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Optimal Remedies for Anticompetitive Mergers

BY KEN HEYER

THERE IS A LONG-RUNNING DEBATE among antitrust attorneys and economists over how best to remedy anticompetitive mergers. The debate, in large part, revolves around whether it is better to have a remedy that is "structural" or one that is "behavioral." That debate has been revived recently in the wake of a number of cases where the Antitrust Division has negotiated a behavioral remedy, and also by the Antitrust Division's 2011 issuance of a revised Policy Guide to Merger Remedies.[1]

This article discusses significant issues raised by this debate. First, I posit that the "structural vs. behavioral" remedy debate asks the wrong question. As a consequence, participants have failed to provide an especially helpful framework for analysis and decision-making. As explained below, economically efficient decisions for dealing with anticompetitive mergers cannot be made based on whether a structural remedy is, in the abstract, "better" than a behavioral one, or vice-versa. While decision-makers, practitioners, and economists often speak as if the default should be a structural remedy in any merger that raises competition issues, this tendency obscures the fact that (1) structural remedies are themselves inherently flawed; (2) the limited empirical evidence we have suggests that they have often failed to prevent competitive harm; and (3) other alternatives will make more economic sense in many contexts. Perhaps even more important is the fact that "structural" and "behavioral" remedies are not the competition authority's only options, and frequently they will not be the competition authority's two most attractive alternatives.

Second, recognizing that the identification of an optimal remedy is not susceptible to a one-size-fits-all approach, I evaluate the relative merits of the alternatives available to the competition agencies. I explain that although the choice of an optimal remedy cannot be made by adhering to simple "bright line" rules, decisions can still be tethered to sound economic principles.

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The Problem with Defaulting to Structural Remedies

When a competition agency evaluates how to respond to an anticompetitive merger, there are reasons why a structural remedy may be superior to a behavioral remedy. These include (at least) the following.

First, government bureaucrats are not trained, or especially well-equipped, to devise and implement restrictions on firm behavior that, even in a static world, will achieve efficient outcomes. Allocating to an expert regulatory agency (where one already exists) the task of monitoring, policing, and arbitrating disputes concerning post-merger behavior does not solve the problem. While doing so might be viewed as better than having that task be handled by generalist antitrust officials, in our free market economic system we appropriately have a strong preference that competition in the marketplace generate behavior and outcomes, rather than expert regulators.

Second, a structural remedy may also be superior because monitoring and policing firm behavior imposes additional costs on the agencies and courts when—as is true in virtually all cases warranting a remedy—the firm would prefer not to abide by it.

Third, in dynamic markets subject to changing technologies, costs, and demand conditions, imposing restrictions on a firm's conduct risks reducing, rather than enhancing, economic efficiency. It is not enough to say that firms can petition for termination or modification of decrees that are no longer serving their purpose. Doing so takes time, usually requires evidence of inefficiencies already incurred, and may not prove persuasive to regulators and courts even if true.

Structural remedies therefore have at least one clear advantage over conduct-oriented ones: after implementing a structural remedy, neither the government nor the courts need to monitor and police the ongoing behavior of the merged firm. For example, where the structural remedy takes the form of divesting a plant and/or other assets deemed sufficient to enable ongoing competition "at least as great as what would have taken place but for the merger," regulators can stand back and permit the private marketplace to take it from there.

