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The Future of Merger Control in Technological Markets as Revealed in Recent Merger Cases

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MERGER CONTROL IS BECOMING increasingly global as commercial entities expand their reach worldwide, blurring the boundaries of business activities across national borders. In the 1990s, competition review of mergers underwent the first stage of globalization when numerous countries adopted antitrust enforcement regimes, requiring international entities to file mergers that met a given country's thresholds for review.[1] Global companies had to adapt to filing transactions for review with multiple antitrust agencies and manage multi-jurisdictional approval of their transactions.[2]

However, this progress has not kept up with demand for globalization and global standardization, and today we are facing a new era in which the traditional country-by-country merger control approach has become outdated and fails to address basic principles of merger control.[3] This is particularly true in the technology sector where boundaries of activity are less clear, the activity of technological companies in one territory have effect on the commercial activity in other territories and participants tend to have the same status and business model across countries.

In the beginning of 2022, Microsoft announced its intention to acquire Activision Blizzard. This transaction crystalizes the faults of the current international merger control system. The merger was filed for review with more than a dozen different antitrust agencies representing approximately 40 different jurisdictions. Some of the agencies cleared the transaction, some of them cleared the transaction subject to remedies and some blocked or would have liked to block the merger. However, Microsoft was successful in securing approval from the EU. It then prevented the blocking of the merger in the U.S. and ultimately was able to satisfy the UK that an amended transaction will sufficiently address the previous competition concerns that the UK raised.[4] At the time of writing, the deal is still being discussed and has until October 18 to be consummated—a three-month extension agreed by the parties after the court's decision not to grant a preliminary injunction in the U.S. and Microsoft's suggestion to the UK's CMA to review an amended transaction. Although the size of the Microsoft-Activision Blizzard deal is exceptional, the merger control journey it is going through is by no means exceptional. In fact, multi-jurisdictional review of mergers with contradicting results in different jurisdictions has become quite common in recent years.

This is illustrated by two additional recent merger control cases: the Sabre Corporation and Farelogix Inc. merger, and the Illumina Inc. and Grail LLC merger. These two cases cover very different industries—air travel bookings and medical diagnosis respectively. One was horizontal (or at least potentially horizontal) and the other was vertical. The business models of the merging companies were different, and the competitive concerns were different. Both are different from the gaming industry merger of Microsoft and Activision Blizzard which has both horizontal and vertical aspects.

And yet, these three cases share great similarities. They together demonstrate where merger control is headed. All three mergers were challenged by U.S. antitrust agencies, but the courts ultimately allowed them to proceed. In the cases of Sabre-Farelogix and Illumina-Grail, days later, non-U.S. antitrust agencies, the UK CMA in the Sabre-Farelogix case and the EU Competition Commission in the Illumina-Grail case, blocked the merger. In Microsoft-Activision Blizzard the U.S. court allowed merger notwithstanding the decision of the CMA to block the merger following the European Commission decision to allow the merger subject to behavioral remedies.

To understand the significance of these three cases, I will briefly describe each. From there, I will analyze lessons learned from these cases, and finally, conclude by identifying how coordination among competition authorities can lead to more desirable outcomes to help prevent these inefficiencies.

The Sabre-Farelogix Merger Case

Sabre is a leading global distribution system (GDS) for airline travel booking services. It collects information from airlines and provides travel agencies with a platform to compare prices, schedules, and more. Along with Amadeus and Travelport, Sabre is one of three major GDS providers in the world. Farelogix, on the other hand, is a disruptor in the traditional GDS market. It offers a novel business model that allows airlines to sell customized offers directly to travel agents, bypassing GDS services. This new approach threatens the GDS business model.[5]

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In 2019, Sabre announced it intended to acquire Farelogix for $360 million. The proposed merger raised competition concerns regarding potential competition and attracted antitrust scrutiny from both the U.S. Department of Justice (DOJ) and the UK Competition and Markets Authority (CMA). The DOJ decided to challenge the merger, stating that:

> For many years, Sabre has operated outdated technology and resisted innovation. Farelogix is an innovative technology company that has stepped in to address the needs of airlines and their customers.
>
> . . .
>
> Farelogix has injected much-needed competition and innovation into stagnant booking services markets. Airlines have successfully leveraged their ability to turn to Farelogix to negotiate lower fees with Sabre and the other GDSs, and to reduce their reliance on GDSs for booking services. Farelogix has also pioneered the development of new technology that empowers airlines to make a wider array of offers to travelers who book tickets through travel agencies.[6]

However, the U.S. DOJ failed to convince the Federal Court that the merger raises competitive concerns and Judge Stark, relying on the U.S. Supreme Court's ruling in *American Express*[7] decided that "[a]s a matter of antitrust law, Sabre, a two-sided transaction platform, only competes with other two-sided platforms, but Farelogix only operates on the airline side of Sabre's platform."[8]

