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FROM THE CO-CHAIRS

To All Committee Members:

Best wishes for the holidays and the New Year from the M&A Committee! The last Threshold issue of 2017 includes some great reading for our members. We hope our readers will find these articles both interesting and helpful in their day-to-day practices.

The issue begins with an article from Joshua Wright, former FTC Commissioner and Professor at George Mason University, and Kristen Harris, a J.D. Candidate at George Mason University. The article tackles head-on the political debate surrounding merger enforcement in the United States – specifically the so-called *Hipster Antitrust* movement. The authors explain current legislative proposals and explore the potential consequences from abandoning the consumer welfare standard that has guided antitrust enforcement for the last four decades. This article provides fascinating insights into an issue that is sure to be a hot topic in the coming election year.

Our second article comes from Andrew Eklund at Hunton & Williams. The article recaps an ABA Merger Practice Workshop held this Fall that provided a behind-the-scenes view of a merger from pre-signing counseling through a government investigation. The workshop included skilled practitioners from government and private practice. This article summarizes useful lessons that are relevant to new and experienced attorneys alike.

Our third and final article is a round-up of international M&A developments from David Rosner and Mark Mohamed of Blakes. The article covers key merger clearances and investigations from Europe, Canada, Brazil, South Africa, Australia, New Zealand, and elsewhere. In addition, the authors take a look at new M&A policies adopted or under consideration by policymakers

around the world. This article provides a preview of the issues that will capture headlines around the world in 2018.

We will be back in the Spring with more great content. As always, we thank our members for their continued support. Please feel free to contact us if you would like us to publish letters to the editor or if you have ideas for new articles.

Enjoy the newsletter!

Norm and Ronan

Norman A. Armstrong, Jr.
Ronan P. Harty
Committee Co-Chairs

Hipster Antitrust Meets the Clayton Act: Proposed Merger Legislation Abandons the Consumer Welfare Standard

Joshua D. Wright & Kristen A. Harris*

Introduction

Antitrust has taken center stage recently in both academic and political debates. There appears to be two different types of debate emerging. The first type acknowledges the current antitrust framework is appropriate and asks whether and how application of that framework might be better calibrated to protect competition and consumers. The second category of debate rejects the current framework as the foundation of modern antitrust institutions and asks whether those institutions ought to be discarded in favor of something else altogether. The first category of debate is common. This is certainly not the first time that antitrust policy has faced arguments in favor of more or less antitrust enforcement activity. The second category of debate focused upon an outright rejection of the consumer welfare standard is certainly not without precedent in antitrust's history. But challenges to what has emerged as a bipartisan consensus on the foundational pillars of the modern antitrust enterprise have not received this much attention in decades. The evidence that this second group of commentators relies upon to substantiate their claim that modern antitrust institutions ought to be uprooted and discarded in favor of something else either doesn't say what they think it says or is deeply flawed.

In a speech at the Center for American Progress earlier this year, Senator Klobuchar said, "Our goal is to make antitrust cool again. And if the

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Administration won't do it, we will."[1] Senator Klobuchar recently made good on her promise, introducing legislation untethering the Clayton Act from the consumer welfare standard that has served as the lodestar of antitrust analysis for more than 40 years in the name of reinvigorating merger enforcement. Senator Klobuchar's proposal comes in the wake of increasing support for strengthening antitrust enforcement from academics, think tanks, and politicians. The proposed legislation, among other things, would allow condemnation of horizontal mergers that improve consumer welfare on the grounds that they harm individual competitors or reduce consumer choice.

On the academic front, economists and lawyers have pointed to evidence arguing that merger enforcement is too lax. For example, Furman and Orszag, on behalf of the White House Council of Economic Advisors, released a paper showing that the 50 largest firms gained revenue share in 75 percent of the industry.[2] Professor John Kwoka published a book and several articles purporting to demonstrate that current merger enforcement is too lax and allows too many mergers that reduce consumer welfare.[3] Additionally, some have recently suggested that antitrust might be implicated by common ownership.[4] These

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[1] Senator Amy Klobuchar, Address at the Center for American Progress (Mar. 13, 2017), https://www.klobuchar.senate.gov/public/index.cfm/news-releases?ID=8A14F9C9-A2D1-441C-8693-CBC303F31A4D.

[2] See Council of Economic Advisers Issue Brief, Benefits of Competition and Indicators of Market Power, at 4, May 2016, https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160502_competition_issue_brief_updated_cea.pdf. However, the Census Bureau's 50 firm measurement is not based on relevant antitrust markets and does not measure competition.

[3] See JOHN KWOKA, MERGERS, MERGER CONTROL, AND REMEDIES (2015); Joseph Farrell & John Kwoka, Resetting Merger Policy in the New Administration, Concurrences, No. 4-2016, at 17 http://www.concurrences.com/en/review/issues/no-4-2016/on-topic/what-is-trump-antitrust (suggesting that increased concentration evidences lax merger policy); John Kwoka, The Structural Presumption and the Safe Harbor in Merger Review: False Positives, or Unwarranted Concerns? (Ne. Univ. Dep't of Econs., Working Paper, May 19, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2782152; John Kwoka, Does Merger Control Work? A Retrospective on U.S. Enforcement Actions and Merger Outcomes, 78 ANTITRUST L.J. 619 (2012); John Kwoka & Evgenia Shumilkina, The Price Effect of Eliminating Potential Competition: Evidence from an Airline Merger, 58 J. INDUS. ECON. 767 (2010). But see Michael Vita & David F. Osinski, John Kwoka's Mergers, Merger Control, and Remedies: A Critical Review, 82 ANTITRUST L.J. (2018) (forthcoming), https://ssrn.com/abstract=2888485.

[4] See Eric A. Posner et al., A Proposal to Limit the Anti-Competitive Power of Institutional Investors, 81 ANTITRUST L.J. (2017) (forthcoming),

academic criticisms have largely, but not entirely, been within the well-known consumer welfare framework, proposing that various tweaks of merger policy might improve performance of the antitrust enterprise.

Think tanks and politicians have adopted many of these arguments, but have taken them at least one step further. They argue that antitrust's consumer welfare standard itself is a cause of lax enforcement, prevents prohibiting mergers that make consumers worse off, and should be abandoned. For example, the Center for American Progress released a policy brief arguing that antitrust enforcement should address income inequality.[5] And earlier this year the Democratic Party's "Better Deal" campaign was announced, suggesting that the consumer welfare standard has inadequately protected competition.[6] Senator Warren has been supportive of both adopting a public interest standard for enforcement actions and placing the burden on merging parties to prove mergers will not harm competition.[7] There is even support for prohibiting vertical mergers.[8] Ultimately, the proposals represent a departure from the consumer welfare standard.

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https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2872754 ("[T]he concentration of markets through large institutional investors is the major new antitrust challenge of our time."). But see Pauline Kennedy et al., The Competitive Effects of Common Ownership: Economic Foundations and Empirical Evidence (July 26, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3008331 (finding no evidence that common ownership raises airline prices).

[5] See Marc Jarsulic et al., Reviving Antitrust Why Our Economy Needs a Progressive Competition Policy, Center for American Progress (June 2016), https://cdn.americanprogress.org/wp-content/uploads/2016/06/28143212/RevivingAntitrust.pdf.

[6] See A Better Deal, Cracking Down on Corporate Monopolies and the Abuse of Economic and Political Power (2017), https://www.democraticleader.gov/wp-content/uploads/2017/07/A-Better-Deal-on-Competition-and-Costs.pdf ("Over the last thirty years, courts and permissive regulators have allowed large companies to get larger. . . . [U]nder our new standards, companies proposing the largest mergers would be presumed to be anticompetitive.").

[7] See Senator Elizabeth Warren, Reigniting Competition in the American Economy, Keynote Remarks at New America's Open Markets Program Event 7 (June 29, 2016), https://www.warren.senate.gov/files/documents/2016-6-29_Warren_Antitrust_Speech.pdf.

[8] See, e.g., Asher Schechter, Economists: "Totality of Evidence" Underscores Concentration Problem in the U.S., PRO-MARKET (Mar. 31, 2017), https://promarket.org/economists-totality-evidence-underscores-concentration-problem-u-s/ ("Lynn, on the other hand, said . . . [Google, Facebook, and Amazon] are utilities, and there is a simple way to deal with this: we prevent them from vertically integrating.").