Structural remedies, however, are themselves inherently risky and provide no guarantee of success. One can never be certain how competitively the to-be-divested assets will

perform in the hands of a third party. Indeed, studies performed by competition authorities around the world have found that these do not always perform as well as hoped. A recent survey of published studies reviewing the effectiveness of merger control finds that horizontal mergers subject to a divestiture remedy resulted in significant average price increases.[2] One reason for this is that *no* set of asset divestitures, short of literally divesting the acquiring or the acquired firm in its entirety (which is equivalent to blocking the proposed merger altogether), can guarantee the same degree of "but for" competition. Moreover, no partial divestiture can provide the divestee with control of a standalone business unit whose past performance has truly passed a "market test" of effectiveness and viability. Any subset of a firm's entire collection of assets may well have benefited from the tangible or intangible scale and scope economies generated by the prior firm's control over scarce and complementary labor or capital, including assets as intangible as "knowledge and expertise." In brief, in the hands of a divestee, divested assets may well create an entirely different competitive dynamic relative to the "but for world."[3]

Structural remedies, nevertheless, are often the most desirable response by competition authorities to an anticompetitive merger—particularly to the extent that they allow the merged firm to capture merger-specific efficiencies. And a structural remedy seems likely to be preferable to a behavioral remedy when both are feasible, all else being equal.

The problem, however, is that all else seldom is equal. In the vast majority of cases where competition authorities are seriously considering a behavioral remedy, they are likely doing so precisely because a structural remedy (however desirable one might be "in theory") is an infeasible option. A structural remedy may be infeasible—by which I mean "clearly very inefficient as compared with other alternatives"—for a number of possible reasons.

A structural remedy may be inefficient because the necessary remedy would require the merging firms to forgo substantial efficiencies, perhaps even becoming less efficient than they had been prior to the merger. Forgoing those efficiencies would harm not only the merging firms (perhaps deterring them from merging at all) but would generally be harmful to consumers as well. The problem can most clearly be seen in the case of vertical mergers, but it also will apply at times to anticompetitive horizontal mergers.

Consider, for example, a proposed merger of two firms that produce complements. Assume that each has considerable market power in its segment of the production chain—market power that has been legitimately derived and which flows perhaps from substantial internal economies of scale or scope. A theory of harm in such cases may be that the merged firm will find it profitable to disfavor competitors or potential entrants at one of the two levels of the production chain where it will have significant market power, enabling it potentially to extend its market power into adjacent markets. To prevent the feared competitive harm, a structural remedy typically would require the merged firm to divest sufficient assets in one or the other (or both) of the production levels where it holds significant market power. Doing so, however, very likely would sacrifice significant pre-merger efficiencies and perhaps also preclude the realization of merger-specific efficiencies. Moreover, doing so might not even result in the creation of a sufficiently efficient third firm to constrain the merged firm's market power. It is hardly obvious that consumers would benefit from such a remedy, even if it were to reduce concentration in the relevant market.

In certain cases, attempting to remedy an anticompetitive horizontal merger with a structural fix can have negative consequences. Some horizontal mergers hold out the promise of substantial synergies, including production and distribution synergies. Ordering a firm to divest plants to third parties in order to prevent potential competitive harm may prevent such benefits from being realized. Other circumstances, such as where assets are used most efficiently to produce multiple products—some where there are competitive concerns and others where there are not—can readily be imagined as well.[4]

Beyond the False "Structural vs. Behavioral" Dichotomy

Deciding on an optimal response to an anticompetitive merger requires one to compare the costs and benefits of *all* the competition authority's options. Those options include (1) imposing a structural remedy, (2) imposing some sort of behavioral remedy, (3) blocking the merger in its entirety, or (4) permitting the merger to go forward untouched. In those cases where structural remedies are incapable of preventing competitive harms without risking considerable efficiency losses, it will generally be poor economic policy for the competition authority to insist on imposing them.[5] This does not mean that the best solution will be to impose a behavioral remedy. Importantly, in circumstances where competition agencies are seriously considering behavioral remedies, the next-best alternative is rarely to impose a structural remedy. As a result, the relevant question becomes *not* whether behavioral remedies are superior or inferior to structural remedies in the abstract, but rather which of the non-structural alternatives will be best.

