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Six Easy Steps to Better Merger Control Reviews: Recommendations for Competition Agencies Across the Globe

Hugh Hollman and Benjamin Geisel

A central component of any competition law system is merger control. Today, the vast majority of the 142 member agencies that comprise the International Competition Network (ICN) have merger control filing requirements for transactions that meet certain requirements and most prohibit those transactions from closing until formally cleared.¹

While merger control has recently spread like wildfire across the globe,² a number of jurisdictions have decades of accumulated experience in merger control. We are coming up to the 30th anniversary of the EU Merger Regulation (EUMR),³ which adopted a mandatory system of merger control in the European Union. The U.S. Congress passed the Hart-Scott-Rodino Act, which established the pre-closing merger notification regime in the United States, almost 45 years ago. This combined agency experience, coupled with the ICN’s valuable work in this area, is enormously useful—in particular to younger agencies—in promoting “best in class” merger control standards that can enhance the accuracy, consistency, and efficiency of any jurisdiction’s merger reviews.

This article, while not claiming to be exhaustive, identifies six areas that we believe have led to less than efficient merger regimes. In response, we also identify six potential solutions drawn from ICN guidance and current agency practice that we believe will directly improve merger control reviews across the globe if implemented consistently by all agencies: (1) focus on transactions that lead to a change of control; (2) base notification thresholds on the parties’ turnover; (3) only review transactions with a local nexus; (4) provide for flexibility regarding the identity of the notifying party; (5) only request the provision of documents that are necessary for the review; and (6) apply a two-step review process to quickly clear no-issue transactions.

We consider these recommendations as pragmatic solutions that will allow competition authorities to more efficiently obtain the information they need to make quicker, better, and more informed decisions whether or not to challenge a transaction while at the same time reducing the burden on merging parties. We believe these recommendations are nothing short of win-wins for all.

1. Focus on Transactions That Lead to a Change of Control

Employing European parlance, all “concentrations” constitute transactions but not all transactions necessarily constitute concentrations. The specific definition of a concentration determines the

2. From 2008 to 2018, the number of merger control regimes that are either active or in development has almost doubled from around 80 to over 150 (including also non-ICN member jurisdictions), Peter Alexiadis, Elsa Sependa & Laura Vlachos, Merger Control: “Around the World in 80 Days: Management of the Merger Review Process of Global Deals,” 19 Bus. L. Inst.” 202 (2018).
types of transactions a competition agency can review. Unfortunately, those definitions vary widely among jurisdictions.

The most common concept that drives the definition of concentrations in merger control systems worldwide is the acquisition of control on a lasting basis. Some jurisdictions have a more formalistic approach than others as to exactly what constitutes control. For example, control may be defined as the ownership of 50 percent of the voting shares in another company or, irrespective of the percentage of shareholding, the ability to exercise decisive influence over another company’s strategic conduct. While the precise definition may vary, the concept itself is relatively uncontroversial.

However, there are always exceptions to the rule. A number of jurisdictions employ other or additional definitions of concentrations to capture transactions that fall well short of the usual majority control threshold. Germany⁴ and Austria⁵ require, for example, notification of share acquisitions of less than majority ownership (25 percent or more) of the voting or equity shares in a target. Other jurisdictions capture minority shareholdings as low as 10 percent as is the case for Brazil (with the added complication that the threshold requires the analysis of whether there is a horizontal or vertical overlap with the target).⁶ In South Korea, all transactions that render the purchaser the largest shareholder in the target will require notification.⁷ The most extreme example may be Egypt, where no minimum level of shareholding is required for a transaction to constitute a concentration. Instead, virtually every share acquisition of a company is notifiable where parties trigger the—very low—Egyptian turnover thresholds.⁸

Finally, another example of a jurisdiction with merger control provisions that apply to transactions with very low shareholdings (below the above mentioned 25 percent) is again Germany, capturing acquisitions of what is termed “competitively significant influence.”⁹ This provision requires a filing whenever an acquirer obtains a level of influence over the target that goes beyond that of a regular minority shareholder. This is considered most likely to occur where the acquirer is active in the same or an adjacent market to the target and obtains certain representation and/or information rights, although there are no guidelines defining exactly when influence rises to the level of competitive significance.

