Administration

Christine Wilson & Keith Klovers[1]

I. INTRODUCTION

During the 2008 Presidential election, Barack Obama promised to "reinvigorate" antitrust enforcement in the United States. Candidate Obama focused in part on merger enforcement, an area in which he promised to "step up review of merger activity and take effective action to stop or restructure those mergers that are likely to harm consumer welfare."[2] Candidate Obama also argued, "we probably have to update how we approach antitrust to figure out what is truly anticompetitive behavior."[3] Following his election, observers predicted a significant change of position at both the Department of Justice Antitrust Division ("DOJ") and the Federal Trade Commission ("FTC") (collectively, the "Agencies").

Subsequent merger cases suggest that the Agencies revised their approach, sometimes significantly. These changes were particularly evident in the realm of merger remedies. During President Obama's first term, the Agencies—particularly the DOJ—imposed a string of novel merger remedies, including: (i) compulsory innovation (Google-ITA); (ii) compulsory FRAND licensing of a product that did not yet exist (also Google-ITA); (iii) the imposition of divestitures creating two new competitors to replace the loss of one competitor (Ticketmaster-Live Nation); (iv) prospective mandates on the level of employment and output (Gazette-Daily Mail); (v) long-term bans on serving specific current clients (Ticketmaster-Live Nation and Election Systems & Software-Premier Election Solutions); and (vi) significant restrictions on the use of intellectual property ("IP"), particularly patents in the pharmaceutical industry (Perrigo-Paddock) or those viewed as standard-essential (Bosch-SPX and Google-Motorola).

These novel remedies represent a significant and potentially troubling departure from traditional agency practice. During both the Clinton and Bush Administrations, the Agencies consistently held that some remedies, particularly conduct remedies, were likely to impose many costs and few benefits. But the Agencies revived a number of previously disfavored remedies during the first Obama Administration, including what the DOJ now characterizes as a "panoply" of conduct remedies.[4] In the aggregate, these remedies represent a significant

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[2] *See* Jacqueline Bell, *Obama to Take Aggressive Stance on Antitrust*, LAW360.COM, Oct. 31, 2008, http://www.law360.com/articles/75182/obama-to-take-aggressive-stance-on-antitrust (quoting Mr. Obama's statements from the campaign trail).

[3] *Id.*

[4] U.S. DEP'T OF JUSTICE ANTITRUST DIVISION, ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES 13, June 2011 [hereinafter 2011 POLICY GUIDE], http://www.justice.gov/atr/public/guidelines/205108.pdf ("There is a panoply of conduct remedies that may be effective in preserving competition.").

departure from the core merger remedy principles upon which the Agencies have traditionally operated.

Two caveats apply. First, our assessment is based on imperfect (and asymmetric) information. We readily acknowledge that non-public facts may justify remedies that, given our more limited view of a case, appear counterintuitive or ill-suited. We readily acknowledge that, were we privy to the same information as the Agencies, we may draw different conclusions with respect to a particular case than the ones we have reached and describe here. Yet these are largely concerns on the margin; the prevalence of novel remedies *in the aggregate* suggests a fundamental shift in Agency merger policy during the first Obama Administration.

Second, our comments are largely limited to merger remedies adopted by the Agencies during the first Obama Administration. More recent cases—such as United Technologies-Goodrich at the DOJ and General Electric-Avio at the FTC—suggest that both agencies may have returned to a more traditional approach.

II. HISTORICAL AGENCY APPROACH TO REMEDIES

At bottom, the Agencies seek remedies that will effectively replace lost competition. Thus, the Agencies historically have avoided remedies that either (i) are likely to be ineffective or (ii) go beyond the steps necessary to effectively replace lost competition. Both Agencies enshrined this approach in official guidance documents. The FTC addresses merger remedies in its *Frequently Asked Questions About Merger Consent Order Provisions* ("the FAQs"), which it first adopted in 2002.[5] The FAQs state as their basic principle: "that any divestiture or remedial provision must be considered sufficient to maintain or restore competition."[6] The FAQs are, in turn, modeled in large part on the findings of *A Study of the Commission's Divestiture Process* ("Divestiture Study"), which the FTC released in 1999.[7] To replace lost competition, the Divestiture Study contemplated only divestitures that created one new entrant in a given market;[8] it does not address, let alone endorse, any situations that would result in divestitures to two or more entities operating in the same relevant market.[9]

The DOJ took a similar view in its 2004 *Policy Guide to Merger Remedies*, emphasizing that "[a]lthough the remedy should always be sufficient to redress the antitrust violation, the purpose of a remedy is not to enhance premerger competition but to restore it."[10] The *Policy*

[5] FED. TRADE COMM'N, FREQUENTLY ASKED QUESTIONS ABOUT MERGER CONSENT ORDER PROVISIONS n.1, http://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers/merger-faq [hereinafter FTC Merger FAQs].

[6] *Id.* n.1.

[7] STAFF OF THE BUREAU OF COMPETITION OF THE FED. TRADE COMM'N, A STUDY OF THE COMMISSION'S DIVESTITURE PROCESS (1999).

[8] *Id.* at iii ("The divestiture must be to a suitable entity—one that can replace the competition lost as a result of a merger —and the Commission must be able to approve both the buyer and the manner of divestiture.").

[9] *Id.* at 9 (noting that "[i]n some of the orders, multiple buyers were involved," but that these situations involved "a different buyer for each [retail store] site" or "where the assets to be divested included more than one product line").

[10] U.S. DEP'T OF JUSTICE ANTITRUST DIVISION, ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES 7, October 2004 [hereinafter 2004 POLICY GUIDE], http://www.justice.gov/atr/public/guidelines/205108.pdf.