In this section I compare and contrast the economic benefits of each of the non-structural alternatives, keeping in mind that they are most often under consideration only after the agencies have decided that a structural remedy is off the table.[6]

Behavioral Remedies. Behavioral remedies come in many forms, and can be imposed for varying lengths of time. Some very general remarks can be made about their use, although it is well beyond the scope of this article to describe and evaluate the various strengths and weaknesses of them all.[7]

First, among the more important considerations in devising a behavioral remedy is that there be a close nexus between the remedy imposed and the theory of harm motivating its

use. Competitive concerns over "foreclosure," for example, warrant different behavioral restrictions—or requirements—on the merged firm's behavior than do concerns over post-merger information sharing and anticompetitive coordination across competitors.

Second, behavioral remedies should have a term that is only as long as seems reasonably necessary to prevent the feared harm. Market environments are not static, and demand and cost conditions are likely to be changing over time. In such circumstances even a remedy that was optimal at the time it was imposed may turn into one that no longer makes economic sense, eventually becoming harmful not only to the firm, but to consumers.

Third, behavioral remedies should, ideally, be "relatively" easy to monitor, and of a type that can be easily understood and complied with by the merged firm. Intentional evasion should be subject to effective sanctions and penalties, absent which the firm would rationally find it profitable to engage in intentional evasion.

In circumstances where the merged firm operates in multiple geographic markets, many of which are expected to remain very competitive going forward, terms and conditions employed in those markets may provide useful benchmarks for regulating the merged firm's behavior in the market of competitive concern. Behavioral remedies are also likely to be more effective and less likely to prove inefficient in "mature" markets in which costs, demands, and technology are unlikely to change significantly during the term of the restrictions.

It bears emphasizing that behavioral remedies, because they require the regulated firm to act in a manner inconsistent with its own self interest, cannot be expected to work perfectly. Moreover, if poorly designed, they risk making a bad situation even worse.[8] Nevertheless, perfection is seldom an available option, and a behavioral remedy may in certain circumstances be better than other alternatives.

Blocking an Anticompetitive Merger in Its Entirety. In many jurisdictions, competition authorities can elect to block an anticompetitive merger in its entirety; in the United States, the FTC and DOJ can try to convince a court to do so. In the United States, the primary economic cost of moving to block the merger is that, in addition to the real resources devoted to litigation, if the competition authority prevails, any merger-specific efficiencies will be lost. The competition authorities presume, of course, that these efficiencies will not be large enough to prevent the merger from being, on balance, anticompetitive. Nevertheless, enabling the efficiencies to be achieved—if this can be accomplished while also eliminating (or substantially mitigating) the merger's predicted harms—would serve the legitimate interests of the merging firms, the competition authority, and the economy's consumers. In such cases a remedy—perhaps even a behavioral remedy—can be preferable to blocking the merger entirely.

For example, not uncommonly, a merger will implicate a considerable volume of commerce, only a small share of which involves markets where competitive concerns arise. In such cases, competition authorities are generally reluctant to block the entire deal based on competitive concerns that involve a relatively small piece of the merger. In the absence of any merger-specific efficiencies, one might legitimately argue that these deals should be blocked, as even the relatively small harm would not be offset by anything positive. In practice, however, this seems unlikely. A decision to enter into a very large merger is seldom motivated by the prospect of enhancing one's market power over a very small portion of the merging firms' overall operations. And if obtaining greater market power is not the goal, achieving efficiencies normally will be.

[B]ehavioral remedies, because they require the regulated firm to act in a manner inconsistent with its own self interest, cannot be expected to work perfectly. Moreover, if poorly designed, they risk making a bad situation even worse. Nevertheless, perfection is seldom an available option, and a behavioral remedy may in certain circumstances be better than other alternatives.

In such circumstances, if one is willing to credit non-trivial merger-specific efficiencies in markets other than those where the competitive concerns arise (efficiencies that are "inextricably linked" to the potential harms), then stopping the deal in its entirety would be bad policy. Imposing even an imperfect remedy—one that goes a significant way towards resolving the competitive concerns while permitting efficiencies to be achieved—is arguably the optimal choice. And where this cannot be achieved through a structural remedy, a behavioral solution will at times be advisable.

