

## EDITOR'S NOTE

# The Puzzle of M&A

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**O**UR COVER PHOTO SHOWS TWO puzzle pieces that are about to interlock and thus become greater than the sum of each individual piece. Likewise, a successful M&A transaction puts together two companies or sets of assets that become greater together, through synergies and efficiencies, new ways to commercialize R&D, and the like. Of course, it's important to pick puzzle pieces (or M&A targets) that are a good fit—forcing puzzle pieces or ill-matched companies together is not a game plan for success.

But some M&A transactions can have anticompetitive effects, and we need a framework—the corners and other edge pieces of the puzzle, as it were—to help us both form and see the overall picture. Over the last few decades, the U.S. Department of Justice and the Federal Trade Commission have used merger guidelines (and commentary on those guidelines) to provide this framework, and in December 2023 the Agencies issued a new edition.<sup>1</sup>

Our lead article on the mergers puzzle is a conversation with Professors Herbert Hovenkamp and Tim Wu, led by *Antitrust* editorial board member James Keyte, on the 2023 Merger Guidelines and merger law more generally. Wu and Hovenkamp agree that merger inquiries should focus on harm to the competitive process, and neither is overly satisfied with an excessively quantitative approach. They disagree on some of the ways in which the 2023 Guidelines treat precedent. They agree that there has been underenforcement in the past decade, but Hovenkamp asks whether that was a problem within the 2010 Guidelines or simply a failure to follow through on the Guidelines' principles. The conversation was so fascinating that we let it exceed our usual time (and therefore page) limit. You will want to read every word!

Mark Glick, Robert H. Lande, and Darren Bush have a completely different take on the 2023 Merger Guidelines—and their failure to reject the “efficiencies” defense or

rebuttal. The Guidelines acknowledge that merging parties often argue that a merger will create efficiencies that will in turn prevent harm to competition—which the Agencies will not credit unless the efficiencies are merger-specific and verifiable, prevent a reduction of competition in the relevant market, and do not reduce competition in another market. Glick, Lande, and Bush argue that there is no justification for *ever* taking efficiencies into account in merger reviews and adjudication. They explore the text of Section 7 and its legislative history, as well as the Supreme Court's jurisprudence, and find no support for even a narrowly drawn efficiencies defense. And in lower courts, they find judicial enthusiasm for the defense theoretically, but with little practical value—the few courts that have both upheld an efficiencies rebuttal and found significant efficiencies have not found those efficiencies to be dispositive.

Of course, mergers can require notifications in other jurisdictions as well. London-based attorneys Natalie Greenwood and Gavin Robert walk us through the notification process at the United Kingdom's Competition & Markets Authority (“CMA”), including recent legislative changes to the process. They also explain some of the substantive principles that the CMA has applied in recent cases, the CMA's aggressive stance on jurisdiction, and the CMA's approach to remedies.

It's hard to decide *which* of his many titles to use in introducing Tom Campbell, because his lengthy career has been a like a grand tour of legislative, executive, and academic institutions. He brings this vast experience to bear in presenting the case for the consumer welfare standard in antitrust. Campbell explains what consumer welfare is (and how it differs from total welfare) and why, in his view, it is superior to non-economic or “neo-Brandeisian” alternatives.

James Keyte, Minjae Song, and Zening Li provide antitrust lawyers an extremely useful guide to generative AI (“GAI”). First, they drill down into the key inputs in the GAI “stack,” so that we can better understand where any potential competition concerns might arise. Then they explain the policy concerns expressed by enforcers and other stakeholders. Next, they walk through the antitrust analysis under U.S. law. They conclude that antitrust enforcers in the U.S. will have a more difficult time than EU and UK authorities—U.S. enforcers may have a greater burden of showing actual anticompetitive effects under the consumer welfare model.

Christie Boyden tackles the problem of pricing algorithms and the role of antitrust law. She finds very limited precedent (basically holding that no antitrust claim will survive if the competitive harm is purely theoretical), but she notes that federal and state antitrust enforcers filed three complaints in 2023 that, if pursued to substantive ruling, will provide guidance for the law under the Sherman Act (both Sections 1 and 2) and the FTC Act.

Clémence d'Almeida, Julia Molestina, and Charles Pomiès return us to the topic of mergers, but not in a way you

<sup>1</sup> U.S. DEP'T OF JUST. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (2023), <https://www.justice.gov/d9/2023-12/2023%20Merger%20Guidelines.pdf>.

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might expect. They delve into the European Union's Foreign Subsidies Regulation and explain how it will further complicate M&A transactions and merger review in the EU. Our U.S. readers, even if they have no EU transactions, may find this article interesting as we await the FTC's publication of its own foreign subsidies reporting requirements.

Finally, Spencer Weber Waller brings us the third in a series of articles on antitrust in pop culture. He expresses trepidation about writing this third article, because in popular culture, the third installment often signals a decline in quality. But with a survey that includes Willie Wonka, Gary Cooper, Lauren Bacall, Alec Guinness, Portuguese aperitifs, and Austro-Polish vodkas, as well as cartel coffee shops from

Bali to Hoboken, we are confident that Waller has not (to use a pop-culture expression) "jumped the shark."<sup>2</sup>

Returning to our opening metaphor, antitrust law is a puzzle, but one where the pieces can change shape over time, new pieces can materialize, and the picture on the box is out of focus—and also changing. But as practicing lawyers, we still need to put together as many pieces as possible to form at least part of a picture. We hope that this issue of *Antitrust* helps make antitrust law a little less puzzling. ■

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<sup>2</sup> See *Jumping the Shark*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Jumping\\_the\\_shark](https://en.wikipedia.org/wiki/Jumping_the_shark).