The common thread among recent critiques of current merger enforcement has been that there is too little of it. However, the empirical evidence supporting this claim is not fully developed and certainly not sufficient to substantiate it. Thus, the proposal to revolutionize merger enforcement based on incomplete and, as of yet, unpersuasive evidence is unfounded. It is important to note that developments in the economic theory and evidence do not require abandoning the consumer welfare standard. Indeed, one feature of the consumer welfare standard has been that it allows the antitrust enterprise to expand and contract with new learning in economics.[9]

An important difference with the new criticisms of modern merger enforcement is that at least one influential subset of critics appears proudly impervious to economic learning, rejecting entirely the role of economic analysis within merger review in favor of a revolutionary new antitrust regime that is simultaneously larger, less well defined, and aimed at serving multiple goals. The so-called "Hipster Antitrust" movement has more ambitious goals for antitrust than merely improving consumer welfare by protecting consumers from the acquisition and exercise of monopoly power.[10] Instead it aims to harness populist sentiment against large corporations to create a new antitrust enterprise that combines a return to the 1960s "big is bad" antitrust era with results-oriented policy making that is immune to evidence. The signature element of the Hipster Antitrust movement is to reject the consumer welfare standard at the core of the antitrust laws, including merger enforcement, and the various constraints it imposes.[11]

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[9] See Joshua D. Wright & Douglas H. Ginsburg, The Goals of Antitrust: Welfare Trumps Choice, 81 FORDHAM L. REV. 2405 (2013); William E. Kovacic & Carl Shapiro, Antitrust Policy: A Century of Economic and Legal Thinking, 14 J. ECON. PERSP. 43 (2000).

[10] See Press Release, Senator Orrin Hatch, Hatch Speaks on Growing Controversy Over Antitrust Law in the Tech Sector (Aug. 3, 2017), https://www.hatch.senate.gov/public/index.cfm/2017/8/hatch-speaks-on-growing-controversy-over-antitrust-law-in-the-tech-sector ("[T]he consumer welfare standard finds itself besieged from the left. . . . Above all else, we hear again the old, lazy mantras that big is bad. . . . From what I can tell, [hipster antitrust] amounts to little more than pseudo-economic demagoguery and anti-corporate paranoia."); Joshua D. Wright (@ProfWrightGMU), TWITTER (June 19, 2017, 11:51 AM), https://twitter.com/ProfWrightGMU/status/876874984433393664.

[11] See Wright & Ginsburg, supra note 9.

Operating under the assumption that merger enforcement is too permissive, Senator Klobuchar introduced two pieces of legislation proposing changes to the Clayton Act. Perhaps most importantly, the legislation would shift antitrust law away from the consumer welfare standard. Our article evaluates one piece of this proposed legislation.

The Consolidation Prevention and Competition Promotion Act of 2017

In September, Senator Klobuchar introduced the Consolidation Prevention and Competition Promotion Act of 2017 ("CPCPA").[12] The CPCPA proposed several changes to the Clayton Act, including placing the burden of production upon defendants in certain mergers and "eliminating the requirement that a merger 'substantially' lessens competition."[13] The goal of the CPCPA is to "strengthen merger enforcement."[14] The new proposals were introduced because "concentration . . . makes it more difficult for people in the United States to start their own businesses, depresses wages, and increases economic inequality," and "some court decisions and enforcement policies have limited the vitality of the Clayton Act."[15] Further, the CPCPA asserts that such court decisions and enforcement policies have "underestimate[ed] the dangers that . . . mergers will lower quality, reduce choice, . . . or exclude competitors.[16]

Notably, the CPCPA would shift the initial burden of production to the merging parties to show the acquisition would *not* be anticompetitive.[17] The CPCPA would deem some mergers presumptively unlawful, requiring the merging parties in "certain acquisitions that either significantly increase

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[12] Consolidation Prevention and Competition Promotion Act of 2017, S. 1812, 115th Cong. (2017) [hereinafter CPCPA]. Sen. Klobuchar also introduced the Merger Enforcement Improvement Act. See Merger Enforcement Improvement Act, S. 1811, 115th Cong. (2017). The bill would, among other things, require companies to provide competitive information for five years following a consent agreement and require merging parties to pay substantial fees for bigger deals.

[13] CPCPA, supra note 12, at § 2(b)(1).

[14] Eric Croh, Sen. Klobuchar Unveils Bills To Beef Up Merger Enforcement, Law 360 (Sept. 14, 2017), https://www.law360.com/articles/964180/sen-klobuchar-unveils-bills-to-beef-up-merger-enforcement.

[15] CPCPA, supra note 12, at § 2(a).

[16] Id.

[17] Id. at § 2(b)(4).

consolidation or are extremely large bear the burden of establishing that the acquisition will not materially harm competition."[18] There is no economic basis for introducing a presumption of illegality based upon the dollar figure of the transaction. There is simply no reason to believe that deals above the arbitrary dollar figure threshold are more likely to be anticompetitive. Such a rule would also have the inevitable consequence of reducing incentives to propose large, welfare-increasing mergers.

Importantly, the legislation also condemns mergers for reasons unrelated to their impact upon competition and consumer welfare. The proposed legislation contemplates broadening the definition of competitive harm to allow mergers that increase consumer welfare to be successfully challenged merely because they harm competitors *or* reduce choice. The bill states that "the anticompetitive effects of market power created by concentration . . . include foreclosure of competitors," and "that the Clayton Act prohibits mergers that, as a result of consolidation, may . . . reduce choice . . . [or] exclude competitors."[19] This language represents an outright retreat from the consumer welfare standard. The truism that the antitrust laws protect "competition, not competitors," is borne of the economic logic that competition itself often harms rivals, and that the antitrust laws should welcome such economic rivalry because it makes consumers better off.[20] The proposal by its own terms makes most procompetitive mergers unlawful.

[18] Id. Mergers would be presumptively anticompetitive if "the acquisition would lead to a significant increase in market concentration" or post-acquisition, "the acquiring person would hold an aggregate total amount of the voting securities and assets of the acquired person in excess of $5,000,000,000 . . . or the person acquiring or the person being acquired has assets, net annual sales, or a market capitalization greater than $100,000,000,000 . . . and as a result of such acquisition, the acquiring person would hold an aggregate total amount of voting securities and assets of the acquired person in excess of $50,000,000." Id. at § 3(2)(B). To overcome the presumption, the merging parties would be required to "establish, by a preponderance of the evidence, that the effect of the acquisition will not be to tend to materially lessen competition or tend to create a monopoly or a monopsony." Id. The bill provides no indication of what increase in consolidation would be considered significant, but any analysis that relies solely upon market structure has already been completely rejected on the economics.

[19] Id.

[20] Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962).

Additionally, the CPCPA would reduce the plaintiff's burden of proof in cases where the burden is not immediately shifted to the merging parties. The legislation proposes to modify the standard for "unlawful acquisition" in the Clayton Act from "substantially lessen" to "materially lessen." The CPCPA offers little to define "materially lessen," other than the observation that it requires "more than a de minimis amount of harm."[21]

Evaluating the Proposed Legislation: Lessons from History

The challenges to current merger enforcement represent a departure from broad and nonpartisan agreement that an economic approach to antitrust is necessary for healthy competition policy. Perhaps the most egregious departure from the consumer welfare standard and an economic approach to antitrust policy is the reversal of the truism that the antitrust laws protect "competition, not competitors," in favor of a new standard that expressly adopts harm to rivals as sufficient to declare a proposed merger unlawful under the Clayton Act.[22] Condemning a merger by relying solely upon evidence of harm to a rival has no basis in modern antitrust policy grounded in the consumer welfare standard nor in any effects-based analysis of mergers.

History teaches that the return to "big is bad" merger policy is likely to harm consumers and economic growth. Through the 1960s, concentration was the determining factor in merger analysis. In this period, the Court interpreted the Clayton Act to reflect an assortment of social and political goals, including protecting small businesses from more efficient rivals.[23] However, history also

[21] Id. at § 2(b)(2).
[22] Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962).
[23] See United States v. Von's Grocery Co., 384 U.S. 270 (1966) (prohibiting a merger among firms with a combined market share below ten percent); United States v. Phila. Nat'l Bank, 374 U.S. 321 (1963) (setting forth a legal presumption of anticompetitive effects based upon market concentration); Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962) ("[W]e cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved those competing considerations in favor of decentralization.").

teaches that "harm to rivals" as an antitrust standard is unwise antitrust policy.[24] Beginning in the 1970s, in response to the inhospitality tradition in antitrust, economic developments were injected into antitrust law and the Supreme Court adopted the consumer welfare standard.[25]

The modern analytical approach to merger analysis has long moved beyond the structure-conduct-performance ("SCP") paradigm. The SCP paradigm reflected in *Brown Shoe*,[26] *Von's Grocery*,[27] and *Philadelphia Nat'l Bank*,[28] began to lose its footing in the courts less than a decade later in *General Dynamics*.[29] There, the Supreme Court held that merging parties may successfully rebut the government's merger challenge by pointing to facts other than the number of firms in the market and their shares that tended to show the merger would not harm competition.

