

American Needle, Dagher, and the Evolving Antitrust Theory of the Firm: What Will Become of Section 1?

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This summer, on the last regularly scheduled sitting of its October 2008 Term, the Supreme Court granted certiorari in a case that could have far-reaching consequences throughout the law of Sherman Act Section 1. In the case under review, *American Needle, Inc. v. NFL*,¹ the Seventh Circuit, by unanimous panel decision, entered a striking ruling in the long-running debate over whether professional sports leagues can be “single entities” under *Copperweld*.² The court not only said yes, but did so in what is possibly the most likely context in which the member teams could have competed with one another—the licensing of their trademarked logos to makers of sports memorabilia. The Supreme Court granted certiorari on the question whether defendant National Football League acts as a single entity as to this conduct.

Among the decision’s most important consequences will be what it has to say about another recent decision, the underappreciated 2006 ruling in *Texaco Inc. v. Dagher*.³ If the Court reverses in *American Needle*, it may signal that *Dagher* is to be a narrow decision, limited to a fairly peculiar set of facts. If the Court affirms, and particularly if it does so in explicit reliance on *Dagher*, then *American Needle* could, as a practical matter, do significant damage to the enforceability of Section 1 of the Sherman Act; it could in effect immunize significant swaths of concerted conduct among competitors. It would imply that comparatively unintegrated arrangements, like trademark licensing agreements among the NFL member teams, are just as “economically integrated” as the defendants’ joint venture in *Dagher*. In short order we would see horizontal arrangements throughout the economy purporting to have “integrated” around some shared common purpose.

Currently, no Supreme Court case gives very clear guidance as to how courts are to distinguish the actions of “integrated” joint ventures from those subject to at least rule of reason analysis under Section 1, and as will be suggested below, it is hard to imagine how those lines could be drawn. So as a worst-case scenario, the effect of affirmance of the Seventh Circuit’s decision in reliance on *Dagher* could be something like repeal of Section 1 as to wide-ranging horizontal conduct, other than the hardest-core, naked price fixing and market allocations.

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¹ 538 F.3d 736 (7th Cir. 2008), cert. granted, 77 U.S.L.W. 3708 (U.S. June 29, 2009) (No. 08-661).

² *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), held that a corporation cannot conspire for purposes of Sherman Act Section 1 with its wholly owned subsidiary. Technically, the Court ruled only on that narrow issue, but it also made clear its intent that “substance, not form, should determine” all conspiracy issues, *id.* at 773 n.21. The Court implied that Section 1 should be inapplicable to the potentially many contexts in which some integration “does not represent a sudden joining of two independent sources of economic power previously pursuing separate interests,” *id.* at 771, but rather represent “a business enterprise [that has] . . . structure[d] itself in ways that serve efficiency of control, economy of operations, and other factors dictated by business judgment,” *id.* at 773. Lower courts have expanded *Copperweld* “single entity” treatment to a variety of contexts beyond the wholly owned subsidiary situation at issue in *Copperweld*. See *infra* notes 47–48 and accompanying text.

³ 547 U.S. 1 (2006).

In the Background: *Texaco Inc. v. Dagher*

When the Court decided it, *Dagher* did not attract very much interest. Apparently, it just did not seem that significant for the Court to reject per se analysis as to the pricing decisions of a manufacturing joint venture that had already been formed. The Court's opinion was unanimous, after all (the newly appointed Justice Alito not participating), and creation of the venture at stake had even received Federal Trade Commission approval.⁴ At least in the academic literature and trade press, *Dagher* received little sustained analysis. Among those who noticed it, some welcomed it as a useful clarification or a comparatively small and desirable step toward freeing joint ventures from litigation burdens,⁵ and there was some suggestion it might have special relevance to energy industries.⁶ The exception, though, was one article that now seems eerily on target: James Keyte, a defense-side practitioner representing sports leagues and with an admitted interest in advocating their treatment as "single entities," observed the decision's broad potential to restrain the scope of Section 1. As he put it, "the days when one of the best Supreme Court cites for single-entity treatment of joint ventures was Justice Rehnquist's dissent from denial of certiorari in [a 1982 case] are long gone."⁷

Dagher is, in fact, a big deal. At a minimum it was a striking change of course, or at least of emphasis, in the Court's treatment of joint venture activity. *Dagher* seemed to take the outcome of the case before it as obviously determined by the defendants' formal relationship. Prior Supreme Court case law, even aside from the "intra-enterprise conspiracy" cases disavowed in *Copperweld*, contained stern authority opposing evasions of Section 1 through formal arrangements or by labeling an arrangement a "joint venture."⁸ In the mid-1970s and 1980s, although the Court's sympathy for "economic integrations" of all sorts began growing dramatically, it never suggested that the potential synergies of some arrangement, or the fact that it might be "an important and

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⁴ The Commission settled an earlier Section 7 challenge to the venture with a consent decree permitting the venture in question, subject only to a handful of limited divestitures. The decree did not mention the pricing decisions (or any other conduct) that would follow consummation. Defendants settled parallel challenges with several state attorneys general under similar terms. See *Shell Oil Co.*, 125 F.T.C. 769 (1998).

⁵ See, e.g., Thomas A. Piraino, Jr., *The Antitrust Analysis of Joint Ventures After the Supreme Court's Dagher Decision*, 57 EMORY L.J. 735 (2008); James H. "Hart" Holden, *Joint Ventures and the Supreme Court's Decision in Texaco, Inc. v. Dagher: A Win for Substance over Form*, 62 BUS. LAW. 1467 (2007).

⁶ See, e.g., Peter C. Carstensen, *Using Dagher to Refine the Analysis of Mergers and Joint Ventures in Petroleum Industries and Beyond*, 19 LOY. CONSUMER L. REV. 447 (2007). Cf. James A. Keyte, *Dagher and "Inside" Joint Venture Restraints*, ANTITRUST, Summer 2006, at 44, 44:

The precise holding in . . . *Dagher* was not unanticipated by the antitrust community: for most practitioners, it made perfect sense for the Court to hold that it is not per se illegal for a lawful, economically integrated joint venture to set the prices of the venture's own products, even if those products included two formerly competing brands (Texaco and Shell). For others, *Dagher* merely confirms that so-called structural joint ventures—in which all the relevant competitive assets of the joint venture parents are placed in the venture—should be treated essentially as mergers. From both perspectives, in reversing the court of appeals, *Dagher* could be viewed as a *sui generis* correction of another Ninth Circuit aberration.

⁷ Keyte, *supra* note 6. Mr. Keyte represents the National Hockey League as amicus before the Supreme Court in *American Needle*, and he recently reiterated his views of *Dagher* in James A. Keyte, *American Needle Reinvents the Single-Entity Debate*, ANTITRUST, Summer 2009, at 48.

⁸ In the frequently cited *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951), for example, the government sued a U.S. corporation that had entered into horizontal market allocation agreements with two foreign affiliates in which it owned stock, but with control of neither. Justice Black famously wrote that he could "find [no] support in reason or authority for the proposition that agreements between legally separate persons and companies to suppress competition among themselves and others can be justified by labeling the project a 'joint venture.'" *Id.* at 598. *Timken* remains at least nominally good law, as even *Copperweld* merely distinguished it on its facts, implying that a shareholder with something less than controlling ownership could conspire with its corporation. 467 U.S. at 764–65. At least some lower courts and newest Justice consider *Timken* to have been overruled only to the extent that it endorsed the intra-enterprise conspira-

increasingly popular” one,⁹ should exempt it entirely from Section 1 scrutiny.¹⁰ *NCAA v. Board of Regents* went so far as to say that while “a joint selling arrangement may make possible a new product by reaping otherwise unattainable efficiencies,” it remained the case that “joint ventures have no immunity from the antitrust laws.”¹¹ Even *Copperweld* observed that “joint ventures,” despite their potential efficiencies, “are judged under a rule of reason”¹²

But, admittedly, a seed was planted as early as 1982, when the *Maricopa County* Court offhandedly observed (in incautious dicta) that “partnerships [and] other joint arrangements” are ordinarily “regarded as . . . single firm[s]”¹³ Even though the integration that the Court considered in *Dagher* was probably not quite so “integrated” as the Court said it was,¹⁴ and even though the Court arguably reversed *sub silentio* a fair body of learning on the ancillary doctrine,¹⁵ the Court relied heavily on that dictum from *Maricopa County* to rule in *Dagher* that the pricing

cy rule as to wholly owned subsidiaries. See *Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 336 (2d Cir. 2008) (Sotomayor, J., concurring); *infra* notes 56–61 and accompanying text. Likewise, it seems clear that *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972), and *United States v. Sealy, Inc.*, 388 U.S. 350 (1967), both finding per se liability for some internal decisions of joint ventures, would be decided differently now and will eventually be overturned as to the issue of per se treatment. And yet they remain nominally good law.

⁹ *Dagher*, 547 U.S. at 5.

¹⁰ During the late 1970s, and in particular in *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977), and *Broadcast Music, Inc. v. CBS.*, 441 U.S. 1 (1979), a majority of the Court began to express concern that its traditional per se rules might be prohibiting innovation and beneficial private arrangements. Those cases inaugurated the present period during which the Court has fairly often refused to apply per se treatment to arrangements that under its prior precedents could be classified as per se illegal. See *Cal. Dental Ass’n v. FTC.*, 526 U.S. 756 (1999) (requiring attenuated rule of reason review of professional organizations’ restrictions on price and quality advertising); *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447 (1986) (refusing to judge horizontal group refusal to provide information to insurers under per se rule, though admitting it could be characterized as a boycott); *Nw. Wholesale Stationers, Inc. v. Pac. Stationery and Printing Co.*, 472 U.S. 284 (1985) (refusing to judge the membership rules of a purchasing cooperative under the per se rule, while noting that under many of its prior decisions the rules could be labeled a horizontal boycott); *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85 (1984) (refusing to apply per se rule to horizontal output restraint so that Court could consider possible efficiencies); *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679 (1978) (refusing to apply per se rule to group refusal to engage in price negotiation). While many of these cases have been called “quick look” or “abbreviated rule of reason” cases, and while they have caused a lot of confusion, see, e.g., Stephen Calkins, *California Dental Association: Not a Quick Look, But Not the Full Monty*, 67 ANTITRUST L.J. 495 (2000) (lamenting the confusion), some courts and commentators have come to believe that they are really best understood as simply applications of the “ancillary restraints” doctrine. The Court has never explicitly adopted that doctrine, but it explains most of the quick look cases nicely. See, e.g., *Polk Bros., Inc. v. Forest City Enters., Inc.*, 776 F.2d 185, 188–89 (7th Cir. 1985) (citing *NCAA* and *BMI* as authority for ancillary analysis); Thomas A. Piraino, *A Proposed Antitrust Approach to Buyers’ Competitive Conduct*, 56 HASTINGS L.J. 1121, 1153 n.148 (2005).

¹¹ *NCAA*, 468 U.S. at 113 (internal quotation omitted).

¹² 467 U.S. at 768.

¹³ *Arizona v. Maricopa County Med. Soc’y*, 457 U.S. 332, 356 (1982) (emphasis added) (“[In] partnerships or other joint arrangements in which persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit. . . . the partnership is regarded as a single firm competing with other sellers in the market.”).

¹⁴ Specifically at issue in *Dagher* was one of two arrangements the parties established, this one constituting an agreement not to compete with respect to about 25 percent of gasoline sold in the Western United States. The venture, despite the inevitably presumed productive synergies, also managed to produce a substantial price increase despite evidence of falling costs. See Carstensen, *supra* note 6, at 448. Moreover, while it is true that the parties did not compete as to refining and distribution in the territory covered by their two agreements, they did compete in markets around the world in exploration and drilling, and oversees they competed in refining and distribution. Perhaps most significant is that their agreement was created only for a five-year duration and in fact it terminated after four. See *id.*

¹⁵ *Dagher* applied an approach that was arguably at odds with a body of lower court case law and agency interpretation. Previously, even very tightly integrated joint ventures could be addressed under the ancillary rule. That is, even where a restraint was part of the venture’s basic work it still had to be “reasonable” (even if, were it a naked restraint, it would be per se illegal). See, e.g., *Blackburn v. Sweeney*, 53 F.3d 825 (7th Cir. 1995); *Yamaha Motor Co. v. FTC.*, 657 F.2d 971 (8th Cir. 1981); *Fed. Trade Comm’n & U.S. Dep’t of Justice.*, *Antitrust Guidelines for Collaborations Among Competitors* (2000), available at <http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf> (setting out

decisions of an “economically integrated” joint venture that was not a “sham” could not be per se illegal. While technically the Court left open the question whether those decisions might violate the rule of reason,¹⁶ the opinion could be taken to imply that the “internal” decisions of a joint venture as to its “core” functions are immune from Section 1 on a single-entity rationale. This follows from repeated dicta, as when the Court characterized the conduct challenged by the plaintiff as internal decision making by “little more than . . . a single entity”¹⁷

Sports and the Single-Entity Problem

Quite a long time before *Dagher*, and even well before *Copperweld*, the courts grappled with the entity status of professional league sports, and their analysis has been driven by what are thought to be that industry’s asserted economic idiosyncrasies.¹⁸ A lot has been said about these matters,¹⁹ and at least two special economic features bear on the leagues’ antitrust treatment. One familiar to all antitrust watchers is that competitive sports require (or at least benefit substantially) from some centralized decision making in order for the product to be produced. Specifically, teams need some means by which to schedule games and they need some agreement on the rules by which games will be played. It also became apparent as long ago as the 19th century that fans desire play to be organized in some way to ensure that teams are appropriately matched by skill and that there be some systematic means to judge their performance (as by holding a regular season with playoffs and a championship).²⁰ This may call for seemingly anticompetitive league rules, which for example constrain recruiting, limit some expenditures, or equalize rev-

agencies’ view of the ancillarity doctrine). But, in one fairly surprising portion of the opinion, the *Dagher* Court reversed the Ninth Circuit for applying ancillarity, holding that “the . . . doctrine has no application . . . where the business practice being challenged involves the core activity of the joint venture itself—namely, the pricing of the very goods produced and sold by [the joint venture].” 547 U.S. at 7–8. Moreover, this new ancillarity approach introduces a metaphysical distinction that seems likely to generate a lot of uncertainty. *Dagher* seems to imply that some conduct might be “outside” or other than “core” venture activity, and yet still enjoy the protection of the ancillary restraints rule. But that could only be if the conduct is “reasonably necessary” to the venture’s procompetitive purposes. When will it be the case that a restraint is not an “inside” activity, but is nevertheless “reasonably necessary” to a venture’s purposes?

¹⁶ See 547 U.S. at 7 n.2 (noting that the Court considered only whether defendants’ conduct could be per se illegal because plaintiff failed to plead any rule of reason theory; though defendants briefed the argument “that Section 1 of the Sherman Act is inapplicable to joint ventures,” *id.*, the Court refused to reach it).

¹⁷ *Dagher*, 547 U.S. at 6.

¹⁸ The single-entity argument has never been taken as seriously in the case of college sports, and most of the case law and academic discussion of the single-entity issue has concerned professional sports. Even though universities collaborate in athletic conferences, and though it is generally thought that their collaboration there should be judged with some deference, universities are less integrated than the member teams of a professional sports league. Thus, the argument goes, single-entity treatment may or may not be appropriate for professional leagues but it would not be for college athletic conferences. In any case, any hope for single-entity treatment of college sports seems plainly foreclosed by *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984).

¹⁹ See, e.g., MARK CONRAD, *THE BUSINESS OF SPORTS* 1–20, 261–76 (2006); PAUL DOWNWARD & ALISTAIR DAWSON, *THE ECONOMICS OF PROFESSIONAL TEAM SPORTS* 11–40 (2000); STEFAN KÉSENNE, *THE ECONOMIC THEORY OF PROFESSIONAL TEAM SPORTS: AN ANALYTICAL TREATMENT* 1–29, 101–24 (2007); Marc Edelman, *Why the “Single Entity” Defense Can Never Apply to NFL Clubs: A Primer on Property-Rights Theory in Professional Sports*, 18 *FORD. INT. PROP., MEDIA & ENT. L.J.* 891 (2008); Franklin M. Fisher et al., *The Economics of Sports Leagues—The Chicago Bulls Case*, 10 *MARQ. SPORTS L.J.* 1 (1999); Nathaniel Grow, Note, *There’s No “I” in “League”*: *Professional Sports Leagues and the Single Entity Defense*, 105 *MICH. L. REV.* 183, 191–94 (2006).

²⁰ Strictly speaking, sports play can occur without this kind of centralization. Various sports have existed at different times without league control; in particular during the 19th century “barnstorming” play took place, and was rather commercially successful in professional baseball. It ultimately proved problematic, though, and rationalization by leagues evolved in one way or another in all major amateur and professional sports. See generally Edelman, *supra* note 19, at 897–99.

venues (as by pooling them).²¹ But a second and much less noticed phenomenon is that an economic tension inheres in commercial sports, and it presents the leagues with an externality or collective action problem, because team owners have interests at odds with parity. An individual team's greater athletic success, other things equal, usually means greater profitability in gate receipts, broadcast revenues, and the sale of ancillary products like memorabilia and sponsorship rights.

The latter fact seems largely to explain why successful leagues have in every case been organized as tightly integrated pools of separately owned teams. True single-entity organization has been attempted several times in professional sports, mostly during the mid-1990s (it seems generally acknowledged that the attempts of this period were aimed at securing *Copperweld* immunity²²). So far such attempts have not worked well financially, and those that have survived have done so only following organizational changes to permit separate team ownership. Though their problems probably have more than one explanation,²³ it appears that the single-entity form's chief weakness as a business model is that investors oppose it.²⁴ While much of the single-entity rhetoric has been based on the teams' purportedly shared interests, their interests are actually in fairly direct pecuniary conflict, even as to the activity that is allegedly least commercial: on-field play. This fact has some significance to the problem in *American Needle*.

Throughout about thirty years or so of case law, leagues of all shapes and sizes have worked to convince everyone that, in light of their economic peculiarities, they are antitrust single entities. Though the effort got a boost from an early suggestion by Robert Bork,²⁵ an early trial court opin-

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²¹ See CONRAD, *supra* note 19, at 11–15.

²² While there had been true single-entity organizations well into the past, *see, e.g.*, David Fintz, *Note, The Women's Right to Participate in the Game of Baseball*, 15 CARDOZO J.L. & GENDER 641, 647–51 (2009) (discussing the history of one such league, the All-American Girls Professional Baseball League, founded by Cubs owner Phillip Wrigley in 1943 as a single non-profit corporation; the AAGPBL was the league featured in the film *A League of Their Own*), a new wave of several of them emerged in the mid-1990s. While their centralized organization was also said to promise scale economy, a chief purpose of these new leagues' single-entity form was antitrust strategy. See CONRAD, *supra* note 19, at 15–17; Edelman, *supra* note 19, at 900–03.

²³ It is often argued that without separate ownership fans will not believe that competition among the teams is honest. *See, e.g.*, *N. Am. Soccer League v. NFL*, 670 F.2d 1249, 1251 (2d Cir. 1982); *Chicago Prof'l Sports Ltd. P'ship v. NBA*, 95 F.3d 593, 605 (7th Cir. 1996) (*Bulls II*) (Cudahy, J., concurring); Fisher et al., *supra* note 19, at 5–6; Grow, *supra* note 19, at 194. The claim seems at least incomplete. It is belied by the experience of the MLS and the WNBA, *see infra* note 24, and it also seems that the concern for honest competition could be addressed by a visible, strong, and fully independent Commissioner, a fixture that all of the major leagues have adopted. *See* Edelman, *supra* note 19, at 906–07.

²⁴ The best evidence on point was the creation of Major League Soccer (MLS) and the creation of the Women's National Basketball Association (WNBA). The MLS was initially conceived as literally a single entity—one corporation that would own all the teams as well as the facilities, the referees, and the central administration. What is so interesting is that it did not work. The league in that structure could not attract sufficient capital, and the general explanation has been that individual investors desire to own a team with better prospects than others, and hope to outperform the others, for the sake of greater profitability. So the MLS settled on a fairly complex hybrid structure combining a strong central hierarchy with some individual autonomy for team “investor-operators.” *See* Edelman, *supra* note 19, at 900–03. At the moment, in fact, there is agitation to make the MLS teams even more independent. *See* Grahame L. Jones, *MLS Looks Way Down the Field*, L.A. TIMES, Mar. 29, 2006, at D8. The WNBA's experience was similar. Originally conceived as a single entity wholly owned by the existing NBA teams, the league foundered financially and its governing board decided in 2002 that the only way to attract sufficient new capital was to allow individual team ownership. *See* CONRAD, *supra* note 19, at 18–20.

²⁵ ROBERT BORK, *THE ANTITRUST PARADOX* 278–79 (1978) (“[S]ome activities can only be carried out jointly. Perhaps the leading example is league sports. When a league of professional lacrosse teams is formed, it would be pointless to declare their cooperation illegal on the ground that there are no other professional lacrosse teams. . . . In this case, the league is best viewed as being the firm . . .”).

ion,²⁶ and a few tidbits of ambiguous but much-cited support from Supreme Court opinions,²⁷ the many federal opinions to address the question have almost unanimously disagreed. It is probably not fair to say that the circuits have categorically ruled it out, since most of the opinions describe the issue as fact-sensitive. However, the First,²⁸ Second,²⁹ Third,³⁰ Sixth,³¹ and Ninth Circuits³² have ruled against single entity status for sports leagues. Somewhat less clear authority can be found in the Eighth and D.C. Circuits.³³ There is also the problem that the Supreme Court itself once opened the door for Section 1 liability as against the NFL, though admittedly it did not directly address the single-entity issue.³⁴ The only authority supporting single-entity treatment had been from the Seventh Circuit, and prior to *American Needle* it had remained dicta.³⁵ Notably, sev-

²⁶ *San Francisco Seals, Ltd. v. NHL*, 379 F. Supp. 966 (C.D. Cal. 1974).