In contrast, only two days after the U.S. court decision the CMA decided to block the merger, stating that:

> Farelogix has developed technology that allows airlines to offer more choice to passengers who purchase tickets from travel agents by way of customising their flight experience through, for example, booking specific meals or seats with extra leg room. Sabre does not currently offer this new technology but is investing in developing it. If Sabre were to buy Farelogix it will be unlikely to develop the technology itself. Airlines, and ultimately their passengers, will lose out from both this lack of innovation and the insufficient competition between the remaining companies in the market.
>
> . . .
>
> The CMA considers that Farelogix's continued independence will likely help motivate Sabre to innovate further, giving airlines more choices in connecting to travel agents that will allow tickets and extra products to be sold through travel agents in more innovative ways.[9]

Following the CMA's decision, the parties decided to abandon the transaction. Sabre appealed the CMA's decision on jurisdictional grounds, but the appeal was dismissed.[10]

The Illumina-Grail Merger Case

In September 2020, Illumina announced the acquisition of Grail for $8 billion. Illumina is a leading supplier of DNA sequencing technology used for genetic and genomic analysis, while Grail is a developer of a multi-cancer early detection test that has the potential to revolutionize cancer detection and treatment.[11] Illumina formed Grail in 2016 and then spun it off shortly afterwards, while maintaining a minority stake. Illumina aimed to reacquire Grail. The merger, which was not between competitors, was reviewed by the U.S. Federal Trade Commission (FTC) as a vertical merger. The FTC expressed concerns about foreclosure, as Illumina is a monopoly in next-generation DNA sequencing (NGS) and a critical input for Grail's development and future product. Grail is racing against others to be the first to produce early detection of multi-cancer (MCED).[12]

The FTC decided unanimously on March 2021 to challenge the merger, stating that:

> . . . If this acquisition is consummated, it would likely reduce innovation in this critical area of healthcare, diminish the quality of MCED tests, and make them more expensive.
>
> As the only viable supplier of a critical input, Illumina can raise prices charged to Grail competitors for NGS instruments and consumables; impede Grail competitors' research and development efforts; or refuse or delay executing license agreements that all MCED test developers need to distribute their tests to third-party laboratories. For the specific application at issue in this matter—MCED tests—developers have no choice but to use Illumina NGS instruments and consumables.[13]

The European Commission started its review of the merger in April 2021, applying a new guiding document of the EU Merger Regulation that encouraged referrals of mergers to the EU, even if neither the European Commission nor any of its Member States have jurisdiction over the merger.[14] Hence, the European review of the merger took place while in the U.S. it was already under court review.

Despite the European Commission's ongoing investigation, the deal was consummated in August 2021 after the FTC decided to withdraw from requesting a preliminary injunction. On September 9, 2022, an American Administrative Law Judge (ALJ) allowed the merger, despite the FTC's arguments, mainly because Illumina already had a monopoly in the DNA sequencing market and had an economic interest in Grail. In addition, the lack of close substitutes for Grail's test would make foreclosure unprofitable, without plausible opportunities to divert sales from other customers to Grail. [15]

Just six days after the ALJ's decision the European Commission gave its decision to block the merger stating that Illumina has both the ability and incentive to foreclose access to Grail's rivals who rely on Illumina's NGS to develop their cancer-detection tests.[16]

The FTC and Illumina appealed the decisions of the ALJ in the U.S. and the European Commission respectively. In the U.S., the FTC Commissioners reversed the ALJ decision returning back to the decision to block the merger and the FTC ordered Illumina to divest Grail. In July 2023, the EU fined Illumina €432 million for closing the deal without EU

approval.[17] As this paper is being written both the decision of the European Commission and the decision of the Commissioners of the FTC are under judicial review in the U.S. and Europe.

The Microsoft-Activision Blizzard Merger Case

In January 2022, Microsoft Corporation announced a merger with video game developer Activision Blizzard, Incorporated, for USD$68.7 billion cash.[18] Pundits noted this would be the largest video game-related acquisition in history and is projected to make Microsoft the third largest video game publisher worldwide, surpassing Nintendo Inc.[19]

Microsoft is the fourth largest video game publisher by revenue. It owns and maintains the popular Xbox series of gaming consoles.[20] Activision Blizzard was ranked as the sixth largest video game publisher worldwide in the same year. It develops multiple major video game IPs—most notably, the *Call of Duty* franchise, the world's highest grossing video game franchise.[21] As Microsoft is both a major producer and distributor of video games and their platforms, the proposed merger is therefore both horizontal and vertical.