While the SCP approach was borne of contemporary economic thinking, industrial organization economics has long since moved beyond the notion that market structure itself determines the nature of competition and associated competitive outcomes.[30] In fact, the SCP paradigm was rejected because it contradicted the evidence. Industrial organization economists have long understood that the causal relationship between competition and market structure can also run the other direction—that is, the nature of competition can determine

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[24] See William E. Kovacic & Carl Shapiro, Antitrust Policy: A Century of Economic and Legal Thinking, 14 J. ECON. PERSP. 43 (2000) (describing the period from 1936-1972 as reflecting a "heightened suspicion of corporate gigantism" and where "[c]ourts routinely slighted efficiency rationales for challenged behavior" and "also held that non-efficiency goals, such as preserving small firms, were relevant to applying [the Clayton Act]" concluding that "[f]ew decisions of this era command praise today.").

[25] See R. Hewitt Pate, Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Antitrust Law in the U.S. Supreme Court (May 11, 2004), https://www.justice.gov/atr/speech/antitrust-law-us-supreme-court#N_17_. See also Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 54 (1977) (lifting the per se prohibition against vertical nonprice restraints); United States v. Gen. Dynamics Corp., 415 U.S. 486 (1974) (considering factors that suggested concentration alone does not determine the competitive effects of a merger).

[26] Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

[27] United States v. Von's Grocery Co., 384 U.S. 270 (1966).

[28] United States v. Phila. Nat'l Bank, 374 U.S. 321 (1963).

[29] United States v. Gen. Dynamics Corp., 415 U.S. 486 (1974).

[30] See Douglas H. Ginsburg & Joshua D. Wright, Philadelphia National Bank: Bad Economics, Bad Law, Good Riddance, 80 ANTITRUST L.J. 201, 207 (2015) ("The SCP paradigm is now dead and has been for quite some time.").

market structure. For example, Harold Demsetz famously explained that the observed correlation between firm size and firm profits could be the result of competition to exploit economies of scale, or to innovate and create a superior product.[31] There is a near consensus that market structure alone is not a reliable predictor of competitive effects.[32] Rather, modern merger analysis has evolved to rely upon more direct economic evidence of competitive effects and to evaluate post-merger pricing incentives with better economic tools.

The 2010 Horizontal Merger Guidelines reflect this evolution, shifting the focus away from market definition and shares to predict the impact of a proposed merger and instead placing greater emphasis upon the direct approach described above.[33] This evolution reflects antitrust agencies' understanding of the simple economic point that increases in firm size can sometimes result in more, not less, competition and better results for consumers.[34] The consumer welfare approach incorporates the economic tools required to identify those mergers that indeed make consumers worse off and should be challenged as well as those that are likely to increase competition or have no impact at all. There is widespread agreement among antitrust experts that this evolution in economic method, captured in both the weakening of the structural presumption in the courts and the Horizontal Merger Guidelines, toward welfare analysis and away from

[31] See Harold Demsetz, Two Systems of Belief about Monopoly, in INDUSTRIAL CONCENTRATION: THE NEW LEARNING 164, 178-81 (Harvey J. Goldschmid, et al., eds., 1974); Dean Amel & Luke Froeb, Do Firms Differ Much?, 39 J. INDUS. ECON. 323 (1991) (observing that firm effects, specifically firm-wide management practices, are more important than market effects or concentration to explain variation in profitability); Timothy J. Muris, Improving the Economic Foundations of Competition Policy, 12 GEO. MASON L. REV. 1, 10 (2003) ("The SCP paradigm was overturned because its empirical support evaporated.").

[32] See U.S. DEP'T OF JUSTICE AND FED. TRADE COMM'N, COMMENTARY ON THE HORIZONTAL MERGER GUIDELINES 16 (2006) ("[M]arket concentration may be unimportant under a unilateral effects theory of competitive harm."), www.justice.gov/atr/public/guidelines/215247.pdf.

[33] See U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 1 (2010).

[34] See Harold Demsetz, Why Regulate Utilities?, 11 J. L. ECON. 55 (1968) ("[T]he asserted relationship between market concentration and competition cannot be derived from existing theoretical considerations and . . . is based largely on an incorrect understanding of the concept of competition or rivalry.").

noneconomic considerations has benefited consumers and the economy more broadly.[35]

Evaluating the Proposed Legislation: Lessons from the Empirical Evidence

One important claim underlying proposals to strengthen existing merger policy is that the antitrust agencies are currently under-enforcing the law—that is, anticompetitive mergers are systematically permitted. That is a testable claim. Those in favor of the movement away from the consumer welfare standard submit that increased consolidation has led to consumer harm that the antitrust agencies are systematically missing. However, the empirical evidence simply does not support this claim.

Perhaps the leading piece of evidence offered in support of this claim is Furman and Orszag's demonstration that the aggregate revenue share of the 50 largest firms within an "industry" has increased over time and is greater than 30 percent in many sectors.[36] These industry measurements are made at the two-digit NAICS code level, which are much broader than relevant antitrust markets.[37] From a methodological standpoint, it is difficult to believe these figures measure

[35] See, e.g., 1 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 110 (3d ed. 2006) ("The biggest advantages conferred by the use of relatively traditional microeconomics as the guiding principle for antitrust are two: coherence and welfare. . . . [P]opulist goals should be given little or no independent weight in formulating antitrust rules and presumptions. As far as antitrust is concerned, they are substantially served by a procompetitive policy framed in economic terms."); Wright & Ginsburg, supra note 9, at 2416 ("The shift from myriad social, political, and protectionist goals to welfare has produced significant benefits for consumers and brought coherence to antitrust law.");
Donald F. Turner, The Durability, Relevance, and Future of American Antitrust Policy, 75 CALIF. L. REV. 797, 798 (1987) ("Antitrust law is a pro-competition policy. The economic goal of such a policy is to promote consumer welfare through the efficient use and allocation of resources, the development of new and improved products, and the introduction of new production, distribution, and organizational techniques for putting economic resources to beneficial use. . . . [E]conomics-based antitrust law serves those goals to a substantial extent by preventing . . . mergers . . . that tend to eliminate or reduce competition without yielding economic benefits.").

[36] See Council of Economic Advisers Issue Brief, Benefits of Competition and Indicators of Market Power, at 4, May 2016, https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160502_competition_issue_brief_updated_cea.pdf.

[37] For HSR purposes, antitrust authorities request revenue information at the 6- and 10-digit NAICS code level because information at the 2-digit NAICS code level does not provide useful information about competition.

anything remotely related to the product market competition industrial organization economists attempt to analyze. Further, one can excuse a competition lawyer or economist from not being moved by the suggestion that the average market share of the top *50* firms exceeding *six tenths of a percent* is convincing exercise of market failure. This evidence is often combined with the observation that markups have increased over time to imply that market power is increasing across the economy.[38] Of course, there are many potential explanations for increasing markups over time—including the growth of industries with product differentiation and higher fixed costs, which is consistent with a shift in the type of competition, not a reduction in it. Additionally, a conclusion that markups are a result of market power ignores changes in business models over the past several decades, which have reduced costs and enhanced variety for consumers. There is indeed some evidence that output increased over the same time period.[39] Accordingly, the evidence that there is a large reduction in competition is lacking and weak at best making it a mistake to conclude that these data evidence lax antitrust enforcement.

A second claim by those who argue current merger enforcement is failing and in need of an overhaul is that anticompetitive mergers often pass through the agency review process. The primary piece of evidence proffered to support this claim is Professor Kwoka's meta-study of merger retrospectives.[40] Kwoka combines the results of these studies to suggest that "close call" mergers are

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[38] See Jan De Loecker & Jan Eeckhout, The Rise of Market Power and the Macroeconomic Implications (Nat'l Bureau of Econ. Research, Working Paper No. 23687, 2017), www.nber.org/papers/w23687.