Guide also noted that "restoring competition is the only appropriate goal with respect to crafting merger remedies."[11]

The Agencies also professed a strong preference for structural remedies. For example, the FTC adopted guidance stating that "most orders relating to a horizontal merger will require a divestiture" and noted in passing that "[c]onduct relief also may be required to remedy the anticompetitive effects of a vertical merger."[12] The DOJ took a similar view in the 2004 edition of its *Policy Guide*, which expressly noted that "structural remedies are preferred to conduct remedies in merger cases because they are relatively clean and certain, and generally avoid costly government entanglement in the market."[13] The *Policy Guide* also noted that because conduct remedies are "more difficult to craft, more cumbersome and costly to administer, and easier . . . to circumvent,"[14] the DOJ will consider conduct remedies either (i) "as an adjunct to a structural remedy" or (ii) when a structural remedy is either infeasible or would reduce economic efficiency.[15]

When the Agencies deem conduct remedies appropriate, they traditionally have limited their type and scope. For example, when the FTC's *Negotiating Merger Remedies* guidance document addresses conduct remedies, it notes that "conduct relief may include a requirement to erect firewalls to protect confidential information or a requirement not to favor certain entities."[16] Although the FTC's guidance does not foreswear other conduct remedies, it does suggest that the FTC takes a limited view of the types of permissible conduct remedies. This view also appears in the FAQs, which—beyond structural remedies—indicate that the FTC has in the past considered "certain transitional obligations, employee non-solicitation and incentive provisions and information firewalls."[17]

The DOJ's 2004 *Policy Guide* took essentially the same view, naming "firewalls, fair dealing, and transparency provisions" the "most common forms of stand-alone conduct relief."[18] Even for these limited conduct remedies, however, the DOJ cautioned that they "can present substantial policy and practical concerns."[19]

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[11] *Id.*

[12] FTC Merger FAQs, *supra* note 5, Question 1; FED. TRADE COMM'N, STATEMENT OF THE FEDERAL TRADE COMMISSION'S BUREAU OF COMPETITION ON NEGOTIATING MERGER REMEDIES [hereinafter Negotiating Merger Remedies], http://www.ftc.gov/tips-advice/competition-guidance/merger-remedies

[13] 2004 POLICY GUIDE, *supra* note 10, at 7.

[14] *Id.* at 18.

[15] *Id.*

[16] Negotiating Merger Remedies, *supra* note 12.

[17] FTC Merger FAQs, *supra* note 5, Question 1 ("For example, most orders relating to a horizontal merger will require a divestiture . . . . This general listing is not exhaustive; past orders have frequently included other provisions, such as certain transitional obligations, employee non-solicitation and incentive provisions and information firewalls.").

[18] 2004 POLICY GUIDE, *supra* note 10, at 22.

[19] *Id.* ("The most common forms of stand-alone conduct relief are firewall, fair dealing, and transparency provisions. As discussed below, however, their ongoing use, along with that of all other forms of stand-alone conduct relief, can present substantial policy and practical concerns.").

III. "UPDATING" THE AGENCIES' APPROACH DURING THE FIRST OBAMA ADMINISTRATION

Both Agencies accepted unusual merger remedies during the first Obama Administration. However, each agency took a slightly different approach; the DOJ developed several unusual conduct remedies, primarily for vertical mergers, whereas the FTC focused its efforts on regulating the use of intellectual property rights. Given these contextual differences, we discuss each in turn below.

A. Changes at the Department of Justice

Between 2010 and 2011, the DOJ imposed a series of novel conduct remedies designed to ameliorate competitive harms in vertical mergers. Although the DOJ sometimes also adopted more conventional conduct remedies,[20] several of these consent decrees featured novel terms. Relatedly, one of these vertical mergers also featured an unusual structural remedy. Perhaps to reflect these changes, the DOJ also updated its *Policy Guide on Merger Remedies* in June 2011.[21]

In some cases, the DOJ barred the merging parties from continuing existing commercial arrangements. In Ticketmaster-Live Nation, for example, the DOJ facilitated the entry of Anschutz Entertainment Group ("AEG") by requiring Ticketmaster to: (i) provide AEG with an AEG-branded primary ticket service supported by Ticketmaster technology for up to five years; (ii) grant AEG an option to acquire a royalty-free license to use Ticketmaster's then-current platform within a four year window; *and* (iii) once the five-year support period ended, abstain from providing primary ticketing services to AEG.[22]

Similarly, in Election Systems & Software-Premier Election Solutions ("ES&S-Premier"), a horizontal merger, the parties agreed to a divestiture remedy that barred the company from bidding for certain contracts with customers who used the acquired Premier equipment.[23] In

[20] Specifically, the DOJ obtained conduct remedies that were more or less in line with their pre-2010 objectives in one vertical merger case settled during that time, GrafTech's acquisition of Seadrift. In that case, the parties agreed (i) to erect a firewall between the upstream and downstream businesses, (ii) to terminate a most-favored nation (MFN) clause GrafTech held with a competing upstream supplier, and (iii) to terminate an information sharing agreement related to a since-terminated supply agreement. United States v. GrafTech Int'l Ltd., No. 10-02039, §§ IV.A.-IV.C., V.A. (D.D.C. Mar. 24, 2011) (Final Judgment). Somewhat unusually, however, the parties also agreed to provide certain ordinary-course documents to the DOJ each quarter and notify the DOJ of certain changes in Seadrift's production. *Id.* § IV.C.

[21] U.S. DEP'T OF JUSTICE ANTITRUST DIVISION, ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES, June 2011, http://www.justice.gov/atr/public/guidelines/272350.pdf [hereinafter 2011 POLICY GUIDE].

[22] United States v. Ticketmaster Entm't, Inc., No. 10-00139, § IV.A.2 (D.D.C. July 30, 2010) (Final Judgment) (describing the divestiture and limiting a private label ticketing arrangement between Ticketmaster and AEG to "a period of no more than five years from the date of execution of the license"); *see also* Competitive Impact Statement at 14, United States v. Ticketmaster Entm't Inc., No. 10-00139 (D.D.C. filed Jan. 25, 2010) ("The Final Judgment gives AEG incentives to exercise its option to acquire a copy of Host (or to develop or acquire a competing primary ticketing platform) by prohibiting Defendants from providing primary ticketing services to AEG's venues after AEG's right to use the AEG Site expires. That provision is critical to preserving competition in the primary ticketing services market because it guarantees that, within five years, AEG will have to either supply its own primary ticketing services or obtain them from some company other than the merged firm.").

[23] United States v. Election Sys. & Software, Inc., No. 10-00380, § IV.L. (D.D.C. June 30, 2010) (Final Judgment) (apart from a few small exceptions, "Defendant may not use such a license to attempt to compete for any opportunity to sell or lease Premier Voting Equipment System Products contained within a Request for Proposal (or

both cases, the DOJ appeared to sacrifice competition for some customers—such as those in ES&S-Premier that used Premier equipment—in an effort to create a viable alternative supplier for those customers not subject to the DOJ's ban. These remedies thus replaced competition only for a portion of the market; for the remaining customers, the remedies actually limit competition.