The merger raised concern among multiple antitrust and competition agencies worldwide. Notable concerns raised included the impact of Microsoft being able to limit the distribution of Activision Blizzard's games to Xbox only (including *Call of Duty*), and the impact the merger would have on the emerging cloud gaming industry. Despite this, a vast number of competition authorities approved the merger—including those in China,[22] Japan,[23] Brazil,[24] South Korea[25] and New Zealand[26]

Three major agencies opposed the merger—the U.S. Federal Trade Commission, the European Commission and the UK Competition and Markets Authority. Each voiced opposition to the merger in February 2023—with the CMA rejecting it in April and the FTC securing an injunction in June. However, on all three fronts the decision would eventually be reversed or softened.

The EC's concern of blocking the *Call of Duty* franchise from competing platforms was met by a concession from Microsoft to secure a 10 year contract to allow Nintendo to distribute *Call of Duty* on their own platforms. The EC allowed the merger on May 15, dismissing fears of console exclusivity.[27]

Next, the FTC would succeed in June 2023 in securing a short-lived temporary injunction by again citing the dangers of console exclusivity of *Call of Duty* as well as the impact on cloud gaming. However, the injunction was overturned less than a month later by the courts, dismissing fears of console exclusivity. Judge Corley noted:

> Microsoft's acquisition of Activision has been described as the largest in tech history. It deserves scrutiny. That scrutiny has paid off: Microsoft has committed in writing, in public, and in court to keep Call of Duty on PlayStation for 10 years on parity with Xbox. It made an agreement with Nintendo to bring Call of Duty to Switch. And it entered several agreements to for the first time bring Activision's content to several cloud gaming services. This Court's responsibility in this case is narrow. It is to decide if, notwithstanding these current circumstances, the merger should be halted—perhaps even terminated—pending resolution of the FTC administrative action. For the reasons explained, the Court finds the FTC has not shown a likelihood it will prevail on its claim this particular vertical merger in this specific industry may substantially lessen competition. To the contrary, the record evidence points to more consumer access to Call of Duty and other Activision content. The motion for a preliminary injunction is therefore DENIED.[28]

The FTC appealed the ruling, which was rejected by the Ninth Circuit and an injunction request to the U.S. Supreme Court was declined[29] and the FTC withdrew its challenge to the case.[30]

The UK CMA formally blocked the merger in late April due to dangers posed to the cloud gaming market. However, on July 11 (the same day as the rejection of the U.S. injunction), the CMA requested the Competition Appeal Tribunal to stay the appeal litigation. After discussion with Microsoft, the CMA announced that the August 2023 amended transaction resolved its major concerns.[31]

With talks remaining ongoing and the Australian authority still considering the case,[32] the Microsoft-Activision Blizzard merger remains uncertain.

The Similarities Between the Three Cases

Despite dealing with three separate and unrelated markets, and differing concerns about competition, there are notable similarities in how the three merger cases were approached. In all cases, antitrust agencies presented unconventional theories of harm in their efforts to block the mergers. In the Sabre-Farelogix case, the theory was a "killer acquisition" of a potential competitor, while in the Illumina-Grail case and the Microsoft-Activision Blizzard case, it was the theory of vertical foreclosure of competitors to the acquired entity.[33]

In the first two cases, the antitrust agencies agreed on the competition concerns and believed the mergers should be blocked. The arguments for challenging the mergers were nearly identical on both sides of the Atlantic. However, in the end, the mergers were approved by the court in the U.S. but blocked in the UK and Europe respectively. In the Microsoft-Activision Blizzard Case the U.S., EU and UK agencies agreed on the relevant competitive concerns and differed only on whether the remedies offered will resolve the concern.

Finally, all cases involved technological markets with a heavy emphasis on innovation, research, and development. As a result, all cases are addressing markets with a significant level of uncertainty, including questions about the evolution of the markets, the success of products, and reasonable business models, which have no clear answers.

The Lessons on the Direction of Merger Review Cases in Technological Markets

Based on the three recent cases, some conclusions can be drawn:

The first is that the American courts are reluctant to broaden the causes or grounds for blocking mergers. They are also reluctant to reduce the high burden that is required today from the antitrust agencies in order to succeed in their challenge of a merger.[34] This is a continuing tendency. For the last four decades courts in the U.S. have been willing to block only horizontal mergers and in most cases this was done in markets with very few participants to begin with. The Illumina-Grail case was the second attempt of American antitrust agencies in the last few years to block a vertical merger. The previous attempt took place in 2016-2018 when the DOJ challenged the merger of AT&T and Time Warner. However, that attempt also ended up in the DOJ losing the case and the merger being approved.[35] The Microsoft-Activision Blizzard was a third attempt to block a vertical merger, which also did not succeed.