[39] See Sharat Ganapati, Oligopolies, Prices, and Quantities: Has Industry Concentration Increased Price and Restricted Output? at 2 (Oct. 26, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3030966 (finding some correlation between price increases and higher concentration in manufacturing industries, but an increase in productivity dampens that relationship and finding no correlation in higher concentration and price increases in non-manufacturing sectors, while finding output increases substantially correlate with higher market concentration).

[40] See Kwoka, MERGERS, supra note 3; American Antitrust Institute, A National Competition Policy: Unpacking the Problem of Declining Competition and Setting Priorities Moving Forward (Sept. 28, 2016) ("Leading economist John Kwoka's meta-analysis of 50 studies encompassing more than 3,000 mergers over the last 25 years indicates that post-merger prices increased, on average, by 7.2%.").

generally anticompetitive and further concludes that consumers would be better off with stricter merger enforcement.[41] However, economists at the FTC reviewed Kwoka's work, discrediting Kwoka's methodology as a "substantial departure from standard meta-analytical methodology" and ultimately rejecting Kwoka's conclusions.[42] In keeping with the apparent trend, the evidence suggesting that merger enforcement is too permissive is weak.[43]

Conclusion

The case for the proposed legislation—whose purpose is to strengthen antitrust enforcement—is questionable, at best. But it carries with it substantial risk that by untethering merger enforcement from the consumer welfare standard it will do far more harm than good to consumers. Antitrust scholars from across the ideological spectrum, lawyers and economists alike, have long recognized the danger of an antitrust system that elevates harm to rivals above harm to competition. Economics, history, and the evolution of antitrust jurisprudence all teach that the proposed legislation is a serious risk to consumers. Challenges to the antitrust enterprise—including the consumer welfare standard, its analytical core—are common. Proposed adaptations supported by sound theory and evidence have been generally embraced. Those that lack substantiation have been less successful. The proposal raises important issues about the future direction of the antitrust enterprise and encourages a healthy discussion of its current capabilities. We look forward to that discussion.

[41] Id.
[42] Vita & Osinski, supra note 3.
[43] One serious problem is that Kwoka relied upon public data, which are necessarily incomplete and inaccurate. Another problem is his use of an unrepresentative sample of which two-thirds covers only three industries. Such a disproportionate data sample cannot reliably predict overall merger outcomes. Therefore, Kwoka's data do not show that recent merger enforcement policy has become lax nor do they support the need for stricter merger enforcement. See id.

The Eight-Hour Merger: Key Takeaways From The ABA Merger Practice Workshop

Andrew W. Eklund*

This past September, members of the antitrust community gathered at the Newseum in Washington, DC for the third-ever ABA Merger Practice Workshop. The day-long event, put on by the Section of Antitrust Law, simulated a hypothetical merger transaction from initial counseling through the conclusion of government's investigation. The workshop provided a behind-the-scenes look at how some of the most accomplished private practitioners, corporate counsel, and government enforcers engage in the review of a complex hypothetical merger of two competing high-tech companies.

THE SET-UP

The simulation followed the course of a hypothetical merger of two companies involved in automobile satellite navigation. The buyer, AutoMap, was an early entrant to the market. AutoMap had some software capabilities but its strength was in hardware. Its main product was the "NaviGate," a personal navigation device ("PND"). The seller, GlobeTrek, focused on satellite navigation software. Complicating the analysis, GlobeTrek licensed its software to AutoMap's biggest rival, Duprix, to sell the "Travel Bug" PND.

Over the course of the day, antitrust practitioners from both the public and private sector played the roles of the various people who would typically be involved in analyzing a transaction. For added realism, the parties' documents, submissions to the "Federal Bureau of Enforcement," and materials from non-party witnesses contained potentially troubling statements regarding the purpose of the transaction. Additionally, the simulation included scripted gaffes to add additional challenges for the parties.

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The simulation compressed the lifecycle of a merger into a single day, with segments devoted to different stages of the review. Some sessions, like the initial premerger counseling, occurred only with one side or the other on stage. Other sessions, like the initial meeting with agency staff, occurred with both the merging parties and the government enforcers. A midday panel featured experts outside of the simulation commenting on the progress of the parties. At the end of the simulation, the audience of about 150 attendees voted on whether or not the government should challenge the merger, with 65% voting in favor of letting the transaction go through with remedies that had been proposed by the parties. A final panel of commentary analyzed the entire simulation.

LESSONS FROM THE SESSIONS

Over the course of the day, themes and lessons emerged as the parties argued their case to the government regulators. While some of these takeaways were scripted (like whether or not to hire an expert economist), other lessons came from observations made by the commentators (such as what arguments tend to be most effective).

Be prepared to tell a procompetitive story of the deal (and back it up with evidence)

In the simulation, buyer's counsel (Amanda Wait and Jamillia Ferris) initially argued that the transaction would allow the combined company to engage in new levels of innovation. In real life, Federal Trade Commission (FTC) and Department of Justice (DOJ) staff are receptive to explanations as to why the deal either preserves or enhances competition. But blanket statements about increasing innovation or other procompetitive arguments will be met with skepticism if not backed up with concrete plans or examples. In other words, merging parties must be prepared to describe what the combination of the two companies will enable them to do that neither company could have done on its own. As one commentator suggested: don't argue conclusions, argue facts.

Commentators Bruce Hoffman and Molly Boast also emphasized that the procompetitive effects of a merger are almost always more compelling than estimates of efficiencies the parties expect to derive from the transaction. Efficiencies are notoriously difficult to predict accurately. By contrast, concrete plans are usually far more persuasive than estimates of efficiencies which may never materialize. The parties in the simulation eventually dropped their arguments about cost-savings when they had no evidence to back up these claims. Instead, they described plans to combine the best-in-class hardware of the buyer with the best-in-class software of the seller, which helped allay the government's concerns (and the concerns of the voting audience).

Information sharing in the due diligence process may implicate gun-jumping issues

The merging parties wanted to share information with each other for the purposes of evaluating the proposed transaction. But as seller's counsel (Courtney Dyer and John Snyder) pointed out, merging parties need to be very careful about how they share information and what information is shared.

Mergers subject to the Hart-Scott-Rodino Antitrust Improvements Act are subject to two different statutes which prohibit pre-merger coordination: Section 1 of the Sherman Act and subpart (g) of the HSR Act. Under the HSR Act, consummating the merger or otherwise exercising beneficial control over each other before the merger receives clearance from the government can subject the parties to large fines, currently over $40,000 per day.[1]

Even if a merger has been cleared under HSR, under the Sherman Act, any contract, combination, or conspiracy which restrains trade is illegal. This means that the merging parties are still limited in what they may agree to or do jointly until *after* the transaction has closed.

In the context of the due diligence process, merging parties will likely need to share competitively-sensitive information in order to properly assess

[1] 16 C.F.R. § 1.98(a).

whether a merger between the parties is appropriate. Merging parties should tailor the information-sharing process to limit (1) what information is shared, (2) who has access to that information, and (3) how far in advance of closing the information is shared.

Consider retaining your economists early

The FTC and DOJ will assign a staff economist to almost every matter. Those economists will start developing their economic analyses early in the review. Sometimes it can be challenging to convince clients that they need to hire an economic expert in the early stages of the transaction. Even when an economist is retained, it can be challenging to gather useful data early in the process, particularly if only a few employees of the company know about the proposed transaction.

Counsel for merging parties encountered this issue in the simulation. Although counsel recommended that their clients hire an economist early in the process, the clients were not enthusiastic about this suggestion. The parties were dismayed in their initial meeting with the agency staff that the agency had brought an economist (Erich Emch). And as the simulation and commentators like Howard Shelanski showed, complex econometric review, such as upward pricing pressure analysis, is still an important method of screening for potentially anticompetitive transactions. Having an economist early on can help frame the economic analysis and show why a transaction should not raise issues—and possibly help avoid a second request.

The merging parties eventually brought in their own economist (Elizabeth Bailey), who was able to effectively rebut the agency’s economic analysis.

Documents can be the deciding factor in whether a deal is challenged

The agencies carefully consider documents produced by the parties in making decisions about whether to clear the deal. Documents that support the procompetitive story of the transaction can help your case. Conversely, questionable statements can create challenges to getting your deal through. But as

the panelists made clear, it is always better to own those bad documents (and hopefully explain why they are should not raise any issues) than to hope that the investigators will not find the document.