²⁷ Justice Rehnquist gave the idea some support in *NFL v. North American Soccer League*, 459 U.S. 1074 (1982) (Rehnquist, J. dissenting from denial of cert.). The Second Circuit in that case had reversed a bench trial verdict finding the NFL immune from Section 1 as a single entity. *N. Am. Soccer League v. NFL*, 670 F.2d 1249 (2d Cir. 1982). While Justice Rehnquist did not argue that defendant NFL was immune under a single-entity theory, and argued in favor of applying an ancillarity standard to the league's conduct, he noted as part of his reasoning that "[a]lthough individual NFL teams compete with one another on the playing field, they rarely compete in the marketplace." 459 U.S. at 1077. Furthermore he analogized the NFL to a law firm that might impose non-compete rules on its own partners. *Id.* at 1078. Likewise, in dicta in *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996), the Court discussed certain aspects in which the NFL is more like one firm than several competitors. *Id.* at 248–49. Finally, the idea was given some support in *NCAA v. Board of Regents*, 468 U.S. 85 (1984), which based its rule of reason treatment of a horizontal output restraint on the fact that defendant NCAA had the need for internal cooperation in order to produce its product.

²⁸ *Fraser v. Major League Soccer, LLC*, 284 F.3d 47 (1st Cir. 2002); *Sullivan v. NFL*, 34 F.3d 1091 (1st Cir. 1994).

²⁹ *N. Am. Soccer League v. NFL*, 670 F.2d 1249 (2d Cir. 1982).

³⁰ *Mid-South Grizzlies v. NFL*, 720 F.2d 722, 786–87 (3d Cir. 1983).

³¹ *NHL Players Ass'n v. Plymouth Whalers Hockey Club*, 419 F.3d 462 (6th Cir. 2005).

³² *L.A. Mem. Coliseum Comm'n v. NFL*, 726 F.2d 1381 (9th Cir. 1984).

³³ In both *Mackey v. NFL*, 543 F.2d 606 (8th Cir. 1976), and *Smith v. Pro Football, Inc.*, 593 F.2d 173 (D.C. Cir. 1978), the courts upheld judgments against the NFL and member teams for Section 1 violations. This seemingly confirms that at least sometimes the league and its teams are not single entities, though neither opinion explicitly addressed the single entity issue. It might also be relevant that both opinions involved labor relations with players, an area that even strong proponents of single-entity treatment believe should be an exception to the single-entity finding. *See, e.g., Bulls II*, 95 F.3d at 600; *Grow, supra* note 19.

Much of the authority against single-entity treatment predates *Copperweld*, and it has been argued that *Copperweld* overruled or modified it. *See, e.g., Grow, supra* note 19, at 199–201. But the courts to have considered that argument have disagreed. *See Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1148 n.17 (9th Cir. 2003); *St. Louis Convention & Visitors Comm'n v. NFL*, 154 F.3d 851, 856 (8th Cir. 1998) (noting lower court's finding that NFL's single-entity defense was barred by collateral estoppel, following *L.A. Memorial Coliseum Commission v. NFL*, 726 F.2d 1381 (9th Cir. 1984), and further that that decision remained good law even though it predated *Copperweld* and the Eighth Circuit's own ruling in *City of Mt. Pleasant v. Associated Electric Cooperative*, 838 F.2d 268 (8th Cir. 1988). However, because the appeal was resolved on other grounds the court did not actually reach that question itself.).

³⁴ In *Radovich v. NFL*, 352 U.S. 445 (1957), the Court reversed dismissal of a player's antitrust claim against the league, which had been granted on the district court's view that the "baseball exception" of *Federal Baseball Club of Baltimore v. National League*, 259 U.S. 200 (1922), should apply to football as well. The Court did not explicitly address the single entity issue. However, as the petitioner observed before the Court in *American Needle*, the Court did purport to find all of the defendant NFL's "remaining contentions" to be "lacking in merit," and the NFL's briefing before the *Radovich* Court included an argument that the teams were "quasi partners" and that "to refer to a conspiracy among the member teams of the [NFL] is to disregard the nature of the enterprise." *American Needle, Inc. v. NFL*, No. 08-661 (U.S. Nov. 17, 2008) (petition for certiorari).

³⁵ *Chicago Prof'l Sports Ltd. P'ship v. NBA*, 961 F.2d 667 (7th Cir. 1992); *Bulls II*, 95 F.3d at 593. There is one other peculiar and much more limited bit of support for single-entity status from the Fifth Circuit. In *Eleven Line, Inc. v. North Texas State Soccer Association*, 213 F.3d 198 (5th Cir. 2000), a panel found that a conspiracy could not be alleged against the "[m]oms and dads" who volunteered as coaches and in other capacities in a non-profit amateur soccer league for school-age children, despite their league's adoption of allegedly anticompetitive eligibility rules promulgated by state and national soccer organizations. Judge Jones' reasoning is fairly unclear on this point, but appears to have been at least partially driven by the fact that the "[m]oms and dads . . . [were] not economically motivated . . ." 213 F.3d at 205.

eral circuits have explicitly found or noted in dicta that member teams compete in various ways “off the field,”³⁶ and even the Seventh Circuit opinions acknowledge that leagues should be considered multiple entities for some purposes.³⁷

American Needle

The Seventh Circuit Opinion. Then came Judge Kanne’s opinion in *American Needle*. In late 2000 the teams of the NFL voted collectively to enter into a ten-year exclusive license with Reebok to produce headwear bearing the teams’ trademarked logos. Thus ended what had been a long period of some competition among headwear manufacturers. Prior to 1963 the teams had individually licensed their own marks directly to manufacturers or through agents, and in many cases a team would license more than one manufacturer to make products bearing its mark. In 1963, some of the teams established a California corporation to act as their licensing agent. In 1982 a successor entity was given the exclusive right to license all the teams’ marks. Even after that the agent continued to license more than one maker to use its marks. Interestingly, each of the major league sports organizations in the United States have created wholly owned licensing arms with some exclusive rights to license the teams’ marks, and these arrangements all date to about the same time—the early 1980s.³⁸ There also was a boom in licensing revenues beginning shortly thereafter, during the 1980s and 1990s, and some league officials have fairly frankly attributed it to the consolidation of league-wide licensing in these entities.³⁹

We cannot yet know quite what plaintiff American Needle’s theory of harm will be, given the early stage of the proceedings. But there is some reason to believe that this pattern of the collectivization of the NFL teams’ licensing, and in particular the NFL’s Reebok contract, has had bad effects already. Even with no discovery at all as to the question of the exclusive deal’s purpose or effect, plaintiff American Needle was able to adduce evidence of substantial and persistent price increases for the products now exclusively made by Reebok.

Judge Kanne’s opinion affirming summary judgment for the defendant dutifully quotes portions of *Copperweld* and summarizes existing Section 1 case law on sports leagues, but it only offers two actual rationales for the ruling. First, Judge Kanne notes that the teams had been collectively licensing their trademarks for a long time (since 1963).⁴⁰ What really seems much more important was his rejection of the idea that the question should depend to any extent on whether the teams could have competed with one another. He writes first that the panel “[was] not convinced that the NFL’s single-entity status . . . turns *entirely* on whether the league’s member teams can compete with one another”⁴¹ Then, with virtually no analysis of whether their ability to com-

Likewise, the Central District of California’s 1974 ruling in *San Francisco Seals*, 379 F. Supp. at 966, was never explicitly overturned but is presumably no longer good law under *L.A. Coliseum Commission*, 726 F.2d at 1381.

³⁶ See, e.g., *Sullivan v. NFL*, 34 F.3d 1091, 1098 (1st Cir. 1994); L.A. Mem. Coliseum Comm’n v. NFL, 726 F.2d 1381, 1389–90 (9th Cir. 1984); *Mid-South Grizzlies v. NFL*, 720 F.2d 722, 786–87 (3d Cir. 1983).

³⁷ *Bulls II*, 95 F.3d at 600 (“Sports are sufficiently diverse that it is essential to investigate their organization and ask *Copperweld*’s functional question one league at a time—and perhaps one facet of a league at a time, for we do not rule out the possibility that an organization such as the NBA is best understood as one firm [in some cases] . . . , but is best understood as a joint venture [in others]”).

³⁸ See CONRAD, *supra* note 19, at 268–76.

³⁹ See Stuart B. Chris, *Sports Logo Licensing Boom Keeps Growing*, DAILY NEWS REC., June 9, 1988, 2 (quoting official of Major League Baseball Properties, MLB’s licensing unit, as attributing rise in license revenue to “taking control of licensing from the 26 individual clubs”).

⁴⁰ 538 F.3d at 744. Though he characterized this point as the “most important[.]” it actually seems irrelevant. As a few of the parties have pointed out in briefing to the Supreme Court, that a conspiracy has succeeded for a long time cannot determine its legality.

⁴¹ 538 F.3d at 743 (emphasis added).

pete *could* be relevant to their entity status, he writes that “with that said, American Needle’s assertion that the NFL teams have deprived the market of independent sources of economic power unravels.”⁴² The brief analysis following that claim boils down to the panel’s view that “the NFL teams share a vital economic interest in collectively promoting NFL football.”⁴³

In other words, a unanimous panel of a federal court of appeals has now held the following conduct to be categorically exempt from Section 1 liability: a collection of business firms that happened to share an “economic interest in collectively promoting” one product (league-sanctioned football games) could establish a horizontal conspiracy fixing the price of a different product (team-sanctioned, team-specific hats), having quite different economic characteristics and as to which they have competed even in the recent past. They may also boycott all but one downstream distributor of that product with the purpose of maximizing revenue from sales of that different product.

Consequences. The conjunction of *Dagher* and an affirmance in *American Needle* could be corrosive to antitrust enforcement. A major open question under *Dagher* is just how broadly it should be read. While many have taken *Dagher* to mean simply that the conduct of joint ventures displaying some significant integration cannot violate Section 1 per se, another possible reading is that all “internal” decisions concerning the venture’s “core” conduct should be immune from Section 1. If the *American Needle* Court frames the question before it as how to resolve that open question, and then the Court affirms, there would remain the important job of identifying the class of entities that are sufficiently “economically integrated” so that their internal conduct is immune from Section 1.

This would create at least two very hard problems. First, there would remain no meaningful line between single- and multiple-entity conduct.⁴⁴ The courts are uninterested in any “complete unity of interest test” that might be borrowed directly from *Copperweld*,⁴⁵ and less demanding “unity of interest”⁴⁶ tests tend to be extremely amorphous and give really no guidance at all.⁴⁷ The underlying problem is that, though the courts and most commentators use the phrase with a lot of confidence, “joint venture” is no term of art, and is not, contrary to the *Dagher* Court’s view, even

⁴² *Id.* Importantly, plaintiffs were afforded no discovery as to whether the NFL teams did or could compete with respect to trademark licenses to headwear manufacturers, and in fact the panel ruled against American Needle on a Rule 56(f) discovery dispute on that point, which was also on appeal. *Id.* at 740–41.

⁴³ *Id.*

⁴⁴ One of the best analyses of the problem, by a former Deputy Assistant Attorney General in the Antitrust Division, was Judge Boudin’s theoretical digression in *Fraser v. Major League Soccer, LLC*, 284 F.3d 47 (1st Cir. 2002), discussed *supra* notes 28 and accompanying text. Having worked through a careful analysis of the problems that single-entity distinctions pose, he concluded that “[o]nce one goes beyond the classic single enterprise, including *Copperweld* situations, it is difficult to find an easy stopping point or even decide on the proper functional criteria for hybrid cases.” *Id.* at 59.

⁴⁵ See, e.g., *Bulls II*, 95 F.3d at 598 (characterizing a proposed test for single-entity status requiring “complete unity of interest” as “silly” because even corporate parents and their wholly owned subsidiaries can have internal conflicts of various kinds).

⁴⁶ A “unity of interest” test is simply one that determines whether two formally distinct defendants are an antitrust single entity by asking whether they have sufficiently shared interests. See, e.g., *Oksanen v. Page Mem. Hosp.*, 945 F.2d 696, 703 (4th Cir. 1991) (characterizing the relevant test under *Copperweld* to be whether defendants share a “unity of interest,” and finding such a unity between a hospital and the medical staff board charged with making its personnel decisions).

⁴⁷ This was true, for example, in the Seventh Circuit *American Needle* ruling, which was based almost entirely on a finding, supported by no citation to record evidence, that the member teams of the NFL share a collective interest in “promoting” their main product of live “NFL Football.” See also *Jack Russell Terrier Network of N. Cal. v. Am. Kennel Club, Inc.*, 407 F.3d 1027 (9th Cir. 2005) (non-profit group and an umbrella group with which it was affiliated cannot conspire); *City of Mt. Pleasant v. Assoc. Elec. Coop.*, 838 F.2d 268 (8th Cir. 1988) (supplier members of electricity cooperative cannot conspire, even though they are legally separate and have no overlapping ownership).

really a “form of business organization” at all. It is more an offhand, colloquial generalization; it is like colloquial use of the word “partnership,” which can mean anything from a loose grouping of community activists, to an agreement in principle among world leaders, to a marriage of man and wife. The second hard problem follows from the first. An immunity so powerful and so malleable as the one seemingly adopted in *American Needle* will create a very big loophole in Section 1 that business will quickly exploit. Problems like these have actually already manifested themselves, even prior to *Dagher*; ever since *Copperweld*, the range of relationships that lower courts have found to be single entities has spread substantially beyond the wholly owned subsidiary situation.⁴⁸

The Solicitor General’s Brief and Reading the Tea Leaves. *American Needle* was a blockbuster when the Seventh Circuit decided it, and yet it managed to get even more interesting this summer. Just after the new President’s inauguration and the assembly of his antitrust team, the Court invited the views of the Solicitor General (SG) on the question of certiorari.⁴⁹ The SG’s brief urged the Court to deny it.⁵⁰

American Needle was a blockbuster when the Seventh Circuit decided it, and yet it managed to get even more interesting this summer.

The SG’s brief is a puzzle, both for why it was requested and for what it says. First, it is intriguing that the Court sought the SG’s involvement. The request only requires four votes, and neither the number of votes nor their identities are made public, but one must wonder why exactly the Court was interested in the administration’s views of this case. While it is possible that the Court merely meant to offer the administration a courtesy as to this area of enforcement policy that would likely change following the election,⁵¹ it is tantalizing to speculate whether there were some more practical, and perhaps cynical, motives. A bloc of four and perhaps five of the Justices presumably would be pleased to affirm in the case, two probably pretty firmly favor reversal, and the final one is more mysterious.⁵² So who sought the SG’s views, and why? We will likely never know, of course, but one interesting possibility presents itself. None of the Justices presumably would expect the new administration to favor affirmance. So Justices who would support affirmance, or at least frown on antitrust scrutiny of joint ventures, presumably would not favor giving the new antitrust enforcers such a prominent chance to state their views of the case. Perhaps some group of four Justices who favor broad antitrust enforcement thought that a way to keep the case from

⁴⁸ See, e.g., *Jack Russell Terrier Network*, 407 F.3d at 1027; *Day v. Taylor*, 400 F.3d 1272 (11th Cir. 2005) (a manufacturer and its distributor-agents cannot conspire, and the “vastness” of the network of agents is irrelevant); *Williams v. I.B. Fischer Nevada*, 999 F.2d 445 (9th Cir. 1993) (franchisor and its nationwide chain of retail franchisees cannot conspire); *Oksanen v. Page Mem. Hosp.*, 945 F.2d 696 (4th Cir. 1991) (en banc) (hospital and its medical staff are single entity, even with respect to medical staff peer review decisions); *City of Mt. Pleasant*, 838 F.2d at 268.

⁴⁹ The Court made the request one month after President Obama’s inauguration, just after the confirmation of his new Solicitor General and just before the new AAG’s confirmation vote. He had already designated a new FTC Chairman.

⁵⁰ Brief of United States as Amicus Curiae Opposing Certiorari, *American Needle, Inc. v. NFL*, No. 08-661 (U.S. May 28, 2009), available at <http://www.usdoj.gov/atr/cases/f246500/246555.htm>.

⁵¹ EUGENE GRESSMAN ET AL., *SUPREME COURT PRACTICE* 516–17 (9th ed. 2007) (noting that requests for the SG’s views on certiorari ordinarily indicate that a case either raises important government interests not represented by the parties or is of unusual public significance).

⁵² While it goes without saying that this speculation is hazardous, it seems likely that there are four votes for affirmance, based on the authorship and make-up of antitrust opinions in the last several years: Chief Justice Roberts and Justices Alito, Scalia, and Thomas. Justice Kennedy seems likely to favor affirmance as well, given his authorship of such opinions as *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007), and *Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). Presumably Justice Stevens will vote for reversal, given his frequent dissents in the Court’s pro-defendant decisions of the past few decades (including, importantly, in *Copperweld*, though not in *Dagher*, from which no one dissented). Justice Ginsburg too seems a likely vote for reversal, as she has joined some Stevens dissents. One might expect Justice Breyer, the Court’s strongest antitrust expert, to oppose a decision so logically flawed and so damaging to antitrust enforcement, but one might also have expected him not to join in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), for the same reasons.

the Court was to solicit the SG's likely opposition to certiorari. If so, that might shed some light on the ultimate line-up of votes in the case. It would imply at least four votes for reversal, and if one of them was departing Justice Souter, his likely replacement is a judge who also will probably vote to reverse.⁵³

Even though the signatories to the SG's brief opposing certiorari include top Supreme Court lawyers, a recent dean of the Harvard Law School, and a handful of antitrust powerhouses,⁵⁴ the brief is substantively quite weak. It begins by stressing that the opinion below is incorrect and could have major, negative consequences. Then it works through a handful of quite strained and unpersuasive arguments that the case is not well suited for review under the Court's certiorari standards.

While it is probably wise that we mortals mostly stay out of the Court's procedural arcana and the special politics surrounding the SG,⁵⁵ the sense on reading the SG's brief is that the signatories did not really doubt that certiorari would be appropriate. Rather, one suspects that they did not want to see this Court decide this case. One must guess that neither the new President, nor his top antitrust enforcers, nor SG Kagan could desire to watch as, following a denial of certiorari, the courts of the Seventh Circuit apply the *American Needle* ruling to ever wider classes of conduct once thought to satisfy the Section 1 multiplicity requirement easily. Yet they view affirmance as much worse.

Two Bright Spots. For those of us who would like to see Section 1 of the Sherman Act survive without sub silentio judicial repeal, there are at least two bright spots in these matters. The first is also quite intriguing, and possibly ironic. American Needle's able trial counsel, who developed a persuasive fact case at pretrial even with very limited discovery, is joined on the Supreme Court appeal by the same team that argued for defendant Texaco in the *Dagher* case. American Needle's side will be argued by Glen Nager, the head of Jones Day's appellate practice and among the country's most accomplished Supreme Court advocates. Among the other stellar Jones Day lawyers who join him on the briefs is Joe Sims, a chief figure in the firm's antitrust practice and one of the country's leading antitrust practitioners. Mr. Sims in particular brings a gravitas, such that the Court is unlikely to perceive him as just some pro-plaintiff populist; not only was he on the defendant's brief in *Dagher*, he was a Deputy Assistant Attorney General for antitrust first appointed in the Ford administration.

The other bright spot is that the line-up of likely votes in the case⁵⁶ would be made substantially stronger for reversal now that Judge Sotomayor has been elevated to the Court as Justice Sotomayor. In her very recent concurrence in *Major League Baseball Properties v. Salvino, Inc.*,⁵⁷ she implicitly disagreed with the reasoning in Judge Kanne's *American Needle* opinion. The facts in *Salvino* were nearly on all fours with *American Needle*.⁵⁸ While the court did not address any

⁵³ See *infra* notes 56–61 and accompanying text.

⁵⁴ Specifically, the signatories were SG Kagan and two deputies from her office, as well as the acting General Counsel of the Federal Trade Commission, the Assistant Attorney General for Antitrust, the head of the Antitrust Division's Appellate Section, and another Antitrust Division attorney.

⁵⁵ Cf. GRESSMAN ET AL., *supra* note 51, at 237 (arguing that the main reason the Court grants the SG's certiorari petitions so much more frequently than any others is simply that the SG understands the Court's certiorari standards so well).

⁵⁶ See *supra* note 52.

⁵⁷ 542 F.3d 290 (2d Cir. 2008).

⁵⁸ Plaintiff Major League Baseball Properties (MLBP) was an entity substantially identical to the exclusive licensing agent in *American Needle*, NFL Properties, Inc. MLBP brought infringement claims against defendant Salvino, a maker of sports memorabilia. Salvino alleged in antitrust counterclaims that the exclusive license arrangement was in effect a price-fixing conspiracy in violation of Section 1.

single-entity issue,⁵⁹ it did find that a professional sports league's joint licensing arrangement could be challenged only under the rule of reason and that it was legal under that standard. In her concurrence then-Judge Sotomayor took the majority sternly to task for its view that the licensing arrangement did not involving any actual agreement on price, finding that view in conflict with prevailing law.⁶⁰ Critically, she cited *Dagher* for the view that the court "must decide . . . whether the [licensing arrangement], which is price fixing in a literal sense, should nevertheless be reviewed under a rule of reason in light of [its] other efficiency-enhancing benefits."⁶¹ This seems important, again, because the Court in *American Needle* may frame the question before it as whether *Dagher* can be read to hold all "internal" joint venture decisions as to "core" conduct simply immune from Section 1. Her citation to *Dagher* seems to reject that reading.