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⁹ GWB, supra note 4, at no. 4.
Recommendation. Competition authorities should only focus on transactions that result in a lasting change of control. This concept of an acquisition of control is widely recognized as a bedrock concept for assessing the applicability of merger control rules since it is generally considered as most likely to directly impact the structure of a market.  

2. Base Notification Thresholds on the Parties’ Turnover

The assessment of whether certain thresholds are met is a practical tool for competition authorities to filter out transactions that will have no or only negligible anticompetitive effects. Setting the bar at the optimal level can be tricky. The bar has to be low enough to capture transactions having an actual impact on competition but high enough to avoid overburdening transactions that will only have negligible effects, if any, on the competitive landscape.

**Turnover based thresholds: the best approach, if done right.** The ICN specifically recommends that mandatory notification thresholds should be based on objectively quantifiable criteria. Turnover (but also asset-based) thresholds are the best examples of such an approach. They are also usually readily available and relatively straightforward in their application. A good example of such a test is the European Union’s merger control regime, which does not only provide clear turnover thresholds in the EUMR but also provides guidance on the calculation and allocation of the relevant turnover in the European Commission’s Consolidated Jurisdictional Notice.

The lack of clear definitions makes it very difficult for merging parties to determine whether a filing is required. One of the most common definitional issues is whether a given turnover threshold relates to a company’s global or domestic activities. By way of example, a notification in Pakistan is required where the annual turnover of the acquirer reaches at least approximately USD 4.1 million or the combined turnover of the acquirer and the target reaches approximately USD 8.2 million or more. But Pakistani competition law is not clear whether this relates to local or global turnover. While such low thresholds only seem to make sense when the relevant turnover is local, the authority’s view may differ. With such low turnover thresholds, it is almost a foregone conclusion that turnover thresholds are met if any foreign sales are included in the calculation.

Another awkward definitional issue is that a few jurisdictions require that seller turnover is included in the turnover calculation, although a seller is never party to a concentration (albeit to the transaction). This is the case for Brazil, with the added complication that it seems unclear whether only controlling sellers, as established by Brazilian law, or sellers with shareholdings as

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10 When considering widening the scope of transactions that would be subject to merger control review, authorities should bear in mind that including acquisitions of minority shareholdings and transactions with any possible competitively significant influence (regardless of degree) is likely going to exponentially expand the range of possible transactions requiring notification to transactions that raise little or no competitive concerns. On balance, it is arguably preferable to exclude them from merger control on efficiency grounds or, at the very least, provide clear written guidance to allow merging parties to accurately assess whether their transaction is covered.


13 Section IV (“TURNOVER”), Notice under Council Regulation 139/2004 on the control of concentrations between undertakings, 2008 (C95) 35, 43 (EC).

14 As a general remark, in this article, figures in U.S. dollars are converted based on average of the daily rates for the period from January 1, 2018 to 31 December 2018.

15 The thresholds require, inter alia, an annual turnover of the acquirer of at least PKR 500 million (approx. USD 4.1 million) or the combined turnover of the acquirer and the target of at least PKR 1 billion (approx. USD 8.2 million). Competition (Merger Control) Regulations (2016), S.R. & O. 1176, 4(2)(a), 4(2)(b), 4(2)(c), and 4(2)(d) (Pak.).
low as 20 percent, as sometimes suggested by the Brazilian authority, need to be included.\(^{16}\) Yet another example is Ukraine, where—in the extreme case—notifications are triggered by the seller’s domestic turnover alone, i.e., even when neither the acquirer nor the target is actually active in Ukraine.\(^{17}\) It is difficult to see how such a transaction might possibly have a negative impact on competition in Ukraine and why it would be in the interest of the Ukrainian competition authority to review it.

Another practical concern is how thresholds are calculated. Currency fluctuations can quickly change thresholds that would otherwise serve as effective screens against transactions that are unlikely to have competitive effects within the jurisdiction. Of course, the opposite is also true. Currency appreciation may result in possibly anticompetitive transactions being screened out from consideration. A possible solution is automatic indexing of turnover thresholds.\(^{18}\) Differing rules between jurisdictions for how turnover (and asset value) is calculated (e.g., book vs. fair value, and incorporation of goodwill) may also reduce the effectiveness of thresholds.