The DOJ imposed another creative remedy in the Google-ITA transaction: a compulsory innovation conduct remedy. To address concerns that Google would not maintain and upgrade ITA's existing product, called QPX, the settlement required Google to "devote substantially the same resources to the research and development and maintenance of QPX for the use of customers as ITA did in the average of the two years prior to the filing of the Complaint."[24] The settlement also required Google to create a new product, InstaSearch, that ITA was in the process of developing. Specifically, the settlement commits Google to undertaking "commercially reasonable efforts to ensure that the InstaSearch implementation conforms to the proposed technical specifications" and, if Google provides a version of InstaSearch that is better than the proof of concept specifications, commits Google to "make that improved product available to all OTIs."[25]

The DOJ also imposed complicated FRAND licensing obligations in two cases, Ticketmaster-Live Nation and Google-ITA.[26] While FRAND royalty calculations are perceived as complex even in ordinary cases, the Google-ITA consent added even more complexity to that analysis by requiring Google to sell on FRAND terms a product (InstaSearch) that did not yet exist.[27]

In a newspaper case, *Charleston Gazette-Daily Mail*, the DOJ required the divestiture of one paper, the *Daily Mail*, and set unusually detailed ongoing conduct obligations for it. To restore competition to its pre-close levels, the Final Judgment required the divestiture purchaser, MediaNews (or, in some cases, the associated joint venture formed under the Newspaper Preservation Act), to publish the *Daily Mail* daily, to budget for a staff of 32 full-time news and editorial employees, to offer a 50 percent discount on the purchased newspaper for at least six months, and thereafter to provide the same discount for both the *Daily Mail* and the *Gazette*.[28] Although the DOJ faced a less-than-ideal remedial situation, including a long-since consummated transaction and a joint operating agreement promising ongoing entanglement between the *Gazette* and the *Daily Mail* post-divestiture,[29] the DOJ's unusually detailed remedy is

RFP) or a Request for Quote (or RFQ) for a voting equipment system, or any upgrade, request or order that calls for replacement of 50 percent or more of a customer's installed voting equipment").

[24] Competitive Impact Statement at 10, United States v. Google Inc., No. 11-00688 (D.D.C. filed Apr. 8, 2011) [hereinafter Google-ITA Competitive Impact Statement]; *see also* United States v. Google Inc., No. 11-00688, § IV.F. (D.D.C. Oct. 5, 2011) (Final Judgment).

[25] Google-ITA Competitive Impact Statement, *id.*, at 11-12.

[26] *Ticketmaster Entm't, Inc.*, No. 10-00139, § IV.A.2 (Final Judgment); *Google*, No. 11-00688, §§ IV.A-IV.H. (Final Judgment).

[27] *Google*, No. 11-00688, § IV.H. (Final Judgment).

[28] United States v. Daily Gazette Co., No. 07-0329, § IV.B. (S.D. W.V., July 19, 2010) (Final Judgment).

[29] *See, e.g.*, Complaint ¶¶ 13-23, United States v. Daily Gazette Co., No. 07-0329 (S.D. W.V. filed May 22, 2007).

uncomfortably reminiscent of the Civil Aeronautics Board's regulation of airlines' sandwich sizes in the 1970s.[30]

Finally, the DOJ adopted an unusual structural remedy in Ticketmaster-Live Nation. As noted above, both agencies seek to adopt remedies that will replace lost competition effectively. But the agencies traditionally have not sought to make a market more competitive than it was pre-merger. Along with the various conduct remedies imposed in Ticketmaster-Live Nation, however, the DOJ adopted structural remedies designed to induce the entry of two new competitors (AEG and Comcast-Spectacor) to replace the one acquired firm (Live Nation).[31] Shortly after the merger, Assistant Attorney General Christine Varney acknowledged in Senate testimony that "[t]he settlement requires Ticketmaster to divest more ticketing than it will gain through its acquisitions of Live Nation."[32]

Perhaps to reflect its new approach to merger remedies, the DOJ issued a revised *Policy Guide* in June 2011.[33] The revised *Policy Guide* formally expands both the frequency with which the DOJ will impose conduct remedies and the species of conduct remedies it may consider. The revised version deletes any claim that conduct remedies are disfavored, particularly in the vertical merger context.[34] Although the revised *Policy Guide* expresses no limitation on the types of conduct remedies the DOJ will consider, it notes that "[t]here is a panoply of conduct remedies that may be effective in preserving competition."[35] This list includes provisions endorsed by the previous version of the *Policy Guide*, such as firewalls and "fair dealing" (non-discrimination) provisions, but also endorses more unusual provisions such as mandatory licensing, anti-retaliation provisions, and prohibitions on "certain kinds of contracting practices."[36] The revised edition also excises a passage noting that the ongoing use of conduct remedies—which the DOJ then limited primarily to firewalls, "fair dealing," and transparency provisions—"can present substantial policy and practical concerns."[37]

Consistent with this approach, AAG Varney defended the DOJ's record of unusual vertical merger remedies and *Policy Guide* revisions. In an interview in the *Wall Street Journal*, she argued that vertical mergers do not present the DOJ with "binary choices," and thus the DOJ is best served by using its full complement of remedies, including conduct remedies.[38]

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[30] The CAB's micromanagement of airlines' operations (including sandwich sizes) led then-CAB Chairman Alfred E. Kahn to ask, "Is this what my mother raised me to do?" *See* HERBERT HOVENKAMP, THE OPENING OF AMERICAN LAW: NEOCLASSICAL LEGAL THOUGHT, 1870-1970, at 321 (2015) (providing quote without attribution). Kahn went on to become the "Father of Deregulation."

[31] *Ticketmaster Entm't, Inc.*, No. 10-00139, §§ IV.A, IV.E (Final Judgment).

[32] Statement of Christine A. Varney, Ass't Atty. Gen., Antitrust Div., Before the Subcomm. on Antitrust, Comp. Pol'y & Consumer Rights, Senate Comm. on the Judiciary, Oversight of the Enforcement of the Antitrust Laws, at 3, June 9, 2010, *available at* http://www.justice.gov/atr/public/testimony/259522.pdf.

[33] 2011 POLICY GUIDE, *supra* note 21.

[34] *Id.* at 12.

[35] *Id.* at 13.

[36] *Id.*

[37] 2004 POLICY GUIDE, *supra* note 10, at 22 ("The most common forms of stand-alone conduct relief are firewall, fair dealing, and transparency provisions. As discussed below, however, their ongoing use, along with that of all other forms of stand-alone conduct relief, can present substantial policy and practical concerns.").

[38] Thomas Catan & Gina Chon, *Antitrust Chief to Step Down*, WALL ST. J., July 7, 2011, *available at* http://online.wsj.com/articles/SB10001424052702303544604576430171298566868.

B. FTC Cases

The FTC also experimented with unusual merger remedies during the first Obama Administration. In contrast to its sister agency's focus on conduct remedies, the FTC focused more narrowly on regulating the use of IP rights, particularly those in the pharmaceutical industry or those viewed as standard-essential. In at least three cases, the FTC imposed conduct remedies regulating IP and IP litigation not directly implicated by the transaction at issue. Notably, all three cases came towards the end of the first Administration.