With any luck, at least one of the seemingly likely votes for affirmance will be convinced of the danger and implausibility of the *American Needle* ruling. And then with real luck, Justice Sotomayor will write for the resulting majority, and will recap her excellent analysis from *Salvino*. If she does, here's hoping, for the sake of meaningful future antitrust enforcement, that she will cite to *Dagher* in exactly the same way. ●

⁵⁹ This is presumably because a single-entity finding would be precluded under Second Circuit precedent. *See* *N. Am. Soccer League v. NFL*, 670 F.2d 1249 (2d Cir. 1982).

⁶⁰ She attacked the majority's "flawed view that the Clubs have made no agreement on price," and wrote that "[a]n agreement to eliminate price competition from the market is the essence of price fixing." 542 F.3d at 334–35. "Were the majority correct," she added, "competing companies could evade the antitrust law simply by creating a 'joint venture' to serve as the exclusive seller of their competing products. So long as no agreement explicitly listed the prices to be charged, the companies could act as monopolists through the 'joint venture,' setting prices together for their competing products . . ." *Id.* at 335. Also encouraging is her reliance on *Timken* and on the Collaboration Guidelines' observation that "labeling an arrangement a 'joint venture' will not protect what is merely a device to raise price or restrict output . . ." *Id.* at 336 (citing Collaboration Guidelines, *supra* note 15, at 9).

⁶¹ *Id.* at 337 (citing *Dagher*, 547 U.S. at 5).

Oracle Bones: Limited Lessons from China's Merger Rulings

Nathan Bush

Twelve months have passed since China's Antimonopoly Law (AML) took effect amidst hopes that Chinese competition policy might advance the interests of Chinese consumers and anxieties that it might prove an instrument of protectionism, populism, or industrial policy.¹ The AML's debut on August 1, 2008 was promptly upstaged by the global financial crisis; worldwide M&A activity ebbed and policymakers dwelt on stimulus and stabilization.

Development of the merger review regime has nevertheless surged ahead. The AML establishes a mandatory, suspensive, two-stage review process for mergers, acquisitions, and other "concentrations" satisfying applicable notification thresholds. The Antimonopoly Bureau of the Ministry of Commerce (MOFCOM) is responsible for administering the merger control regime, capitalizing on the experience of reviewing over 600 transactions involving foreign investors under the antimonopoly review provisions of the previously issued Regulations on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors.²

The international deal flow dictates MOFCOM's docket, and the financial crisis likely spared MOFCOM an onslaught of filings. As of July 21, 2009, MOFCOM had received fifty-eight notifications under the AML, among which twelve were pending and forty-three had been cleared.³ The remaining three notifications elicited the only decisions yet published by any Chinese agency or court enforcing the AML: the conditional clearance of InBev NV/SA's acquisition of the Anheuser-Busch Companies Inc., the conditional clearance of Mitsubishi Rayon Co.'s acquisition of Lucite International, and the prohibition of the Coca-Cola Company's proposed acquisition of Huiyuan

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¹ See Zhonghua Renmin Gongheguo Fanlongduan Fa [Antimonopoly Law of the People's Republic of China], (promulgated by the Standing Committee of the National People's Congress on Aug. 30, 2007 and effective on Aug. 1, 2008), available at http://www.gov.cn/flfg/2007-08/30/content_732591.htm. An unofficial English translation is available as an appendix to Nathan Bush, *The PRC Antimonopoly Law: Unanswered Questions and Challenges Ahead*, ANTITRUST SOURCE, Oct. 2007, <http://www.abanet.org/antitrust/at-source/07/10/Oct07-Bush10-18f.pdf>. References and quotations herein are based on this English translation.

² See Guanyu Waiguo Touzizhe Binggou Jingnei Qiye de Guiding [Regulations on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors], (promulgated by Ministry of Commerce, State Owned Asset Supervision and Administration Commission, State Administration of Taxation, State Administration of Industry and Commerce, China Securities Regulatory Commission and State Administration of Foreign Exchange on August 8, 2006 and effective on Sept. 8, 2006), available at http://www.legaldaily.com.cn/misc/2006-08/29/content_397421.htm. (translation available by subscription at <http://www.chinalawinfo.com>); see also Shang Ming, *Antitrust in China—A Constantly Evolving Subject*, COMPETITION L. INT'L, Feb. 2009, at 3.

³ See Jingyingzhe Jizhong Fanlongduan Shencha Anjian Zuixin Tongji Qingkuang [Latest Statistics Regarding Anti-Monopoly Review Cases on Concentrations of Operators], July 21, 2009, available at <http://fdj.mofcom.gov.cn/aarticle/zcfb/200907/20090706409831.html?662121439=2196958877>.

Fruit Juice Company Ltd.⁴ While these merger rulings and recent rulemaking efforts shed some light on the determinants of Chinese merger policy, reading too much into the sparse public record remains risky.

Implementing Measures

The AML text sketches out a merger review scheme derived chiefly from European Commission and German practices, but it leaves many basic questions to be answered through implementing measures or enforcement. The State Council released the Rules of the State Council on Notification Thresholds for Concentrations of Undertakings when the AML first took effect, but these measures did little more than set the basic notification thresholds without which the merger control scheme simply could not operate.⁵

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Six months later, MOFCOM released a battery of new measures tackling a broader range of technical, procedural, and doctrinal questions. These new non-binding guidelines largely codify practices developed during the first months of merger review under the AML and previous practice under the M&A Rules concerning the submission and contents of merger notifications.⁶ MOFCOM also invited public comment on draft guidelines setting forth principles for market definition in merger proceedings. It released the final version on July 7, 2009.⁷ On July 15, 2009, MOFCOM joined China's central bank and financial regulators in issuing additional special notification thresholds for concentrations in the financial sector.⁸

In addition, MOFCOM released for public comment drafts of several formal implementing regulations around the Chinese New Year. Following extensive public comment, the State Council Legislative Affairs Office (SCLAO) posted revised drafts for public comment in late March 2009. As of July 22, 2009, at least, these measures have not been finalized. These draft regulations

⁴ See Zhonghua Renmin Gongheguo Shangwubu Gonggao [Notice [2008] No. 95 of the Ministry of Commerce of the People's Republic of China] (issued by Ministry of Commerce, Nov. 18, 2008, effective the same day) [hereinafter InBev/AB Notice], available at <http://fldj.mofcom.gov.cn/column/print.shtml?ztxx/200811/20081105899216>; Zhonghua Renmin Gongheguo Shangwubu Gonggao [Notice [2009] No. 22 of the Ministry of Commerce of the People's Republic of China] (issued by Ministry of Commerce, Mar. 18, 2009, effective the same day) [hereinafter Coke/Huiyuan Notice], available at <http://fldj.mofcom.gov.cn/aarticle/ztxx/200903/20090306108494.html?3695772507=1142016402> []; Zhonghua Renmin Gongheguo Shangwubu Gonggao [Notice [2009] No. 28 of the Ministry of Commerce of the People's Republic of China] (issued by Ministry of Commerce, Apr. 24, 2009, effective the same day) [hereinafter Mitsubishi/Lucite Notice], available at <http://fldj.mofcom.gov.cn/aarticle/ztxx/200904/20090406198805.html>.

⁵ See Guowuyuan Guanyu Jingyingzhe Jizhong Shenbao Biaozhun de Guiding [*Rules of the State Council on Notification Thresholds for Concentrations of Undertakings*], (adopted and effective on Aug. 1, 2008), available at <http://fldj.mofcom.gov.cn/aarticle/c/200811/20081105917434.html?1905141926=1480175>.

⁶ See Guanyu Dui Jingyingzhe Jizhong Shenbao De Zhidao Yijian [Guiding Opinions on the Notification of Concentrations of Business Operators (Draft)], released by MOFCOM, Jan. 7, 2009, available at <http://fldj.mofcom.gov.cn/aarticle/xgxz/200901/20090105993824.html?1282482011=1142016402>; Guanyu Dui Jingyingzhe Jizhong Shenbao Wenjianziliao De Zhidao Yijian [Guiding Opinions on the Notification Materials of Concentrations of Business Operators (Draft)], released by MOFCOM, Jan. 7, 2009, available at <http://fldj.mofcom.gov.cn/aarticle/xgxz/200901/20090105993841.html?2708545371=1142016402>.

⁷ For the initial draft for comments, see Guanyu Xiangguanshichang Jieding De Zhinan [Guidelines for Definition of the Relevant Market (Draft)], released by MOFCOM, Jan. 7, 2009, available at <http://fldj.mofcom.gov.cn/aarticle/zcfb/200901/20090105993492.html?3866173275=1142016402>. For the final version, see Guowuyuan Fanlongduan Weiyuanhui Guanyu Xiangguan Shichang Jieding De Zhinan [Guidance for Defining the Relevant Market by the Anti-Monopoly Commission of the State Council], May 24, 2009, released by MOFCOM on July 7, 2009, available at <http://fldj.mofcom.gov.cn/aarticle/j/200907/20090706384131.html?1908194213=2886899183>.

⁸ See Jinrongye Jingyingzhe Jizhong Shenbao Yingyee Jisuan Banfa [Measures for the Calculation of Business Turnover for the Notification of Financial Operators' Concentration], released by MOFCOM, PBOC, CBRC, CSRC, CIRC, July 15, 2009, available at <http://www.mofcom.gov.cn/aarticle/b/c/200907/20090706411759.html>.

- clarify key concepts in identifying reportable transactions and flesh out the filing requirements;⁹
- describe the procedures for conducting merger review;¹⁰
- outline procedures for investigating and addressing circumstances where parties fail to report transactions that trigger the applicable notification thresholds;¹¹ and
- address circumstances where MOFCOM determines that an otherwise unreportable transaction nevertheless threatens to restrict or eliminate competition.¹²

On many technical issues concerning the scope of reportable transactions and procedural issues concerning the conduct of reviews, successive measures have moved closer to prevailing international practices. When it comes to substantive merger analysis, however, the draft implementing measures fall silent. Under the AML, concentrations that may “exclude or restrict competition” are to be blocked or approved subject to restrictive conditions, unless the parties to the transaction “can prove that the positive effects of such concentration on competition obviously outweigh the negative effects” or that “the concentration is in the public interest.”¹³ Likely competitive effects should be evaluated based on the parties’ market shares, the concentration of the relevant market, the effects on “market access and technological progress,” the effects on consumers and other relevant enterprises, the “development of the national economy,” and “other fac-

⁹ For the MOFCOM draft, see Jingyingzhe Jizhong Shenbao Zanxing Banfa (Zhengqiu Yijian Gao) [Interim Measures on the Notification of Business Operators’ Concentration (Draft for Comments)], released by MOFCOM, Jan. 20, 2009, available at <http://fldj.mofcom.gov.cn/article/zcfb/200901/20090106011461.html?3048406107=1142016402>. For the revised SCLAO draft, see Jingyingzhe Jizhong Shenbao Zanxing Banfa (Zhengqiu Yijian Gao) [Interim Measures on the Notification of Business Operators’ Concentration (Draft for Comments)], released by SCLAO, Mar. 13, 2009, available at http://bmyj.chinalaw.gov.cn/lismsPro/law_download/fulltext/1236930767681.doc.

¹⁰ For the MOFCOM draft, see Jingyingzhe Jizhong Shencha Zanxing Banfa (Zhengqiu Yijian Gao) [Interim Measures on the Review of Concentrations of Business Operators (Draft for Comments)], released by MOFCOM, Jan. 20, 2009, available at <http://fldj.mofcom.gov.cn/article/zcfb/200901/20090106011511.html?1354103899=1142016402>. For the revised SCLAO draft, see Jingyingzhe Jizhong Shencha Zanxing Banfa (Zhengqiu Yijian Gao) [Interim Measures on the Review of the Concentration of Business Operators (Draft for Comments)], released by SCLAO, Mar. 13, 2009, available at http://bmyj.chinalaw.gov.cn/lismsPro/law_download/fulltext/1236930796575.doc.

¹¹ For the MOFCOM draft, see Guanyu Dui Weiyifa Shenbao De Jingyingzhe Jizhong Diaocha Chuli De Zanxing Banfa (Caoan) [Interim Measures for Investigating and Disposing the Suspected Concentration of Business Operators Failed to File a Notification According to Law (Draft)], released by MOFCOM, Jan. 19, 2009, available at <http://fldj.mofcom.gov.cn/article/zcfb/200901/20090106010073.html?3165912155=1142016402>. For the revised SCLAO draft, see Guanyu Dui Weiyifa Shenbao De Jingyingzhe Jizhong Diaocha Chuli De Zanxing Banfa (Caoan) [Interim Measures for Investigating and Disposing the Suspected Concentration of Business Operators Failed to File a Notification according to Law (Draft)], released by SCLAO, Mar. 13, 2009, available at http://bmyj.chinalaw.gov.cn/lismsPro/law_download/fulltext/1236930319604.doc.

¹² For the MOFCOM drafts of these measures, see Guanyu Dui Weida Shenbao Biaozhun Shexian Longduan De Jingyingzhe Jizhong Zhengju Shouji De Zanxing Banfa (Caoan) [Interim Measures on Collecting Evidences Regarding Suspected Monopolistic Concentrations Between Business Operators Not Reaching the Notification Thresholds (Draft)], released by MOFCOM, Jan. 19, 2009, available at <http://fldj.mofcom.gov.cn/article/zcfb/200901/20090106010097.html?3602185307=1142016402>. See also Guanyu Weida Shenbao Biaozhun Shexian Longduan De Jingyingzhe Jizhong Diaocha Chuli De Zanxing Banfa (Caoan) [Interim Measures on Investigations and Handling of Suspected Monopolistic Concentrations Between Business Operators Not Reaching the Notification Thresholds (Draft)], released by MOFCOM, Feb. 6, 2009, available at <http://fldj.mofcom.gov.cn/article/zcfb/200902/20090206031314.html?4122344539=1142016402>. For the revised SCLAO draft, see Guanyu Dui Weida Shenbao Biaozhun Shexian Longduan De Jingyingzhe Jizhong Zhengju Shouji De Zanxing Banfa (Caoan) [Interim Measures on Collecting Evidences regarding Suspected Monopolistic Concentrations between Business Operators Not Reaching the Notification Thresholds (Draft)], released by SCLAO, Mar. 13, 2009, available at http://bmyj.chinalaw.gov.cn/lismsPro/law_download/fulltext/1236930501132.doc. See also Guanyu Weida Shenbao Biaozhun Shexian Longduan De Jingyingzhe Jizhong Diaocha Chuli De Zanxing Banfa (Caoan) [Interim Measures on Investigations and Handling of Suspected Monopolistic Concentrations between Business Operators Not Reaching the Notification Thresholds (Draft)], released by SCLAO, Mar. 13, 2009, available at http://bmyj.chinalaw.gov.cn/lismsPro/law_download/fulltext/1236930170064.doc.

¹³ See AML, arts. 28–29.

tors that may affect the market competition” as the enforcement authorities may deem necessary.¹⁴ The official notices published by MOFCOM when blocking or prohibiting a concentration have recited these factors.

These provisions confer tremendous discretion on MOFCOM. On one hand, the balancing test focusing on the effects on competition arguably comports with the U.S. “substantial lessening of competition” and European “significant impediment to effective competition” standards, and most of the statutory factors are relevant to assessing the competitive impact of a transaction. On the other hand, patently anticompetitive concentrations that fail the balancing test might nevertheless be cleared in the name of unspecified “public interests.” (Although several other jurisdictions do allow public interests to override antitrust objections to mergers, the public interest judgment is often severed from the initial antitrust assessment). Considering a deal’s impact on the “development of the national economy” invites inquiry into collateral impacts on industrial policies aimed at promoting indigenous innovation, global Chinese brands, and national champions in key sectors. While a patently procompetitive transaction might not be blocked on these grounds, conditions imposed to safeguard national economic development may not serve consumers. None of the draft implementing measures released to date meaningfully constrain MOFCOM’s approach to substantive issues. It falls to the enforcement process to reveal China’s substantive policy on merger control.

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Opacity and Missing Data

Divining the future of Chinese antitrust from MOFCOM’s public enforcement record is a dubious exercise. First and foremost, most MOFCOM reviews leave no public record at all. MOFCOM decisions to block or conditionally clear concentrations are the only administrative decisions required to be publicized under the AML. Ironically, this is one area where MOFCOM follows U.S. practice (i.e., keeping most HSR notifications confidential) rather than European practice (i.e., routinely publicizing summaries of reported deals). This approach obscures not only the cases where MOFCOM finds no elimination or restriction of competition, but also any cases where MOFCOM finds that the benefits to competition outweigh the harms or that public interests are advanced. It also shields from public scrutiny questions concerning the AML’s applicability to recent consolidations of state-owned enterprises (SOEs) in key strategic sectors. Soon after the AML took effect, the State-owned Assets Supervision and Administration Commission (SASAC) suggested that mergers of state-owned enterprises controlled by the central government would not be subject to AML review because they are cleared by the State Council itself.¹⁵ According to Chinese media reports, dozens of mergers of SOEs have been consummated without AML review, including several (such as the October 2008 merger of China Unicom and China Netcom) that clearly satisfied the notification thresholds. It is difficult to discern clear trends in Chinese competition policy from the three published decisions alone with no record of MOFCOM’s approach to the forty-three transactions cleared unconditionally.

Second, even when MOFCOM has published its decisions, the public record for testing MOFCOM’s analysis is extremely sparse. The official notices have been brief and conclusory. The InBev/AB and Mitsubishi/Lucite decisions were 626 and 2,198 characters respectively—less than

¹⁴ See AML, art. 27.

¹⁵ Guoziwei Renshi Cheng Yangqi Chongzu Bu Xuyao Shangwubu Fanlongduan Shencha [SASAC Says the Restructure of Central Enterprises Does Not Need Anti-Monopoly Review by the Ministry of Commerce], available at <http://finance.sina.com.cn/roll/20080802/09455160451.shtml>.

two pages. Even the controversial Coke/Huiyuan notice was only 1,481 characters (about 1.5 pages), devoting only 336 characters to substantive analysis. Each public notice has summarized the procedural history of the review, recited the statutory factors, presented MOFCOM's conclusions, and discussed conditions without delving into MOFCOM's evaluation of competing factual and economic arguments or methodology for gauging competitive effects or public interest issues. Moreover, there is no public record of the formal written submissions, hearings, or ex parte communications from interested parties. In particular, there is no public record of the proposals and counterproposals regarding remedial conditions. Consequently, outside observers are unable to test the connection between the sparse published findings and the underlying evidence.

To be fair, the public records of merger review proceedings in most other jurisdictions are also sparse (with the European Commission a conspicuous exception). Indeed, MOFCOM notices are far more detailed than most Chinese agency decisions. Fairly or not, this opacity compounds the challenges MOFCOM faces in demonstrating the credibility of Chinese antitrust policy. Outsiders can point to numerous comments by Chinese government officials, official media reports, and policy actions in recent years suggesting that central government industrial policies may trump consumer welfare and economic efficiency in some circumstances. Personnel within the MOFCOM Antimonopoly Bureau have impressed foreign interlocutors with their increasingly nuanced understanding of foreign antitrust principles, and they are receptive to the practices of foreign peers—not just in Brussels and Washington, but also in Bonn, Canberra, and elsewhere. Nevertheless, the Antimonopoly Bureau's posture in debates within the central government on general policies or specific cases remains uncertain.

The Three Pilot Merger Rulings: Outliers or Omens?

InBev/Anheuser-Busch. InBev's acquisition of Anheuser-Busch created the world's largest beer maker, owning brands and holding stakes in breweries worldwide. Although the parties' historic strengths generally lay in different geographic markets, the U.S. Department of Justice (DOJ) raised concerns about the deal's impact on the beer drinkers of upstate New York. InBev was required to sell Labatt USA to a third-party purchaser to be approved by the DOJ and license the acquirer to brew and sell Labatt brand beer throughout the United States.¹⁶ The DOJ's imposition of these conditions may have emboldened MOFCOM to select this transaction as the first display of MOFCOM's enforcement authority.¹⁷ But while the DOJ specifically concluded that the merger itself would eliminate competition and harm consumers, MOFCOM stopped short of that finding.¹⁸ Instead, MOFCOM simply found that the "size of the acquisition is enormous, the market share of the combined new enterprise is very big, and the competitiveness of the combined new company will be increased significantly."¹⁹ Nevertheless, MOFCOM imposed conditions to "reduce possible adverse effects on future competition in the Chinese beer market."²⁰ Shang Ming, the director of the Antimonopoly Bureau, has explained that the "the aim of the attached conditions was to

¹⁶ See Press Release, U.S. Department of Justice, Justice Department Requires Divestiture in InBev's Acquisition of Anheuser-Busch (Nov. 14, 2008), available at http://www.usdoj.gov/atr/public/press_releases/2008/239430.htm.

¹⁷ *Id.*

¹⁸ See InBev/AB Notice, *supra* note 4.

¹⁹ *Id.*

²⁰ *Id.*

reduce the negative impact on future competition in the Chinese beer market that the merged entity could bring about.”²¹

Specifically, MOFCOM directed InBev to obtain approval from the MOFCOM Antimonopoly Bureau before (1) increasing Anheuser-Busch’s existing 27 percent stake in Tsingtao Brewery Co., Ltd.; (2) increasing InBev’s existing 28.56 percent stake in the Pearl River Brewery Co., Ltd.; or (3) seeking to acquire stakes in China Resources Snow Brewery (China) Co., Ltd. or Beijing Yanjing Brewery Co., Ltd. InBev was further directed to “inform MOFCOM in a timely manner regarding the change of InBev’s controlling shareholders or the shareholders of InBev’s controlling shareholders.”²² (Neither the notice nor any other published measures detail the procedures or timeline for securing permission in such cases). Normally, such investments would not be subject to review by the MOFCOM Antimonopoly Bureau unless they qualified as “concentrations” involving a change of control over a business operator. In cases where a new investment would qualify as a concentration, the notification requirement may provide a tripwire for ad hoc review of otherwise unreportable concentrations. Even though an acquisition of control over a small Chinese brewer with low revenues might evade mandatory notification, the State Council Notification Rules permit MOFCOM to launch an investigation on suspicion that the acquisition would restrict or eliminate competition. Obliging the parties to report such concentrations facilitates MOFCOM’s determination of whether or not to exercise this authority. However, in cases where an incremental investment in a Chinese brewery would not constitute a concentration, requiring the blessing of the Antimonopoly Bureau represents a dramatic expansion of the Antimonopoly Bureau’s power.