**Thresholds should not require a substantive pre-assessment.** The ICN Recommended Practices explain that merger notification tests should be straightforward to reduce transactional costs on the parties while also benefiting the competition agencies by limiting the need for them to review transactions with no or limited anticompetitive effects.\(^{19}\) According to the ICN, market share-based thresholds may be suitable for later stages of the merger review process but they are not suitable as merger screens because they are inherently subjective and fact-intensive.\(^{20}\) Market share tests are burdensome because they require the parties to expend considerable effort to define relevant markets (often absent any clear market definition precedent) and assess the parties’ presence in such markets prior to even knowing whether a transaction is notifiable or not.

Spain’s merger control laws are an example. Whenever the turnover threshold test is not met in Spain, an alternative market share threshold test applies. That test requires notification where a concentration results in the acquisition (i.e., no overlap) or increase (i.e., overlap) in market share of at least 30 percent of a relevant product market in Spain.\(^{21}\) This puts a huge burden on the parties, for a number of reasons. First, they have to identify and define all relevant product and geographic markets in which the parties are active locally. This usually requires extensive research of the local competition authority’s case precedents (if any). Second, the parties need to assess their market power in each of those local product markets. This requires a party to invest considerable time, money, and effort to accumulate, analyze, or purchase from external providers the available data to calculate market shares.

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\(^{16}\) Lei nº 12.529, supra note 6; Resolução nº 2, supra note 6.

\(^{17}\) Zakon Ukrainy “Pro zakhyst ekonomichnoi konkurentsii” [Law of Ukraine on Protection of Economic Competition] No. 2210-III, dated 11 January 2001, art. 1 and 24 / Ukraine Official Journal dated 02.03.2001—2001, No. 7, p.51, art. 260, act code 17835/2001 (Ukr.). While there seem to be efforts to change Ukrainian merger control rules to abandon the requirement to include the seller’s turnover and assets value on the side of the target for the calculation of the thresholds, it is currently unclear what the scope of changes would be and when exactly such changes may become effective. See, in that regard, the draft order of Zminy do Polozhennia pro poriadok podannia zaia do Antymonopolnoho komitetu Ukrainy pro poperednie otrymnannia dozvolu na kontsentratsii subiektyv hospodariuvannia (Polozhennia pro kontsentratsii) [Amendments to the Regulation on the rules for submission of applications to the Antimonopoly Committee of Ukraine for the prior approval of a concentration of undertakings (Regulation on Concentration)] (Ukr.).


\(^{19}\) ICN Recommended Practices for Merger Notification and Review Procedures, supra note 11, II. B.

\(^{20}\) Id. II. E.

\(^{21}\) Competition Act, art. 8(1)a (B.O.E. 2007, 15) (Spain).
Parties also need to ensure that their approaches and calculations are aligned to obtain consistent and credible results. Only after all of these time-consuming steps can the transacting parties assess whether their concentration is notifiable. While it could be argued that this market share assessment may save time during the next phase of notification preparation, this will, of course, only apply should the transaction actually trigger the relevant 30 percent threshold.

**Filing thresholds should take account of the economic reality of the transaction.** Apart from whether the relevant turnover (or asset value) tests are easy to apply, another possible complication is identifying the party which has the relevant turnover to satisfy the applicable merger control test for filing. Even the timing of the transaction can make a difference. This is best explained with an example from Ukraine.

Assume that there are two investors, A and B, which plan to acquire a joint venture company located outside of Ukraine in which each of them will hold 50 percent. Investor A has turnover in Ukraine in excess of USD9.4 million. Investor B is not active in Ukraine. Each of the two investors meets the global turnover threshold of USD177 million. According to Ukrainian merger control laws, such a transaction will constitute two distinct concentrations: the investment of Investor A and the investment of Investor B. A filing requirement will only exist should Investor A (which has turnover in Ukraine) acquire its stake in the joint venture before Investor B. Only then would Investor A’s turnover be included in the joint venture’s turnover and both the domestic and the global turnover threshold would be met. However, as long as both acquisitions take place at the same time or Investor B acquires its joint venture stake prior to Investor A, no filing obligation arises, since Investors A and B would not be parties to the same concentration and each of them (together with the joint venture) would not meet all relevant notification thresholds.