First, in Perrigo's 2012 acquisition of Paddock, the FTC worried that payments received by Paddock under a back-up supply agreement would, post-merger, change Perrigo's incentives to develop a generic version of the prescription drug AndroGel.[39] To remedy this concern, the FTC severely limited Perrigo's ability to settle Hatch-Waxman Act litigation related to the prescription drug AndroGel, for the most part barring Perrigo from receiving "anything of value" to take any action "that otherwise deters, prevents, or inhibits" Perrigo's ability to sell generic AndroGel.[40] Although the acquisition did tangentially involve the AndroGel supply agreement, the FTC's contemporaneous action against patent settlements in other cases suggests that the remedy was designed to serve the FTC's broader policy goals.

Second, in November 2012, the FTC imposed a similar remedy as part of Bosch's acquisition of SPX. The FTC addressed the primary issue, increased horizontal concentration, through a divestiture remedy.[41] However, in response to pre-merger conduct by acquired company SPX, the FTC also required Bosch to license certain SPX SEPs on FRAND terms and to abandon pending patent litigation initiated by SPX.[42]

Third, in early January 2013, the FTC cleared Google's acquisition of Motorola Mobility with conditions intended to regulate Google's IP rights. The consent order required Google to honor FRAND commitments made on any standard-essential patents ("SEPs") issued or pending "in the United States or anywhere else in the world,"[43] without regard to whether they were part of the acquisition. The order also required Google to cease and desist from asserting its FRAND-encumbered SEPs in most patent litigation contexts.[44]

IV. RECENT TRENDS

Recent trends suggest that the agencies have returned to more conventional merger remedies. This trend is particularly apparent for vertical mergers, which are more susceptible to creative conduct remedies, particularly under the DOJ's 2011 *Policy Guide*. Two recent vertical mergers—one at each agency—provide useful, albeit limited, indications that the agencies are returning to more traditional approaches.

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[39] Complaint ¶15, *Perrigo Co.*, FTC Docket No. C-4329 ("The proposed acquisition would make Perrigo a party [a back-up supply] agreement [with Abbott and Par], thereby enhancing Abbott's and Perrigo's ability to coordinate on delaying the introduction of Perrigo's product into the market.").

[40] *Perrigo Co.*, FTC Docket No. C-4329, § IV.B, (July 26, 2011) (Decision & Order).

[41] *Bosch*, FTC Docket No. C-4377, § II (Apr. 24, 2013) (Decision & Order).

[42] *Id.* § IV.

[43] *Motorola Mobility LLC*, FTC Docket No. C-4410, §§ I.J., I.R., II.A. (July 24, 2013) (Decision & Order) (defining the term "FRAND Commitment" and ordering Google not to "revoke or rescind any FRAND Commitment" unless certain conditions were met).

[44] *Id.* §§ II.B-II.E.

Although the 2011 *Policy Guide* remains untouched, in the next significant vertical merger, United Technologies' 2012 acquisition of Goodrich, the DOJ imposed remedies more consistent with the FTC's policy statement than its own. United Technologies ("UTC") manufactured both the finished downstream product—aircraft turbines—and a significant component incorporated in the finished product, whereas Goodrich manufactured several upstream components for several downstream aircraft turbine manufacturers, including UTC competitor Rolls-Royce.[45] The DOJ was concerned that these linkages raised unilateral competitive effects issues for two products—large main engine generators and aircraft turbine engines—and coordinated effects issues for a third product, engine control systems for large aircraft systems.[46] Unlike Ticketmaster-Live Nation and its sibling settlements, however, the DOJ consent decree relies principally on structural divestitures, limiting conduct remedies—such as transition services and supply agreements—to those necessary to support the divestiture remedy.[47] That is, the DOJ once again limited conduct remedies to a complementary, rather than substitute, role.

Shortly after UTC-Goodrich, the FTC similarly imposed limited conduct remedies to settle concerns involving General Electric's ("GE") acquisition of Avio. Like UTC-Goodrich, the case concerned vertically related entities in the aircraft turbine supply chain; GE manufactured aircraft turbine engines, whereas Avio furnished critical components to GE and its competitors.[48] Unlike the DOJ cases, the parties agreed to a fix-it-first divestiture remedy.[49] To supplement the divestiture, the consent decree (i) imposes a firewall protecting competitively sensitive information on its downstream competitors held by Avio and (ii) prohibits GE from influencing Avio's development of a component for its rivals.[50]

V. CONCLUSION/RECOMMENDATIONS

Although we do not have perfect information, some of these merger remedies trouble us. Some agency remedies, such as compulsory innovation, compulsory licensing, and detailed conduct remedies that border on industrial engineering, risk exactly the kind of "costly government entanglement in the market" that the 2004 *Policy Guide* sought to avoid. Although it is difficult to say with certainty whether any individual remedy was appropriate, in the aggregate these remedies represented a significant shift in agency merger policy. The DOJ took it one step further, formalizing the change by revising its official *Policy Guide* in 2011.

However, we take comfort from the remedies in UTC-Goodrich and GE-Avio, which appear to signal the Agencies' return to more traditional merger remedies. We hope the Agencies will remain on their newfound course, and urge the DOJ to formalize this return to traditional remedial measures in the *Policy Guide* by formally reverting to its 2004 language.

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[45] Competitive Impact Statement at 13-18, United States v. United Techs. Corp., No. 12-01230 (D.D.C. filed July 26, 2012).

[46] *Id.*

[47] United States v. United Techs. Corp., No. 12-01230, §§ IV-VI (D.D.C. May 29, 2013) (Final Judgment).

[48] Complaint ¶¶ 8-14, *General Electric Co.*, FTC Docket No. C-4411 (filed Aug. 30, 2013).

[49] Press Release, Fed. Trade Comm'n, General Electric Agrees to Settlement with FTC that Allows the Purchase of Avio's Aviation Business, July 19, 2013, http://www.ftc.gov/news-events/press-releases/2013/07/general-electric-agrees-settlement-ftc-allows-purchase-avio%E2%80%99s (noting that "[t]he proposed order settling the FTC's charges builds on a commercial agreement GE, Avio, and Pratt & Whitney recently negotiated").

[50] *General Electric Co.*, FTC Docket No. C-4411, §§ III-V (Aug. 30, 2013) (Decision & Order).