The *InBev* decision might signal MOFCOM’s readiness to leverage reviews of reported concentrations into proactive monitoring of key sectors. The remedy might also say less about MOFCOM’s general approach to remedies than about MOFCOM’s eagerness to demonstrate the AML’s potency to domestic and foreign observers. The opportunity to follow the DOJ in imposing conditions on one of the last big deals inked before the financial crisis may have proven unique.

Mitsubishi/Lucite. The *Mitsubishi/Lucite* decision reflects refinements in MOFCOM’s approach to remedial conditions. MOFCOM focused on the product market for methyl methacrylate (MMA). MOFCOM deemed the relevant geographic market to be China-wide, but the notice provides no analysis supporting this conclusion.²³ With respect to horizontal effects within the China MMA market, MOFCOM found that their combined market shares would reach 64 percent, dwarfing second-ranked PetroChina Jilin Petrochemical (a subsidiary of China’s state-owned oil and gas giant) and third-ranked Heilongjiang Longxin Chemical Co., Ltd. (another SOE). MOFCOM’s notice does not, however, disclose current market shares or address the change in concentration in the market.²⁴ Nevertheless, MOFCOM concluded that “with its dominant position gained on the MMA market, Mitsubishi Rayon will, after the concentration, have the ability to eliminate and restrict its competitors in China’s MMA market.”²⁵ With respect to vertical effects, the notice explains that Mitsubishi Rayon, which also manufactures downstream products, would be “capable of foreclosing” rivals in downstream markets by exploiting its dominance in the upstream MMA

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²¹ See Shang Ming, *supra* note 2, at 11.

²² See *InBev/AB Notice*, *supra* note 4.

²³ See *Mitsubishi/Lucite Notice*, *supra* note 4.

²⁴ *Id.*

²⁵ *Id.*

market.²⁶ The notice provides no further analysis of the horizontal or vertical effects. Instead, the decision jumps from a finding of a 64 percent market share (with no discussion of the current market shares or relative change in concentration) to findings of dominance and vertical foreclosure.

In some respects, the analysis of the Taiwan Fair Trade Commission (TFTC) analysis picks up where MOFCOM left off. The TFTC pegged the parties' shares of the Taiwan MMA market in 2007 at 10.04 percent for Mitsubishi and 40.93 percent for Lucite.²⁷ While acknowledging the post-merger market share of over 50 percent, the TFTC focused on the likely competitive effects of the transaction. A TFTC press release explained that "the merged enterprise will still be subject to the restraint of market competition from foreign and domestic manufactures, considering the recession and future overcapacity, the price competition is fierce and it is hard to say the merged company has the ability to increase the price by itself." The TFTC further noted the absence of any "positive fact which indicates collusion or concerted action" or "considerable barrier of entry," as well as the strong countervailing power of customers. Finding that the transaction would "benefit other manufactures and customers in Taiwan through competitive products, better efficiency and innovation," the TFTC cleared the merger "because its economic advantages outweigh its competitive disadvantages."²⁸ While the evidence on the record before MOFCOM *may* have suggested a greater threat to competition than the TFTC perceived, it is not clear from MOFCOM's published notice.

In any event, the notice explains that MOFCOM requested that the parties propose remedial conditions, which MOFCOM accepted with modification.²⁹ Although the dynamics of these discussions are not public, the resulting conditions are provocative. To address the vertical foreclosure risks, MOFCOM mandated a one-time sale of 50 percent of the annual production capacity of Lucite's China plant at cost for a five-year period to one or more third parties.³⁰ Failure to follow through could lead MOFCOM to compel the outright sale of the China plant, which would be held separately until the capacity sale was made.³¹ To address the horizontal issues, MOFCOM directed Mitsubishi Rayon to seek MOFCOM approval before either acquiring an existing Chinese plant or establishing a new plant in China to produce MMA and certain other products during a five-year period.³²

As in *InBev*, MOFCOM demonstrated its comfort with ongoing market supervision. Improving on *InBev*, MOFCOM focused on *acquisitions* of existing MMA plants (which would technically constitute concentrations, even if the target's revenues would not trigger notification) rather than supervising all investments. The restriction on greenfield projects is more troublesome because new capacity should increase supply and decrease prices. The notice implies that the parties themselves proposed the basic approach of these remedies. Given the depressed demand and "future overcapacity" (as acknowledged by the TFTC), proposing these conditions may have been

²⁶ *Id.*

²⁷ See Bu Jinzhi Rishang Sanling Liyang Gongsi Yu Yingshang Lucaite Gongsi Jiehe An [Not Prohibit the Merger Between Japanese Company Mitsubishi Rayon and British Company Lucite], Feb. 18, 2009, available at <http://www.ftc.gov.tw/internet/main/doc/docDetail.aspx?uid=126&docid=10387>.

²⁸ *Id.*

²⁹ See Mitsubishi/Lucite Notice, *supra* note 4.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

a small price to pay for securing clearance. Conversely, MOFCOM's acceptance of these proposed commitments leaves unresolved the question of whether MOFCOM would ultimately have blocked the deal or imposed different conditions had the second-phase inquiry run its course.

Coke/Huiyuan. On September 3, 2008, Coca-Cola publicly announced plans to acquire Huiyuan through a wholly owned subsidiary for HK\$17.9 billion.³³ Huiyuan, China's largest fruit juice maker, was established as a private company in 1992, and subsequently listed in Hong Kong through a Cayman Islands listing vehicle in 2007. The proposal provoked tremendous public outcry in China, but the objections dwelt more on the foreign control over one of China's premier domestic consumer brands than on potential anticompetitive effects.³⁴ As the scheduled deadline for the decision approached, there were signs that MOFCOM might conditionally clear this transaction (as it had with InBev). On March 18, 2009, MOFCOM released a brief notice blocking the acquisition.³⁵ One week later, MOFCOM released an official "Q&A" clarifying MOFCOM's approach.³⁶

MOFCOM advanced a theory of competitive harm arising from the "leveraging" of Coca-Cola's dominance in the carbonated beverage market into the fruit juice market. The official notice, however, only summarized a series of key conclusions. First, MOFCOM found that the acquisition would enable Coca-Cola "to carry over its dominance over the carbonated soft drink market to the fruit juice beverage market, triggering the effect of eliminating or restricting competition over the existing fruit juice beverage enterprises and, in turn, compromising the legitimate interest of consumers."³⁷ Second, MOFCOM emphasized that brand recognition is "a key factor affecting the effective competition in the beverage market."³⁸ After the transaction, Coca-Cola would have "considerably stronger market power in the fruit juice beverage market by controlling two well-known fruit juice brands," specifically Huiyuan and Coca-Cola's existing "meizhiyuan" brand.³⁹ MOFCOM found that "given its current dominance over the carbonated beverage market and the carry-over effect, the concentration will considerably raise the barriers for potential competitors to enter the fruit juice beverage market."⁴⁰ Third, MOFCOM concluded that the acquisition would squeeze out small and medium-sized domestic fruit juice enterprises and "curtail the ability of domestic enterprises to compete and independently innovate in the fruit juice beverage market."⁴¹ This, in turn, would negatively affect "the pattern of effective competition in the Chinese fruit juice beverage market" and impede "the sustained and sound development of the Chinese fruit juice industry."⁴²

³³ See Huiyuan chujia kele de gantan yu sikao [Thoughts About the Acquisition of Huiyuan by Coca Cola], Sept. 10, 2008, available at <http://news.brandcn.com/pinpaipinglun/200809/152406.html>.

³⁴ See, e.g., *Coca-Cola's Huiyuan Offer Sparks Concern*, CHINADAILY.COM.CN, BUS. DAILY UPDATE, Sept. 4, 2008, available at http://www.chinadaily.com.cn/bizchina/2008-09/04/content_6999688.htm.

³⁵ See *Coke/Huiyuan Notice*, *supra* note 4.

³⁶ See Shangwubu Xinwen Fayanren Yaojian Jiu Kekoukele Gongsì Shougou Huiyuan Gongsì Fanlongduan Shencha Jueding Da Jizhe Wen [MOFCOM Spokesman Yao Jian Answering Reporters' Questions Regarding Anti-Monopoly Review Decision for Coca Cola's Acquisition of Huiyuan], Mar. 24, 2009 [hereinafter MOFCOM Coke/Huiyuan Q&A], available at <http://bgt.mofcom.gov.cn/aarticle/c/e/200903/20090306123715.html?529279142=1480175>.

³⁷ See *Coke/Huiyuan Notice*, *supra* note 4.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

The final decision to prohibit the transaction follows the decision-making structure outlined in the AML. Initially, MOFCOM determined that the concentration would have the effect of “eliminating or restricting competition.”⁴³ MOFCOM specifically found that the transaction would adversely impact “effective competition in the Chinese fruit juice beverage market.”⁴⁴ In the same sentence, however, MOFCOM also emphasized the transaction’s adverse impact on “the sound development of the fruit juice industry.”⁴⁵ MOFCOM concluded that the parties had “failed to provide sufficient evidence” to prove either “that the positive impact of the concentration over the competition considerably outweighs its negative impact” or “that the concentration serves the public interest of society.”⁴⁶ The notice explains that MOFCOM requested Coca-Cola to propose remedial conditions, and Coca-Cola responded with an initial proposal followed by a second proposal.⁴⁷ Nevertheless, MOFCOM concluded that these proposals “still fail to effectively reduce the negative impact caused by the concentration.”⁴⁸ The notice does not describe these remedial conditions, explain whether MOFCOM proposed alternate restrictive conditions, or state whether such alternatives were rejected by the parties. MOFCOM then reiterated that Coca-Cola had “failed to propose, within the prescribed time limit, a feasible solution to reduce the negative impact.”⁴⁹ Accordingly, MOFCOM prohibited the transaction.

Press coverage of the ruling underscored suspicions that economic nationalism or protectionism drove the decision.⁵⁰ But while theories of “leveraging” or “portfolio effects” to block conglomerate mergers meet skepticism in the United States and Europe, MOFCOM can point to U.S. and EU precedents.⁵¹ Indeed, in 2003 the Australian Competition and Consumer Commission (ACCC) blocked Coca-Cola’s acquisition of Australian juice-maker Berri Limited on a “leveraging” theory.⁵² Regardless of the actual motivations behind the decision, MOFCOM’s stated grounds for blocking the transaction fall near—though not necessarily beyond—the outer boundaries of international antitrust practice. Setting aside the overarching debate as to whether blocking a conglomerate merger on portfolio effects grounds is ever sound competition policy, the MOFCOM notice cannot clearly demonstrate that the theory was appropriately applied in these circumstances. The ACCC devoted five pages of its *Berri* assessment to a detailed “competition analy-

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ See, e.g., David Barboza, *China Blocks Coke Bid for Juice Maker*, N.Y. TIMES, Mar. 19, 2009, at B10, available at http://www.nytimes.com/2009/03/19/business/worldbusiness/19coke.html?_r=1.

⁵¹ The theories of “leveraging” or “portfolio effects” remain controversial in the United States and Europe. See, e.g., ORGANIZATION FOR ECONOMIC COOPERATION & DEVELOPMENT [OECD], OECD ROUNDTABLES ON PORTFOLIO EFFECTS IN CONGLOMERATE MERGERS (2001), available at <http://www.oecd.org/dataoecd/39/3/1818237.pdf>; see also Thibaud Verge, Portfolio Effects and Entry Deterrence (Paper Prepared for CRESSE Conference in Corfu—July 2006, Jan. 2007), available at <http://83.145.66.219/ckfinder/userfiles/files/pageperso/tverge/PortfolioCRESSE.pdf>; J. Thomas Rosch, Concurring Statement of J. Thomas Rosch, FTC v. Ovation Pharms. (Dec. 16, 2008), available at <http://www.ftc.gov/os/caselist/0810156/081216ovationroschstmt.pdf>.

⁵² See Australian Competition and Consumer Commission, ACCC Assessment of Coca-Cola Amatil Limited’s Proposed Acquisition of Berri Limited (*Berri*) (Nov. 25, 2003), available at <http://www.accc.gov.au/content/item.phtml?itemId=503214&nodeId=933cf0f7f72fc1bbe102c39b6243b815&fn=Coca-Cola%20Amatil%20Ltd's%20proposed%20acquisition%20of%20Berri%20Ltd%20-%202008%20October%202003%20-%20re%20carbonated%20soft%20drink%20and%20fruit%20juice.pdf>.

sis” considering the distinctive distribution channels for carbonated soft drinks and fruit beverages, the dynamics and structure of Australian market, the growth of Coke’s “Fruitopia” fruit beverage brand, and evidence that bundling (and customer-side bundling) was already occurring in the market. The MOFCOM notice, in contrast, offers barely five sentences of analysis.

The subsequent Q&A articulated MOFCOM’s leveraging theory more clearly than the original notice had:

Although the substitutability between carbonated soft drinks and fruit juice beverages is not high, they both belong to non-alcoholic beverages and are in two closely neighboring markets. Already having existing dominance in the carbonated soft drink market, Coca-Cola would further strengthen its competitive advantages and influence in the fruit juice beverage market and produce an additive effect from the strong alliance once the acquisition is completed. For the purpose of its profit-maximization, after completion of the acquisition, Coca-Cola is capable of transferring its dominance in the carbonated soft drink market to the fruit juice beverage market by capitalizing on its dominance in the carbonated soft drink market and conducting tied or bundled sales of fruit juice beverages and carbonated soft drinks or imposing exclusive trading conditions. This will severely weaken or eliminate the ability of other fruit juice beverage makers to compete with it and thus harm the competition in the fruit juice beverage market, ultimately forcing consumers to accept higher prices and less choice.⁵³

MOFCOM has insisted that its analysis was not distorted by “factors irrelevant to competition law, nor affected by what some foreign media called the nationalistic mood.”⁵⁴ The public record provides insufficient detail either to condemn or exonerate MOFCOM on these charges. While the ACCC’s handling in *Berri* of a similar transaction involving the same acquiring group and a target in the same industry barely six years beforehand may have proven genuinely persuasive as a matter of antitrust principle, it may also have provided convenient cover to reach a politically expedient outcome.

Perhaps the principal lesson of *Coke/Huiyuan* is that parties to high-profile transactions can neither neglect their antitrust case (by failing to articulate credible grounds for clearance in terms of efficiencies and consumer welfare) nor neglect their public policy case (by failing to address the concerns of competing interests and objectives within the Chinese establishment).

While anticompetitive deals may be cleared without public comment from MOFCOM, accommodating political pressure to block otherwise procompetitive deals requires a published decision. In *Coke/Huiyuan*, domestic political pressures may arguably be reconciled to international antitrust practice via *Berri* and similar foreign precedent emphasizing leveraging and portfolio risks. More intriguing will be the instances where foreign antitrust practices and domestic political pressures are wholly irreconcilable.

As the AML epoch enters its second year, augurs of Chinese antitrust are scrutinizing the three published decisions to foresee how MOFCOM Antimonopoly Bureau personnel might resolve tensions between sound antitrust and safe politics. Greater clarity and detail in published merger decisions would not only provide greater guidance for companies to factor Chinese antitrust policy into their M&A strategies, it would inspire greater confidence among foreign and domestic observers alike in the rigor and integrity of MOFCOM’s substantive antitrust analysis. More Delphic decisions, in contrast, may further fuel fears that industrial policy, protectionism, populism, and raw politics taint Chinese antitrust. ●

⁵³ See MOFCOM *Coke/Huiyuan* Q&A, *supra* note 36.

⁵⁴ *Id.*

Whither Merger Review? Looking Forward While Looking Back

Timothy P. Daniel

President Obama's antitrust team is now in place. Federal Trade Commissioner Jon Leibowitz became Chairman Leibowitz in early March, and he named his senior management team, including Bureau of Competition Director Richard Feinstein and Bureau of Economics Director Joseph Farrell. The full Senate confirmed Christine Varney in April as Assistant Attorney General (AAG) for Antitrust in the Department of Justice. And in March, Carl Shapiro returned to the Antitrust Division as Deputy Assistant Attorney General for Economic Analysis.

These officials take their positions at a time when the antitrust enforcement record of the Bush Administration has faced criticism for being too lax, particularly the Antitrust Division's merger enforcement record. In fact, Shapiro co-authored one of the more widely cited articles¹ criticizing the Bush Administration's merger enforcement record, arguing that the Antitrust Division's merger enforcement recently has been lax because the number of merger enforcement actions as a percent of Hart-Scott-Rodino (HSR) filings was significantly lower during the recent Bush Administration than it was during the Clinton and first Bush Administrations.² While some commentators have risen to the defense of the Bush Administration Antitrust Division's merger enforcement record,³ the selection of these senior officials makes it virtually certain that the Obama Administration will increase the intensity of merger review.⁴

When that happens, what exactly would it mean? Would it mean that the newly appointed antitrust officials applaud the merger challenges brought during the latter years of the Bush Administration and simply instruct the legal and economic staff at the agencies to "do more like that"? Or would it mean that the newly appointed antitrust officials will seek to modify the agencies' approach to merger enforcement and instruct the staff to pursue a different mix of merger cases from those brought during the Bush Administration? How the agencies allocate their scarce merger enforcement resources is clearly a critical issue, as noted in Chairman Leibowitz's statement that the settlement in the FTC's litigation with Whole Foods "allows the FTC to shift resources to other important matters."⁵ The question, therefore, is how the new competition enforcement officials will define "other important matters" with respect to merger enforcement.

¹ Jonathan B. Baker & Carl Shapiro, *Detecting and Reversing the Decline in Horizontal Merger Enforcement*, ANTITRUST, Summer 2008.

² *Id.* at 30.

³ See, e.g., Timothy J. Muris, *Facts Trump Politics: The Complexities of Comparing Merger Enforcement over Time and Between Agencies*, ANTITRUST, Summer 2008.

⁴ During the 2008 campaign, presidential candidate Senator Obama promised as much. In February 2008, Senator Obama criticized the Bush administration for having "what may be the weakest record of antitrust enforcement of any administration in the last half century." Statement of Senator Barack Obama for the American Antitrust Institute, Feb. 20, 2008, available at <http://www.antitrustinstitute.org/Archives/obama2.ashx>. As a consequence of this perceived weakness, Senator Obama pledged that his administration would "reinvigorate antitrust enforcement. It will step up review of merger activity and take effective action to stop or restructure those mergers that are likely to harm consumer welfare, while quickly clearing those that do not." *Id.*

⁵ Press Release, Fed. Trade Comm'n, FTC Consent Order Settles Charges that Whole Foods' Acquisition of Rival Wild Oats Was Anticompetitive (Mar. 6, 2009), available at <http://www.ftc.gov/opa/2009/03/wholefoods.shtm>.

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The merger enforcement agenda during the last two years of the Bush Administration, while active, tended to focus on relatively small transactions and/or ones with relatively narrow antitrust markets, from a geographic and/or product market perspective.

This article provides context for this question by examining in detail the merger enforcement records of the FTC and the Antitrust Division in 2007 and 2008. I believe a careful look at this record uncovers the merger enforcement priorities in place during the latter years of the Bush Administration and gives insight into the likelihood that the Obama Administration appointees will instruct the agencies' merger enforcement staff to shift direction in meaningful ways. Some recent articles have examined the number of merger challenges over time in an effort to compare the enforcement records of various administrations.⁶ Studies such as these that count the number of challenges do not account for the nature of the challenges, i.e., whether the parties operated in national or local markets and whether the industries involved were large or small. This article analyzes such issues.

My primary conclusions are that the merger enforcement agenda during the last two years of the Bush Administration, while active, tended to focus on relatively small transactions and/or ones with relatively narrow antitrust markets, from a geographic and/or product market perspective. Further, the transactions challenged by the antitrust agencies involved relevant markets where the merging parties' combined share was typically well above 50 percent, which in turn implies market concentration levels well above the thresholds identified in the Horizontal Merger Guidelines.⁷ The extent to which the agencies' recent merger challenges only occurred in markets with such high combined share levels for the merging firms and market concentration levels is striking. When economic activity and merger activity pick up, the newly appointed antitrust enforcement officials may well seek to expand merger enforcement into more sizable markets with lower concentration levels, thereby targeting larger transactions that affect a broader cross-section of the economy's consumers.⁸

⁶ See, e.g., Baker & Shapiro, *supra* note 1; John D. Harkrider, *Antitrust Enforcement During the Bush Administration—An Economic Estimation*, ANTITRUST, Summer 2008.

⁷ This latter observation is consistent with the findings in the report released by the FTC in December 2008, *Horizontal Merger Investigation Data, Fiscal Years 1996–2007*, available at <http://www.ftc.gov/opa/2008/12/horizmerger.shtm>. According to that report, of the 870 markets included in enforcement actions taken by the FTC in horizontal mergers over this period, 714 (or approximately 82 percent) involved post-merger Herfindahl measures of 2400 or higher, and 615 (or approximately 71 percent) involved post-merger Herfindahl measures of 3000 or higher. *Id.* tbl. 3.1. According to the U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines (1992, revised 1997), available at <http://www.usdoj.gov/atr/public/guidelines/hmg.htm>, a market with a Herfindahl measure in excess of 1800 is considered to be "highly concentrated." *Id.* § 1.5.