This example illustrates that companies can theoretically structure parts of a transaction and change their timing to avoid a filing requirement in Ukraine. Thus, the end result ultimately depends on an arbitrary technical filing distinction instead of a careful assessment of competitive effects. An approach that better reflects reality is to assess multiple transactions as one economic concentration. The merger control thresholds then apply to the entire concentration and all parties involved. This method is followed by the European Commission, as explained in its Consolidated Jurisdictional Notice.

**Parties value legal certainty.** Legal uncertainty is another criticism often leveled at voluntary merger filing regimes. Australia and Singapore recommend a filing if certain turnover and/or market share thresholds are met. This approach may appear to be in the parties’ best interests by

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23 Id.

24 Section 1.5 (“Interrelated transactions”), Notice under Council Regulation 139/2004, supra note 13, at 12, 15.

25 While the Australian Competition and Consumer Act 2010 does not provide for any thresholds in its Section 50, which prohibits acquisitions that would have the effect or likely effect of substantially lessening competition in any market in Australia, the Australian Competition and Consumer Commission (ACCC) Merger Guidelines November 2008 (as amended November 2017) state that notification of a contemplated merger is encouraged where the products of the merger parties are either substitutes or complements, and the merged firm will have a post-merger market share greater than 20 percent in the relevant market (§2.9). Competition and Consumer Act 2010 (Cth) s. 50 (Austl.); ACCC Merger Guidelines 2008, as amended November 2017, s. 2.9 (Austl.). Likewise, the Singapore Competition Act (Chapter 50B) does not provide any thresholds. Competition Act (Cap 50, 2006 RevEd). The Competition and Consumer Commission of Singapore (CCCS) recommends in part three of its CCCS Guidelines on Merger Procedures 2012 that parties are recommended to make a notification where the merged entity will have a market share of at least 40 percent or the merged entity will have a market share of between 20 percent to 40 percent and the post-merger combined market share of the three largest firms (CR3) is 70 percent or more (§3.6). Guidelines on Merger
providing them with the freedom to decide whether they prefer to notify or not. But this is arguably a misperception. A voluntary filing regime does not mean the parties can engage in concentrations without any review. Instead the lack of a clear filing obligation means that a voluntary regime puts more of a burden on the parties to assess whether to file. As with jurisdictions with market share tests, parties are required to make a substantive pre-assessment, i.e., how high the risk is that the authority may initiate a merger control review ex officio.\footnote{See, e.g., ACCC Merger Guidelines 2008, as amended November 2017, s. 2.9 (Austl.) Competition Act (Cap 50, 2006 RevEd), div 5, s 62; ACCC Merger Guidelines 2008, as amended November 2017, s. 1.7 (Austl.).} Voluntary filing regimes, therefore, most often result in greater uncertainty for merging parties. In our experience, merging parties would prefer to avoid that uncertainty more than they would choose the greater flexibility of voluntary filings.\footnote{ICN Recommended Practices for Merger Notification and Review Procedures, supra note 11, at II. A.}

**Recommendation.** Notification thresholds should be based on the parties’ turnover, as they are straightforward to apply and make use of information generally readily available. They also form objectively quantifiable criteria. Thresholds that are opaque or require a substantive pre-assessment of the transaction are best avoided to prevent unnecessary burdens on merging parties and potentially diverging conclusions. Additional written guidance to define the relevant terms and calculation methods further increases their user-friendliness. Equally, for voluntary filing regimes, the agency’s notification recommendation should be based on turnover thresholds in combination with clear written guidance as to when a transaction is likely to raise potential competition concerns to reduce the legal uncertainty for the parties.

3. Only Review Transactions with a Clear Local Nexus

A fundamental principle underlying merger control is that jurisdiction should only be asserted over transactions that impact competition within a reviewing jurisdiction’s territory.\footnote{Id.} Merger control thresholds should, therefore, be developed to screen out those transactions that will have no or only negligible local effects. This requires a material nexus between the jurisdiction, the proposed transaction, and the transacting parties.

