Editor’s Note:
Getting Mergers Right

BY MICHAEL A. LINDSAY

When you are doing a major merger, any CEO will tell you that you have to hope you got it right—and that you didn’t get anything major wrong. The same holds true—or should hold true—for antitrust enforcers and counselors. This issue of Antitrust explores several aspects of mergers in the domestic and international context, the merger review process, and the role and importance of risk allocation provisions in transaction agreements. The articles in this issue were written before the COVID-19 virus had spread and affected both the economy and the merger review process. The topics discussed in this issue will remain relevant when the economy returns to normal.

James Keyte offers some initial thoughts on the joint FTC-DOJ draft vertical merger guidelines. His principal point is that although the draft provides at least some amount of incremental clarity of the agencies’ enforcement approach, the draft leaves a number of important questions unanswered. Some of those issues were discussed in the Summer 2019 edition of this magazine, which warrants re-reading in light of the draft guidelines. After releasing the draft and setting a 30-day comment period, the agencies announced an extension of the comment period and then held a public workshop in March 2020.

Three articles in this issue deal with larger firms acquiring smaller firms. First, Kelly Fayne and Kate Foreman explore the possibility of “killer” acquisitions—that is, an acquisition where a larger firm acquires a smaller firm (often a start-up in need of financing) for the purpose of preventing the smaller firm’s product from coming to market. They assume for argument’s sake that such acquisitions may occur, but they question how often they actually happen. Fayne and Foreman also consider the costs that merger review can impose on the parties, especially on the ex ante incentives of entrepreneurs to invest in developing new products and services.

Second, David Emanuelson and Danielle Drory join in this same discussion, with a specific focus on big tech. They note that many of today’s big tech firms grew in part through acquisition of nascent technology firms—acquisitions that, they argue, created efficiencies that reduced costs, resulted in new features, and enabled a more seamless customer experience. They also describe Senator Elizabeth Warren and Senator Amy Klobuchar’s proposed antitrust legislation and what they believe would be the chilling effects that this legislation might have on the entire ecosystem of the technology sector.

Third, John Harkrider reviews three attempted acquisitions in the tech space that the United Kingdom’s Competition and Markets Authority (CMA) reviewed. Two transactions were abandoned, and the third is under review, but all three involved a larger tech firm’s acquisition of a smaller tech company. He explores the breadth of CMA’s jurisdictional claims (all three transactions involved U.S. companies) and the degree of convergence between the CMA and U.S. enforcement agencies. (Fayne and Foreman discuss U.S. enforcers’ challenges to two of these transactions.)

Benjamin Bradshaw and Scott Schaeffer discuss the debate over common ownership of competing firms through institutional investors. They take no position on whether this kind of common ownership has anticompetitive effects, but they provide a useful guide to the key issues—and some key background facts—in this ongoing debate.

Some institutional investments are led by private equity firms, and like any other investor, PE firms want to make successful investments. Sometimes, however, PE investments do not work out, and the PE firm tries to invoke the “failing firm” defense to sell a company to a strategic buyer. Elisa Kantor Perlm an reviews the basic principles behind this defense and their specific application to PE owners. She concludes that the existing rules are sufficient to address the complexities that PE ownership can entail—and that the investment objectives of a PE firm and other stakeholders are not relevant to the legality of a proposed sale to a strategic buyer and do not excuse a PE owner from satisfying the “failing firm” requirements.

Mark Botti, Nicholas Hill, Sheridan Rogers, and Mathis Wagner discuss what they see as an important development in the banking world that should play an key role in analyzing bank mergers (although it has not yet been done so): the emergence of virtual banks, where depositors do not typically have access to a physical branch and instead conduct transactions electronically. At least from a retail banking perspective, they argue that this development should have significant
imlications for measuring the degree of bank concentration in merger analysis.

Despite today’s neo-populist movement in antitrust, economic analysis remains critically important. One key concept in assessing vertical mergers is the effect on eliminating double marginalization (EDM). John Kwoka and Margaret Slade help non-economists to understand what double marginalization is and why anyone would care about its elimination. They agree that at least some vertical mergers require close scrutiny, and they caution that the calculation of EDM is often simplistic and flawed, and that its treatment as the principal source of efficiency can be misplaced. Kwoka and Slade also explore ambiguous EDM effects in vertical mergers outside of the common analytical paradigms.

Antitrust counselors can better assess antitrust risks and advise their clients if the enforcement process is transparent. Anna Lyle-Smythe and Lucy Chambers offer a comparison of the relative degrees of merger enforcement (and other antitrust enforcement) in the European Union, China, and the United States. (Readers interested in transparency should also read Harkrider’s article, which discusses transparency of the UK merger review process.) Lyle-Smith and Chambers describe the merger review processes as they existed before the COVID-19 pandemic. Competition agencies around the world have announced temporary measures (such as elimination of in-person meetings) that may affect relative transparency until the public health situation normalizes.

What happens when, despite the best efforts of antitrust counselors to get it right, a deal fails on antitrust grounds? Most parties will have agreed on antitrust risk allocation in their transaction documents. Karen Kazmerzak, James Lowe, and Joseph Coniglio discuss the kinds of risk allocations available to the parties, but more interestingly, they also discuss litigation over the meaning of these various risk allocations in transactions that failed to close. Any antitrust counselor who reviews antitrust risk allocation provisions would benefit from reading this article.

Continuing our tradition of direct engagement with competition officials, Associate Editor Vanessa Turner interviewed Margrethe Vestager, who, in addition to her service as the European Commission’s Commissioner for Competition, has now taken on a second EC role as Executive Vice President for a Europe Fit for the Digital Age. This wide-ranging interview includes some topics that merger counselors will want to note, particularly Vestager’s comments about potentially reviewing the Commission’s Notice on the definition of relevant market.

Finally, William Kolasky concludes his three-part series on antitrust in the Warren Court. Although none of the four cases he discusses were merger cases, he does discern a more general lesson from the Warren Court’s antitrust jurisprudence. Kolasky acknowledges that several recent reviews of merger retrospectives have raised serious questions about whether our merger policy has become too relaxed. He urges that we take these studies seriously but that we also learn from the Warren Court experience so that we do not over-correct.

Whether you are an enforcer, a counselor, or a judge, we hope that the articles in this issue help you get mergers right.