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Finding the Right Lodestar for Defining Markets

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Finding the Right Lodestar for Defining Markets

David A. Balto & Matthew Lane[1]

I. INTRODUCTION

Economics is the lodestar for antitrust law and sound competition policy. Economic reasoning plays a key role in identifying the problems being litigated and framing the legal rules that will be applied to these problems. *McWane Inc. v. Federal Trade Commission*,[2] currently on appeal to the 11th Circuit, has the potential for illuminating important economic concepts in an area of antitrust law that is rarely addressed on appeal—identifying the relevant market.

In *McWane*, the U.S. Federal Trade Commission ("FTC") relied on qualitative data unsupported by robust economic analysis to narrowly define a market, even though market data was available. Appellate decisions on relevant markets are sparse and this case could provide a vehicle to reassert the importance of using established economic tests to accurately gauge relevant markets.

II. THE NEED FOR EMPIRICAL ECONOMIC METHODS

The benefits of empirical economic methods in antitrust are well recognized. "[T]he use of economic methods helps focus the attention of decision-makers and litigants on the connection between the economic theory of the case and the evidence."[3] This use of empirical economic methods forces the plaintiff "to state, with reasonable specificity, what competition might be harmed by the challenged practices. . . ."[4] It "also permits the defendant to rebut the idea that competition is fragile enough to be harmed, by attempting to establish a wider market."[5]

Identification of the relevant market can be done with either quantitative or qualitative economic evidence. "But when qualitative evidence is employed, the underlying economic logic of the identification strategy is often analogous to an approach to identification taken in the empirical economics literature with respect to quantitative evidence."[6] Reliance on well-accepted methods of identification is crucial because of the occurrence of false positives or false negatives due to external factors.[7] For this reason, qualitative data should be supported by an established economic test unless good market data is scarce. Then, and only then, should a plaintiff be permitted to sidestep this important evidence based on necessity.

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[2] McWane Inc. v. Federal Trade Commission, No. 14-11363 (11th Cir. filed Mar. 28, 2014).

[3] HANDBOOK OF ANTITRUST ECONOMICS 3-4 (Paolo Buccirossi ed. 2008)

[4] *Id. at* 7.

[5] *Id.*

[6] *Id.* at 11.

[7] *See*, *e.g.*, *id.* at 19-23.

This desire to have identification grounded in established economic methods is apparent in the case law. The Supreme Court stated over 50 years ago that:

> [i]n considering what is the relevant market for determining the control of price and competition, no more definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purposes make up that 'part of the trade or commerce,' monopolization of which may be illegal.[8]

Courts have widely applied this rule by requiring a relevant market to be defined by an economic test supported by expert testimony.[9] One of the most used economic tests is the measurement of the cross-elasticity of demand between the product and its substitutes.[10]

III. CONCERNS REGARDING THE FTC'S MARKET ANALYSIS IN *McWANE*

Given the importance of economics in defining markets and measuring market power, it is surprising how economically sparse the FTC's market analysis was in its *McWane* decision.[11] In *McWane*, the FTC defined a market consisting of domestically manufactured iron pipe fittings; even though these iron pipe fittings are functionally interchangeable with foreign produced iron pipe fittings. The Commission relied on two pieces of evidence in defining a domestic fittings market: 1) the existence of a small portion of consumers that required domestically manufactured iron pipe fittings, either by preference or encoded in local laws, in their specifications, and 2) the difference in price between fittings sold into open and domestic-only specifications.[12] Neither of these facts is especially persuasive without being backed up by a robust and accepted economic test supported by expert testimony, and that was clearly absent from the record in this case.

What is more surprising is what the FTC did not do in *McWane*. The FTC did not identify or study specific customers to make sure that they had hard preferences significant enough to support a separate market. The FTC's expert economist did no economic tests of any of the relevant markets.[13] The expert's opinion was instead based on certain documents and testimony and not the result of any economic test such as a study of the cross-elasticity of demand.

One factor considered in *McWane* was a desire to buy American-sourced products. But a consumer's preference to "buy American" is not sufficient to create an entirely separate market. For one, such a ruling could create separate markets in any number of situations where some attribute of a company generates brand loyalty. For example, a customer shopping for salad dressing might select one from Newman's Own because they like the taste or because Newman's

[8] United States v. EI du Pont de Nemours & Co., 351 US 377, 395 (1956).

[9] *E.g.*, Bailey v. Allgas, Inc., 284 F.3d 1237, 1246 (11th Cir. 2002); American Key Corp. v. Cole Nat'l Corp., 762 F.2d 1569, 1579 (11th Cir. 1985)

[10] *See*, *e.g.*, Brown Shoe Co. v. U.S., 370 U.S. 294, 325 (1962).

[11] McWane, Inc., FTC No. 9351 (Feb. 6, 2014) http://www.ftc.gov/system/files/documents/cases/140206mcwaneopinion_0.pdf.

[12] *Id.* at 14-15. For clarity, it is important to note that customers can specify whether the parts to be used in the project are to be domestically produced or open to all bidders.

[13] Brief for Appellant at 32, McWane Inc. v. Federal Trade Commission, No. 14-11363 (11th Cir. filed Mar. 28, 2014).

Own donates 100 percent of after-tax profits to charity.[14] This attribute of charity permits Newman's Own to have some amount of price difference as compared to other salad dressings due to the fact that many consumers might choose to spend a little more knowing that their money is going to a good cause. However, it would seem unwise to classify products that give to charity as their own product market when they are otherwise indistinguishable from their competitors.

These attributes of a product can distort product market evidence. If something about the attribute causes the prices to rise, then those customers who are ambivalent or weakly loyal to the brand will defect. In the salad dressing example, if Newman's Own had to raise the price per bottle substantially higher than competing salad dressings then all customers but those intent on donating to charity would buy salad dressing from other brands. The extreme preference for Newman's Own and the price differential would give the appearance of a separate market for charitable salad dressing. However, this does not tell the whole story. Fiercely loyal Newman's Own customers would presumably still have a defection price point. Additionally, they may change their attitudes towards donating to charity through salad dressing purchases entirely. This example is not perfect because it would be hard to imagine a situation where Newman's Own would need to raise prices in such a manner. But the cost differences in producing some products in the United States often necessitate higher prices than their imported counterparts.

What occurs in this example is similar to an inverse "Cellophane Fallacy."[15] The Cellophane Fallacy states that undertaking a market definition analysis at monopolistic prices can lead one to define too broad a market and fail to identify market power when it is present. This happens because the product is priced so high that an additional small, but significant, price increase leads consumers to switch to imperfect substitutes. Consider, for example, customers who would replace overpriced cellophane with aluminum foil. In this example, an attribute that is valued by certain customers has created an increase in price such that only those who value it highly will continue to purchase. Examining a market by only looking at those extremely loyal customers can lead a market to be defined too narrowly and market power assumed when it is not present.