Under the merger control rules of many jurisdictions, this local nexus requires at least two of the transacting parties to have substantial commercial activities within the reviewing jurisdiction’s territory. As these two parties will often be the acquirer and the target there will be a clear link between jurisdiction and the transaction. However, there are circumstances where even two-party thresholds do not fulfill the nexus requirement. For example, where two companies create a joint venture to manufacture products for a specific local market, that concentration can trigger filings in a number of other jurisdictions based solely on the parent companies’ turnover in those jurisdictions even though the proposed joint venture will have no revenues or assets in those other
jurisdictions. For example, this is the case in Turkey,\textsuperscript{29} the European Union,\textsuperscript{30} and China.\textsuperscript{31} This can place a huge burden on parties in terms of timing and transaction costs, in particular where the applicable turnover thresholds are set at a very low level, as is the case for Turkey, which only requires a combined domestic turnover of more than approximately USD 20.7 million in addition to two of the parties involved reaching a turnover in excess of USD 6.2 million each.\textsuperscript{32} The equitable solution is requiring a local nexus, i.e., the joint venture only needs to be filed in the jurisdictions in which it will be active. This approach is followed in Canada\textsuperscript{33} and Germany.\textsuperscript{34}

The local nexus requirement should also directly form part of the merger control threshold test to avoid unnecessary filings from the outset, and not part of the substantive review of the transaction after the parties have already had to incur the time and expense of a filing.

**Recommendation.** Correctly calibrated turnover thresholds that require a minimum level of domestic sales from—at least two of—the merging parties, one of which should be the target, is the most straightforward way of ensuring a local nexus between the jurisdiction, the transaction, and the transacting parties.

### 4. Provide for Flexibility Regarding the Identity of the Notifying Party

A number of jurisdictions adopt the highly formalistic approach of requiring a specific entity to act as the notifying party. A common notification condition that can unnecessarily burden merging parties is the requirement that only the directly acquiring entity can notify. Special purpose vehicles (SPVs) are often created specifically for a transaction and end up as the directly acquiring entity. SPV creation is usually driven by tax considerations, and they do not otherwise engage in any economic activity and have no turnover or personnel. By definition, therefore, such an SPV cannot possibly have an economic impact or be relevant to the competitive effects of the transaction.

\textsuperscript{29} A notification is required where either, combined domestic turnovers of the parties exceed TL 100 million (approx. USD 17.6 million) and domestic turnovers of each of at least two of the transaction parties exceed TL30 million (approx. USD 5.28 million) or (i) in case of an acquisition, domestic turnover of transferred assets or business exceeds TL30 million and world-wide turnover of at least one of the other parties exceeds TL500 million (approx. USD 88 million), or (ii) in case of a merger, domestic turnover of any of the parties exceeds TL30 million and world-wide turnover of at least one of the other parties exceeds TL500 million. 405 Sayılı Rekabetin Korunması Hakkında Kanun [Turkish Law on Protection of Competition No. 4054] (Turk) in conjunction with 2010/4 sayılı Rekabet Kurulundan İzin Alınması Gereken Birleşmeler ve Devralmalar Hakkında Tebliğ [2010/4 Sayılı Tebliğ] [Communiqué No. 2010/4] (Turk), as amended from time to time.

\textsuperscript{30} Article 1 of the EUMR which usually requires a combined worldwide turnover of the transacting parties of more than EUR5 billion (approx. USD9.9 billion) and a community-wide turnover of at least two parties of more than EUR250 million (approx. USD295.4m). However, for greenfield joint ventures outside of the EEA, the EUMR does not provide any exemption. Council Regulation 139/2004, supra note 3, at 1, 6.


\textsuperscript{32} Sayılı Tebliğ, supra note 29, art. 7.

\textsuperscript{33} Competition Act, R.S.C. 1985, c. C-34, amended by S.C. 2018, c. 8, s. 116 (Can.). (The example relates to an acquisition of the target by its two parents.)

\textsuperscript{34} GWB, supra note 4, § 185(2).
SPVs are frequently replaced in multi-jurisdictional transactions prior to closing as they can involve long periods of preparation. Once again, tax considerations often drive such changes, which may lead to a reshuffling of the entities. In the process, the basic entity structure of the transaction then changes before closing but without any actual market effects.