As the parties' counsel showed in the simulation, having an explanation for a troubling statement makes a difference. The parties' submissions, and third-party affidavits, contained facts and statements which suggested that other competitors were not going to be able to effectively compete against the post-merger entity. Unsurprisingly, these statements raised concerns for the government enforcers (portrayed by David Kully, Aileen Thompson, Jennifer Schwab, Kara Kuritz, and Kim Van Winkle). But the parties' counsel were prepared, and were able to point to other materials which described the capabilities of a competitor—including the major market gains it had made in its first year of business. As the audience vote showed, being prepared and owning the document paid off.

Investment bankers may overstate the synergies of the merger

In analyzing the potential benefits of a transaction, investment bankers may be overly optimistic about the synergistic qualities of a proposed merger. This can negatively impact the government review process if the synergies they predict cannot be substantiated.

Panelists cautioned that many bad documents they have encountered over the years were prepared by people engaging in puffery. Although puffery can make a deal look more attractive to the buyer or seller, it can also raise concerns on the part of the government enforcers. Coordinating with investment bankers to ensure consistent messaging in both pre-merger analyses and deal announcements can help minimize scrutiny from an investigating agency.

Transaction review can be impacted by other jurisdictions

In the simulation, the parties had to consult with Chinese counsel (Yizhe Zhang and Fay Zhou) to determine whether a filing would be required in China.

American counsel was surprised to learn that the standard review period in China can last over 180 days.

Although the simulation did not deal with the full scope of Chinese merger review, this illustrated the issue that complex transactions often encounter: many foreign jurisdictions have robust merger control regimes. When preparing a transaction timeline, keep in mind that foreign enforcers work on their own schedule—and it may not be quick. Merging parties also should not ignore likely involvement from state attorneys general who may conduct their own investigations and seek their own remedies.

Know who to talk to at the agency—and how to talk to them

Fortunately for the workshop's merging parties, there were no issues with how their counsel interacted with the agency staff or front office. But as one panelist warned, how one interacts with the agency staff can have a major impact on how the investigation goes. Bernard Nigro cautioned that agency staff should be treated with the same respect that one would give to the front office. Being disrespectful to agency staff can have negative consequences in the merger advocacy process.

Further, the staffers assigned to a case—both attorneys and economists—are responsible for running the investigation at the ground level. Agency staff will therefore be the most familiar with the nuances of each investigation. Howard Shelanski noted that this was especially true for members of the Bureau of Economics, whose research backgrounds vary widely. As a result, the best-informed economist regarding a merger's industry could also be the most junior economist on staff. Panelists cautioned against pushing for meetings with front office personnel if there was not a compelling reason to do so, and to keep the agency staff informed of your intent to meet with the front office.

Bring in your litigators early in the process

As the focus of the workshop was on the merger advocacy process, there was no trial as part of the program. But the panelists warned that if the merging

parties think there is a reasonable chance that the proposed deal will be challenged, involving antitrust litigators early in the timeline can improve your process. Not only will the litigators help with developing the client's story for why the merger is not anticompetitive, but they can be prepared to suggest an early, aggressive timeline to litigate the matter if the agencies are unwilling to accept the merger with proposed remedies. Of course, this assumes that your client has the stomach to litigate a merger challenge.

Belittling your client's business is unlikely to support your argument

At one point, buyer's counsel mentioned their client's challenges in developing software, and that acquiring the seller would help counteract that issue. But commentator Bruce Hoffman colorfully cautioned against using the "we really suck" defense. Rather than arguing that one of the parties is terrible at the business, it is more believable to explain that a party may be stronger in some areas and weaker in others. Even then, this kind of argument may not be enough to win the day.

FINAL THOUGHTS

Although the audience voted overwhelmingly in favor of clearing the merger with remedies, the simulation showed the various friction points that can appear when advocating for a merger. And in the real world, the decision to challenge is not made by an audience, but rather by the front office attorneys at the FTC and DOJ. As the final panel showed, the Administration in power can impact whether a merger is likely to be challenged: Juan Arteaga, former Deputy Assistant Attorney General under the Obama Administration, said he would have challenged the proposed merger, but current Deputy Assistant Attorney General Bernard Nigro said he would have let the deal go through without remedies (which was not an available option in the audience vote).

Ultimately, the workshop showed that successfully advocating for a merger involves a need for strong facts, and a deep knowledge of those facts, to support your client's proposed transaction.

International Round-Up

David Rosner and Mark Mohamed*

While total M&A activity slowed in the third quarter of 2017,[1] competition law agencies around the world continued to review a series of global and local mergers, many of which gave rise to interesting and complex antitrust issues. To keep you abreast of the latest developments, we have summarized some of the most interesting agency merger decisions and ongoing reviews from agencies around the world, as well as news of interesting policy developments.

1) Conditional Approvals and Other Interesting Cases

Efficiencies Win Again in Canada: Conditional Clearance for Superior Plus/Canwest Propane.

The Canadian Competition Bureau has cleared the acquisition of Canwest Propane by Superior Plus.[2] Superior Plus, the largest propane retailer in Canada acquired the bulk propane distributor from Gibson Energy ULC for CAD $412 million[3] and received final regulatory clearance on September 27, 2017. The Bureau's clearance was conditional upon Superior's commitment to divest 14 retail propane sites in 12 local markets across the country which, in the Bureau's view, would have otherwise been subject to a substantial lessening of competition as a result of the merger. Although the Bureau's review concluded that the merger would increase propane prices and substantially lessen competition in 22 of the 25 relevant geographic markets, the potential for significant gains in efficiency

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[1] Reuters, "With mega-deals elusive, global third-quarter M&A deal volumes slip" (September 28, 2017), online: https://www.reuters.com/article/us-m-a-thirdquarter/with-mega-deals-elusive-global-third-quarter-ma-deal-volumes-slip-idUSKCN1C33GF.

[2] Competition Bureau, "Competition Bureau statement regarding Superior Plus LP's proposed acquisition of Canwest Propane from Gibson Energy ULC", (September 28, 2017), online:http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04307.html.

[3] Business News Network, "Superior Plus purchases Gibson's Canwest Propane for $412M", (February 13, 2017), online:http://www.bnn.ca/superior-plus-purchases-gibson-s-canwest-propane-for-412m-1.670359.

outweighed the anticompetitive effects. In their efficiencies analysis, the Bureau considered cost savings that would result from overlap in Superior and Canwest's locations, delivery routes, and head office operations. Together with the Bureau's clearance of last year's Superior/Canexus merger (which was opposed by the US Federal Trade Commission),[4] the Superior/Canwest deal highlights the continuing role of the unique efficiencies defence in Canadian merger review.

Abbott and Alere Divest to Obtain Approvals

In September 2017, to obtain clearances for the proposed $8.3 billion acquisition of diagnostics device manufacturer Alere Inc. by Abbott Laboratories, the parties reached settlement agreements with the FTC[5] and Canadian Competition Bureau[6] to divest two point-of-care medical device product lines. The parties reached a similar agreement with the European Commission in January.[7] Abbott and Alere, both US-based healthcare companies with global distribution, competed in the market for diagnostic medical devices. Competition agencies were concerned that the proposed merger would reduce competition in the markets for various portable point-of-care devices, specifically in the markets for blood gas testing systems and cardiac marker testing systems. To satisfy the divesture requirement, Alere has agreed to sell its Epoc blood testing system to German healthcare company Siemens AG for an undisclosed amount,[8] and its Triage cardiac marker testing system to US-based Quidel Corporation in a deal

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[4] Competition Bureau, "Competition Bureau statement regarding Superior's proposed acquisition of Canexus" (June 28, 2016), online: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04111.html.

[5] Federal Trade Commission, "FTC Requires Abbott Laboratories to Divest Two Types of Point-Of-Care Medical Testing Devices as Conditions of Acquiring Alere Inc.", (September 28, 2017), online: https://www.ftc.gov/news-events/press-releases/2017/09/ftc-requires-abbott-laboratories-divest-two-types-point-care.

[6] Competition Bureau, "Competition Bureau statement regarding the acquisition by Abbott of Alere", (September 28, 2017), online: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04308.html.

[7] European Commission, "Mergers: Commission approves acquisition of Alere by Abbott Laboratories, subject to conditions", (January 25, 2017), online: http://europa.eu/rapid/press-release_IP-17-147_en.htm.