Returning to *McWane*, the market realities of the domestic iron pipe fittings market show why a narrow market definition is faulty. Most fittings used in the United States were manufactured domestically until just a few decades ago.[16] Importers began to successfully take business from U.S. manufacturers starting in the mid-1980s.[17] This process accelerated and in 2003 the U.S. International Trade Commission ("ITC") found that cheap imports were causing market disruption and material injury to the U.S. iron pipe fitting market.[18]

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[14] NEWMAN'S OWN, http://www.newmansown.com/charity/ (last visited Nov. 21, 2014).

[15] *See*, *e.g.*, George W. Stocking & Willard F. Mueller, *The Cellophane Case and the New Competition*, 45 AM. ECON. REV. 1 (1955).

[16] McWane, Inc., FTC No. 9351, 61 (May 9, 2013) (initial decision by administrative law judge) http://www.ftc.gov/sites/default/files/documents/cases/2013/05/130509mcwanechappelldecision.pdf.

[17] *Id.*

[18] *Id.* at 62.

Other manufacturers either cut domestic production or exited the market.[19] McWane became the last manufacturer standing with a full line of iron pipe fittings.[20] McWane closed one of its two iron pipe manufacturing plants and the last remaining plant was not running at full capacity.[21] In 2007, McWane booked $7 million in idle plant losses.[22] The differential caused by the higher costs of manufacturing iron pipe fittings domestically caused all customers to defect except for those that placed a high value on the attribute of American-made, and it is unclear whether even those costumers had immoveable hard preferences.

The fact that some of these American-made preferences were embodied in local laws does not necessarily convert this into a separate market. These laws are similar to a father that declares "absolutely no child of mine will ever buy a foreign car." Like the father, laws generally have numerous exceptions to account for special circumstances ("but Dad, there isn't an American car on the market that meets my needs"). Additionally, laws can be repealed just like the father's mind can be changed.

The FTC relies on a leading antitrust treatise to justify using this qualitative data alone to define the product market.[23] The treatise states that "[t]o the extent that regulation limits substitution, it may define the extent of the market."[24] However, this treatise also leaves open the possibility that it may not define a market. Under these circumstances, it seems like tried and true economic tests are still required to ensure that a domestically manufactured iron pipe fittings market exists.

The best evidence that the FTC relies on in setting a separate domestic market was a finding that McWane priced its domestic iron pipe fittings differently based on project specifications and not the cost of production.[25] The Commission came to this conclusion based on the price differential between McWane's domestic iron pipe fittings and its blended pipe fitting prices, which contain both domestic and imported iron pipe fittings.[26]

Unfortunately, there are other reasons why McWane might price its blended iron pipe fittings even substantially lower than its domestic iron pipe fittings. One likely reason is that McWane is trying to get rid of excess domestic iron pipe fitting inventory. Creating a blended price is a good way to do this because domestic iron pipe fittings can be sold at cost or at a loss without destroying their value. Another likely, and related, reason is to keep its domestic foundry running as efficiently as possible given the very low domestic demand. McWane may need to produce more tons than it could sell to domestic customers. In this case its only option is to run up domestic inventory and sell into open specifications because they can't run the foundry any less and still be efficient and keep their skilled people employed.

[19] *Id.*

[20] *Id.*

[21] *Id.* at 12.

[22] *Id.* at 159.

[23] Brief for Appellee at 24-25, McWane Inc. v. Federal Trade Commission, No. 14-11363 (11th Cir. filed Mar. 28, 2014).

[24] IIB PHILLIP E. AREEDA, HERBERT HOVENKAMP, & JOHN SOLOW, ANTITRUST LAW ¶572b at 430 (3d ed. 2007).

[25] *Id.* at 15.

[26] *Id.*

These identification issues illustrate why the Commission's finding of a separate domestic iron pipe fitting market using qualitative evidence was woefully insufficient without being backed up by an accepted economic test. Such a test would confirm the FTC's theory and demonstrate that the qualitative evidence relied upon was not caused by external factors. There was very little reason not to conduct an economic test in *McWane* as there were a number of ways to get good data on the iron pipe fitting industry.

This over-reliance on qualitative evidence without an accepted economic test is not only a problem of law, but also a problem of policy. The FTC should always be an advocate for evidence-based antitrust analysis. Commissioner Wright explains evidence-based antitrust analysis as:

> harnessing the best available economic theory and evidence to improve decision-making about specific enforcement matters, policy decisions, resource allocation, agency design, and other critical decisions. The central idea is to wherever possible shift away from casual empiricism and intuitions as the basis for decision-making and instead commit seriously to the decision-theoretic framework applied to minimize the costs of erroneous enforcement and policy decisions and powered by the best available theory and evidence.[27]

Indeed, economists "have examined the effects of economists on competition authorities and conclude that the horizontal integration of economics into all levels of competition law decision-making increases the consistency and quality of analysis."[28]

The FTC's decision in *McWane* to use an intuitive market definition based on qualitative evidence without proving it through an economic test demonstrates Wright's point. The method the FTC used to prove a relevant market was easy to apply but with a significant potential for error. This method will be attractive for generalist judges to use in future antitrust cases even when, as here, there is data available to perform a more accurate economic based test.

IV. CONCLUSION

Unfortunately, the results of following the FTC's method in *McWane* for defining a relevant market could be a significant step backwards in antitrust jurisprudence. There are a number of markets where external factors like American-made, charitable contributions of a manufacturing company, whether a company sources from Fair Trade certified suppliers, and even successful branding can create the appearance of a separate product market under the *McWane* precedent. Judges attempting to apply the *McWane* ruling in order to define a relevant product market might be tempted to define Starbucks coffee, Newman's Own salad dressing, and Coke as their own product markets due to strong consumer preference and possible price differences based on this preference.

It is far from unreasonable to require that qualitative evidence of a separate market be supported by an accepted economic test when the data required to perform such a test is readily available. This will lead to economic-evidence based antitrust analysis "best practices" that can be

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[27] *Interview with Joshua D. Wright, Commissioner, Federal Trade Commission*, THE ANTITRUST SOURCE (August 2014), *available at* http://www.bingham.com/Publications/Files/2014/08/Interview-with-Joshua-D-Wright.

[28] Joshua D. Wright, *Abandoning Antitrust's Chicago Obsession: The Case for Evidence-Based Antitrust*, 78 ANTITRUST L.J. 1, 267 (2012).

applied by any judge. Such a requirement is consistent with sound antitrust law and will prevent over-enforcement and false positives in market definitions.