In the case of vertical mergers, the behavioral option may be of relatively greater value, as vertical mergers generally hold out the prospect of significant merger-specific efficiencies, and structural remedies are less likely to be feasible. Efficiency considerations are not, as already noted, unique to vertical mergers. In the same vein, horizontal mergers that promise significant synergies—which frequently involve combining complementary functions of competing firms—may well preclude an efficient structural remedy as well.

In many cases, blocking the merger in its entirety is the most desirable option. Where an anticompetitive merger is unlikely to generate significant merger-specific efficiencies—either in the markets of competitive concern, or in other markets—the argument for doing so is especially strong. Indeed, the fact that remedies seem frequently to prove inad-

equate may imply that competition authorities too often settle with merging parties when they should instead seek to block the merger entirely.

One reason why remedies may fail to achieve their desired outcome is that the merging parties are much more knowledgeable than the government about the likely consequences of agreeing to a remedy; for example, they may have better knowledge about how well some third party will be able to compete against them after acquiring divested assets. Profit-seeking firms are very likely to know their businesses, and their business environments, far better than a competition authority can be expected to. And given this informational imbalance, the merging parties' willingness to agree to a remedy in cases where significant merger-specific efficiencies are unlikely may itself suggest cause for concern over whether the remedy will serve its intended purpose. Without efficiencies, the merging parties gain little or nothing from consummating the deal after relinquishing any ability to profit from a post-merger exercise of market power. The risk that the remedy will prove inadequate is a very real one, and if there are no significant benefits—other than litigation cost savings—from refusing to block the merger in its entirety, why refrain?[9]

Arguments that the competition authority should settle for imperfect remedies because the authority may, if it chooses to litigate, lose in court (i.e., claims that "obtaining half a loaf is better than the risk of getting nothing at all") are not obviously compelling. Although counter-examples can doubtless be constructed (such as where the agency is privy to information that it cannot put before a court, or where the law is not fully in line with sound economics), there seems little reason for assuming that where the evidence shows a proposed merger will likely violate Section 7 of the Clayton Act, an objective judge hearing all of the evidence at trial would not rule in the plaintiff's favor. And, it is at least theoretically possible that the competition agency may have reached an incorrect decision as to the merger's likely competitive effects. If so, then a decision to litigate the case will, assuming the parties put the agency to its proof, cost only the litigation expenses and some damage to the agency's pride.

Finally, a word needs to be said about the findings and conclusions of retrospective analyses that attempt to measure a merger's effect on economic welfare. Such analyses typically focus on those markets where competitive harm was feared. However, merger-specific efficiencies may arise in other markets served by the merged firm. For this reason, even if a remedy has failed to completely eliminate the feared harm in the market(s) of competitive concern, it may have permitted efficiencies elsewhere and been preferable to blocking the merger in its entirety.

Permitting an Anticompetitive Merger to Proceed with No Remedy. At the other extreme, a competition authority can always choose to allow an anticompetitive merger to close without imposing any remedy at all. In such cases, the economic cost is equal to the predicted adverse competitive effect, the magnitude of which will of course depend on the facts in the particular case at hand.[10] Some proposed mergers are likely to result in very substantial anticompetitive effects, including, at times, reduced innovation.[11] In other cases the likely adverse effect will be small. The magnitude of the predicted harm is, in turn, relevant to competition authorities seeking to choose optimally among available responses: for reasons discussed below, if the merger is unlikely to have large anticompetitive effects, allowing it to go through unchallenged might be the most efficient option.[12]

Although counterintuitive (and surely uncommon), there are certain circumstances where it can be optimal for the competition authority to exercise its prosecutorial discretion to permit an anticompetitive merger to proceed unchallenged. What might some of those be?