The Sabre-Farelogix case was an attempt to block a merger of potential competitors. This is also the second attempt in the last few years to block a merger due to concern about potential competition. The previous attempt was done by the FTC in the merger of Steris Corporation with Synergy Health plc in 2015. In that case the FTC attempted to block a merger in the sterilization of products services market. The FTC viewed Synergy as a competitor that can potentially bring a new method for sterilization of products that will compete with the local incumbents. However, the attempt to block the merger was not successful and the merger was allowed by the ALJ. [36]

All three cases that were described above demonstrate the tendency of the U.S. courts to adopt a conservative approach to antitrust. Although the three recent cases are not enough to draw definite conclusions on the attitude of the courts, it seems that the courts in the U.S. are not prepared quite yet to block a vertical merger nor a merger between potential competitors. The view that courts in the U.S. in the last few decades tend to adopt a conservative approach and are reluctant to intervene in the markets is well supported.[37]

To the benefit of the conservative approach, it is worth emphasizing that in technological markets in which research and developments are key elements, the ability to foresee clearly where the market is heading is limited and therefore one can understand a more cautious approach to regulatory market intervention.

Although the objection of the DOJ and the FTC to the mergers was not based on the traditional horizontal theory of harm, in both cases the theory of harm that was brought before the court was not novel and was not unestablished in the theory of antitrust. The existence of "killer acquisition" phenomena is today well established both in theory and in practice.[38] The notion that a company can foreclose its competitors by merging vertically with its supplier or its client has existed for many decades.[39] And yet the U.S. courts are still willing to block only horizontal mergers in markets where the competitors are few.

The second lesson is that the European Commission, the UK's CMA and the U.S. antitrust agencies appear prepared and willing to try to block mergers in technological markets even if it requires adopting a less conventional approach and taking more risks. The European and UK analysis of the mergers at hand are well aligned with the approach of the American antitrust agencies. They both identified the need to be less lenient towards mergers and are willing to take more risks and challenge mergers that were not challenged before. [40]

The Sabre-Farelogix merger and the Illumina-Grail mergers were analyzed in a similar manner and with a similar outcome on both sides of the Atlantic Ocean. One may wonder if the change in leadership of the American agencies following the 2020 elections is the cause of the shift in American antitrust agencies' approach. However, it seems that the change in approach is not just a change in the direction of the political wind but a deeper change in approach towards mergers as a whole, and specifically towards mergers in technological markets. The Sabre—Farelogix investigation and the DOJ's decision to challenge the merger took place under the DOJ's previous leadership. The FTC's decision to challenge the merger of Illumina and Grail was decided unanimously by all commissioners of the FTC including the more conservative ones. These two facts demonstrate that the change in the approach towards mergers is common to the European/ UK competition agencies and to the U.S. antitrust agencies.

It is therefore fair to conclude that the difference in approach doesn't rest between the two sides of the Atlantic Ocean but between the American judicial system and its own antitrust and competition agencies.

The third lesson relates to jurisdiction and nexus. Mega-mergers that occurred in recent decades brought many antitrust agencies to the conclusion that merger filing thresholds, as they are currently designed, do not capture the most crucial mergers in the technological sector and therefore they are unable to block mergers that may raise competition concerns.[41] A few steps were taken by different legislators and agencies in order to expand their ability to review mergers that do not meet the revenue thresholds.[42] This enhanced the blurring of boundaries of jurisdiction and nexus issues. In both the Sabre-Farelogix case and the Illumina-Grail case the parties to the merger raised legal doubts regarding the authority of the CMA and the European Commission respectively to review the mergers at hand and decide them. In the Illumina-Grail case it was not disputed that the European Commission took a step to expand its authority over mergers of entities that don't necessarily have present activity in Europe. The courts in both cases were unwilling to intervene in the decision of the competition agencies regarding their authority to review the

merger and backed the decision of the agency. The ability and incentive of the competition agencies to expand their reach to mergers in the technological sectors that don't have traditional nexus to their jurisdiction, makes the boundaries of merger review murkier than ever before and contributes to the duplication of merger reviews.

The fourth insight is that procedure does matter. In the U.S., the antitrust agencies have no authority to block a merger. In some cases, their willingness to challenge the merger in court makes the parties withdraw, but it is only the courts that may block a merger. Hence, the court is the one that determines the content of the antitrust laws in the U.S. and accordingly holds the ability to navigate the direction in which antitrust in the U.S. is heading.

In Europe and the UK, like most other regimes there is a professional agency within the administration that analyzes and decides cases. Judicial review is an essential component, and many major antitrust cases get to court. But there is a significant difference between a judicial review of an administrative decision and an administrative decision that is taken by the court. When a court needs to take the administrative decision of whether to block a merger or not it will apply its own discretion (as it should). When the duty of the courts is limited to reviewing the administrative decision, the discretion of the court is more limited.