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The HCC Guide on the Detection and Prevention of Collusive Tendering

Lia Vitzilaiou[1]

I. INTRODUCTION

On September 24, 2014, the Hellenic Competition Commission ("HCC") published a guide on the detection and prevention of collusive practices in public procurement (collusive tendering), focusing on structural and behavioral screens.

Although the guide is in principle addressed to contracting authorities, it is a useful tool also for undertakings participating in a tender process, since it highlights specific practices that may be considered anticompetitive and draw the associated consequences. In this sense, the guide may be used by tenderers not only to self regulate, but also to scrutinize and denounce the behavior of other candidates and thus assist competition authorities in detecting cartel activity.

II. THE GUIDE

The Guide mainly contains empirical screens and is based on the respective guidance and experience of European and international competition authorities, as well as the OECD. In this sense, its usefulness is not restricted to a national level, but may be widely used by competition authorities and undertakings.

First, the Guide describes the most common forms of collusive tendering; second, it indicates certain market conditions that facilitate collusion; third, it describes some detection methods and indications of suspicious behavior; and fourth, it suggests some deterrent methods.

III. THE MOST COMMON FORMS OF COLLUSIVE TENDERING

According to the HCC, the contractors who engage in collusion usually agree beforehand who shall submit the winning bid and manage to artificially increase the final prices of the tendered contract. These agreements usually provide complementary mechanisms for sharing the profits that arise from these higher contract prices, such as subcontracting, supply agreements, or even virtual billing. And, sometimes, the cartelists apply complex methods of profit sharing, such as allocation of profits through a series of tenders, tender rotation, or market allocation.

Generally, collusive tendering takes four forms, which may appear in isolation or in combination: A) bid-rigging (including cover-bidding, bid-suppression, and bid-rotation); B) market/customer allocation; C) price-fixing; and D) restrictions on quantities.

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A. Bid-Rigging

Bid-rigging takes place when some or all the participants in a tender agree beforehand who shall win the tender and thus eliminate competition between them. The main methods of bid-rigging are:

1. Cover-Bidding

By this method the competitors agree to submit: (i) higher bids than that of the agreed winner, (ii) bids which contain terms unacceptable to the contracting authority, or (iii) bids lacking the necessary formalities prescribed by the call for tender ("CFT") in order to ensure that the tender will not be declared void.

This practice was applied in the *Elevators and Escalators* case[2] where, from 1995 to 2004, the undertakings submitted cover-bids and allocated tenders per Member State in Belgium, the Netherlands, Germany, and Luxembourg. The winner of the tenders was determined by the cartelists according to its market share in each Member State and, accordingly, the remaining tenderers coordinated their prices at very high levels. Furthermore, in Germany and the Netherlands, the cartelists agreed on existing customer maintenance, namely the undertakings already supplying certain organizations were designated to win all tenders of those organizations. The fines in this case reached EUR 922 million.

Cover-bidding was also applied in U.K. tenders for the construction of hospitals, schools, and university buildings during 2000-2006 and also involved virtual-billing.[3]

2. Bid-Suppression

By this method, certain competitors agree not to submit a bid, or to withdraw their bid, in order to ensure that the tender will be awarded to the undertaking determined by the competitors as a group.

3. Bid-Rotation

By this method, the competitors agree to win tenders by rotation. The contracts may be allocated according to either the volume of the supplied goods or the contract value, either equally or in proportion to the competitors' market shares.

This method was applied in the *International Removal Services* case,[4]which concerned nine Belgian companies of international removal services operating as a cartel from 1984 to 2003. These companies allocated contracts among themselves and accordingly presented bogus quotes to clients; then, they compensated each other by amounts already included in the final tender price, which were paid through virtual invoices. The fines imposed exceeded EUR 32.7 million.

[2] *See* European Commission, IP/07/209; Commission decision of 21 February 2007, substantially upheld on appeal Cases T-145/07 etc General Technic-Otis v Commission [2011] ECR II-000.

[3] OFT, Decision CA98/02/2009.

[4] *See* European Commission, IP/08/415;Commission decision of 11 March 2008, substantially upheld on appeal Cases T-204/08 etc Team Relocations NV v Commission [2011] ECR II-000.

A similar method was used in the *Pre-Insulated Pipes* case,[5] where ten heating pipe constructors in Germany and Denmark allocated contracts on the basis of respect for "existing traditional customer relationships," and accordingly submitted higher bids than those of the agreed winner. The relevant fines exceed ECU 92 million.

B. Market/Customer Allocation

Market/customer allocation takes place when competitors agree to share markets or customers, usually according to customer categories or geographical areas. In order to do so, competitors configure their bids in such a way to ensure that the contract will be awarded to the undertaking to which the products and/or the customers and/or the area have been allocated beforehand.

This method was used in the *Gas Insulated Switchgear* case,[6] concerning 11 groups of companies, which had formed a cartel from 1998 to 2004 in the switchgear market. They exchanged information in order to coordinate their bids and allocate markets as per their shares and place of establishment. The fines imposed exceeded EUR 750 million.

Similarly, in the *Industrial Bags* case,[7]from 1991 to 1997 sixteen undertakings had formed a cartel in the market of plastic industrial bags, operating in Belgium, Germany, Spain, France, Luxembourg, and the Netherlands. They shared markets; allocated sale quotas; assigned customers, deals, and orders; exchanged information; and fixed prices. The relevant fines exceeded EUR 290 million.

At a national level, in 2007 the HCC fined two security companies for customer allocation, which involved cover-bidding.[8]

C. Price-Fixing

Price-fixing is the practice where competitors agree on a certain price and/or a price increase or otherwise affect the price of a product or service. Price-fixing may take the form of (i) setting minimum prices, (ii) abolishing or restricting rebates, (iii) applying price calculation methods, (iv) increasing prices, or (v) maintaining prices at a certain level.

D. Restrictions on Quantities

Restrictions on quantities is the practice of competitors agreeing to reduce or restrict the offered quantities of a product or service, in order to restrict their availability and thus increase the contract price of the tender.

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[5]*See* European Commission IP/98/917; OJ [1999] L24/1, [1999] 4 CMLR 402, substantially upheld on appeal Cases T-9/99 etc HFB Holding v Commission [2002] ECR II-1487, [2001] 4 CMLR 1066.

[6]*See* European Commission, IP/07/80; Commission decision of 24 January 2007, upheld on appeal Cases T-110/07 etc Siemens v Commission [2011] ECR II-000, [2011] 4 BCMLR 1335.

[7]*See* European Commission, IP/05/1508, Commission decision of 30 November 2005, Case COMP/38354, Commission v BPI PLC and others, C(2005)4634, substantially upheld on appeal (see cases C-50/12 et seq and ECJ Judgment of 26 November 2013No.C-50/12P)

[8]*See* HCC decision of 11 January 2007, No. 325/V/2007.