First, in some cases it is possible to predict that the litigation costs—those that would be incurred by the plaintiff, the defendant, and the court system—will be very high. Such might be the case, for example, if a challenge to a merger with small predicted harm to competition will go to trial and then appeal. When a competition authority allows a merger to go through, these litigation costs are saved. Conversely, an offsetting consideration is that a demonstrated commitment to challenging even small anticompetitive mergers—ones where litigating may in isolation fail a cost-benefit test—can reduce the number of such mergers that are proposed. To the extent firms anticipate a court challenge even if short-run considerations argue in favor of letting the deal go through, the deterrence effect from an occasional challenge may make such a policy efficient.

Second, a competition authority's decision not to litigate an anticompetitive merger might also be efficient when it seems likely that the court will rule in the defendants' favor. In most instances it seems reasonable to assume that if competitive harm is very likely, a court will be persuaded to conclude similarly. However, one can imagine circumstances where this would not happen. For example, the competition authority may be privy to compelling evidence from third parties that, perhaps because of the unwillingness of potential witnesses to testify, it is unable to put effectively before a judge. In such cases, if the merging firms refuse to settle or abandon their transaction, efficiency dictates allowing it to proceed unchallenged.

Similarly, courts may permit an anticompetitive merger if, under relevant antitrust law and legal precedent, they impose too high a burden of proof on the plaintiff to show that competitive harm is "sufficiently likely," or "substantial enough." On the other hand, courts may block mergers that are actually beneficial to the economy by preventing those that satisfy a total, but not a consumer welfare standard. In such cases, competition authorities may wish to use their prosecutorial discretion not to challenge those mergers in the first place.[13]

Finally, there may be situations where both the competition authority and the courts will agree that the merger is most likely to prove harmful, and yet blocking the merger

would be the wrong decision. When might this be the case?

It will generally make good sense for competition authorities and courts to base their decisions on the outcome they believe is most likely to occur—i.e., the "point estimate" of harm (or benefit). And yet, since outcomes are always uncertain, it is useful to at least inquire into the expected costs and benefits of being wrong. In particular, one might want to ask how substantial the forgone benefits might be in the (unlikely) event that one's best ex ante estimate turns out to be wrong. If these forgone benefits are large enough, then even a relatively small probability of their being incurred may outweigh the expected harms that we feel are "most likely."

An extreme hypothetical example helps illustrate the point. Consider a merger of two pharmaceutical firms that compete in selling a particular drug. The merger will not create a monopoly, but substitutes are imperfect and a small but significant price increase seems likely if the merger were to proceed. The best guess is that merger-specific efficiencies from combining the two firms are unlikely. However, there is perhaps a one in five chance that they will be achieved. Finally, if these efficiencies are achieved, the merged firm will develop a cure for cancer relatively quickly. In this case, even though the parties' likelihood of achieving their merger-specific efficiencies is sufficiently small that net harm seems most likely, it could be appropriate to permit the merger to occur.

While the economic logic underlying this hypothetical is sound (indeed, under an "expected value" approach the merger is best viewed as procompetitive, rather than anticompetitive), competition authorities and courts are well-advised to demand that defendants meet a high burden of proof when considering such claims. It is difficult enough for antitrust analysts to predict outcomes that are "most likely;" it is even more difficult to accurately map the magnitudes and probabilities of even less likely future states of the world. Indeed, some of these may imply even greater harm than what is "most likely." It should therefore not be enough simply to assert that some future state of the world is "possible." One needs also to demonstrate that such an outcome is sufficiently likely, and of sufficient magnitude, to reverse the implications of what will generally be more reliable evidence.

For the reasons given above, there may be certain cases where any "cure"—a behavioral remedy, a structural remedy, or even blocking the merger entirely—might be worse than the disease.