There is also the issue of who holds the burden of proof in court. In the U.S. the burden lies with the antitrust agencies. They need to convince the court to intervene in the market and block the merger. The parties to the merger need only shed the doubts or demonstrate the loopholes in the antitrust agencies' case.[43] In Europe and the UK, the appealing side is the parties to the merger. In many of the regimes these administrative decisions enjoy a preliminary presumption of propriety, and although such presumption may be refuted, this changes the balance of the discussion.

This change in procedure has a tremendous effect on the outcome and on the ability to adopt a flexible and less conservative approach.

The fifth and last insight from these three cases is that the merger control system doesn't function well when it comes to global mergers. The mere fact that different jurisdictions have reached different outcomes on mergers that are global in their essence and have essentially the same competition and economic effects in all major economies is by itself an undesired outcome.[44]

This is not to say that all antitrust agencies should agree on all merger cases all the time. There are cases where the markets look substantially different in different countries. That by itself may draw different conclusions. And yes—from time to time we can even accept and expect a different outcome over the same merger in different jurisdictions due to differences in ideology and approach. But this shouldn't happen too frequently.

Antitrust rules should be transparent, clear and predictable, and the outcome should be based on professional analysis, economic theory and legal rules that are commonly accepted. We demonstrated the problem on three specific mergers that were reviewed each by several different antitrust agencies. In many global mergers the situation is complex. Contradicting decisions among antitrust agencies is a heavy weight on the ability to predict the outcome of the merger review process. This adds a substantial amount of uncertainty to the parties to the merger, to the business community and to the public. Although this paper concentrates on three merger cases, these three cases are by no means the only cases in the last few years in which different merger reviews by different jurisdictions brought different outcomes. [45]

The Microsoft-Activision Blizzard case is a notable inversion of the above—where we see that discoordination between agencies allowed for Microsoft to have greater success in appealing decisions by citing approvals from other jurisdictions. While it cannot be proven that the UK softened and began negotiations because of in part the U.S.' decision being reversed, it is notable it happened immediately after and on the heels of the EC's reversal, which was cited as a criticism of its own ruling three weeks previous.

In this circumstance, the loser can be said to be the agencies—which have their decision-making authority eroded. Appeals become more and more powerful and approvals by some jurisdictions can be cited as grounds for approval in other jurisdictions,[46] while the market which each agency control an ever shrinking proportion of the financial considerations of the merging entities in deciding to go through with the merger. In all of these situations, we see that this discoordination is costly and undesirable for agencies, and parties alike.

How can we start repairing this situation? This is the topic of the next section.

How Can We Improve the Multinational Merger Control System?

As discussed, the antitrust agencies appear to be reasonably aligned in their analysis of mergers in technological markets, allowing for deeper cooperation in achieving joint outcomes. In most of the cases of mergers in the technological markets the analysis is quite similar across antitrust agencies.

There is already substantial cooperation between agencies on mergers under their jurisdiction, with discussions between agencies on mergers filed for review in multiple jurisdictions being a common practice. The sharing of information and evidence collected by agencies is encouraged by the International Competition Network and the Competition Commission in the OECD and has become increasingly frequent.[47] Further, the FTC in 2011 released a best practices statement outlining the benefits and procedures for cooperation between the U.S. and EU in merger investigations, arguing such cooperation is beneficial for both the agencies and parties under review[48]

Throughout the years agencies have been able to enhance their cooperation through different practices and procedures.

They agreed on recommended practices for merger notification and review procedures[49] back at the beginning of the millennium. As an outcome of the intensive cooperation among competition agencies new and valuable procedures were created.

One prominent outcome of the ongoing cooperation was the creation of a waiver procedure in multi-jurisdictional mergers according to which parties to a merger are requested voluntarily to waive confidentiality protections vis-à-vis the agency that originally received the merging party's confidential information and to allow agencies to share information regarding the merger. This allows for a more efficient and expedited review and therefore parties usually grant such waivers. The sharing of information is a cornerstone in the cooperation of agencies in merger review cases and has become standard practice in multi-jurisdictional mergers and a very effective one.[50] Sharing confidential information pursuant to a waiver is the most frequent method of sharing confidential information between competition agencies. The main advantage of waivers is that it is voluntary. Parties are willing to waive their confidentiality because they recognize the advantages of having a more expedited and coordinated review for them. For agencies the granting of waivers may help to avoid the need to use official channels in formal cooperation procedures, and the consequent delays this can entail.[51]

Yet the sharing of information between agencies is only one aspect in which cooperation can be beneficial. There are many other aspects in which competition agencies can enhance their cooperation to the benefit of all, such as cooperation to align timetables for merger review; cooperation in remedy design and sharing implementation analysis; discussing theories of harms; and support in court review proceedings.[52]

It is time to take the current form of cooperation one step further. As agencies are facing the challenges of reviewing mergers in the technological areas and as they struggle to develop new theories of harm and to understand the complexity of new business models, this is a critical period offering substantial advantage to do so as a joint team.

