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Divergence in Parallel Merger Reviews: How, Why, Where Do We Go From Here?

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Transactions in today's highly globalized world are often subject to parallel investigations in different jurisdictions. These parallel reviews create the possibility of divergent, or even conflicting, outcomes. But such divergent outcomes have historically been rare, as U.S. and European Commission (EC) antitrust agencies have collaborated to formulate "an advisory framework for interagency cooperation" in merger investigations. See Best Practices on Cooperation in Merger Investigations, US-EU Merger Working Group. Similarly, U.S. Federal Trade Commission (FTC) and EC regulators have committed to work together through the EU-U.S. Joint Technology Competition Policy Dialogue. And EC and United Kingdom regulatory leaders have called for a formal cooperation agreement between their respective agencies.

Notwithstanding pledges of cooperation, since Brexit at the end of 2020, the U.K. Competition and Markets Authority (CMA) anticipates that a significant proportion of its merger reviews will run in parallel with investigations by the EC, raising concerns that the incidence of divergence will increase. The recent merger review decisions by the CMA and the EC regarding Microsoft's proposed acquisition of Activision-Blizzard have further thrust the topic of divergence into the spotlight. This article explores possible reasons why global antitrust agencies have diverged in their past merger investigation decisions, trends regarding divergence in recent years, and the implications of these trends on merger control moving forward.

Explaining Divergence

While it is difficult to pinpoint any single factor as the underlying cause of divergent outcomes in a given case, a few stand out as especially influential: differences in market definition, differences in theories of harm, and differences in approaches to remedies.

Differences in market definition. Divergent merger control outcomes can be explained, at least partially, by facts that allow merger enforcement authorities to take different positions on product and geographic market definition, and to give varying weight to local market conditions. For example, in evaluating the Wabco-ZF transaction, the U.S. Department of Justice (DOJ) focused on the parties' participation in the North American steering components market and, in January 2020, conditioned its approval of the transaction on Wabco's divestiture of that business. In contrast, the EC accepted the parties' claim that there was no overlap in that same product market in the EU, and unconditionally approved the merger.

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Similarly, the divergence between the EC decision in its review of the Outokumpu-Inoxum transaction in November 2012 and the decisions by China and the United States can be explained by differences in the agencies' market definitions. In that case, the EC focused on a narrow geographic market—the European Economic Area (EEA)—and discounted imports. Concluding that the parties' combined market share in the EEA would be 50-60%, the EU imposed remedies that included significant divestitures. China and the United States, on the other hand, appeared to consider only the parties' combined global share of about 12%. Accordingly, China gave unconditional approval and the transaction received early termination of the Hart-Scott-Rodino (HSR) waiting period in the United States.

Differences in theories of harm. A second reason why parallel merger reviews may result in divergent outcomes is that regulators adopt different theories of harm. In particular, antitrust agencies have differed in the extent to which they consider conglomerate effects—the theory that two merging parties, which are not competitors in the same product market (no horizontal overlap) and do not have a supplier-customer relationship (no vertical overlap), would form a combined entity that could leverage its power in one market over a neighboring market because the parties are active in complementary or closely related markets. The concern is that the merged entity will have the ability and incentive to foreclose rivals by either tying (or effectively tying through decreased interoperability with rivals' products) or bundling its products.

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The United States was wary of conglomerate theories for decades after the U.S. Supreme Court decided two cases in the 1960s based on economic theories that were later heavily criticized and rejected. In *FTC v. Procter & Gamble*, 386 U.S. 568 (1967), the court embraced the "entrenchment" doctrine, which sought to prevent mergers that strengthened an existing firm's dominant position through greater efficiencies or gave the acquired firm greater access to products or financial resources, to the detriment of its smaller rivals. This theory was soundly rejected by legal and economic scholars for being contrary to antitrust policy, which works to improve efficiency and aggressive competition to ultimately benefit consumers. In the other case, *FTC v. Consolidated Foods*, 380 U.S. 592 (1965), the court held that a merger could violate antitrust laws if it created an opportunity for reciprocal dealing. That theory, like entrenchment, has since been severely criticized and would be invoked today only in a case where the foreclosure effect were significant. Accordingly, in 2001, the DOJ approved the GE-Honeywell merger with minimal conditions, while the EC blocked the merger based on conglomerate concerns. Similarly, in 2020, the United States unconditionally approved the NVIDIA-Mellanox acquisition while the EC and China both scrutinized potential conglomerate effects. Although the EC ultimately did not identify any concerns and did not impose conditions on the transaction, China came to a different conclusion and imposed conditions, including behavioral remedies to prevent the parties from tying or bundling their products.