Conclusion

When competition authorities determine that a proposed merger is likely to be anticompetitive, they can impose a structural remedy, impose a behavioral remedy, block the merger in its entirety, or let the merger go through untouched. One size does not fit all, and the optimal choice in any given case will depend heavily on the facts. At times, a structural remedy will be best, though a behavioral remedy may be optimal in cases where a structural one is infeasible. Any remedy, however, carries the risk of only imperfectly solving the feared competitive harm (and/or conceivably also impeding efficiency).

Unfortunately for those in search of bright-line rules, the need to weigh the efficiencies of each possible remedy and the fact that there are countless fact patterns that can warrant different remedies in different contexts means that the application of antitrust merger remedies does not lend itself to a simple analytical framework. This should not be surprising: markets are complicated, our knowledge and predictive abilities are imperfect, and salient facts differ in important ways from case to case. As a result, adhering to a few simple rules in all cases cannot be expected to generate efficient outcomes. That said, decision makers can (and should) try to identify and make as transparent as possible the objective principles for guiding how they will approach the relevant facts—facts that need to be uncovered and analyzed carefully, not simply credited because they are "possibilities." Even if policy approaches towards remedies do not translate into easily applied "bright lines," publicizing and debating the principles themselves should provide useful guidance to the antitrust community at large.

Perhaps most significantly, the lack of bright-line rules does not mean that decisions should be, have been, or will be made randomly and untethered from sound economic principles. Further debate, discussion, and hopefully more empirical evidence, would be highly desirable in developing future policies towards competitively troublesome mergers. ■

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[1] *See* U.S. Dep't of Justice, Antitrust Division Policy Guide to Merger Remedies [hereinafter Merger Remedies Manual] (June 2011), *available at* http://www.justice.gov/atr/public/ guidelines/272350.pdf.

[2] For studies by government competition authorities, see, e.g., European Comm'n, Directorate Gen. of Competition, Merger Remedies Study (Oct. 2005), *available at* http://ec.europa.eu/competition/mergers/legislation/ remedies_study.pdf; Fed. Trade Comm'n, Bureau of Competition, A Study of the Commission's Divestiture Process (1999) (FTC Divestiture Study), *available at* http://www.ftc.gov/os/1999/08/divestiture.pdf; Competition Bureau Canada, Competition Bureau Merger Remedies Study (2011), *available at* http://www.competitionbureau.gc.ca/eic/site/cbbc.nsf/ vwapj/cb-merger-remedy-study-summary-e.pdf/$FILE/cb-mergerremedy-study-summary-e.pdf. *See also* John Kwoka & Daniel Greenfield, *Does Merger Control Work? A Retrospective on U.S. Enforcement Actions and Merger Outcomes* (Nov. 4, 2011), *available at* http://ssrn.com/abstract= 1954849. Kwoka and Greenfield find that prices rose nearly 9 percent in matters where a structural remedy was imposed. They also found, albeit for a sample of only three pure conduct remedies, that in these instances the post-merger price increases averaged slightly more than 15 percent. While these data strongly suggest that many of the sampled mergers were anti-competitive, they do not necessarily demonstrate that the agreed-upon remedies failed to perform as expected. It is possible that in some cases competition authorities agreed to remedies that even they anticipated would only partially cure the competitive problem. The authority might rationally have done so if it believed there was a significant risk of losing the case if it went to trial. If so, the competitive harm might have been even greater in the absence of the remedy, but still better than if no relief had been obtained at all.

[3] In theory, depending on the assets already in the hands of the acquirer, competition could, conceivably, be enhanced in the market of competitive concern.

[4] Though somewhat beyond the scope of this article, it is worth noting that the merging firm's interests in who the divested assets are sold to will not be the same as those of the competition authority. The merging firm will generally prefer to sell to a firm unlikely to compete very effectively, and may have relatively greater knowledge than the competition authority as to which company this might be. For this reason, where the assets (or rights) that need to be divested can be clearly identified ex ante and the competition authority prohibits their acquisition by a firm that would itself raise competitive concerns, there is a good argument for the competition authority (or a designated agent) to auction off the assets to the highest bidder and give the proceeds to the merged firm. It is unclear why, other than fear of too much competition, the merging parties would reject such a solution.