⁸ It is unclear whether the Obama Administration antitrust officials will alter the analytical approach to horizontal merger enforcement embodied in the Horizontal Merger Guidelines. The bipartisan Antitrust Modernization Commission (AMC) concluded in its Report in April 2007 that "the basic framework for analyzing mergers followed by the U.S. enforcement agencies and courts is sound." Antitrust Modernization Comm'n, Report and Recommendations 9, available at http://govinfo.library.unt.edu/amc/report_recommendation/toc.htm. The AMC's lone recommendation regarding the Horizontal Merger Guidelines was relatively minor—clarification of the analytical approach to mergers that involve innovation—and did not challenge the overarching analytical framework embedded in the Horizontal Merger Guidelines. *Id.* at 11. Newly appointed AAG Varney applied the Horizontal Merger Guidelines during her tenure as a Commissioner at the Federal Trade Commission in the 1990s. See Christine Varney, The Health Care and Antitrust Interface in an Era of Fundamental Industry-Wide Realignment, Speech at the SMS Health Executives Forum (Oct. 23, 1995), available at <http://www.ftc.gov/speeches/varney/pitoc23.shtm>. She also supported their expansion to include a section on efficiencies in 1997. See Press Release, Fed. Trade Comm'n, FTC/DOJ Announce Revised Guidelines on Efficiencies in Mergers, (Apr. 8, 1997), available at <http://www.ftc.gov/opa/1997/04/effpress.shtm>. On the other hand, Joe Farrell and Carl Shapiro recently have advocated an alternative approach to the Horizontal Merger Guidelines' focus on market shares and concentration in differentiated products mergers. Joseph Farrell & Carl Shapiro, *Antitrust Evaluation of Horizontal Mergers: An Economic Alternative to Market Definition* (Nov. 25, 2008), available at <http://faculty.haas.berkeley.edu/shapiro/alternative.pdf>. For a discussion of this article and others written by Farrell and Shapiro, see Gregory K. Leonard & Mario A. Lopez, *Farrell and Shapiro: The Sequel*, ANTITRUST, Summer 2009.

Merger Enforcement in the Latter Years of the Bush Administration

Assessing a particular administration's merger enforcement priorities is complicated because the horizontal transactions that generate public information are not a random sample of all horizontal transactions. In fiscal year 2007, for instance, the federal antitrust agencies received Hart-Scott-Rodino filings for 2201 transactions, of which only sixty-three (2.9 percent) resulted in the issuance of a second request.⁹ And, of those transactions for which a second request was issued, only a subset generated public information regarding the investigating agency's competitive analysis and enforcement decision. Thus, information is not readily available for merger investigations that were viewed by the investigating agencies as relatively "close calls" but ultimately closed.¹⁰

While acknowledging these selection issues in this article, I examine the press releases issued by the two antitrust agencies during 2007 and 2008. The press releases provide details on the mergers that were challenged, remedied, or cleared, and thus provide important information on the agencies' merger enforcement practices and priorities. In addition, the agencies' practice during the Bush Administration of issuing statements when certain investigations were closed means that the press releases provide information on investigations that fall on both sides of the enforcement line.

A review of the agencies' press releases indicates that the agencies actively challenged mergers during the final two years of the Bush Administration. Table 1 shows, for calendar years 2007 and 2008, the number of horizontal merger investigations for which the FTC and the Antitrust Division issued press releases announcing an official action.¹¹ Over this two-year period, the FTC issued thirty-two press releases pertaining to merger enforcement decisions and the Antitrust Division issued thirty-five press releases.¹² Table 1 divides these decisions into four categories: (1) the agency challenged the proposed merger and sought to prevent it by filing for a preliminary injunction in district court; (2) the parties resolved the agency's concerns by signing a consent decree specifying a particular remedy (divestiture, licensing, etc.); (3) the agency issued a closing statement explaining why the transaction was not challenged; and (4) the agency issued a statement following the parties' decision to abandon the transaction due to the competitive concerns identified during the investigation. The remainder of this article discusses the agencies' decisions in more detail.

⁹ See Fed. Trade Comm'n & Dep't of Justice Antitrust Div., Hart-Scott-Rodino Annual Report Fiscal Year 2007, App. A, available at <http://www.ftc.gov/os/2008/11/hsrreportfy2007.pdf>.

¹⁰ A lack of information also applies to investigations of consummated transactions that are not subject to the HSR pre-merger filing requirements; the transactions for which information on the agencies' analysis and decision are available represent a select few of the consummated transactions that occurred during the relevant time period.

¹¹ See Appendix for Tables. In September 2008, the FTC reached a settlement with Fresenius and Daiichi Sankyo to resolve a purely vertical concern. Press Release, Fed. Trade Comm'n, FTC Challenges Vertical Agreement Between Fresenius and Daiichi Sankyo (Sept. 15, 2008), available at <http://www2.ftc.gov/opa/2008/09/fresenius.shtm>. This vertical matter is not included in the totals in Table 1. Also not included are the Evanston/Highland Park and Chicago Bridge & Iron merger litigations, both of which produced court decisions in merger investigations launched years earlier. Press Release, Fed. Trade Comm'n, FTC Issues Final Opinion and Order to Restore the Competition Lost in Evanston Northwestern Healthcare Corporation's Acquisition of Highland Park Hospital (Apr. 28, 2008), available at <http://www.ftc.gov/opa/2008/04/evanston.shtm>. Press Release, Fed. Trade Comm'n, Federal Appeals Court Rules in Favor of FTC in Case Against Chicago Bridge & Iron Co. (Jan. 25, 2008), available at <http://www2.ftc.gov/opa/2008/01/cbi.shtm>.

¹² The antitrust agencies may issue multiple press releases related to a particular transaction, such as one press release when the transaction is initially challenged or cleared and subsequent press releases related to the final approval of the remedy or resolution of litigation. A particular merger investigation is counted only once in Table 1.

Litigated Mergers

While it is of course true that consumers can be harmed by small transactions that fall below the HSR thresholds, the fact that so many of the litigated merger challenges in 2007 and 2008 fell into this category suggests that the agencies devoted disproportionate resources to litigating small transactions where the measure of overall consumer harm simply cannot be that pronounced.

Table 1 reveals that the FTC has been willing to challenge mergers in court over the past two years: eight court challenges in two years represent an active litigation record under any standard.¹³ The Antitrust Division also was willing to go to court, but at a lower rate: three court challenges in two years.¹⁴ But a detailed look at these litigated matters reveals that the significant resources devoted by the agencies to merger litigation often focused on relatively small transactions (i.e., those below the HSR filing thresholds)¹⁵ or relatively small relevant markets.

Over one-third of the merger litigations in 2007–08 involved transactions that fell below the HSR filing thresholds: two of the eight FTC merger litigations and two of the three Antitrust Division litigations over this two-year period fit this description.¹⁶ While it is of course true that consumers can be harmed by small transactions that fall below the HSR thresholds, the fact that so many of the litigated merger challenges in 2007 and 2008 fell into this category suggests that the agencies devoted disproportionate resources to litigating small transactions where the measure of overall consumer harm simply cannot be that pronounced.

Of the remaining six FTC merger litigations in 2007 and 2008—the ones for which HSR filings were required—four involved a single, localized geographic market (Dominion/Equitable; Western/Giant; Inova/Prince William; and CCS/Newpark), one involved a relatively narrow product market (premium natural and organic supermarkets) across multiple local geographic markets (Whole Foods/Wild Oats), and the last involved a highly specialized commercial software product

¹³ For instance, in the last year of the Clinton Administration, the FTC merger litigation record was described as “busy and productive” during which the agency “filed four preliminary injunctions in merger matters.” And of these four matters, two were not litigated because the parties abandoned the transaction after the FTC filed its request for a preliminary injunction. See Molly S. Boast, Acting Director, Bureau of Competition, Fed. Trade Comm’n, Report from the Bureau of Competition Before the ABA Section of Antitrust Law Spring Meeting (Mar. 29, 2001), available at <http://www.ftc.gov/speeches/other/boastmollys.shtm>.

¹⁴ In 2008, each agency issued a press release when a proposed transaction was abandoned after the agency expressed serious concerns. These transactions were Herff/Jones (class rings) for the FTC and Google/Yahoo! (Internet advertising) for the Antitrust Division. These outcomes also reflect the agencies’ willingness to go to court if necessary to challenge an allegedly anticompetitive transaction. See Press Release, Fed. Trade Comm’n, Statement of FTC’s Bureau of Competition Regarding Announcement that Herff Jones and American Achievement Group Have Terminated Their Acquisition Agreement (Dec. 8, 2008), available at <http://www.ftc.gov/opa/2008/12/classrings.shtm>; Press Release, Dep’t of Justice Antitrust Div., Yahoo! Inc. and Google Inc. Abandon Their Advertising Agreement (Nov. 5, 2008), available at http://www.usdoj.gov/atr/public/press_releases/2008/239167.htm.

¹⁵ The HSR size of transaction threshold that triggered an obligation to file was \$56.7 million on Jan. 1, 2007, increased to \$59.8 million on Feb. 21, 2007, and increased again to \$63.1 million on Feb. 28, 2008. See Press Release, Fed. Trade Comm’n, Commission Announces Revised Jurisdictional Thresholds for Section 8 and Section 7A of the Clayton Act (Jan. 16, 2007), available at <http://www.ftc.gov/opa/2007/01/fyi0708.shtm>; Press Release, Fed. Trade Comm’n, Commission Announces Revised Jurisdictional Thresholds for Section 8 and Section 7A of the Clayton Act (Jan. 18, 2008), available at <http://www.ftc.gov/opa/2008/01/clayton.shtm>.

¹⁶ For the FTC, these two matters are Polypore/Microporous (battery separators—in administrative litigation), and Ovation (prescription drugs for rare disease affecting newborns—in administrative litigation). Press Release, Fed. Trade Comm’n, FTC Issues Administrative Challenge to Polypore International, Inc.’s Consummated Acquisition of Microporous Products L.P. and Other Anticompetitive Conduct (Sept. 10, 2008), available at <http://www2.ftc.gov/opa/2008/09/polypore.shtm>; Press Release, Fed. Trade Comm’n, FTC Sues Ovation Pharmaceuticals for Illegally Acquiring Drug Used to Treat Premature Babies with Life-Threatening Heart Condition (Dec. 16, 2008), available at <http://www.ftc.gov/opa/2008/12/ovation.shtm>. For the Antitrust Division, these two matters are Daily Gazette/Media News (newspapers in West Virginia—in litigation), and Microsemi/Semicoa (specialized semiconductors for use in defense applications—in litigation). Press Release, Dep’t of Justice Antitrust Div., Justice Department Files Antitrust Lawsuit Against Daily Gazette Company and MediaNews Group (May 22, 2007), available at http://www.usdoj.gov/atr/public/press_releases/2007/223466.htm; Press Release, Dep’t of Justice Antitrust Div., Justice Department Files Antitrust Lawsuit Against Microsemi Corporation (Dec. 18, 2008), available at http://www.usdoj.gov/atr/public/press_releases/2008/240549.htm.

(CCC/Mitchell).¹⁷ As with the non-HSR merger litigations summarized above, the magnitude of the consumer harm from these transactions is necessarily limited by the scope of the markets involved (with the possible exception of the CCC/Mitchell transaction, which involved software used nationwide to estimate the value of repairs from automobile accidents, which number in the millions).

During 2007 and 2008, the Antitrust Division litigated only one matter that required an HSR filing: JBS/National (beef purchasing and processing).¹⁸ The parties ultimately abandoned the transaction in February 2009 rather than continue to pursue litigation with the Antitrust Division.¹⁹

To be clear, I am not saying that consumers were not at risk from the eleven mergers litigated by the FTC and the Antitrust Division during 2007 and 2008—these cases may well have been meritorious from a consumer welfare perspective. Yet it seems fair to say that the mergers litigated in 2007 and 2008 involved relatively small amounts of potential consumer injury because they involved transactions that either did not require an HSR filing or, with some exceptions, involved narrow antitrust markets (on a geographic and/or product dimension.) Looking forward, FTC Chairman Leibowitz and AAG Varney may well re-examine whether the agencies' litigation resources are being deployed to maximal consumer benefit.

Mergers Settled with a Consent Decree and Remedy

Most merger investigations do not end up in court. Well over half of the merger-specific press releases issued by the agencies in 2007 and 2008 pertain to merger investigations that were resolved when the parties agreed to divest assets to address the competitive concerns raised by the transaction. These two years are typical in this regard—merger investigations frequently conclude when the parties and the investigating agency agree on a remedy. Thus, merger investigations that ultimately settle provide important evidence on the agencies' merger enforcement priorities.

Table 1 indicates that the FTC settled twenty-two merger matters and that the Antitrust Division settled twenty-six merger matters in 2007 and 2008. To better assess the agencies' overall merger enforcement agendas during this period, Tables 2 and 3 place these merger settlements into a number of discrete categories.

¹⁷ In these six litigated matters, the FTC suffered losses in district court in three of them: Whole Foods/Wild Oats (request for preliminary injunction denied by the district court, preliminary injunction then granted on appeal, case settled Mar. 6, 2009), *see* Press Release, *supra* note 5; Dominion/Equitable (complaint dismissed by district court on jurisdictional grounds, deal abandoned while the FTC appealed this ruling), *see* Press Release, Fed. Trade Comm'n, FTC Dismisses Administrative Complaint Challenging Acquisition of The Peoples Natural Gas Company from Dominion Resources, Inc. (Feb. 4, 2008), *available at* <http://www2.ftc.gov/opa/2008/02/dom.shtm>; Western/Giant (request for a preliminary injunction denied by the district court and the FTC declined to appeal), *see* Press Release, Fed. Trade Comm'n, FTC Ends Administrative Litigation in Western Refining Case (Oct. 3, 2007), *available at* <http://www2.ftc.gov/opa/2007/10/western.shtm>. In the remaining three FTC challenges that involved deals that required HSR filings, the parties abandoned the transaction, two prior to the preliminary injunction hearing (Inova/Prince William and CCS/Newpark) and the other after a district court granted the FTC a preliminary injunction (CCC/Mitchell). *See* Press Release, Fed. Trade Comm'n, Statement of FTC's Bureau of Competition Regarding Inova Health System's Announced Withdrawal of Plans to Merge with Prince William Health System (June 6, 2008), *available at* <http://www2.ftc.gov/opa/2008/06/inova.shtm>; Press Release, Fed. Trade Comm'n, Statement of FTC's Bureau of Competition Regarding Announcement that Parties Have Terminated the Agreement for CCS Corporation to Acquire Newpark Environmental Services (Nov. 24, 2008), *available at* <http://www.ftc.gov/opa/2008/11/redsky.shtm>; Ron Knox, *Companies Abandon Deal After Antitrust Injunction*, GLOBAL COMPETITION REV., Mar. 12, 2009, <http://www.globalcompetitionreview.com/news/article/13068/companies-abandon-deal-antitrust-injunction>.

¹⁸ Press Release, Dep't of Justice Antitrust Div., Justice Department Files Lawsuit to Stop JBS S.A. from Acquiring National Beef Packing Company (Oct. 20, 2008), *available at* http://www.usdoj.gov/atr/public/press_releases/2008/238382.htm.

¹⁹ Press Release, Dep't of Justice Antitrust Div., Department of Justice Statement on the Abandonment of the JBS/National Beef Transaction (Feb. 20, 2009), *available at* http://www.usdoj.gov/atr/public/press_releases/2009/242857.htm. One indication of the economic downturn is that this is the only press release related to merger enforcement issued by the Antitrust Division during the first six months of 2009.

FTC Merger Settlements. With regard to the FTC, Table 2 shows that the twenty-two merger settlements reached in 2007 and 2008 can be placed into the following six general product categories:

- Pharmaceutical mergers (8): Merger-specific competitive concerns in certain segments of the pharmaceutical industry were resolved via divestitures, allowing the overall transaction to proceed.
- Consumer products mergers (4): Merger-specific competitive concerns in certain product markets were resolved via divestitures, allowing the overall transaction to proceed.²⁰
- Highly specialized business software mergers (2): Merger-specific competitive concerns in specific market segments were resolved via divestitures and non-structural relief (e.g., termination of existing long-term contracts and elimination of non-compete agreements), allowing the overall transaction to proceed.²¹
- Highly specialized industrial products mergers (4): Merger-specific competitive concerns in certain product segments were resolved via divestitures and non-structural relief (such as licensing of intellectual property), allowing the overall transaction to proceed.²²
- Retail mergers (3): Merger-specific competitive concerns in local geographic markets were resolved via divestitures, allowing the overall transaction to proceed.
- Terminating of refined petroleum products merger (1): Merger-specific competitive concerns in local geographic markets were resolved via non-structural relief (e.g., ownership interests of the merging parties in certain entities were modified to be passive), allowing the overall transaction to proceed.

Categorizing these settlements in this way brings the FTC's merger enforcement priorities during 2007 and 2008 into focus. Of primary interest for the FTC is the pharmaceutical sector, consistent with the agency's historic focus on health care issues. Recent announcements of several large pharmaceutical mergers, some of which are now under investigation at the FTC, indicate that the pharmaceutical sector will continue to be an area where the FTC will allocate considerable merger enforcement resources.²³

Table 2 indicates that the pharmaceutical transactions resulting in settlements involved very highly concentrated markets. Of the eight pharmaceutical transactions that resulted in settlements, five included at least one merger-to-monopoly market, one included a market where the merging parties had a combined share in excess of 90 percent, one involved a 3-to-2 transaction, and one involved the combination of two close competitors in an already highly concentrated market. These exceedingly high concentration and share levels are not surprising, given the significant barriers to entry in pharmaceutical markets. What is perhaps a bit surprising is that markets with similarly high concentration and share figures dominated other non-pharmaceutical merger settlements reached by the FTC in 2007 and 2008, as discussed below.

²⁰ The product markets at issue in these four matters were fishing line, super-premium vodka and other liquors, spices, and pregnancy tests.

²¹ The product markets at issue in these two matters were specialized human resources software, and electronic records and related software used by law enforcement agencies.

²² The product markets at issue in these four matters were continuous filament mat, sodium silicate, waterjet cutting systems, and specialty epoxy resins.

²³ Among the mergers recently announced are Pfizer/Wyeth and Merck/Schering-Plough. Both are under investigation at the FTC. See Rosalind Donald, *Pfizer May Sell Animal Health Business to Clear Wyeth Merger*, GLOBAL COMPETITION REV., Mar. 19, 2009, <http://www.globalcompetitionreview.com/news/article/13105/pfizer-may-sell-animal-health-business-clear-wyeth-merger/>; Rosalind Donald, *FTC Digs Deeper in Merck Merger*, GLOBAL COMPETITION REV., June 23, 2009, <http://www.globalcompetitionreview.com/news/article/16219/ftc-digs-deeper-merck-merger/>.

With regard to FTC merger settlements involving national markets other than pharmaceuticals, the transactions involve four matters for which the merging parties' customers are final consumers and six matters for which the merging parties' customers are businesses. Table 2 indicates that in nine of these ten matters, the parties had a combined share in excess of 60 percent (and in several cases in excess of 80 percent), or the transaction combined the two leading firms in the relevant market.²⁴ From a purely structural perspective, therefore, these matters were not close calls, with Herfindahl measures well in excess of the "highly concentrated" threshold of 1800 contained in the Horizontal Merger Guidelines.²⁵ While a full competitive analysis of each of these transactions must go beyond a consideration of concentration and shares, it is notable that the settlements reached by the FTC in the last two years of the Bush Administration involved only transactions with concentration levels high above the concentration thresholds articulated in the Horizontal Merger Guidelines. One question is whether the new Administration will continue this practice, or instead seek remedies in transactions with lower concentration levels as well.

Finally, the FTC has long been the agency that reviews retail mergers and transactions in the distribution of refined petroleum products. In these industries, competitive issues arise in localized geographic markets. In the four such matters settled during 2007 and 2008, Table 2 indicates that the merging parties' shares of relevant local markets were relatively high, including one matter with post-transaction shares of between 50 and 100 percent (depending on the geographic market) and another that combined the nation's top two farm-store retailers.

All in all, the FTC's recent merger settlements reflect an enforcement policy that obtains remedies in narrowly circumscribed markets (product or geographic) with very high concentration levels, with a particular focus on the pharmaceutical sector. The vast majority of settlements arose in markets where the merging parties would have had a post-transaction share of at least 60 percent. Going forward, it will be interesting to see whether the FTC under Chairman Leibowitz also seeks remedies in merger matters with considerably lower concentration levels, i.e., those closer to the thresholds contained in the Horizontal Merger Guidelines.²⁶

Antitrust Division Merger Settlements. With regard to the Antitrust Division, Table 3 shows that the twenty-six merger settlements reached in 2007 and 2008 can be placed into the following six general product categories, some of which overlap with the FTC's categories:

- Consumer products merger (1): Merger-specific competitive concerns in product segment (beer sold in several local markets in upstate New York) were resolved via divestitures, allowing the overall transaction to proceed.
- Highly specialized business software mergers (2): Merger-specific competitive concerns in

²⁴ The tenth matter is TALX Corporation, in which the FTC challenged a series of consummated transactions that ultimately resulted in two highly concentrated software markets. Press Release, Fed. Trade Comm'n, FTC Challenges Acquisitions by TALX Corp. that Stifled Competition in Unemployment Compensation Management and Employment Verification Services (Apr. 28, 2008), available at <http://www2.ftc.gov/opa/2008/04/talx.shtm>.

²⁵ A transaction that produces a firm with a post-transaction share of 60 (80) percent would imply a Herfindahl measure of at least 3600 (6400).