However, the position of U.S. antitrust agencies may be changing. Until this year, U.S. antitrust agencies "had not brought in modern times any challenges to mergers of unrelated products that rely on 'conglomerate' theories." Conglomerate effects of mergers—Note by the United States, submitted for Item 1 of the 133rd OECD Competition Committee meeting, 6 (June 2020), https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/oecd-conglomerate_mergers_us_submission.pdf. Instead, the DOJ and FTC challenged mergers of complements based on vertical theories of harm, and noted that they would "continue to consider new learning about potential effects from mergers."

Earlier this year, the FTC sued to block the Amgen-Horizon acquisition based on a conglomerate theory, citing concerns regarding Amgen's history of and ability to further engage in cross-market bundling of drugs. The FTC Bureau of Competition Director Holly Vedova stated that this lawsuit "sends a clear signal to the market: The FTC won't hesitate to challenge mergers that

enable pharmaceutical conglomerates to entrench their monopolies at the expense of consumers and fair competition." https://www.ftc.gov/news-events/news/press-releases/2023/05/ftc-sues-block-biopharmaceutical-giant-amgen-acquisition-would-entrench-monopoly-drugs-used-treat. This stance brings the FTC into closer alignment with the EC, which in recent years appears to have a renewed interest in examining conglomerate effects, although its concerns are often assuaged and the transaction ultimately approved with behavioral remedies, like in Bayer-Monsanto, Broadcom-Brocade, Intel-McAfee, and Microsoft-LinkedIn.

Whether the Amgen-Horizon suit is unique to the facts of that case or the pharmaceutical industry, or whether it marks a policy shift for U.S .antitrust agencies, is still uncertain.

Approaches to remedies. Jurisdictions may also differ in the extent to which they are willing to approve remedies. Across the board, antitrust regulators have been moving away from behavioral remedies, instead preferring structural remedies where appropriate. Recently, however, the CMA has been more skeptical about the effectiveness of remedies generally, particularly in digital markets but in other industries as well. For example, the CMA refused to accept the proposed structural remedy package in the Cargotec-Konecranes transaction, despite the fact that the proposed divestiture included all products identified in its provisional findings, and ultimately blocked the deal in early 2022. In contrast, the EC conditionally approved the merger with the proposed structural remedies.

Taking a more aggressive position than the CMA, DOJ leadership has publicly stated that even structural remedies are insufficient when a transaction poses competitive concerns, explaining that the DOJ will choose to litigate cases to block a merger altogether as "the surest way to preserve competition." AAG Kanter's remarks to the New York State Bar Association Antitrust Section, Jan. 24, 2022, https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-remarks-new-york. Indeed, for over a year after Kanter's remarks, the DOJ did not agree to any consent decrees in its merger enforcement cases. The streak was broken just two months ago in ASSA ABLOY-Spectrum Brands, a highly unusual case in which a settlement was reached mid-trial in light of clear indications that the DOJ would be unlikely to succeed in proving its case in court.

Other considerations. Global antitrust regulators may also differ in the extent to which they consider third-party feedback and their treatment of any existing contracts or agreements made by the parties, such as Google's letter promising to honor preexisting licensing commitments in its proposed acquisition of Motorola Mobility. Some jurisdictions, like China, may also be more willing to block a deal or impose remedies to protect national interests or local firms.

Divergence Trends

Recently, both the number of parallel reviews and the number of divergent outcomes seem to be increasing. In the year after Brexit (2021), the CMA and EC opened 12 parallel merger review cases. Of those 12 parallel reviews, three cases—Meta-Kustomer, Cargotec-Konecranes and Veolia-Suez—resulted in divergent outcomes. Of the parallel merger review cases opened by the CMA and EC in 2022, there have already been three divergent outcomes—ALD-LeasePlan, Sika-MBCC, and Microsoft-Activision. Two other cases are pending in Phase II in the EU but received Phase I clearance in the U.K.: Booking-eTraveli (unconditional Phase I clearance in the UK) and Korean Airlines-Asiana Airlines (conditional Phase I clearance in the U.K.). The DOJ is also considering a lawsuit to block the latter transaction.