Treating the directly acquiring entity as the notifying party may result, therefore, in an unnecessary additional notification of a transaction that has already been reviewed by an antitrust authority. Of course, an additional notification includes another filing fee and statutory waiting period. This is all the more cumbersome since the parties will also have to once more gather all the relevant formal documents for the new entity, even though it could again be nothing more than another SPV. Unfortunately, Japan follows this approach.35

Recommendation. Abandon the requirement of having the directly acquiring entity as the notifying party and replace it with what is most common in other jurisdictions—any entity in the control chain from the direct acquirer up to the ultimate parent entity. This change is universally beneficial as the competitive impact of a transaction should be assessed in any event by considering a corporate group’s activities and certainly not only the acquiring entity’s activities, especially if, like an SPV, it does not have any. This flexibility would allow parties to make changes to their transaction structure without the fear of losing time and resources or breaching contractual obligations (often in the context of long stop dates). It would also spare competition authorities from having to re-review filings that although already fully assessed, still need to go through the regular review and clearance procedure.

5. Only Request the Provision of Documents That Are Necessary for the Review

Once parties identify the jurisdictions where merger control filings are required, next steps are preparing and collecting the initial notification requirements. Apart from the information required to complete the filing forms, various supporting documents are often required by the reviewing agencies, such as corporate documents, financial statements, and powers of attorney. The ICN has advised agencies to limit these requirements to ensure proportionality with the competitive concerns likely presented by each transaction.36 However, even the basic initial notification requirements can already be unnecessarily burdensome. For example, Ukraine consular officials require powers of attorney to be hole-punched, stamped, and even folded in a specific way before they will certify the documents.

This is an area that lends itself to standard templates and requirements, but more often than not, most jurisdictions have their own unique requirements. The ICN could promote the interests of the global antitrust community by endorsing specific standardized forms and supporting documents, perhaps even by providing basic templates.37 While jurisdictions do, of course, have different systems of law, recommended models would definitely promote convergence and limit the burden on parties. Sometimes, national administrative law may obligate an agency to request doc-

35 Shiteki-dokusen no Kinshi oyobi Kōseitorihiki no Kakuho ni Kansuru Hōritsu [Dokusen Kinshi-hō] [Act on Prohibition of Private Monopolization and Maintenance of Fair Trade of Japan] Act No. 54 of 1947, art. 10, sec. 2 (Jap.) (regarding the acquisition of shares; the applicable provision will be different depending on the type of the transactions).

36 ICN Recommended Practices for Merger Notification and Review Procedures, supra note 11, at V.

37 While there is consolidated information available for a number of jurisdictions on the ICN website under the headline “Templates,” this collection does not provide actual templates used in these jurisdictions but presents the necessary information in a more structured format. Templates, supra note 1.
Required formal documents. The following are examples of formality requirements increasing time and expense without having much relevance to the assessment of the competitive effects of a transaction:

Some jurisdictions, including Russia, require the submission of articles of association (AoA) for the notifying party.38 Others, such as Indonesia, even go as far as to require the submission of the AoA of each of the notifying party’s group entities having sales or assets in Indonesia.39 By contrast, a number of other jurisdictions (e.g., the European Union and China) do not require the submission of any AoA.40 This is surely an indication that the added value of such documents is limited.

Financial statements can be helpful for the competition assessment. But there are jurisdictions that require financial statements for each notifying party’s group entity with sales or assets in the jurisdiction. Indonesia has this “every entity” approach.41 While it is understandable that a competition authority may want proof, for example, that an undertaking concerned does meet the jurisdiction’s turnover threshold, it likely would make more sense to focus on the notifying party’s consolidated annual group report, especially when financial statements of a holding company are submitted. Since the latest financial statements suffice for most jurisdictions, we recommend that competition authorities in jurisdictions that require submission (and translation) of financial statements for previous years consider removing this requirement.42

A number of jurisdictions, including South Korea, require the parties to provide signed minutes of the board of directors meeting during which the transaction was discussed and agreed.43 This requirement is likely intended to ensure that competition authorities only need to review those transactions that are relatively advanced and likely to proceed. But where parties submit signed purchase and/or shareholders agreements, the parties’ intentions are clear and the provision of board minutes becomes redundant.