²⁶ It also will be interesting to see whether the FTC expands the reach of horizontal merger enforcement using innovative theories. For instance, Commissioner Rosch's concurring statement in the Ovation Pharmaceuticals matter advocated challenging transactions that did not alter market shares or concentration but could be shown to create incentives to increase prices post-transaction. Concurring Statement of Commissioner J. Thomas Rosch, *Federal Trade Commission v. Ovation Pharmaceuticals, Inc.* at 1 (Dec. 18, 2008), available at <http://www.ftc.gov/os/caselist/0810156/081216ovationroschstmt.pdf>. Chairman Leibowitz's concurring statement in the same transaction expressed support for Commissioner Rosch's analysis. Concurring Statement of Commissioner Jon Leibowitz, *Federal Trade Commission v. Ovation Pharmaceuticals, Inc.* at 1 (Dec. 18, 2008), available at <http://www2.ftc.gov/os/caselist/0810156/081216ovationleibowitzstmt.pdf>.

specific market segments were resolved via divestitures and non-structural relief (e.g., licensing agreements) allowing the overall transaction to proceed.²⁷

- Highly specialized industrial and business products mergers (5): Merger-specific competitive concerns in certain product segments were resolved via divestitures, allowing the overall transaction to proceed.²⁸
- Agricultural products merger (1): Merger-specific competitive concerns in certain product segments (cotton seeds) were resolved via divestitures and licensing agreements, allowing the overall transaction to proceed.
- Local market mergers (14): Merger specific competitive concerns in local markets were resolved via divestitures, allowing the overall merger to proceed.²⁹
- “Smokestack” industries operating in regional, national, or international geographic markets mergers (3): Merger-specific competitive concerns were resolved via divestitures of manufacturing facilities, allowing the overall transaction to proceed.³⁰

Looking at these outcomes more closely, the Antitrust Division, like the FTC, reached settlements in transactions where the merging parties’ post-transaction share typically was very high. With regard to transactions involving products sold to businesses in national or regional markets, Table 3 shows that seven of the eight settlements involved transactions where the post-merger share of the merging parties would have been 64 percent or higher, and in most cases above 80 percent.³¹ Shares were similarly high in the fourteen transactions involving a variety of local geographic markets: Table 3 shows that in all but one of these transactions the merging parties would have had a post-transaction share in excess of 50 percent (and typically higher) or that the transaction combined the two major players in the relevant markets.³² These settlements, like many of those reached by the FTC, involved markets where the merging parties’ shares are high, and market concentration levels were well above the “highly concentrated” threshold contained in the Horizontal Merger Guidelines.

The parties’ market shares were somewhat lower in the three settlements in “smokestack” industries, and in the one settlement involving a consumer product (beer). In these cases, the parties’ combined shares were estimated by the Antitrust Division to be between 37 and 45 percent. A combination of factors, particularly the finding that key rivals in capital-intensive industries were capacity constrained, led the Antitrust Division to conclude that divestitures of some capacity was needed to prevent the transactions from reducing competition.

²⁷ The product markets at issue in these two matters were software used for financial research and clinical tests for individuals with speech and language disorders.

²⁸ The product markets at issue in these five matters were end-of-car cushioning systems for railroad cars, drop cable used by cable providers, carbon bonded ceramics, college and university textbooks, and commercial ice makers.

²⁹ These remedies were obtained in several industries that the Antitrust Division has historically reviewed: building materials (such as cement and aggregates); banking; wireless telephony; radio/TV broadcasting; health insurance; movie theaters; and miscellaneous transportation-related markets (bus service, waste collection and hauling, and airport services).

³⁰ The product markets at issue in these three matters were tin mill products, newsprint, and coated recycled boxboard.

³¹ The one exception to this trend was the Cenage/Houghton Mifflin transaction, which involved the sale of college textbooks. The merging firms in this transaction had a combined share of approximately 35 percent, and the transaction increased the Herfindahl index by approximately 500 to over 3000 in each relevant market. See *United States v. Cenage Learning Holdings I, L.P.*, Case No. 1:08-cv-00899, Competitive Impact Statement (May 28, 2008), available at <http://www.usdoj.gov/atr/cases/f233600/233677.htm>.

³² The one exception is the PNC/National City transaction, for which the publicly available information does not include information on the parties’ shares in the relevant local banking markets.

In sum, the Antitrust Division's merger settlement record over the final two years of the Bush Administration resembles the FTC's record: settlements were reached in matters with relatively narrow geographic and/or product markets with high levels of post-transaction concentration. The magnitude of consumer harm associated with these transactions cannot be dismissed, but it certainly appears limited by the nature of the markets involved.

Conclusion

The installation of President Obama's antitrust team promises to bring change to antitrust enforcement in the merger area, particularly at the Antitrust Division. AAG Varney has criticized the Antitrust Division's recent merger enforcement record; one commentator noted that during her confirmation hearings AAG Varney stated that the Bush Administration's reliance on the Chicago School approach to merger enforcement "had created a reluctance for the government to go forward and attempt to block mergers in the marketplace."³³ DAAG Shapiro also has been critical of the Antitrust Division's merger enforcement record, pointing in particular to the low level of merger enforcement during the Bush Administration measured either against other time periods or against the FTC's merger enforcement actions during the same time period.³⁴

AAG Varney and DAAG Shapiro have been understandably vague regarding what they would have done had they held their current positions during the Bush Administration, so it is unclear how the merger enforcement statistics reported above might have been different had these new officials been making the decisions. Still, both Varney and Shapiro have hinted that they might have challenged the Whirlpool/Maytag and XM/Sirius mergers that were cleared by the Antitrust Division.³⁵ Interestingly, both of these high profile mergers conform to the recent Bush Administration's merger enforcement record described above in one respect—post-transaction concentration levels would have been well above the Horizontal Merger Guidelines' thresholds under market definitions that would have supported a challenge. Where these two cleared transactions differ from those typically challenged during the final two years of the Bush Administration is their size and reach—both Whirlpool/Maytag and XM/Sirius involved sizable transactions in large, national markets.

While the ultimate merger enforcement agenda of the newly appointed antitrust officials will only become clear with time, these officials have pledged to be more aggressive than their immediate predecessors. Our review of the last two years of the Bush Administration merger enforcement record indicates that the agencies' recent focus has been on transactions in national industries that traditionally fall to one agency or the other (pharmaceutical mergers to the FTC, "smokestack" mergers to the Antitrust Division) and on transactions where the competitive issues arise in narrow markets, from a product and/or geographic market perspective, with relatively high post-transaction share and concentration levels. With regard to merger settlements, the extent to which share and concentration levels typically have exceeded the benchmarks contained in the Horizontal Merger Guidelines by such a wide margin is quite striking. One possible path to reinvigorating merger enforcement would entail FTC Chairman Leibowitz and Assistant Attorney General Varney instructing their merger staffs to consider challenging transactions in larger markets, even if they involve lower concentration levels. ●

One possible path to reinvigorating merger enforcement would entail FTC Chairman Leibowitz and Assistant Attorney General Varney instructing their merger staffs to consider challenging transactions in larger markets, even if they involve lower concentration levels.

³³ Andrea Agathoklis, *In Their Own Words: Predicting Enforcement Under Varney and Leibowitz*, ANTITRUST, Summer 2009, at 6.

³⁴ Baker & Shapiro, *supra* note 1, at 30.

³⁵ See Agathoklis, *supra* note 33, at 7 (quoting Varney as saying during her confirmation hearings that "from the outside, those [Whirlpool/Maytag and XM/Sirius] looked like mergers in horizontal markets that one wonders why they were not challenged."); see also Baker & Shapiro, *supra* note 1, at 32 (similarly questioning the Antitrust Division's decisions to close both of these merger investigations).

Appendix

TABLE 1
Horizontal Merger Investigations Announced by the Federal Trade Commission
and Department of Justice Antitrust Division by Action Type
2007–2008

Action Type	Federal Trade Commission		Department of Justice Antitrust Division	
	2007	2008	2007	2008
(a)	(b)	(c)	(d)	(e)
Agency Challenged Merger	3	5	1	2
Transaction Settled with Remedy	10	12	10 ¹	16
Transaction Not Challenged	1	0	2	3
Parties Abandoned Transaction	0	1	0	1
Total:	14	18	13	22

Note: The Evanston/Highland Park and Chicago Bridge & Iron Company/Pitt-Des Moines, Inc. transactions reviewed by the Federal Trade Commission are excluded from this analysis. While court decisions relating to these two transactions were made during this time period, the merger investigations were launched years earlier.

¹ Includes merger between FirstGroup PLC and Laidlaw International Inc., which resulted in a fix-it-first decision. In such situations, the agency agrees not to issue a complaint if the parties fix the competitive concerns up front.

Source: Press Releases, Federal Trade Commission and Department of Justice Antitrust Division, available at <http://www.ftc.gov> and <http://www.usdoj.gov/atr>.

TABLE 2
Horizontal Merger Investigations Announced by the Federal Trade Commission (“FTC”) Where the Merging Parties and the FTC Agreed to a Remedy
2007–2008

Industry Type/ Date of Press Release	Parties in Transaction	Relevant Product Market(s)	Combined Share of Merging Parties	Other Detail on Share/Concentration
(a)	(b)	(c)	(d)	(e)
Pharmaceutical				
1/18/2007	Hospira Inc.; Mayne Pharma Ltd.	5 Generic Injectable Drugs: (1) Hydromorphone Hydrochloride (2) Nalbuphine Hydrochloride (3) Morphine Sulfate (4) Preservative-free Morphine (5) Deferoxamine Mesylate	n.a.	(1) Companies are 2 of 3 suppliers of generic version of Hydromorphone Hydrochloride. (2) Hospira is only supplier of generic injectable Nalbuphine Hydrochloride. Mayne is in process of entering market. (3) Hospira is leading producer of generic injectable Morphine Sulfate. There are currently only three suppliers and Mayne is in process of entering market. (4) Hospira is one of two producers of generic injectable Preservative-Free Morphine. Mayne is in process of entering market. (5) Hospira is one of two producers of generic injectable Deferoxamine Mesylate. Mayne is in process of entering market.
4/16/2007	Actavis Group hf.; Abrika Pharmaceuticals, Inc.	Generic isradipine capsules	100%	Merger-to-monopoly: Companies are the only two suppliers of generic isradipine capsules in the United States.
9/27/2007	Mylan Laboratories (Merck Generics); E. Merck oHG	5 Generic Drugs: (1) Acebutolol hydrochloride capsules (2) Flecainide acetate tablets (3) Guanfacine hydrochloride tablets (4) Nicardipine hydrochloride capsules (5) Sotalol hydrochloride AF tablets	(1) Acebutolol hydrochloride capsules: 100% (2) Flecainide acetate tablets: 78% (3) Guanfacine hydrochloride tablets: >53% (4) Nicardipine hydrochloride capsules: 86% (5) Sotalol hydrochloride AF tablets: n.a.	Merger-to-monopoly: Acebutolol hydrochloride capsules Three-to-two merger: Nicardipine hydrochloride capsules, Sotalol hydrochloride AF tablets Five-to-four merger: Flecainide acetate tablets Guanfacine hydrochloride tablets—Mylan, Merck/Par, Watson and Actavis, are the only suppliers of the 2 mg formulation of guanfacine. Because many customers prefer to purchase the 1 mg and 2 mg formulations of the product from one supplier, the competitive significance of the other four suppliers who do not sell these formulations is limited.
10/9/2007	Kyphon, Inc.; Disc-O-Tech (Medical & Orthopedic Technologies)	Minimally Invasive Vertebral Compression Fracture (MIVCF) treatment products	>90%	Kyphon has 90% share in MIVCF product. Disc-O-Tech's Confidence is its closest substitute.
11/16/2007	Schering-Plough Corp.; Organon BioSciences N.V. (includes subsidiary Intervet, Inc.)	3 live poultry vaccines for the prevention and treatment of: (1) Georgia 98 strain of infectious bronchitis (2) Fowl cholera due to Pasteurella Multocida (3) Mycoplasma Gallisepticum (MG)	(1) Live Georgia 98: 100% (2) Fowl cholera due to Pasteurella Multocida: > 85% (3) Mycoplasma Gallisepticum: >72%	Schering-Plough and Intervet are two of only three major suppliers of Pasteurella Multocida and are the only suppliers of Live Georgia 98 vaccine in the United States.

Industry Type/ Date of Press Release	Parties in Transaction	Relevant Product Market(s)	Combined Share of Merging Parties	Other Detail on Share/Concentration
(a)	(b)	(c)	(d)	(e)
Pharmaceutical				
8/13/2008	Sun Pharmaceutical Industries Ltd.; Taro Pharmaceutical Industries Ltd.	3 generic formulations of anticonvulsant drugs carbamazepine: (1) Immediate-release carbamazepine tablets (2) Chewable carbamazepine tablets (3) Extended-release carbamazepine tablets	(1) Immediate-release carbamazepine tablets: 68% (2) Chewable carbamazepine tablets: 35% (3) Extended-release carbamazepine tablets: 100% (anticipating FDA approval)	Merger-to-monopoly: Extended-release carbamazepine tablets Three-to-two merger: Chewable carbamazepine tablets Four-to-three merger: Immediate-release carbamazepine tablets
12/19/2008	Teva Pharmaceuticals Industries Ltd; Barr Pharmaceuticals Inc."	29 individual generic drugs: (1) Tetracycline hydrochloride (HCl) capsules; (2) Chlorzoxazone tablets; (3) Desmopressin acetate tablets; (4) Metoclopramide HCl tablets; (5) Carboplatin injection; (6) Tamoxifen citrate tablets; (7) Metronidazole tablets; (8) Trazodone HCl tablets; (9) Glipizide/metformin HCl tablets; (10) Cyclosporine liquid; (11) Cyclosporine capsules; (12) Flutamide capsules; (13) Mirtazapine orally disintegrating tablets; (14) Deferoxamine injection; (15) Epoprostenol sodium (freeze-dried powder) injection (epop); (16) Weekly fluoxetine capsules; and (17)-(29): 13 generic oral contraceptive markets equivalent to: (17) Ortho-Cept (18) Mircette (19) Triphasil (20) Alesse (21) OrthoNovum 1-35 (22) OrthoNovum 7/7/7 (23) Loestrin FE (1mg/.02mg & 1.5mg/.03mg) (24) Loestrin FE (1mg/.2mg) (25) Loestrin FE 24 (26) Ovcon 35 (27) Ortho-Cyclen (28) Ortho Tri-Cyclen (29) Ortho Tri-Cyclen Lo 28	(1) Tetracycline hydrochloride (HCl) capsules: 100% (2) Chlorzoxazone tablets: 100% (3) Desmopressin acetate tablets 100% (4) Metoclopramide HCl tablets: 82% (5) Carboplatin injection: 60% (6) Tamoxifen citrate tablets: 73% (7) Metronidazole tablets: 89% (8) Trazodone HCl tablets: 75% (9) Glipizide/metformin HCl tablets: 51% (10) Cyclosporine liquid: 55% (11) Cyclosporine capsules: 41% (12) Flutamide capsules: 42% (13) Mirtazapine orally disintegrating tablets: 36% (14) Deferoxamine injection: 16% (15) Epoprostenol sodium (freeze-dried powder) injection (epop): 100% (16) Weekly fluoxetine capsules: n.a. (17) Ortho-Cept: n.a. (18) Mircette: n.a. (19) Triphasil: n.a. (20) Alesse: n.a. (21) OrthoNovum 1-35: n.a. (22) OrthoNovum 7/7/7: n.a. (23) Loestrin FE (1mg/.02mg & 1.5mg/.03mg): n.a. (24) Loestrin FE (1mg/.2mg): n.a. (25) Loestrin FE 24: n.a. (26) Ovcon 35: n.a. (27) Ortho-Cyclen: 68% (28) Ortho Tri-Cyclen: 51% (29) Ortho Tri-Cyclen Lo 28: n.a.	Merger-to-monopoly: Generic Tetracycline HCl tablets, Chlorzoxazone tablets, and Desmopressin Acetate tablets. Three-to-two merger: Generic Tamoxifen Citrate, Cyclosporine Liquid, and generic oral contraceptives equivalent to Ortho-Cyclen and Ortho Tri-Cyclen. Four-to-three merger: Metoclopramide HCl tablets, Carboplatin Injection, Metronidazole tablets, Trazodone HCl tablets, Cyclosporine capsules, Flutamide capsules, Glipizide/Meformin HCl tablets, Deferoxamine Injection, and Mirtazapine ODT. For the other products, this transaction would eliminate one of up to four competitors in each of the relevant markets.
12/29/2008	King Pharmaceuticals, Inc; Alphaarma, Inc."	Long-acting opioid (LAO) analgesic drug, Kadian	n.a.	The transaction would reduce the close and substantial competition between King and Alphaarma in the relevant market, which is already highly concentrated.

Industry Type/ Date of Press Release	Parties in Transaction	Relevant Product Market(s)	Combined Share of Merging Parties	Other Detail on Share/Concentration
(a)	(b)	(c)	(d)	(e)
Consumer Products				
8/9/2007	Jarden Corp.; K2 Incorporated.	Monofilament fishing line	n.a.	Companies are the two most significant suppliers of monofilament fishing line in the US.
7/17/2008	Pernod Picard; V&S Vin & Spirit	Super-premium vodka, cognac, domestic cordials, coffee liqueur and popular gin	n.a.	Companies produce the two leading brands of "super-premium" vodka sold nationwide-Absolut and Stolichnaya.
7/30/2008	McCormick & Company, Incorporated; Unilever's Lawry's and Adolph's Brands	Lawry's and Adolph's brand of seasoned salt products	Nearly 80%	
12/23/2008	Inverness Medical Innovations, Inc.; ACON Laboratories, Inc.	Consumer pregnancy tests	70%	
Highly Specialized Business Software				
4/28/2008	TALX Corporation; James E. Frick, Inc.; Johnson & Associates, LLC; assets from Gates McDonald & Company; Sheakley-Uniservice, Inc.; TBT Enterprises, Inc. UI Advantage, Inc., Jon-Jay Associates, Inc.; Employers Unity, Inc.	(1) US market for outsourced unemployment compensation management (UCM) (2) US market for verification of income and employment (VOIE) services	n.a.	The Agency considers each of the relevant markets to be highly concentrated, and the acquisitions have served to substantially increase concentration (measured by both the Herfindahl-Hirschman Index or by the number of competitively significant firms remaining in the market).
9/16/2008	Reed Elsevier Inc.; ChoicePoint Inc.	Sale of electronic public records services to law enforcement customers	over 80%	Agency considers these two firms as the only two significant suppliers of electronic public records services to US law enforcement customers.
Highly Specialized Industrial Products				
10/26/2007	Owens Corning; Compagnie de Saint Gobain	Continuous filament mat (CFM) and related technology	90% of CFM sold in North America	
6/30/2008	Carlyle Partners IV, L.P. (owns PQ corporation); INEOS Group Limited	Sodium silicate	62% in Midwest United States	Four-to-three merger: Combination of largest competitor (PQ) with 3rd largest competitor (INEOS). This transaction would reduce the number of competitors from 4 to 3 in the Midwest United States market.
7/10/2008	Flow International; OMAX Corp.	Waterjet cutting systems	n.a.	Flow is the leading supplier of water jet cutting systems in the United States while OMAX is the second leading supplier of water jet cutting systems in the United States.

Industry Type/ Date of Press Release	Parties in Transaction	Relevant Product Market(s)	Combined Share of Merging Parties	Other Detail on Share/Concentration
(a)	(b)	(c)	(d)	(e)
Highly Specialized Industrial Products				
10/2/2008	Hexion LLC; Huntsman Corporation	Specialty epoxy resins and methyl diisocyanate (MDI)	60%–90%, depending on geographic market	Four-to-three merger: There are only four US producers of MDI and the two companies account for between 60 and 90 percent of sales in the various North American markets for specialty epoxy resins.
Retail				
6/4/2007	Rite Aid Corporation; Brooks and Eckerd pharmacies (from Canada's Jean Coutu Group)	Pharmacy services	50%–100%, depending on geographic market	Each of the 23 local markets identified in the Commission's complaint is highly concentrated with respect to the retail sale of pharmacy services to cash customers. In all of the markets, companies are two of a small number of pharmacies offering cash services, and combined, account for at least half—and up to 100 percent—of the pharmacies in those markets.
11/27/2007	The Great Atlantic & Pacific Tea Company, Inc. (A&P); Pathmark Stores, Inc.	Supermarkets	n.a.	Companies are supermarket competitors in the highly concentrated areas of Staten Island, NY and Shirley, Long Island, New York.
5/5/2008	Agrium, Inc.; UAP Holding Group	Bulk fertilizer and farm stores	n.a.	Agrium is the largest retail farm store operator in the US while UAP is the second-largest farm store operator in the US. Agency considers these two firms direct competitors in six overlapping areas. New farm store entry has become highly infrequent due to the risks involved in expending significant sunk costs.
Terminaling of Refined Petroleum Products				
1/25/2007	Kinder Morgan, Inc.; Carlyle, Riverstone, and KMI management	Terminaling of gasoline and other light petroleum products	n.a.	Investment funds controlled by Carlyle and Riverstone would hold interests in both KMI and Magellan, leading to a reduction in competition in the terminaling of gasoline in eleven markets in the Southeast where customers have few competitive alternatives. Agency considers merging parties two primary independent participants in these eleven Southeast US markets.

Sources: Press Releases and the Analysis of Agreement Containing Consent Orders to Aid Public Comment, Federal Trade Commission, available at <http://www.ftc.gov>.