[8] Fierce Biotech, "Alere to offload blood gas assets to Siemens, clearing final antitrust barrier to Abbott takeover", (July 24, 2017), online: https://www.fiercebiotech.com/medtech/alere-to-offload-blood-gas-assets-to-siemens-clearing-final-antitrust-barrier-to-abbott.

worth $440 million.[9] In addition to selling off the two product lines, Alere has also committed to divesting two manufacturing facilities in Ottawa, Canada to Siemens and a manufacturing facility in San Diego, California to Quidel.

Global Medical Devices Merger Wins Conditional European Clearance While U.S. Review Continues

In October, the European Commission's Directorate-General for Competition (DG Comp) cleared BD's proposed acquisition of Bard. The clearance decision is subject to the condition that BD divest its core needle biopsy devices business and a tissue marker product that is under development. The merger was originally announced in late April, and notified to DG COMP at the end of August. The parties won a Phase I clearance decision by proposing worldwide remedies that addressed DG COMP's concerns. Core needle biopsy devices are used in procedures for the removal of tissue samples. DG COMP concluded that the merger would eliminate one of Bard's few credible competitors, and that Bard faced limited competitive pressure otherwise. The merger would have the effect of reducing choice and innovation in this product area. To address the concern, BD committed to divesting its core needle biopsy devices business, including all development projects related to these products. Tissue markers are small items placed following biopsy procedures in breasts to help re-locate the biopsy site for future reference. DG COMP concluded that Bard was a leader in this segment and faced few competitors, but BD was developing a product that could potentially compete in the near future. The merger would eliminate this future competition. To address the concern, BD committed to divest its development project related to tissue markets.[10]

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[9] Fierce Biotech, "Quidel to buy up Abbott target Alere's triage assets in $440M deal", (July 17, 2017)

[10] DG COMP, "Mergers: Commissioner approves acquisition of Bard by BD, subject to conditions", (October 18, 2017), online: http://europa.eu/rapid/press-release_IP-17-4024_en.htm.

The merger was also notified to the U.S. antitrust agencies, among others. The parties announced that they had received second requests from the U.S. Federal Trade Commission in June.[11]

European Vending Machine Deal Wins Clearance, Subject to Local Divestitures

In late August, DG COMP announced it had cleared Switzerland-based Selecta's acquisition of Netherlands-based Pelican Rouge. The clearance decision is subject to the condition that Selecta divest its vending services business in Finland, thereby eliminating all competitive overlap between the merging parties in that Member State. Both parties are active in the supply and service of vending machines, and the supply of inputs for those machines, in a number of European countries. DG COMP concluded that the merger would not raise concerns in Belgium, France, Ireland, the Netherlands, Spain, Norway or the UK, but that concerns would arise in Finland.[12] The transaction was originally announced in March, and was completed on September 8.[13]

Agrium/PotashCorp Merger Gets Clearance in Canada, China, and India. Still Awaiting US Approval.

Between September and November 2017, the proposed merger between Agrium Inc. and Potash Corporation of Saskatchewan (PotashCorp) won

[11] PR Presswire, "BD and Bard Receive Second Requests from FTC under HSR Act", (June 9, 2017), online: https://www.prnewswire.com/news-releases/bd-and-bard-receive-second-requests-from-ftc-under-hsr-act-300471876.html.
[12] DG COMP, "Mergers: Commission approves acquisition of Pelican Rouge by Selecta, subject to conditions", (August 25, 2017), online: http://europa.eu/rapid/press-release_IP-17-2882_en.htm.
[13] Selecta press release, "Selecta completes acquisition of Pelican Rouge", (September 8, 2017), online: http://www.selecta.com/media/selecta-completes-acquisition-of-Pelican-Rouge/.

clearances from competition authorities in Canada,[14] India,[15] and China.[16] The transaction is billed as a merger of equals between the two Canadian companies, with PotashCorp being the largest crop nutrient company in the world, and Agrium being a producer of agricultural products with a global distribution network. While the Canadian clearance was unconditional, the Chinese and Indian approvals were conditional upon divestiture of PotashCorp's shareholdings in three investments in competing companies. Chinese regulators also required the conversion of PotashCorp's equity interest in Sinofert Holdings Limited to a passive investment. Clearance from the US FTC is the final hurdle to closing; the parties' disclosure indicates an expectation that the FTC's review will be complete by the end of 2017.[17]

Brazilian Antitrust Authorities Give Conditional Approval to AT&T's Acquisition of Time Warner

The Brazilian Administrative Council for Economic Defense (CADE) gave conditional approval for the proposed $85.4 billion acquisition of media company Time Warner by telecommunications giant AT&T.[18] AT&T operates in Brazil through its DirectTV satellite service and through a majority shareholding in Sky Brasil. Time Warner operates in Brazil by providing television content, such as HBO, to distributors. The CADE's review of the merger raised concerns over the vertical integration of AT&T's media distribution business with Time

[14] Competition Bureau, "Competition Bureau statement regarding proposed merger between Agrium and Potash Corporation of Saskatchewan", (September 11, 2017), online: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04305.html.

[15] Agrium press release, "Agrium and PotashCorp Announce Receipt of Regulatory Approval in India", (October 18, 2017), online: https://www.agrium.com/en/investors/news-releases/2017/agrium-and-potashcorp-announce-receipt-regulatory-approval-india.

[16] Agrium press release, "Agrium and PotashCorp Announce Receipt of Regulatory Approval in China", (November 7, 2017), online: http://www.agrium.com/en/investors/news-releases/2017/agrium-and-potashcorp-announce-receipt-regulatory-approval-china.

[17] Financial Post, "Agrium-PotashCorp merger to close by year-end after Chinese approval received", (November 7, 2017), online: http://business.financialpost.com/pmn/commodities-business-pmn/agriculture-commodities-business-pmn/agrium-selling-u-s-plants-to-win-american-approval-of-potashcorp-merger.

[18] CADE, "Time Warner's purchase by AT&T is approved with restrictions", (October 24, 2017), online: http://en.cade.gov.br/press-releases/time-warner2019s-purchase-by-at-t-is-approved-with-restrictions.

Warner's content licensing. To address CADE's potential concerns about vertical integration, the parties entered into a Merger Control Agreement with CADE under which AT&T would keep Sky Brasil and Time Warner channels as separate, independent companies. Time Warner must also continue to offer is programming to all distributors who wish to carry it, and Sky Brasil cannot refuse to broadcast content from other channel providers. Finally, the CADE will appoint an independent consultant to monitor compliance with the Merger Control Agreement, and review the terms of any content licensing and programming deals. Review of AT&T/Time Warner by the United States Department of Justice continues, and has been subject to extensive public speculation about what remedies might be required to win clearance.[19]

Rival Bidders Each Seek European Approval to Acquire Spanish Infrastructure Company

Abertis is a publicly-traded Spanish infrastructure company that operates toll roads, builds telecommunications infrastructure and operates a range of other infrastructure businesses. Abertis has attracted unsolicited bids from two potential suitors, Italy-based Atlantia and Germany-based Hochtief.

Atlantia announced its tender offer in May, and the Spanish securities regulator approved Atlantia's tender offer in early October.[20] Atlantia notified its proposed acquisition of Abertis to DG COMP on September 8, and DG COMP issued an unconditional clearance on October 13. DG COMP found that Altantia and Abertis overlap in a number of markets related to toll roads and intelligent transport systems, however the merger did not raise concerns given, among other things, the lack of geographic overlap between the parties road networks, and the

[19] New York Times, "Justice Department Says Not So Fast to AT&T's Time Warner Bid", (November 8, 2017), online: https://www.nytimes.com/2017/11/08/business/dealbook/att-time-warner.html.

[20] Atlantia, "The Spanish Stock Exchange Commission Approves Voluntary Public Tender Offer in Cash and Stock of the Entire Issued Shares of Abertis Infraestructuras", (Oct. 9, 2017), online: http://www.atlantia.it/documents/49112/176579/2017-10-09_Authorization_CNMV_-_ENG.pdf.

fact that the market for toll motorway concessions is highly regulated and subject to bidding processes.[21]

Atlantia's proposed acquisition is conditional upon compliance with merger notification laws in a number of other jurisdictions, including the United States, Brazil and Chile. Chile's competition authority, the Fiscalia Nacional Economica (FNE), announced its clearance on October 12, 2017.[22]

Hochtief announced its tender offer in October.[23] The offer, which may be subject to competition law clearances in various jurisdictions, has not been notified to the European Commission at time of writing.