Multi-jurisdictional mergers in technological markets should be reviewed jointly by one team working on behalf of and composed of members of each agency involved. According to the same principle that created the practice of waivers that allowed sharing of confidential information, agencies can create a broader joint review of multi-jurisdictional mergers. This would go beyond current coordination and information sharing practices that exist today. The joint team will collect the required data on behalf of all involved agencies and will create one analysis of the merger considering different possible approaches. At the end of the review the team will publish one joint decision on behalf of all agencies that are involved in the merger review.

The voluntary approach towards the parties to the merger that was adopted by the agencies in connection with sharing of information in merger review processes can be adopted in the creation of global review teams too. The parties to the merger will be requested to give their voluntary consent to the review by the global review team, as per the precedent set in the OECD/ICN waiver process outlined earlier.

For the agencies specifically involved in such a joint review team there will also be a voluntary dimension. The voluntary dimension can be achieved either by allowing agencies to voluntarily join the global review team or by allowing an involved agency to break away from the joint global decision if the decision doesn't consider specific circumstances of that jurisdiction such as substantially different market shares of the parties, different consumer habits, etc. Otherwise, agencies will be expected to follow the joint team's decision and to promote this decision in accordance with the relevant procedure in their own jurisdiction.

The suggested model is, therefore, a "soft" model based on the willingness of competition agencies to cooperate and on the voluntary consent of the parties. Both competition agencies and merging parties may learn that such a voluntary path saves them resources, confusion, uncertainty and creates better informed and better analyzed decisions. The proof of such a model will need to be in the pudding. If agencies will too frequently decide to break away from the decision of the joint merger review team, it will show that the new model has no advantage. However, if the general custom is that agencies respect the joint merger review decision and are willing to defend it in their courts, it will strengthen the model and its reputation.

The main advantage of having a "soft" voluntary model is that it requires no legislation, and it avoids sovereignty and international law questions.

This suggested change in the way multi-jurisdictional mergers will be reviewed comes with a few difficulties that need to be addressed. The two major obstacles in creating a global merger review regime are firstly, the difference in procedure among different jurisdictions and secondly, the need to create a high level of trust among agencies.

As to procedure, antitrust agencies made a substantial step in standardizing the procedural aspects of their work by agreeing on the International Competition Network Framework on Competition Agency Procedures (ICN-CAP 2019).[53] This framework, which was announced and presented in the spring of 2019, was joined by more than 70 competition and antitrust agencies around the globe. The framework sets due process standards that became the global benchmark for appropriate competition law enforcement.[54] Hence, the ICN-CAP can create the baseline for mutual and joint work in reviewing mergers in technological markets.

In addition, the parties to the merger will be requested to give their voluntary consent to the review by the global review team, as per the precedent set in the OECD/ICN waiver process outlined earlier. This joint global team will work under transparent procedural rules and the consent of the parties will include consent to the procedural rules that they abide by.

This model presents significant benefits in terms of efficiency, greatly reducing procedural burden and costs for both sides. Parties to multi-jurisdictional mergers will have an incentive to voluntarily agree to the joint review because it will further expedite the review process and will save effort in interacting with multiple agencies, and most importantly, will reduce the risk of contradicting decisions in different jurisdictions.

In the current situation every jurisdiction that is involved in reviewing a merger holds a veto right over the merger. It needs only one blocking jurisdiction to create a hurdle for the merger. The recent Microsoft—Activision Blizzard merger case demonstrates this clearly. Parties can get the consent of all agencies but one and they will still be unable to consummate their deal. This is naturally undesirable for the firm but also for each of the other regulators involved, who have the authority of their own decision-making powers eroded by other jurisdictions. To avoid such an outcome, the parties have a high incentive to commit their merger to review by a joint team of all agencies.

Trust is more difficult to achieve, as it is built gradually through cases of successful cooperation. Agencies should trust the joint global team to do a professional and comprehensive review that will allow the agencies to litigate their decision in court taking into account that some courts require a high threshold of evidence from the relevant agencies.

Alongside these two obstacles there are clear advantages for creating a review by a joint multi-jurisdictional team in mergers in the technological sector. First and most important, it will reduce the number of cases with conflicting decisions from different agencies. In addition, it allows the agencies to join forces in a burdensome and challenging merger review. Further, it promotes the creation of one consistent approach and case law towards mergers in the technological sector, which is especially pertinent as legal theory outlining technological economic regulation is still growing. Finally, it creates a more resilient decision which will make the decision less vulnerable to judicial intervention and overruling. The pros of such a system will outweigh the cons.