Many jurisdictions, including China and the European Union, require the submission of a signed power of attorney (PoA) on behalf of the notifying party,44 despite it being highly unlikely

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39 Penggabungan atau Peleburan Badan Usaha Dan Pengambilalihan Saham Perusahaan yang Dapat Mengakibatkan Terjadinya Praktek Monopoli dan Persaingan Usaha Tidak Sehat, Elucidation of Article 8 § (3) of Government Regulation No. 57 of 2010 on Merger, Consolidation, or Share Acquisition of Company that Could Cause Monopolistic Practices and Unfair Business Competition (GR 57/2010), State Gazette No. 69 of 2010 (Indon.).
40 However, China does require the submission of an authentic copy of the notifying party’s certificate of corporation. Fanlongduan Fa, supra note 31, art. 23 (China); Guojia Shichang Jiandu Guanli Zongju Fanlongduanju Guanyu Jingyingzhe Jizhong Shenbao Wenjian Ziliao de Zhidao Yijian, supra note 31.
41 Penggabungan atau Peleburan Badan Usaha Dan Pengambilalihan Saham Perusahaan yang Dapat Mengakibatkan Terjadinya Praktek Monopoli dan Persaingan Usaha Tidak Sehat, supra note 29.
42 Id.
that a law firm would notify a transaction without being authorized to do so by the transacting parties. To avoid what is essentially an unnecessary formality, competition authorities may want to consider requesting a PoA only in cases in which there are indications that a party’s representative is acting without that party’s authorization or consent.

**Formalization and translation of documents.** The burden on the parties increases still further where documents require translation or additional formalization such as notarization or an apostille. In Turkey, for example, a PoA for a notification requires a notarization and a legalization. Where the notifying party is domiciled outside of Turkey, the PoA needs to be notarized first by a local notary in the entity’s country of origin where the PoA is signed. It then needs to be legalized, i.e., either apostilled by the relevant authority in the country of origin or, where the country of origin is not a member state to the Apostille Convention, the legalization has to be done by the relevant ministry in the country of origin and the local Turkish embassy/consulate. Once the PoA arrives in Turkey, its Turkish translation also needs to be notarized by a notary in Turkey.

The translation of documents in their entirety is an extremely time-consuming and costly exercise. Assuming that the documents are necessary for the competitive assessment of the transaction, a more practical approach is to simply limit the required translations to the relevant parts, instead of having to translate hundreds of pages of, for example, annual reports, with little added value. It would also be most appropriate for the competition authority to make such requests on a case-by-case basis instead of requesting full translations upfront under the pretext that they may prove useful.

**Privileged documents.** Documents (including email communications) containing legal advice from outside or in-house counsel should generally be exempt from any document request coming from a competition authority. This ensures that merging parties receive proper legal advice from their legal counsel and protects their fundamental rights. This approach is widely recognized in common law jurisdictions but unfortunately is handled differently in European continental jurisdictions and elsewhere. Germany, for example, only recognizes the legal professional privilege for outside counsel and only once a criminal investigation has been started.

However, in the absence of harmonized rules on legal professional privilege, and as has been recommended by the ICN following basic comity norms, competition authorities should give due consideration to the rules on legal privilege applicable in the jurisdiction in which the relevant documents were created.

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45 An apostille is only available for countries that are signatories to the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents of 5 October 1961 (Apostille Convention). Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, Oct. 5, 1961, 33.1 U.S.T. 883, 527 U.N.T.S. 189. It allows for a certification for legal purposes (the apostille) in one Member State to be recognized in all other Member States. Where an apostille is not available, a document has to be legalized following the specific requirements of the countries involved, which usually involves the foreign ministries on both sides.


47 Strafprozessordnung [StPO] [Code of Criminal Procedure], § 97 et seq., https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html (Ger.).

Recommendation. Merging parties are usually under the obligation to provide correct and accurate information. A number of jurisdictions, including the European Union, make such a confirmation part of their notification forms. Therefore, in many cases, it could well be argued that no formal documents need to be submitted. All relevant information that such documents can possibly contain is also presented in the notification form itself. Therefore, competition authorities should limit their document requests to specific cases where there is real added value.