2) Ongoing Reviews, Litigation and Prohibitions

Phase II Cases at the European Commission

At the time of writing, DG COMP is reviewing five mergers in Phase II.

Qualcomm notified its acquisition of NXP to DG COMP on April 28, and a Phase II review was announced June 9. DG COMP is concerned that the merger would give the merged entity a strong position in different chipsets, which would create the ability and incentive to exclude rivals through bundling practices. In addition, DG COMP is concerned that post-merger NXP's licensing practices might be modified (resulting in increased royalties and exclusion of rivals) and that the merger would reduce innovation in the development of semiconductors for "connected cars."[24] At time of writing, the provisional deadline for issuance

[21] DG COMP, "Mergers: Commission approves proposed acquisition of Abertis by Atlantia", (October 13, 2017), online: http://europa.eu/rapid/press-release_IP-17-3941_en.htm.

[22] FNE, "FNE aprueba con medidas la operación de concentración entre Atlantia S.p.A y Abertis Infraestructuras S.A.", (October 12, 2017), online : http://www.fne.gob.cl/2017/10/12/fne-aprueba-con-medidas-la-operacion-de-concentracion-entre-atlantia-s-p-a-y-abertis-infraestructuras-s-a/#more-77858.

[23] Hochtief press release, *Creating a Uniquely Global and Integrated Infrastructure Group* (Oct. 18, 2017), https://www.jointroad.com/en/0.jhtml.

[24] DG COMP, "Mergers: Commission opens in-depth investigation into Qualcomm's proposed acquisition of NXP", (June 9, 2017), online: http://europa.eu/rapid/press-release_IP-17-1592_en.htm.

of a decision is suspended. The transaction has already been cleared by the U.S. antitrust authorities.

Bayer notified its proposed acquisition of Monsanto to DG COMP on June 30, and a Phase II review was announced on August 22. DG COMP is concerned that the merger would reduce competition in a number of areas of overlap between the parties, negatively impacting pricing, quality, product diversity and innovation, and that the merger would reduce rivals' access to distributors and farmers. DG COMP's concerns span a number of different product areas, including pesticides, seeds and traits.[25] At time of writing, the provisional deadline for issuance of a decision is suspended. DG COMP's continuing investigation in this matter follows on from earlier clearances of two other transactions involving the agricultural sector: the merger of The Dow Chemical Company and Dupont, and ChemChina's acquisition of Syngenta, both of which have now been completed. The Bayer / Monsanto transaction is subject to review in a number of other jurisdictions, including the United States.

Essilor and Luxottica notified their proposed merger to DG COMP on August 22, and a Phase II review was announced on September 26. DG COMP's main concern is that the merged entity may use its position in optical frames to convince customers to buy its lenses through bundling, thereby excluding rivals.[26] At the time of writing, the provisional deadline for issuance of a decision is August 22, 2018. The transaction has already been cleared by antitrust authorities in Australia and New Zealand,[27] among others, and remains subject to review in a number of other jurisdictions, including the United States.

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[25] DG COMP, "Mergers: Commission opens in-depth investigation into proposed acquisition of Monsanto by Bayer", (August 22, 2017), online: http://europa.eu/rapid/press-release_IP-17-2762_en.htm.

[26] DG COMP, "Mergers: Commission opens in-depth investigation into proposed merger between Essilor and Luxottica", (September 26, 2017), online: http://europa.eu/rapid/press-release_IP-17-3481_en.htm.

[27] Australian Competition & Consumer Commission, "ACCC won't oppose proposed Essilor and Luxottica merger", (October 26, 2017), online: https://www.accc.gov.au/media-release/accc-wont-oppose-proposed-essilor-and-luxottica-merger; Commerce Commission New Zealand, "Commission grants clearance for Essilor and Luxottica merger in NZ market", (September 5, 2017), online: http://www.comcom.govt.nz/the-commission/media-centre/media-

Celanese and Blackstone notified the creation of their acetate flake and acetate tow joint venture to DG COMP on September 12, and a Phase II review was announced October 17. DG COMP is concerned that the combination of the second and third largest manufacturers of acetate tow would create a new player that would not be constrained by its only two remaining major competitors (outside of China), and that the merger might make tacit coordination more likely.[28] DG COMP's provisional deadline to issue its decision is March 19, 2018.

ArcelorMittal notified its proposed acquisition of Ilva to DG COMP on September 21, and a Phase II review was announced on November 8. DG COMP is concerned that the merger would result in higher prices for a number of flat carbon steel products, particular in Southern Europe.[29] The Phase II review is occurring alongside DG COMP's investigation into whether Italian state support measures for Ilva are consistent with European state aid rules. DG COMP's provisional deadline to issue its decision is March 23, 2018.

In addition, a sixth Phase II investigation involving Knorr-Bremse's proposed acquisition of Haldex was concluded after Knorr-Bremse dropped its bid for Haldex.[30] Haldex's board withdrew its support for the transaction, citing harm to its business from delays in the regulatory process and uncertain whether approval would ultimately be forthcoming.[31]

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releases/detail/2017/commission-grants-clearance-for-essilor-and-luxottica-merger-in-nz-market-.

[28] DG COMP, "Mergers: Commission opens in-depth investigation into proposed merger of Celanese's and Blackstone's acetate tow activities", (October 17, 2017), online: http://europa.eu/rapid/press-release_IP-17-3984_en.htm.

[29] DG COMP, "Mergers: Commission opens in-depth investigation into proposed acquisition of Ilva by ArcelorMittal", (November 8, 2017), online http://europa.eu/rapid/press-release_IP-17-4485_en.htm.

[30] DG COMP, "Mergers: Commission opens in-depth investigation into Knorr-Bremse's proposed takeover of competing brakes manufacturer Haldex", (July 24, 2017), online: http://europa.eu/rapid/press-release_IP-17-2126_en.htm.

[31] Automotive News Europe, "Knorr-Bremse drops bid for Haldex", (September 19, 2017), online: http://europe.autonews.com/article/20170919/ANE/170919708/knorr-bremse-drops-bid-for-haldex.

A Market Competitor and the New Zealand Commerce Commission Join Forces to Block Staples/OfficeMax Merger

The New Zealand Commerce Commission recently filed suit to block the takeover of OfficeMax by Winc, which was formerly known as Staples before being acquired by US-based Platinum Equity in March 2017.[32] The Commission's lawsuit is likely to be combined with a previous civil lawsuit brought by Australian competitor Complete Office Suppliers, which had already sought an injunction to stop the proposed merger. Although the Commerce Commission previously gave approval for Staples' proposed acquisition of OfficeMax's parent company, Office Depot, in 2015, the deal was not completed following opposition by U.S. and Canadian agencies, and the New Zealand clearance's validity expired. The Commerce Commission concluded that the current transaction, which was not notified by Platinum Equity, would be likely to lessen competition in the market for stationary supplies.[33] The case is being reviewed against the background of a recent scandal that resulted in a competitor, Fuji Xerox, being barred from bidding to supply stationary products to public sector organizations.[34]

EDEKA and Kaiser's Tengelmann Lose Appeal Against Merger Prohibition Even Though the Merger Was Approved on Public Interest Grounds

EDEKA and Kaiser's Tengelmann, two German supermarket chains whose 2015 merger was prohibited by the German Federal Cartel Office, have lost their appeal to have the prohibition declared illegal.[35] The 2015 merger was

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[32] Global Competition Review, "New Zealand sues to block Staples/OfficeMax", (November 7, 2017), online: http://globalcompetitionreview.com/article/1149822/new-zealand-sues-to-block-staples-officemax.

[33] Commerce Commission New Zealand, "Commission launches High Court injunction to stop Platinum buying OfficeMax", (November 2, 2017), online: http://www.comcom.govt.nz/business-competition/business-competition-media-releases/detail/2017/commission-launches-high-court-injunction-to-stop-platinum-buying-officemax.

[34] Stuff New Zealand, "ComCom seeks injunction to block takeover of OfficeMax", (November 2, 2017), online: https://www.stuff.co.nz/business/industries/98504318/comcom-seeks-injunction-to-block-takeover-of-officemax.