Conclusion

As I have shown, discoordination among competition and merger control authorities across national boundaries carries with it significant disadvantages for both regulators and the regulated. The cases that were discussed above illustrate that conflicting decisions for mergers with interests across national boundaries can significantly harm businesses and can create substantial difficulties for agencies. The current state of things gives each country's agency veto power on the one hand but on the other hand a result in other jurisdictions can be used to sway and force a reversal of decisions elsewhere.[55]

As technological markets continue to grow and continue to blur national boundaries, competition and merger control agencies will be increasingly tested and their authority eroded in the absence of large-scale cooperation. In the face of significant ideological and procedural consensus on the importance of benefits to cooperation and information sharing in merger review, the natural next step is to move towards full joint review of multi-jurisdictional merger cases. The sheer procedural and cost benefits for such cooperation is immense, for all parties involved. ■

[1] Today there are more than 140 countries that have merger control rules, most of which require pre closing notification of the merger. In 1989 when the European Union adopted the EU Merger Regulation there were only a handful of countries with effective merger control regime.

[2] OECD, Recommendation of the OECD Council on Merger Review (2005), https://www.oecd.org/daf/competition/ReportonExperienceswithMergerReviewRecommendation.pdf; Jenny Frederic, *Substantive Convergence in Merger Control: An Assessment*, 1 Revue des Droits de la Concurrence at 21-41 (2015), https://ssrn.com/abstract=2869098.

[3] Nicholas Levy, Alexander Waksman, and Lanto Sheridan, *Global merger control—where to now?* 8 Journal of Antitrust Enforcement at 319–334. https://doi.org/10.1093/jaenfo/jnz026.

[4] At the time of this paper the CMA is still conducting a consultation regarding the amended Microsoft - Activision Blizzard transaction and no final approval of the CMA has been secured. Nevertheless the CMA expressed the view that the amended transaction that was filed to it in August 2023 resolves the major concerns it previously had. See: UK Competition and Market Authority, *New Microsoft/Activision Deal Addresses Previous CMA Concerns in Cloud Gaming* (2023), https://www.gov.uk/government/news/new-microsoft-activision-deal-addresses-previous-cma-concerns-in-cloud-gaming

[5] United States v. Sabre Corporation, 1:99-mc-09999, https://www.justice.gov/opa/press-release/file/1196816/download.

[6] Press Release, U.S. Dep't of Justice, *Justice Department Sues to Block Sabre's Acquisition of Farelogix* (Aug. 20, 2019), https://www.justice.gov/opa/pr/justice-department-sues-block-sabres-acquisition-farelogix.

[7] Ohio v. American Express Co., 585 U.S. ___ (2018)

[8] Opinion, U.S. v. Sabre Corp., et al., 1:19-cv-01548-LPS, April 8, 2020

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[33] To be clear, the ability to foreclose competitors through vertical integration is well established in the literature of antitrust and examples of such incidents are well known. So is the theory of potential competition and the motivation of incumbents to reduce the threat of potential competition by acquiring the new entrant. But in the last four decades no vertical integration was blocked in the U.S. and no merger was stopped because of "killer acquisition" concerns.

[34] See Kostis Hatzitaskos, Brad Howells and Aviv Nevo, *A Tale of Two Sides: Sabre/Farelogix in the United States and the UK,* 12 Journal of European Competition Law & Practice (2021), at 698–704.

[35] The Federal Court of Appeal approved the first instance's decision.

[36] Press Release, Federal Trade Comm'n, FTC Challenges Merger of Companies That Provide Sterilization Services to Manufacturers (May 29, 2015), https://www.ftc.gov/news-events/news/press-releases/2015/05/ftc-challenges-merger-companies-provide-sterilization-services-manufacturers, and FTC Dismisses Complaint Against Steris and Synergy (Oct. 30, 2015), https://www.ftc.gov/news-events/news/press-releases/2015/10/ftc-dismisses-complaint-against-steris-synergy.

[37] See AMG Capital Management v. Federal Trade Commission and Ohio v. American Express Co., 585 U.S. ___ (2018). See also Carl Shapiro, *Protecting Competition in the American Economy: Merger Control, Tech Titans, Labor Markets*,33 Journal of Economic Perspectives (2019) at 79-82; Jonathan B. Baker, *Taking the Error out of Error Cost Analysis: What's Wrong with Antitrust's Right,* 80 Antitrust Law Journal (2015) at 1-38 ; Gregory J. Werden and Luke M. Froeb, *Antitrust and Tech: Europe and the United States Differ, and it Matters,* Competition Policy International Antitrust Chronicle (2019), https://www.competitionpolicyinternational.com/wp-content/uploads/2019/10/CPI-Werden-Froeb.pdf.

[38] Colleen Cunningham, Florian Ederer, and Song Ma, *Killer Acquisitions*, 129 the Journal of Political Economy (2021) at 649–702.