The frequency of parallel reviews—and divergent outcomes as a result—is likely to continue to rise. In 2021, the EC initiated a significant policy reversal, indicating that it would be more willing to accept Article 22 referrals for transactions that its member states do not have jurisdiction to review due to unmet turnover thresholds. At the same time, the CMA is working to cement its broader jurisdictional reach and more aggressive stance on merger control post-Brexit, and is likely to remain willing to open parallel investigations with the EC. Similarly, progressive leadership of the US antitrust agencies under the Biden administration has emphasized the need to revamp merger enforcement, an area that it believes has been too lax in recent years. Moreover, antitrust regulators have become increasingly interested in and willing to investigate M&A activity by large global companies—particularly technology

companies—and the number of high-value transactions is rising. As the overall number of parallel merger investigations increases, the frequency of divergent outcomes may increase as well.

Implications for Future Merger Control

Parallel merger control review and divergent merger control outcomes present a number of potential issues. Perhaps most significantly, they shift the balance of global regulatory power to the most aggressive jurisdiction. One jurisdiction's ability to block a merger that has been approved in other jurisdictions amounts to a veto power over M&A activity. This veto power is especially problematic because the veto works in only one direction, favoring prohibition of transactions that may be considered efficient and pro-competitive elsewhere.

Moreover, to the extent that regulators' diverging or conflicting decisions are upheld or supported by the courts, judges in one jurisdiction can effectively overrule judges in another, potentially implicating questions of both domestic politics and international relations.

Moving forward, whether the antitrust agencies' pledge to cooperate will reduce the divergent merger control outcomes among them is an open question.

Regulators' actions in investigating the Illumina-Grail transaction, for example, generated speculation over whether the FTC improperly used the EC's merger review as a back channel to block a merger that it may not have been able to block on its own through the U.S. court system. See https://www.wsj.com/articles/federal-trade-commission-antitrust-europe-emails-foia-illumina-grail-acquisition-a78e03d0. This concern is heightened by the EC's greater willingness to accept Article 22 referrals for mergers where the turnover does not meet notification thresholds, as in Illumina-Grail, where Grail had no revenues in the EU.

Furthermore, because the veto power always skews in the direction of prohibition, it raises concerns that the merger review process across jurisdictions will stifle innovation and prevent the realization of market efficiencies. This issue is perhaps especially prevalent in the tech industry, where there are greater uncertainties around the future of emerging markets, and reasonable minds can disagree as to the direction of future competition. For instance, although the Austrian competition authority approved Meta's acquisition of Giphy with remedies, the CMA ordered Meta to unwind the transaction. In doing so, the CMA focused on Giphy as a potential future competitor—despite Giphy having negligible market share at the time of transaction—and concluded that behavioral remedies would not sufficiently address vertical foreclosure concerns. The Austrian courts disagreed, finding no anti-competitive effects based on Giphy's potential to compete and determined that the behavioral remedies would mitigate the anti-competitive vertical effects.

Although we will never know which authority's assessment would have been proven true in that case, it is likely that at least some of the mergers that are blocked by a competition authority somewhere would, if allowed to close, have been pro-competitive elsewhere. Combined with more aggressive merger enforcement generally, an increase in divergent outcomes will lead to even fewer successful deals. In addition, the fear of increased regulatory risk alone is likely to deter M&A activity to some extent, which the agencies tend to perceive as a win. However, fewer deals may not actually benefit consumers or otherwise promote the goals of antitrust laws if the result is missed opportunities to further innovation and efficiency.

Moving forward, whether the antitrust agencies' pledge to cooperate will reduce the divergent merger control outcomes among them is an open question. The antitrust community should continue to keep an eye on pending and future parallel merger reviews to see whether regulators will make greater efforts to cooperate and align across jurisdictions, or will trend toward increasing divergence.