[5] In addition, if parties are willing to accept a remedy that likely reduces efficiency, this may be because the remedy fails to fully protect consumers from a merger-generated increase in market power.

[6] It is curious that those who broadly criticize the use of behavioral remedies for anticompetitive mergers seldom acknowledge (or attack as strongly) the common use of behavioral remedies to remedy competitive harm in civil *non*-merger cases. For example, a remedy for predatory pricing is to require the violator to price higher, and a remedy for anticompetitively employing certain types of contracts in certain settings (exclusive dealing, tying, and others) requires that neither these, nor in some cases any alternative means of achieving the same end, be used. These behavioral remedies themselves require ongoing monitoring and policing, and will threaten in some circumstances to impede dynamic, if not also static, efficiency. As with mergers, a structural remedy to address anticompetitive single-firm conduct could, in principle, substitute for ongoing regulation. It is rare, however, for competition agencies to propose, much less for courts to impose, structural remedies to prevent future anticompetitive single-firm conduct. This is largely because of a recognition that a structural prescription is likely to sacrifice significant static and/or dynamic efficiencies. In such circumstances, unless one is prepared to ignore anticompetitive single-firm conduct entirely, behavioral remedies are essentially the only game in town.

[7] Particular categories of behavioral remedy are discussed in greater detail in the revised MERGER REMEDIES MANUAL, *supra* note 1.

[8] Prohibiting price increases, for example, may induce the firm to exercise its market power instead by lowering quality.

[9] Even litigation costs will be zero when parties elect to abandon the merger rather than take their chances in court.

[10] It is also possible, at least in theory, that a policy of permitting anticompetitive mergers when no efficient remedy can be devised might lead to additional costs, such as by providing firms with an incentive to inefficiently restructure their operations (and perhaps their choice of merger partners) so as to make an efficient merger remedy infeasible. My own guess, based on no empirical evidence, is that the magnitude of any such cost is likely to be very small.

[11] Effects on innovation, while potentially quite large, are typically much harder to estimate (or even in some cases to determine the direction of).

[12] For those economists who favor applying a total welfare standard, the cost of permitting an anticompetitive merger is not the higher prices paid by consumers for the relevant product. Rather, it is the value of the incremental output that would be generated by a more competitive market structure, less the size of any other efficiencies, e.g., fixed cost savings, specific to the merger. For those who apply a so-called "consumer welfare" standard, the pure transfer of surplus from consumers to producers would be considered an economic cost as well, and fixed cost savings to the economy would not be counted at all. The distinction can be important in cases where the merger seems likely to generate, in addition to higher prices, non-trivial merger-specific efficiencies captured entirely by the merging firms. *See* Oliver Williamson, *Efficiencies as an Antitrust Defense*, 58 AM. ECON. REV. 18 (1968); *see also* Ken Heyer, *Welfare Standards and Merger Analysis: Why Not the Best?*, COMPETITION POL'Y INT'L, vol. 2 no. 2, Aug. 2006.

[13] Courts may apply what is to an economist an overly hostile stance towards proposed mergers for still other reasons. For example, merger-specific efficiencies likely to benefit consumers might be ignored by courts that interpret strictly the law's literal prohibition on mergers that reduce competition "in any line of commerce." 15 U.S.C. § 18. This can lead to harmful outcomes. In particular, when a merger's predicted harm to consumers in market A is inextricably linked to the merger's predicted benefits to consumers in markets B, C, and D, blocking the merger to protect consumers in the former comes at the cost of harming consumers in the latter. To an economist, if the total benefits exceed the total costs and the choice is between permitting the merger in its entirety or blocking it, efficiency dictates permitting the merger to take place, as there is no logical reason for counting only one portion of the total effect. Courts, however, may, take a different view.