[35] Bundeskartellamt, "Dusseldorf Higher Regional Court confirms prohibition of EDEKA/Kaiser's Tengelmann merger", (August 24, 2017), online:

originally blocked because the agency feared that competition would be significantly worsened.[36] The appeal by EDEKA and Kaiser's Tengelmann is unusual because the merger was eventually cleared by the German Economics Minister for public interest reasons, including job preservation and maintenance of workers' rights. Despite the merger being approved, EDEKA and Kaiser's Tengelmann decided to continue the appeal against the original prohibition as a way to prevent the decision from setting a precedent, and to enable the parties to seek damages against the Federal Cartel Office.

21st Century Fox/Sky Merger Referred to UK CMA for Review

In September, the UK Secretary of State for Digital, Culture, Media and Sport referred the proposed Fox/Sky merger to the Competition and Markets Authority (CMA) for review. At issue in the CMA's review are how the merger would affect both media plurality and broadcasting standards (i.e., whether the purchaser meets the standard of being a fit and proper broadcaster).[37] The CMA has invited submissions on the issues, and has 6 months to make its recommendation to the Secretary of State.

South African Competition Authorities Block Agricultural Merger Due to Potential Coordinated Effects

The South African Competition Commission has blocked the proposed acquisition of African Star and Milling by a consortium-owned holding company comprised of Louis Dreyfus Africa and Willowton.[38] The Commission's review

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http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2017/25_08_2017_EDEKA_KT_Urteil_OLG.html?nn=3599398.

[36] Bundeskartellamt, "Bundeskartellamt prohibits takeover of Kaiser's Tengelmann by EDEKA", (April 1, 2015), online: http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/01_04_2015_Edeka_Untersagung.html;jsessionid=4A9630AADB8FC689E3D862B1F24BB302.1_cid378?nn=3599398.

[37] GOV.UK, "Fox/Sky: CMA publishes statement of issues for investigation", (October 10, 2017), online: https://www.gov.uk/government/news/foxsky-cma-publishes-statement-of-issues-for-investigation.

[38] Competition Commission South Africa, "Latest Decisions by the Competition Commission", (October 5, 2017), online: http://www.compcom.co.za/wp-content/uploads/2017/01/Weekly-Media-Statement-5-Oct-final.pdf.

of the transaction found that Louis Dreyfus Africa and Willowton are competitors in the market for sunflower seed milling, and that the transaction would facilitate coordination between the companies and allow them to share commercially sensitive information. The Commission also found that the transaction would introduce the merged entity into the wheat market, which is adjacent to other markets in which the parties have shareholdings and directorships. Overall, the Commission feared that the merger would serve as a platform for information exchange what would lessen competition in the markets for sunflower seed crushing and other adjacent products.

3) Merger Review Policy Updates

Canadian Competition Bureau Releases White Paper on Big-Data

On September 18, 2017 the Canadian Competition Bureau published a white paper outlining the Bureau's views on the role of "big data" on innovation and competition.[39] The paper outlines the Bureau's intention to continue applying the general analytical framework of merger review to transactions involving big data elements, but also acknowledges that big data creates challenges with market definition and assessing market power. In particular, the Bureau cites "platforms" which collect large amounts of data (eg. search engines, social media, and mobile applications) as examples of cases where defining markets and identifying the existence of market power using traditional approaches becomes very difficult. The paper does not identify or recommend new approaches to assessments of mergers due to the presence of "big data" as one element of the merging parties' businesses. The Bureau invites public feedback on the white paper until November 17, 2017.

[39] Competition Bureau, "Big data and Innovation: Implications for competition policy in Canada", (September 18, 2017), online: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Big-Data-e.pdf/$file/Big-Data-e.pdf

Filing Fee Increase to Keep Pace with Increasing Number of Resource-Intensive Complex Reviews

On October 20, 2017 the Canadian Competition Bureau invited feedback on a proposed change to the filing fees for merger review.[40] The Bureau says that an increase in the number of complex cases that require resource-intensive reviews has led the merger program to run a deficit in recent years. The proposed increase would be the first increase to merger filing fees since 2003, and would increase the fees from $50,000 to $72,000. In subsequent years, merger filing fees will be increased based on a government measure of inflation. If approved, the fee increase would take effect on April 1, 2018. The Bureau will accept public comment on the proposal until November 20, 2017.

Competition Law is On the Minds of Regulators and Politicians as Brexit Approaches

As negotiations for the United Kingdom's departure from the European Union continue following last year's Brexit vote, the nature of the relationship between British and European competition agencies after the split remains subject to extensive discussion. The UK Competition and Market Authority (CMA) has recently considered adding public interest considerations to its merger review process, a move which would be made easier once EU rules no longer apply in the UK, but the executive director for enforcement at the agency has said that Brexit is only one of many factors to consider.[41] The UK small business minister recently warned that failing to set clear guidelines about who, as between British and European competition authorities, is responsible for handing certain issues could impose an extra burden on companies trying to comply with two agencies.[42]

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[40] Competition Bureau, "Competition Bureau's proposal to increase the filing fee for merger reviews", (October 20, 2017), online: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04311.html.

[41] Global Competition Review, "CMA enforcement head: shift in competition sentiment is broader than Brexit", (October 2, 2017), online: http://globalcompetitionreview.com/article/1147871/cma-enforcement-head-shift-in-competition-sentiment-is-broader-than-brexit.

[42] Global Competition Review, "Brexit negotiators seek clarity in UK/EU jurisdiction, says minister", (November 2, 2017), online:

At the same time, debate about whether and how the CMA and British courts should take into account European competition case law continues.[43]

Australian Media Merger Guidelines Finalized

In November, the Australian Competition and Consumer Commission (ACCC) released its updated Media Merger Guidelines, which is the first reform to the guidelines in more than 10 years.[44] The new guidelines were issued following recent reforms to Australia's media ownership laws that will permit mergers that were previously prohibited, and following a decade in which technological change fundamentally reshaped the media landscape in Australia (and around the world). The guidelines detail the ACCC's intended approach to reviewing mergers in the media industry and identifies areas of potential focus, including the role of premium content, media diversity and the impact of technology change and innovation. Importantly, the guidelines provide that the test for mergers in the media sector is the same as mergers in any other sector of the economy – whether the merger will substantially lessen competition or not.[45]

European Commission Considers Screening Foreign Direct Investments

At the annual State of the Union address in September, the president of the European Commission unveiled a proposal to screen foreign direct investments in the European Union.[46] While the Commission reiterated that the EU will maintain an open investment regime, it expressed concerns about foreign take-overs

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http://globalcompetitionreview.com/article/1149647/brexit-negotiators-seek-clarity-in-uk-eu-jurisdiction-says-minister.

[43] Global Competition Review, "Whish to Lords: post-Brexit UK would be 'foolish' to ignore EU case law", (October 13, 2017), online: http://globalcompetitionreview.com/article/1148945/whish-to-lords-post-brexit-uk-would-be-%E2%80%9Cfoolish%E2%80%9D-to-ignore-eu-case-law.

[44] Australian Competition & Consumer Commission, "ACCC releases updated Media Merger Guidelines", (November 1, 2017), online: https://www.accc.gov.au/media-release/accc-releases-updated-media-merger-guidelines.

[45] Australian Competition & Consumer Commission, "ACCC's role in the changing media landscape", (October 31, 2017), online: https://www.accc.gov.au/media-release/acccs-role-in-the-changing-media-landscape.

[46] European Commission, "State of the Union 2017 – Trade Package: European Commission proposes framework for screening of foreign direct investments", (September 14, 2017), online: http://europa.eu/rapid/press-release_IP-17-3183_en.htm.

harming European interests. The Commission's proposal includes establishing a framework for screening foreign direct investments on the basis of security or public interest grounds, and creating a mechanism for cooperation among EU member states for when a proposed foreign direct investment affects European interests. Before coming into effect, the Commission's proposal requires approval from the European Parliament and from the individual Member States.

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While blockbuster M&A transactions have not dominated headlines the past few months, agencies around the world continue to review a docket of complex mergers. Indeed, the docket of "Phase II" cases may be particularly large as the winter sets in, and the uncertainty created by Brexit and the injection of public / national interest considerations into antitrust continues; interested observes can expect significant legal and policy developments arising from the conclusion of merger reviews across the world in the next three to six months.

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The **Mergers and Acquisitions Committee** focuses on issues relating to mergers, acquisitions and joint ventures. Committee activities and projects cover private litigation, both state and federal enforcement, and international merger enforcement activities.

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