[39] See the U.S. Department of Justice and the Federal Trade Commission's joint Vertical Merger Guidelines of June 30, 2020. In September 2021 the FTC withdrew from these joint merger guidelines. But this withdrawal is not related to the mutual recognition that foreclosure is a major theory of harm in vertical integration.

[40] See for example, Andrea Coscelli, A New Route Forward for Regulating Digital Markets,BeesleyLecture(2021)https://www.gov.uk/government/speeches/beesley-lecture-a-new-route-forward-for-regulating-digital-markets.

[41] A summary of the discussion of these concerns appear in OECD, Start-ups, Killer Acquisitions and Merger Control (2020), https://www.oecd.org/daf/competition/start-ups-killer-acquisitions-and-merger-control-2020.pdf, and Summary of Discussion of the Roundtable on Start-ups, Killer Acquisitions and Merger Control (2020), https://one.oecd.org/document/DAF/COMP/M(2020)1/ANN3/FINAL/en/pdf.

[42] See for example Germany in OECD, Start-ups, Killer Acquisitions and Merger Control—Note by Germany (2020), https://one.oecd.org/document/DAF/COMP/WD(2020)20/en/pdf; Korea in OECD, Start-ups, Killer Acquisitions and Merger Control (2020)—Note by Korea https://one.oecd.org/document/DAF/COMP/WD(2020)19/en/pdf; and EU in the amended Article 22 of the EU Merger Regulation (EUMR) that was implied in the Illumina - Grail merger discussed above.

[43] The burden of proof element had a major part in the decision of the U.S. court in the Sabre-Farelogix case. See Kostis Hatzitaskos, Brad Howells, Aviv Nevo, *A Tale of Two Sides: Sabre/Farelogix in the United States and the UK*. 12 Journal of European Competition Law and Practice, at 698–704.

[44] Edoardo Leozappa, *Illumina's Acquisition of GRAIL: A Comparison of the Outcomes,* Fordham Journal of Corporate and Financial Law (2022) https://news.law.fordham.edu/jcfl/2022/11/18/illuminas-acquisition-of-grail-a-comparison-of-the-outcomes.

[45] See for example the merger of Google and Fitbit that was reviewed differently by the European Competition Commission, the South African Competition Commission and the Australian ACCC while allowed to be consummated by the DOJ in the U.S. without any remedies.

[46] See for example the attempt of Sabre's attorneys to use the U.S. court decision in order to influence the judicial decision in the UK: Sabre

Corporation, *Sabre statement on the U.S. District Court decision in the Farelogix acquisition case* (2020), https://www.sabre.com/insights/releases/sabre-statement-on-the-u-s-district-court-decision-in-the-farelogix-acquisition-case/, and Sean O'Neill, *U.S. Judge Rules in Favor of Sabre-Farelogix Acquisition Over Justice Department's Antitrust Objections* (2020), https://finance.yahoo.com/news/u-judge-rules-favor-sabre-123028189.html, and as discussed above the proximity in time between the U.S. court decision on the Microsoft-Activision case and the opening of negotiation between the CMA and Microsoft.

[47] OECD/ICN, OECD/ICN Report on International Co-operation in Competition Enforcement (2021), https://www.oecd.org/competition/oecd-icn-report-on-international-cooperation-in-competition-enforcement-2021.htm.

[48] Federal Trade Comm'n, Best Practices on Cooperation in Merger Investigations (2011), https://www.ftc.gov/system/files/111014eumerger.pdf.

[49] ICN, *Recommended Practices for Merger Notification & Review Procedures* (2017), https://www.internationalcompetitionnetwork.org/portfolio/merger-np-recommended-practices.

[50] OECD/ICN, OECD/ICN REPORT ON INTERNATIONAL CO-OPERATION IN COMPETITION ENFORCEMENT (2021), https://www.internationalcompetitionnetwork.org/wp-content/uploads/2021/01/OECD-ICN-Report-on-International-Co-operation-in-Competition-Enforcement.pdf

[51] *Id*., 108 and 171

[52] *Id*., 120

[53] ICN, *ICN Framework for Competition Agency Procedures (CAP)* (2019), https://www.internationalcompetitionnetwork.org/frameworks/competition-agency-procedures. The discussion on interagency enforcement cooperation p. 33-36.

[54] For a more detailed description of the principles included in the ICN-CAP and how it grew to be the consensus among competition and antitrust agencies see Eddy De Smijter and Filip Kubik, *ICN Framework for Competition Agency Procedures (ICN CAP)* in THE INTERNATIONAL COMPETITION NETWORK AT TWENTY ORIGIN, ACCOMPLISHMENTS AND ASPIRATIONS *(2022),* edited by Paul Lugard and Dave Anderson.

[55] Sabre statement*, supra* note 46.