TABLE 3
Horizontal Merger Investigations Announced by the Department of Justice Antitrust Division (“Antitrust Division”)
Where the Merging Parties and the Antitrust Division Agreed to a Remedy¹
2007–2008

Category or Industry Type/ Date of Press Release	Parties in Transaction	Relevant Product Market(s)	Combined Share of Merging Parties	Other Details on Share/Concentration
(a)	(b)	(c)	(d)	(e)
Consumer Products				
11/14/2008	InBev N.V./S.A.; Anheuser-Busch Companies, Inc.	Beer	Rochester and Buffalo: 45% Syracuse: 41%	AB accounts for approximately 50% of beer sales in the US while Inbev accounts for less than 2% in the large majority of US markets. Agency believes the transaction could lead to higher prices in the Buffalo, Rochester, and Syracuse, NY metropolitan areas. In these three metropolitan areas, the combined firm and one other major competitor (Miller/Coors) would control about 70% of sales, with no other competitor controlling more than 5% of sales in these markets.
Highly-Specialized Business Software				
1/24/2008	Pearson PLC; Harcourt Assessment, Inc.	(1) Adaptive behavior clinical tests (2) Speech and language clinical tests (3) Adult abnormal personality clinical tests	(1) Adaptive behavior clinical tests: 92% (2) Speech and language clinical tests: 90% (3) Adult abnormal personality clinical tests: >93%	Companies are two of only a few firms that supply adaptive behavior and speech and language clinical tests. (1) Pearson's Vineland and Harcourt's ABAS (two of the merging parties' products) are considered as closest substitutes. (2) Pearson's CASL and OWLS are also considered substitutes for Harcourt's CELF product. (3) Pearson is a dominant supplier of adult abnormal personality clinical tests. Harcourt is currently developing a computer-based product akin to Pearson's, but the agency contends that the proposed merger would eliminate Harcourt as a potential competitor in this market.
Highly-Specialized Industrial and Business Products				
2/19/2008	The Thomson Corporation; Reuters Group PLC	(1) Fundamentals data (2) Earnings estimates data (3) Aftermarket research reports	(1) Fundamentals data: n.a. (2) Earnings estimates data: >70% (3) Aftermarket research reports: >90%	(1) Fundamentals data: merging parties are two of the world's top four providers of fundamentals data. Their products are each others' closest substitutes. (2) Earnings estimates data: Merging parties are two of the three largest suppliers worldwide. (3) Aftermarket research reports: Merging parties are top two suppliers worldwide.
4/18/2007	Amsted Industries Incorporated; FM Industries	New and reconditioned end-of-car cushioning units (EOCC's)	New EOCC's: 100% Reconditioned EOCC's: >80%	Merger-to-monopoly: Companies are only two manufacturers of new EOCC units. Three-to-two merger: Companies are two of three suppliers of reconditioned EOCC units used in the railway industry.

Category or Industry Type/ Date of Press Release	Parties in Transaction	Relevant Product Market(s)	Combined Share of Merging Parties	Other Details on Share/Concentration
(a)	(b)	(c)	(d)	(e)
Highly-Specialized Industrial and Business Products				
12/6/2007	CommScope, Inc.; Andrew Corporation	Drop cable	64%–74%	Four-to-three merger: Companies are two of four companies that provide drop cable to cable television companies in the US. CommScope is the leading manufacturer, with 60% to 70% market share while Andrew Corporation's Andes is the third largest manufacturer of drop cable, with about 4% market share.
3/4/2008	Cookson Group PLC; Foseco PLC	Carbon bonded ceramics (CBC's) used in the continuous casting steelmaking process	75%	Three-to-two merger: companies are two of only three competitors that produce CBC's in North America.
5/28/2008	Cengage Learning, Inc.; Houghton Mifflin Harcourt Publishing Company's College Division	Textbooks and related educational materials	>35%	Cengage is the second largest publisher of college text books and ancillary materials in US. HM College is the fifth largest publisher of higher education textbooks in the US. The agency contends that the proposed acquisition will increase the HHI by more than 500, creating a post-merger HHI of more than 3000 in each relevant market.
10/6/2008	Manitowoc Company, Inc.; Enodis	Commercial cube ice machines	70%	Companies are two of only three significant manufacturers in the US, and are the two largest manufacturers in the US.
Local Market				
4/4/2007	Cemex S.A.B. de C.V.; Rinker Group	Ready mix concrete (RMC), concrete block and aggregate	100% of RMC supply in Flagstaff AZ, 60% share of concrete block in Tampa/ St. Petersburg, and 69% share of concrete block in Fort Myers/Naples, FL	Merger-to-monopoly: Flagstaff—companies are the only two competitors able to supply RMC for large projects. Three/Four-to-two merger: in other areas in which divestiture is being required, the companies are two of three/four firms capable of serving "large" projects. In Tucson, AZ, companies are among a small number of firms able to supply aggregates meeting specifications of Department of Transportation. Cemex is the largest supplier of RMC and seventh largest supplier of aggregate in US. Rinker is the second largest supplier of RMC and fifth largest supplier of aggregate in US.
6/12/2007	First Busey Corporation; Main Street Trust, Inc.	Commercial and retail banking services	n.a.	Two major banks based in central Illinois.
9/27/2007	FirstGroup PLC; Laidlaw International Inc.	School bus service	n.a.	Laidlaw Inc. is the largest school bus service company in the US.

Category or Industry Type/ Date of Press Release	Parties in Transaction	Relevant Product Market(s)	Combined Share of Merging Parties	Other Details on Share/Concentration
(a)	(b)	(c)	(d)	(e)
Local Market				
10/30/2007	AT&T, Inc.; Dobson Communications Corporation	Mobile wireless telecommunications services	>60% of subscribers in five local markets	AT&T is the largest mobile wireless telecommunications provider in US while Dobson is the ninth largest mobile wireless telecommunications provider in US. In five local markets, the two companies serve greater than 60% of customers.
11/13/2007	Vulcan Materials Company; Florida Rock Industries, Inc.	Coarse aggregate	Southeast Atlanta and South Hampton Roads: 100% of most specifications	Merger-to-monopoly: Southeast Atlanta, South Hampton Roads and some customers in Northwest Atlanta, Southwest Atlanta, South Atlanta, Columbus, and Chattanooga areas. Three-to-two-merger: Northwest Atlanta, Southwest Atlanta, South Atlanta, Columbus, and Chattanooga, and some customers in West Atlanta. Four-to-three merger: West Atlanta Vulcan is the largest construction aggregates producer in US. Florida Rock is one of largest suppliers of construction aggregates.
2/13/2008	Clear Channel; Bain Capital, Thomas H. Lee Partners	Radio advertising	Advertising Revenue: Houston: 37% Cincinnati: 65% Listener Share: Houston: 34% Cincinnati: 59% Spanish-language listener share: Houston: 75% Las Vegas: 73% San Francisco: 70% Spanish-language advertising revenue: Houston: 79% Las Vegas: 78% San Francisco: 63%	Clear Channel is largest operator of radio stations in the US. The Agency contends that four radio markets in particular, Cincinnati, Houston, Las Vegas, and San Francisco would experience price increases as a result of this merger. Merging companies are each others' best substitutes for Spanish-language listeners in Houston, Las Vegas and San Francisco.
2/25/2008	UnitedHealth Group, Inc.; Sierra Health Services, Inc.	Medicare Advantage Plans	94% in Las Vegas area	UnitedHealth is the largest health insurer in the US, while Sierra Health is the largest health insurer in the Las Vegas area.

Category or Industry Type/ Date of Press Release	Parties in Transaction	Relevant Product Market(s)	Combined Share of Merging Parties	Other Details on Share/Concentration
(a)	(b)	(c)	(d)	(e)
Local Market				
4/29/2008	Regal Cinemas, Inc. Consolidated Theatres Holding GP	First-run commercial movie theaters	Proportion of box office revenues: South Raleigh: 100% North Raleigh: 79% Asheville: 77% Southern Charlotte: 75%	In South Raleigh, the merging parties would control the only two first-run commercial theaters. In North Raleigh, the parties would control three out of five first-run commercial theaters. In Asheville, the merging parties would control four out of six first-run commercial movie theaters, and in Southern Charlotte, the merging parties would control four out of six first-run commercial theaters. Post-merger HHI: South Raleigh: 10000 (increase of 3167 points) North Raleigh: 6523 (increase of 2315 points) Asheville: 6355 (increase of 2777 points) Southern Charlotte: 6058 (increase of 2535 points)
6/10/2008	Verizon Communications Corp.; Rural Cellular Corp. (Unicel)	Mobile wireless telecommunications services	60%–94% of subscribers in 6 local markets in Vermont, New York, and Washington	Verizon is the second largest mobile wireless telecommunications services provider in the US (based on number of subscribers) while Rural Cellular Corp. is the tenth largest.
7/3/2008	Signature Flight Support Corporation; Hawker Beechcraft's flight support services business	Flight support services, also known as fixed-base operations	100% at Indianapolis International Airport	Signature is the largest owner and operators of fixed-base operations in the US. Hawker Beechcraft has fixed-base operations in seven airports in the US.
8/28/2008	Raycom Media, Inc.; WWBT-TV	Local broadcast TV advertising	>50% of TV spot advertising revenue in Richmond, VA designated market area	As originally proposed, transaction would give Raycom ownership of two of the four local broadcast stations in the Richmond designated marketing area.
10/30/2008	Verizon Communications Corp.; Alltel Corp	Mobile wireless telecommunications services	55%–100% share of subscribers	Parties are each others' closest competitors for a significant set of customers in 94 Cellular Marketing Areas. Verizon is the second largest mobile wireless telecommunications provider in the US, as measured by number of subscribers. Alltel is the fifth largest mobile wireless telecommunications services provider in the US, as measured by number of subscribers.

Category or Industry Type/ Date of Press Release	Parties in Transaction	Relevant Product Market(s)	Combined Share of Merging Parties	Other Details on Share/Concentration
(a)	(b)	(c)	(d)	(e)
12/3/2008	Republic Services, Inc.; Allied Waste Industries, Inc.	Collection and disposal of municipal solid waste from commercial businesses	<p>Municipal Solid Waste Disposal: Denver, CO: 87% Charlotte, NC: 80% Cape Girardeau: 70% Houston, TX: 70% Northwest Indiana: 64% Cleveland, OH: 56% Forth Worth, TX: 55% Philadelphia, PA: 52% Flint, MI: 51% Greenville-Spartanburg, SC: 50% San Francisco, CA: 50% Atlanta, GA: 46% Los Angeles, CA: 39%</p> <p>Small Container Commercial Waste Collection Markets: Atlanta, GA: 50% Cape Girardeau: 64% Charlotte, NC: 70% Forth Worth, TX: 42% Houston, TX: 56% Greenville-Spartanburg, SC: 69% Lexington, KY: 75% Lubbock, TX: 63% Northwest Indiana: 44%</p>	<p>Firms are only two of a few significant firms providing commercial waste hauling or municipal solid waste disposal services in 15 metropolitan areas.</p> <p>Municipal Solid Waste Disposal</p> <p>Three-to-two merger: Cape Girardeau, Missouri Area; Charlotte, NC; Greenville-Spartanburg, SC; Houston, TX; Philadelphia, PA; San Francisco, CA</p> <p>Four-to-three merger: Atlanta, GA; Cleveland, OH; Denver, CO; Flint, MI; Fort Worth, TX, Los Angeles, CA; Northwest Indiana</p> <p>Small Container Commercial Waste Collection Markets</p> <p>Three-to-two merger: Charlotte, NC; Greenville-Spartanburg, SC; Houston, TX; Lexington, KY</p> <p>Four-to-three merger: Atlanta, GA; Fort Worth, TX, Northwest Indiana; Lubbock, TX; Cape Girardeau</p>
12/11/2008	PNC Financial Services Group, Inc.; National City Corporation	Banking services	n.a.	PNC will become fifth largest bank in nation. The Agency contends that this merger will have a significant adverse effect on competition in local markets for retail banking, small business banking, and middle market banking services in Western PA.
Smokestack Industries Operating in Regional/National (or Larger) Geographic Markets				
2/20/2007	Mittal Steel Company N.V.; Arcelor S.A.	Tin mill products	37% in Eastern US	Prior to the merger, Mittal and one other integrated steel producer accounted for greater than 74% of all tin mill product sales in the eastern US. Prior to the merger, Arcelor, along with its subsidiary, Dofasco, competed actively with these two firms.
10/23/2007	Abitibi Consolidated, Inc.; Bowater, Inc.	Newsprint market	40% in North America	Abitibi and Bowater are the two largest North American newsprint producers, and they compete against one another to produce and sell newsprint.
3/5/2008	Alvity Packaging LLC; Graphic Packaging International, Inc.	Coated recycled paperboard used to make folding cartons for consumer and commercial packaging, including cereal boxes	42%	Alvity is the largest producer of coated recycled paperboard while Graphic is fourth largest producer of coated recycled paperboard in North America.

Category or Industry Type/ Date of Press Release	Parties in Transaction	Relevant Product Market(s)	Combined Share of Merging Parties	Other Details on Share/Concentration
(a)	(b)	(c)	(d)	(e)
Agricultural Products				
5/31/2007	Monsanto Company; Delta & Pine Land Company	Traited cottonseed	95% in both the Midsouth and the Southeast regions of the US	Post-acquisition HHI will increase by 3310 in the Midsouth to 9110. In the Southeast, the proposed acquisition will increase the HHI by 1489, resulting in a post-merger HHI of 9184.

¹ Includes merger between FirstGroup PLC and Laidlaw International Inc., which resulted in a fix-it-first decision. In such situations, the agency agrees not to issue a complaint if the parties fix the competitive concerns up front.

Sources: Press Releases and Competitive Impact Statements, Department of Justice Antitrust Division, available at <http://www.usdoj.gov/atr>.

Paper Trail: Working Papers and Recent Scholarship

Editor's Note: Bill Page's review covers a topic ripped from today's headlines: John Lopatka's argument that decisions by sports standards-setting bodies on equipment standards or specifications should be per se legal under the antitrust laws. And John Woodbury looks to a recent FTC Report by Malcolm Coate and Andrew Heimert that reviews how the FTC staff have evaluated efficiency claims for guidance on what kinds of hurdles must be overcome to convince the FTC staff to accept an efficiency claim. Send suggestions for papers to review to: page@law.ufl.edu or jwoodbury@crai.com.

—WILLIAM H. PAGE AND JOHN R. WOODBURY

Recent Papers

John E. Lopatka, *Antitrust and Sports Equipment Standards: Winners and Whiners*

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1413172

In this paper, John Lopatka¹ argues that decisions by sports standards-setting bodies should be per se legal under the antitrust laws. (He does not discuss whether similar reasoning would apply to other standards-setting bodies, because the economic circumstances, composition, and incentives of those bodies are too diverse to permit that kind of generalization.) To focus the discussion, he distinguishes equipment standards or specifications, which are the subject of his argument, from rules of the game.² Equipment standards “prescribe the attributes of physical inputs that participants in the sport are permitted or required to use” (e.g., “[t]he bat shall be one piece of solid wood”). Rules, instead, define how the game is played (e.g., “[a] batter is out when [h]is fair or foul fly ball . . . is legally caught by a fielder”). Standards, he notes, “can dramatically affect performance” on the field, but can also determine which products survive in the market because “[s]tandards inherently exclude” to the extent the sport’s participants accept them. As a result of their economic importance to sports equipment manufacturers, standards decisions often provoke antitrust suits by losers, usually alleging a boycott by the standards-setting agency in league with the winning producers. Although the suits are rarely successful, Lopatka argues that courts have failed to grasp the economics of sports equipment markets and therefore have analyzed the legal issues incorrectly.

Lopatka observes that sport is a form of entertainment for both spectators and participants. Its value to these groups depends on “comparative performance” not only among contestants in individual games and over a season, but also among players and teams in different seasons over decades. (Hall-of-famers are players who have won the “long-term” competition by breaking records and passing other benchmarks of performance.) Leagues and their constituent teams

¹ Professor Lopatka is my frequent co-author, but *Winners and Whiners* is exclusively his work.

² Both, of course, are forms of rules that would be included in the sport’s rule book. The point of the distinction is apparently to highlight norms that affect manufactured inputs, and therefore are likely to have economic consequences off the field of play. There is no suggestion that “rules,” under this distinction, would be subject to stricter antitrust scrutiny.

derive income from the value that spectators place on this competition. Equipment manufacturers also derive income from the value that participants place on the competition and their attendant demand for the best compliant equipment. It is in this last context that standards are crucial: “[e]quipment standards become important as physical exertion combines with inanimate inputs to affect outcome.” Because contestants derive value from their relative performance with others, they are willing to pay for equipment that improves their performance. That willingness to pay creates an incentive for equipment manufacturers to innovate both within and outside existing standards. Where their equipment pushes or exceeds the limit of existing standards, a standards-setting body may have to decide whether the products should be approved for officially sanctioned events.

The standards-setting body does not necessarily want to maximize the performance of athletes or the profit of equipment manufacturers. Its incentive, Lopatka notes, “is to maximize the value of the sport subject to the constraint of an acceptable level of participant safety,” a goal that sometimes requires it to prevent innovation. If, for example, someone invented shoes that increased the speed of base runners by 30 percent, base stealing might become so easy that the game would be compromised. Metal bats in the hands of major league hitters would raise similar issues. The standards-setting body then would be required to redefine equipment standards to preserve the value of the game.

A standards-setting agency is an agent of the participants to establish uniformity in the characteristics of their equipment. Uniformity is valuable because it assures fairness in head-to-head competition and over the course of a season. It may also assure that records of human performance retain some meaning across eras—what Lopatka calls long-term competition. But Lopatka’s most important point is that uniformity in equipment standards increases value by creating positive network effects, or scale economies on the demand side. Rules and standards, Lopatka observes, define a network of players who comply with the standards. In golf, for example, this group includes not only Tour players, but duffers who want assurance that their competitors are playing the same game, with standards-compliant equipment. Players and spectators receive direct network benefits as the size of the network grows, because there are more and presumably better players to compete against or to watch. The players also receive indirect network benefits, because a large number of participants spurs manufacturers to produce more and better compliant equipment. Thus, golf club manufacturers will produce clubs that comply with standards that most golfers accept; and, by the same token, golfers “will tend to adopt the set of golf rules and standards for which the greatest array of clubs [is] available.” This positive feedback loop may result in tipping toward one standard, or (if network effects are exhaustible) multiple standards may emerge for different versions of a sport. Once standards are established, they are likely become locked in to some extent because of the costs to contestants of buying new equipment. A standards-setting body may even choose to reject a standard that makes conforming equipment so expensive that few can afford to play the game.

Lopatka observes that manufacturers’ challenges to standards decisions rest on an implicit assertion that the standards-setting body deliberately chose to reduce the value of its sport. Whether a particular decision actually reduces or enhances the sport’s value is virtually impossible to resolve convincingly on a factual level. An innovation that improves performance may be good for the players that take advantage of it, but bad for the sport over the long term; the calculation of which effect predominates is likely to be difficult and impressionistic. Consequently, Lopatka argues that the issue should be resolved categorically based on the incentives of the standards-setter. Under that approach, he concludes that per se legality should follow.

A standards-setting agency has no incentive to reduce the value of its sport, unless it derives revenue from sale of the affected equipment or receives side payments from equipment manufacturers. Lopatka argues that even in the latter case decisions of the standards-setting body do not offend antitrust law, because it is only exercising lawfully acquired market power. “The relevant market,” Lopatka notes, “is defined by the purchase decisions of those buyers who adhere to the governing body’s standards.” The body thus has market power only to the extent participants (or “sports society members”) choose to accept its decisions. If a decision—as an example, to use only wooden bats in minor league baseball—reduces overall welfare, the standards-setting body suffers a loss for that. The body cannot prevent anyone from producing a product; it can only affect the purchase decisions of those who accept its authority, either because they play in sanctioned events or because of network effects—both lawful forms of market power. As Lopatka puts it, “The market, not antitrust, provides the necessary sanction” to limit abuses.

In theory, Lopatka recognizes, players or society members who do not accept the decision of the governing body might be harmed if the decision denied minimum efficient scale to the producers of the non-complying equipment. For example, golfers who want to use clubs that are banned for professional players might have to pay more if the standard reduces demand so much that the producers of those clubs cannot sell enough of them to produce at an efficient scale. But Lopatka argues that this scenario is unlikely—there is no case in which the argument has even been made. Similarly, Lopatka recognizes that it would be unlawful for a standards-setting body to adopt (or fail to adopt) a standard under the threat of incumbent equipment suppliers to withhold sales of their products. But, he notes, “no reported case suggests this kind of supplier coercion.”

Lopatka suggests that equipment manufacturers may be able to protect investments in new technology by contracting with sports governing bodies. He gives the example of Speedo, which consulted continuously with international swimming authorities in the development of its LZR Racer suit that Michael Phelps and others wore in the 2008 Olympics. As that very example shows, however, even extensive consultations will not bind the agency to accept innovations. FINA, swimming’s international standards-setting body, voted in July 2009 to ban high-tech non-textile suits starting in 2010. Thus, the risk will evidently remain that the standard-setting body will eventually find innovations detrimental to the sport, rendering the investments in developing the new equipment worthless.

In a concluding section, Lopatka reviews the classic boycott cases, showing how their standards opened the door for the arguments in sports equipment cases. *Northwest Wholesale Stationers*,³ *Indian Head*,⁴ and *Discon*⁵ now make clear that virtually all sports standards cases should be judged under the rule of reason. In his review of recent sports equipment cases, Lopatka is particularly critical of courts’ insistence that governing bodies justify their decisions based on the integrity of the game, even under a deferential standard. He notes that this requirement places the burden on standards-setting bodies to justify decisions banning new technologies to the detriment of the innovators and to justify decisions approving new technologies to the detriment of existing producers. He notes that, at one point, the NCAA simultaneously had to defend against suits by manufacturers of both wooden bats and aluminum bats, each group

³ *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284 (1985).