IV. MARKET CONDITIONS WHICH FACILITATE COLLUSION

Although collusion can in principle appear in any market, there are some market conditions that generally facilitate collusion. Such conditions may be:

1. A limited number of market players, since this makes communication and coordination between competitors easier.
2. Uniqueness of the products tendered, or the particular specifications thereof, since this reduces interchangeability.
3. Standardized character of the products tendered, since this facilitates price agreements.
4. Familiarization of competitors with tender procedures, since, when tenders of the same products or of similar value are repeated, competitors become accustomed both to each other and the procedure, while the prospect of similar contracts in the future constitutes a motive for cooperation.
5. Familiarity between competitors due to social relationships and/or legal business cooperation and/or participation in a professional association and/or a trade union, since this can facilitate collusion.

V. DETECTION METHODS AND INDICATIONS OF SUSPICIOUS BEHAVIOUR

The detection of collusion is generally difficult due to the inherent secrecy of the negotiations between competitors. However, there are some behavior patterns that are generally regarded suspicious and could constitute cause for concern:

1. Suspicious patterns of bid submission include:
   a) a specific pattern of successful bidders (e.g. a specific sequence of winners between competitors, an award of tenders of the same type or of the same value to the same competitors over time, etc.);
   b) submission of relatively high bids in certain tenders and relatively low bids in similar tenders by the same undertakings;
   c) repeated participation of an undertaking in tenders without ever being successful; and
   d) a high percentage of winning bids for an undertaking which rarely participates in tenders but, when it does so, it succeeds.
2. Suspicious behavior concerning the submission of bids includes:
   a) regular candidates do not submit a bid;
   b) certain bids are suddenly withdrawn;
   c) different bids by different competitors are simultaneously submitted and have similar formats and postal stamps;
   d) different bids by different competitors have similar wording, especially when such wording is unusual;
   e) different bids by different competitors have similar errors;

f) certain bids are less detailed and comprehensive than required by the CFT;

g) bids submitted by different competitors have similar amendments; and

h) bids of different competitors are submitted by the same person or have the same contact details.

3. Suspicious pricing includes:

a) certain competitors submit unexpectedly high bids;

b) almost all competitors submit unjustifiably high bids or unjustifiably low rebates;

c) different competitors submit similar prices;

d) the same competitors sometimes bid high and sometimes low for the same contract without objective justification;

e) the bids of almost all competitors significantly exceed those submitted in previous tenders without objective justification (e.g. cost increase);

f) the bid of a new competitor is significantly lower than those of regular candidates (i.e. indication of collusion between regular candidates); and

g) prices fall dramatically after the bid of a new competitor.

4. Suspicious market allocation includes:

a) successful bidders rotate according to geographical area or type of works/services;

b) competitors charge different prices in different geographical areas, which are unjustified by transport costs;

c) competitors refuse to participate and/or allege that another competitor should not participate in certain tenders due to "relevant agreements;"

d) competitors refuse to participate in tenders concerning certain geographical areas alleging that they "do not wish to interfere in somebody else's business;" and

e) competitors wait until the last minute to submit their bids and are interested to know whether a certain competitor has submitted a bid.

5. Other suspicious indications include:

a) a successful bidder declines its appointment or withdraws its bid before the award, without objective justification;

b) a successful bidder appoints another candidate as its subcontractor;

c) competitors use terms such as "sectoral" or "usual" prices or practices;

d) competitors are aware of each other's bids or of information disclosed only to a certain candidate; and

e) different competitors are represented by the same natural or legal person.

When such suspicious indications come to the attention of contracting authorities, the HCC suggests that they:

1. request clarifications from the candidates (e.g. about their pricing, their reluctance to participate in a tender, etc.);
2. review carefully the tender file and that of previous tenders for similar indications;
3. continue with the tender process and ensure that the candidates do not become suspicious; and
4. inform the HCC.

However, the contracting authorities should not directly accuse the candidates of collusion, since this could lead to destruction of evidence and, if the accusations prove unfounded, to actions against the contracting authorities for defamation.

VI. DETERRENT METHODS

Finally, the HCC Guide indicates some methods by which collusion could be deterred, relating both to the drafting of the CFT and the tender procedure *per se*.

A. The Call for Tender

The HCC proposes that the CFT is drafted in such a way to ensure:

1. a differentiation of the contract value and the object of the tender, since predictability facilitates market allocation. Also, contracts of lower value may attract small companies that are not members of a cartel, while contracts of higher value may achieve better prices and deter bid rotation;
2. a large number of candidates, since collusion is impeded when new participants constantly appear. For this purpose, the CFT should have simple and rational participation requirements, avoid unnecessary restrictions, and refrain from continuous time extensions or automatic renewals of tender contracts; and
3. the secrecy of the candidates' identity, since this will impede communication and coordination among competitors.

It is also advisable that the CFT explicitly mentions that any suspicion of collusion will be reported to the HCC. Further, the CFT should require the candidates to submit a written statement affirming the independent drafting of their bids and lack of communication with their competitors, and include a statement that they will notify the contracting authority of any anticompetitive behavior that comes to their attention during the tender process.

B. The Tender Procedure

Finally, the HCC Guide indicates that the contracting authorities should:

1. Have a good understanding of the relevant market and the value of the items tendered (e.g. information about the products, suppliers, market conditions, prices and costs in the national market and abroad, information from previous tenders etc.) since this will impede overpricing and price-fixing attempts;
2. Have performed an independent evaluation of the procurement items before the publication of the CFT, since this will facilitate the detection of overpricing;

3. Ensure that its personnel has received relevant training, since this will facilitate the detection of suspicious indications and the appropriate treatment thereof; and
4. Analyze the bids in previous tenders to detect any suspicious patterns, since this may disclose certain patterns over time that are not evident in the short term.

VII. EPILOGUE

Detecting and fighting cartels is one of the most challenging issues of competition authorities, especially due to cartels' inherent secrecy and the measures taken by cartelists to conceal their behavior. In their mission against cartels, the use of screens by competition authorities, such as those described herein, can prove a valuable tool for the detection and deterrence of collusion, especially within the frames of tender procedures.

Furthermore, the publication of such screening methods by competition authorities not only assists contracting authorities in detecting suspicious behavior, but also raises awareness. This has the added benefit that tender candidates who do not participate in a cartel can assist competition authorities in exposing it; indeed, they have every reason to do so. In this aspect, the initiative taken by the HCC to not only draft, but also to publish the guide in question should certainly be praised.