⁴ *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988).

⁵ *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128 (1998).

claiming the NCAA had conspired with the other to establish standards detrimental to the game. Lopatka endorses the approach of one court that held that, unless a standards-setting agency's decision was "corrupted by coercion from competitors of the disadvantaged buyer," the court "need not be concerned with the rationality or fairness" of the agency's decision.⁶ This rule is not far from Lopatka's preferred standard of per se legality.

—WHP

Malcolm B. Coate and Andrew J. Heimert, Merger Efficiencies at the Federal Trade Commission 1997–2007 (FTC Bureau of Economics Feb. 2009)

<http://www.ftc.gov/os/2009/02/0902mergerefficiencies.pdf>

In a recent *Paper Trail*,⁷ we summarized and discussed a methodology to evaluate mergers in differentiated product industries proposed by Joe Farrell and Carl Shapiro—now the chief economists for the FTC and Antitrust Division, respectively. That proposal focused on comparing what Farrell and Shapiro call the "cannibalization" tax that could result from the merger with the anticipated efficiencies from the merger to determine whether, on balance, the merger will create upward pricing pressure.

In brief, the cannibalization tax can be thought of as the profits forgone by the firm when an increase in the sales of good 1 comes at the expense of another good 2. When the two goods are sold by independent firms, the tax is zero for the firm producing good 1, since the displacement increases its profits by the margin on the units of good 1 sold for every unit of good 2 displaced. But if these two firms now merge, the merger reduces the profitability that would otherwise result from lowering the price of good 1. This is because some of those increased sales of good 1 at the lower price "cannibalize" the sales of good 2. That is, some of the increased sales of the units of good 1 displace the sales of good 2 units. The forgone profits on the displaced sales of the good 2 units now become an additional cost to the merged firm when it sells more of good 1. Thus, in effect, the merger results in an increase in the marginal costs of producing and selling good 1 and so (other things equal) the post-merger incentive to reduce prices is lower than the pre-merger incentive. If that increase in marginal costs is greater than the anticipated efficiency gain from the merger, then the net increase in costs results in upward pricing pressure for good 1.

Farrell and Shapiro argue that this upward pricing pressure should generate a rebuttable presumption that a merger will increase prices. In this way, Farrell and Shapiro have brought efficiencies to the forefront of merger analysis (at least in differentiated product mergers) because one way to rebut that presumption is to demonstrate that merger-specific efficiencies are more substantial than believed by the agencies. A key question, then, is what hurdles must efficiency defenses overcome to be credible and thus acceptable to the agencies?

With what now may be a renewed focus on efficiencies, a recently released FTC Report authored by FTC staffers Malcolm Coate and Andrew Heimert (C/H) is timely. Their Report, *Merger Efficiencies at the Federal Trade Commission 1997–2007*, reviews how the FTC staff have evaluated efficiency claims during that period and may shed some light on what kinds of hurdles must be overcome to convince the FTC staff to accept an efficiency claim. Key among its conclusions

⁶ *Brookins v. Int'l Motor Contest Ass'n*, 219 F.3d 849, 853–55 (8th Cir. 2000).

⁷ *Paper Trail: Working Papers and Recent Scholarship*, ANTITRUST SOURCE, Dec. 2008, at <http://www.abanet.org/antitrust/antitrustsource/08/12/Dec08-pTrail12-22f.pdf> (reviewing Joseph Farrell & Carl Shapiro, *Antitrust Evaluation of Horizontal Mergers: An Economic Alternative to Market Definition* (Nov. 28, 2008), available at <http://faculty.haas.berkeley.edu/shapiro>).

(which I explore in further detail here) are the importance of merger specificity and verifiability to the staff's evaluation of the efficiencies claim. C/H also compare the differing views of the staffs of the Bureau of Competition (BC) and Bureau of Economics (BE) regarding other reasons to reject efficiency claims.

While this Report was released to the public after President Obama had taken office, it was approved by the Commission while William Kovacic was still Chairman. Although it is possible that the new Democratic leadership at the antitrust agencies will increase the height of the hurdles for agency acceptability of efficiency claims, the C/H Report is nonetheless useful in identifying what those hurdles have been and are likely to be.

C/H compiled the data used for the evaluation from FTC files based on recommendations to the Commission made by the BE staff and the BC staff, as discussed in more detail below. The data compilation spanned the period from April 1997 to March 2007. They made this timing choice in light of the expanded discussion of efficiency defenses adopted by the 1997 revisions to the Horizontal Merger Guidelines.⁸ As C/H describe, those revisions included an emphasis on the parties' burden to demonstrate the verifiability of claimed efficiencies, the absence of practical alternatives to merger to attain them, and that the cost savings would not result from post-merger output reductions. In addition, the revisions indicate that any efficiencies must be shown to be sufficiently large to outweigh any merger-induced tendency to increase price.

In what follows, I am generally faithful to the authors' story but will emphasize and characterize some points differently than C/H. Much (but not all) of their Report focuses on differences in how the BC and BE implemented the 1997 Guidelines revisions. I instead choose to focus on the extent to which merger efficiencies seemed important to the antitrust analysis at the FTC. In addition, I focus more particularly on the kinds of concerns that the two Bureaus expressed about the claimed efficiencies, a focus that is more relevant for antitrust practitioners and is somewhat diluted by the BC versus BE discussions in the Report.⁹

At the outset, it is worth asking whether the FTC staff takes efficiency claims seriously—that is, does it pay more than just lip-service to those seemingly self-serving claims of the merging parties. C/H reviewed fifteen “white papers” submitted by merging parties that had been retained by the staff in their files (most of the white papers were apparently destroyed or otherwise unavailable) and identified a total of fifty-eight efficiency claims made by the merging parties. All but seven of those claims were considered by the staff. So that's the good news—the staff does consider those claims.

The next question, then, is how many of those claims were accepted by the staff. The news there is not as good. C/H reviewed the BC and BE staff memoranda to the Commission for 147 transactions for which a second request was issued and for which efficiencies were discussed in the staff memoranda. The BC memoranda identified 342 distinct efficiency claims and the BE memoranda identified 311 such claims. BC accepted 8 percent of those claims while BE accepted 27 percent of the efficiency claims. (C/H Tables 2 and 3.) For the majority of claims, neither Bureau

⁸ There may be a concern that reviewing the experience with efficiencies over a long span of time might not be particularly meaningful for current practitioners. However, C/H perform a number of simple statistical tests to determine whether there were differences in review between the first five years of the ten-year period (April 1997 through March 2002) and the last five years of the period (April 2002 through March 2007). While some differences emerged, C/H typically found no statistical difference between the two periods. Having said that, it would have been interesting to evaluate whether the revisions resulted in any differences in efficiency concerns or acceptability with the pre-1997 period.

⁹ That is not to say that the Report does not discuss those concerns, but it tends to focus on comparing the BE concerns to those of BC.

offers a decision as to the acceptability of the claims—for both Bureaus, the no-decision percentage was about 60 percent. (C/H Tables 2 and 3). While the Report does not offer an explanation of the high frequency of no-decisions, it may be that these arise in matters where the anti-competitive effects are so obviously absent or so obviously substantial that there was little reason to reach a decision concerning whether the parties established the claimed efficiencies.

To probe this low acceptance rate (my characterization) more deeply, we can rely on the data compiled by C/H. C/H categorized all of the efficiency claims into one of the following three types: “Fixed-Cost Efficiencies,” “Variable-Cost Efficiencies,” and “Other Efficiencies.” The Fixed-Cost Efficiencies category consists of five different kinds of cost savings, including overhead savings, advertising efficiencies, and research efficiencies. The Variable-Cost Efficiencies category also consists of five different kinds of cost savings, including production cost savings, distribution cost savings and best-practice efficiencies. The Other Efficiencies category consists of dynamic efficiencies and generic efficiencies. The former includes savings associated with the ability to offer better or a wider array of products, “cross-selling” synergies, and “an enhanced ability to compete.” The “generic” category is one where C/H were unable to characterize the efficiencies as variable or fixed based on the information in the memoranda.

I was surprised that the Report seemed to treat fixed cost claims with the same degree of importance as variable cost claims, since we expect that the latter are much more likely than the former to be translated into price reductions. In a note, C/H observe that the 1997 Guidelines revisions do not exclude consideration of fixed cost savings and cite the Guidelines’ Commentary for the point that fixed cost savings can have procompetitive effects in a longer-run setting. My experience has been that economists typically focus on the variable cost savings, with little or no analysis of the fixed cost savings. One exception is where the reduction in fixed costs allows the merging parties to create new product “platforms,” such as new classes of cars or drugs.¹⁰

Based on the data compiled by C/H, BC accepted about 7 percent of the fixed and variable cost claims. BE accepted 21 percent of the fixed cost claims and nearly 30 percent of the variable cost claims. (C/H Tables 2 and 3.) Thus, BE was clearly more accepting of the fixed and variable cost efficiencies than BC.

Surprisingly (to me, anyway), both Bureaus had a markedly higher acceptance rate for dynamic efficiency claims—23 percent for BC and 43 percent for BE. (C/H Tables 2 and 3.) I would have thought that the Bureaus would have been more likely to reject the dynamic efficiency claims than the variable and fixed cost efficiency claims because it seems harder to verify the former efficiency type (e.g., improved cross selling or an increased ability to offer new products) than the latter (e.g., switching production from higher to lower cost plants). It would be interesting to explore exactly why the two Bureaus were more inclined to accept what at first glance seems to be a quantitatively fuzzier type of efficiency. C/H note that that these results could suggest that the Bureaus, particularly BE, are prepared to consider the longer-run consequences of the merger.

While BE seems more accepting of efficiencies, the amount of “attention” paid to efficiencies was not much different from that of BC as judged by the percentage of the staff memoranda accounted for by the evaluation of the claimed efficiencies. That evaluation was very limited for both Bureaus. For BC, 5.2 percent of the memoranda addressed efficiencies, while for BE, the corresponding fraction was 5.8 percent, although there was substantial variation in these percentages. C/H report that for BC, there were 22 matters where the efficiency discussion accounted for

¹⁰ It is not clear whether C/H would have categorized such efficiencies as “fixed cost,” “dynamic,” or both.

1 percent or less of the memorandum and 17 where it accounted for at least 10 percent of the memorandum. The corresponding numbers for BE were 14 and 14, respectively. This suggests that for some investigations, the efficiency evaluation by the Bureau was non-trivial.

It would be interesting to know what circumstances warranted a more extensive efficiency evaluation in those matters. Some of the increased interest might be related to the nature of the ultimate enforcement action. The Report does not examine the extent to which staff recommendations on enforcement actions turned on the acceptability of the efficiency claims. However, the Report does note that the number of claims evaluated by BE and BC was as high in matters that resulted in the FTC seeking a preliminary injunction (PI) as in closed investigations.

Along these same lines, C/H note without any detail that the fraction of pages accounted for by efficiency discussions in the BC memoranda was higher for investigations leading to a PI request vs. mergers that were cleared by the agency. For BE, the intensity of the discussion was statistically the same for both types of outcomes. Thus, overall, these suggest that the role of efficiencies in investigations leading to a PI request may have some significance for that decision, and this may be true—perhaps to a lesser extent—for closed investigations.¹¹

In addition, the fraction of claims *accepted* by the Bureau was significantly higher for closed investigations than for those ending in enforcement actions (particularly a PI). For closed matters, the greater acceptance rate for the claimed efficiencies may indicate that the parties offered sufficiently credible claims that they had a role in the Bureau's recommendation not to seek an enforcement action. For BC, efficiency claims were accepted in 6.9 percent of the PI actions and 15.3 percent of the closed matters and while the corresponding acceptance rate for BE was 28 percent and 37 percent, respectively. These data also suggest that the role of efficiencies was of some significance to the outcomes of some of the merger investigations.

C/H also provide statistics on the efficiency concerns of the staff when rejecting the efficiency claims. (C/H make clear that for a claim to be categorized as “rejected,” that rejection must be unambiguous.) To conduct this evaluation, C/H categorized the reasons for the staff's concerns about the claimed efficiencies in a way that tracked the Horizontal Merger Guidelines' standards for “cognizable” efficiencies. These include whether the claimed efficiencies are verifiable, merger specific, and “valid” (i.e., not the result of anticompetitive conduct). Additional reasons included concerns about the fixed-cost nature of the savings, whether or not the efficiencies would be passed through to the consumers, and whether or not the efficiencies would occur outside of the markets of concern.¹²

Table 5 of C/H reports the reasons for rejection of the 12 different categories of efficiencies, defined above. Needless to say, with 12 different categories of efficiencies and 6 categories of rejection types,¹³ populating the 72 different cells will quickly create substantial small-numbers issues, and much more quickly with BE than BC. To reduce the scale of the small-number problems, I aggregated the 5 various fixed cost claim types into one single “fixed-cost” category, and similarly for variable costs. My aggregation is reported in Table 1 (which is based on the data con-

¹¹ For BC, the average number of pages devoted to efficiencies was 12.4 for PI matters and 5.06 for closed matters. For BE, the corresponding number of pages was 3.5 and 2.67, respectively.

¹² Since the usual concern with fixed cost savings is that they are not passed through to consumers, then presumably the pass-through concern is not related to the fixed cost concern. In addition, it is not clear what C/H mean when the Report identifies a “fixed cost” concern with a fixed cost efficiency claim. Presumably, that concern does not mean that the fixed cost savings is a variable cost savings.

¹³ The two other categories of rejection reasons—“Other” and “No Reason Specified”—did not figure into this particular analysis.

tained in C/H Table 5). C/H identify 91 fixed and variable efficiency claims that were clearly rejected by BC and 28 fixed and variable efficiency claims that were clearly rejected by BE.¹⁴

Table 1: Concerns Raised: Rejected Efficiency Claims

	FIXED COST EFFICIENCIES		VARIABLE COST EFFICIENCIES	
	BC STAFF	BE STAFF	BC STAFF	BE STAFF
Verifiability	31%	26%	39%	33%
Merger Specificity	35%	38%	41%	40%
Validity	10%	9%	0%	0%
Out of Market	8%	3%	8%	7%
Fixed Costs	6%	6%	3%	0%
Absence of Pass Through	10%	18%	8%	20%

Source: Malcolm B. Coate and Andrew J. Heimert, Merger Efficiencies at the Federal Trade Commission 1997–2007 (FTC Bureau of Economics Feb. 2009), <http://www.ftc.gov/os/2009/02/0902mergerefficiencies.pdf>, Table 5.

Surprisingly, perhaps, the merger specificity concern was the single most important reason for rejection of the claims, almost equally so for both Bureaus and for both fixed and variable cost claims (35 percent–38 percent for fixed cost claims and 40 percent–41 percent for variable cost claims). (There almost certainly is no statistically significant difference between the two Bureaus on this score.) One might wonder whether the frequency of this concern might be greater in the earlier part of the ten-year period than the later part, as the FTC staff developed an approach to addressing the Guidelines merger-specificity revision. The 1997 revision of the Guidelines replaced the previous requirement that, to be counted, the claimed efficiencies cannot be “reasonably achieved by the parties through other means” to a less restrictive version requiring that the alternative means be ones that could be practically deployed by the firm, not just hypothetically.

The second most-often cited reason for rejection was the staff’s inability to verify the fixed or variable cost savings claims in an apparently convincing way. Again, both Bureaus were equally prone to reject fixed and variable cost claims on these grounds. For fixed cost claims, the rejection rate was 31 percent for BC and 26 percent for BE; the corresponding percentages for variable costs were somewhat higher, 39 percent and 33 percent, respectively. (See Table 1 above.)

Because merger specificity and verifiability dominated the reasons for rejecting fixed or variable cost claims, each of the other three categories (out-of-market efficiencies, fixed-cost efficiencies, and pass-through concerns) is plagued by a very small number of claims for both Bureaus. Consequently, one would not want to rely too heavily on the importance of these reasons for rejection, but pass-through concerns appeared to be more important for BE than BC.¹⁵

We can repeat this same exercise for claims for which the Bureaus registered concern but which neither Bureau either accepted or rejected the claims. Table 2 below is based on the C/H data reported in their Table 4. While this exercise is not likely as probative as that for rejected claims, it nonetheless can serve to highlight what is of most concern to the Bureaus. For fixed cost savings, BC expressed concerns with respect to 100 claims while BE expressed concerns with respect to 86 claims. The corresponding variable cost concerns for each Bureau were 84 and 74, respectively.

¹⁴ The small numbers issues were particularly severe for dynamic and generic efficiency claims and so I do not discuss those here.

¹⁵ As noted above, the category “dynamic” efficiency claims had even more substantial small-number issues and so I have not reported the reasons for rejecting those claims. The numbers were a bit larger for “generic” efficiency claims than for dynamic claims and the most frequent reasons for rejection tracked those for fixed and variable cost claims—merger specificity and verifiability.

In contrast to the rejected claims results, verifiability was the leading reason for concern with respect to the no-decision claims, with merger specificity coming in second. And while verifiability was the leading concern for both fixed and variable cost savings, there was some evidence that there was a seemingly greater concern for variable rather than fixed cost claims.

Table 2: Concerns Raised: No-Decision Efficiency Claims

	FIXED COST EFFICIENCIES		VARIABLE COST EFFICIENCIES		DYNAMIC COST EFFICIENCIES	
	BC STAFF	BE STAFF	BC STAFF	BE STAFF	BC STAFF	BE STAFF
Verifiability	34%	38%	43%	58%	47%	43%
Merger Specificity	21%	20%	32%	26%	35%	30%
Validity	7%	6%	2%	0%	0%	0%
Out of Market	8%	11%	6%	5%	6%	13%
Fixed Costs	12%	15%	2%	3%	0%	9%
Absence of Pass Through	18%	11%	15%	8%	12%	4%

Source: Malcolm B. Coate and Andrew J. Heimert, *Merger Efficiencies at the Federal Trade Commission 1997–2007* (FTC Bureau of Economics Feb. 2009), <http://www.ftc.gov/os/2009/02/0902mergerefficiencies.pdf>, Table 5.

Verifiability accounted for 34 percent of the fixed-cost efficiency concerns of BC, while verifiability accounted for 38 percent of the BE concerns. The corresponding percentages for variable costs were 43 percent and 58 percent. These fixed-variable cost differences may simply reflect the greater scrutiny that might be given to variable costs because of the direct implications of those savings for post-merger pricing.

As with verifiability, merger specificity was of greater concern with respect to variable cost claims than for fixed cost claims. Merger specificity accounted for 32 percent of the BC variable cost concerns and for 26 percent of BE's variable cost concerns. For fixed cost concerns, the corresponding percentages were 21 percent and 20 percent respectively. Pass-through concerns seemed to be equally important for fixed and variable cost claims. For fixed-cost claims, pass-through accounted for 18 percent of the BC concerns and 11 percent of the BE concerns. The corresponding percentages for variable costs are 15 percent and 8 percent.

While concerns with “dynamic” efficiencies were subject to greater small-number problems, verifiability accounted for 47 percent of the BC concerns and 43 percent of the BE concerns—perhaps not too surprising given the typical “fuzziness” of the claims. Still, as noted above, these were the types of efficiency claims most likely to be accepted by both Bureaus. Merger specificity accounted for 35 percent of the BC concerns with dynamic efficiency claims; the corresponding percentage for BE was 30 percent.

Where possible, C/H tallied the magnitude of the efficiency claims made by the parties in the matters reviewed by C/H. On average, the claimed efficiencies amounted to about 8 percent of the value of the transaction. It would have been more useful (if the data were available) to calculate the cost savings as a fraction of total costs to determine whether 8 percent is a “large” efficiency gain. If the gross profit margin were 50 percent, then the cost savings would be about 4 percent of costs. Note that this is much lower than the illustrative 10 percent efficiency gain used in the previously cited Farrell-Shapiro paper.

What does all this suggest for the antitrust practitioner? Few efficiency claims are actually accepted by the Bureaus, and the Bureau memoranda typically spend little space on discussing those claims. I find that disappointing, although that lack of discussion may at least in part be a result of the failure of the merging parties to offer any credible defense of the claimed efficiencies.

Perhaps the extent of the Bureaus' evaluations (and the credibility of the parties' analyses) may increase with the new economic leadership at the agencies.

Nevertheless, efficiencies evidently played a key role in the merger evaluation in several matters, i.e., those matters for which 10 percent or more of the Bureau's memoranda were focused on the efficiency claims. Perhaps the ultimate prescription for practitioners is obvious: If there are no slam-dunks on responding to competitive effects concerns (e.g., entry and repositioning), then the parties need to ensure they have a strong efficiencies story to tell that will outweigh what would otherwise be a post-merger tendency to increase prices.

This is a Report that can be illuminating, but provides such a barrage of results and characterizations that it makes for dense reading, and I did not find the BC versus BE focus as the most obviously helpful way to report these results. A colleague of mine sometimes admonishes me to "admire" an empirical or analytic result that provides insight into an antitrust matter, to consider its full implications for the antitrust assessment, and to spell out those implications. C/H could have spent more time admiring their results.

One important matter that I did not address here was the extent to which concerns were registered by the Bureaus regarding specific types of fixed or variable cost efficiencies, and that alone may make the Report worth reading. For example, verifiability of advertising efficiencies was of much greater concern to both Bureau staffs than was merger specificity.

One might hope that C/H will extend their analysis to explain when the Bureaus choose to expend a relatively greater effort in evaluating the merger claims and in particular to identify the role of efficiencies in "close calls" for matters leading to either enforcement actions or the closing of the investigation. In addition, it would be useful to describe the circumstances in which fixed cost savings were an important component of the investigation, and why. ●

—JRW