Regarding the formalization of requested documents, there seems to be no added value at all in such requirements. Where national administrative law obliges an agency to request documents in a certain form, national legislators should include provisions in their competition laws exempting merger control procedures from such formalization requirements. Furthermore, translations of requested formal documents should be limited to the parts of potential interest to the authority. Lastly, as a matter of international comity, competition agencies should refrain from requesting documents that are covered by legal privilege in the jurisdiction in which they have been created.

6. Apply a Two-Step Review Process to Quickly Clear No-Issue Transactions

To assess a proposed concentration and its effects on the competitive landscape, a competition authority needs to receive information that enables it to conduct a meaningful review. However, a number of jurisdictions require the provision of information that has no real connection to the notified transaction and is not proportionate to the level of potential competitive concern posed by that transaction. In Taiwan, the notifying parties need to provide detailed information on their best-selling products in Taiwan, including their sales value, sales volume and price per unit. They also need to provide information on how much those products contribute to the overall sales of the party in Taiwan, as well as its own and competitors’ market shares, and information on their suppliers and customers. All this information is still required even if it is about products that are completely unrelated to the transaction. Similarly, the Indonesian competition authority requires competitor, supplier, and customer information for all products sold locally by each notifying party’s entities with sales or assets in Indonesia regardless of whether they are involved in the transaction.

A better approach is to follow a two-step notification system. In the first step, a competition authority only requests the information that is strictly necessary to assess the basic parameters of the transaction to see whether its jurisdiction over the transaction is established and whether the transaction has the potential to have a material adverse impact on any market. Information required to perform a step-one assessment includes the following: (1) a description of the transaction structure to assess that it meets the jurisdiction’s definition of a concentration; (2) the provision of the relevant turnover information of the parties to assess whether the jurisdiction’s noti-
fication thresholds are met; (3) a description of the parties, their organizational structure and their activities, in particular in the jurisdiction where the parties notify, to provide a first indication of the relevant markets and potential overlaps of activities; (4) a description of the (potential) markets to which the transaction relates; and (5) a confirmation that certain combined market share thresholds (e.g. 20 percent horizontally, 30 percent vertically) are not exceeded on such relevant markets.

Only in the event that a material market adverse impact seems possible should the transaction enter the second stage. In that second stage, the authority may then request further information and documents to make a substantive assessment of the case.

Recommendation. Since most transactions do not lead to a material negative impact on competition, agencies should adopt a two-step approach when assessing transactions. Such an approach would filter out the vast majority of transactions at step one. It would also substantially unburden both the merging parties and the competition authorities that could focus their resources on the transactions that pose actual concerns.

Conclusion
Streamlining and simplifying merger control regimes will help competition authorities to allocate their limited resources more efficiently and ensure transactions that do not have a material adverse effect on competition are swiftly cleared or, even better, do not require notification. It will also allow competition authorities to focus on those transactions that do have a material impact on the market.

Here is a brief summary of our recommendations that we believe will enhance the efficiency, accuracy, and predictability of merger control systems across the world.

(1) Focus on transactions that lead to an actual change of control. Clear, written guidance should be issued to allow merging parties to easily assess whether their transaction fits within the jurisdiction’s definition of a change of control. ICN guidance and proposed best practices should be incorporated.

(2) Base notification thresholds on objective criteria that are straightforward in their application. Turnover thresholds have the most benefits and best meet these criteria.

(3) Only review transactions where a local nexus exists between the jurisdiction, the transaction, and the transacting parties. Notification thresholds should be the primary method for defining the local nexus but additional provisions/guidance may be necessary.

(4) Provide for flexibility regarding the notifying party. Any entity in the control chain from the direct acquirer to the ultimate parent company should suffice as the assessment should be of the entire corporate group in any event.

(5) Only request documents that are actually necessary for the review of the transaction. Often, this might be none at all. Additional formalization requirements usually have little added value. For documents from other jurisdictions, give due consideration to legal privilege.

(6) Apply a two-step review process to ensure that no-issue transactions can be cleared quickly.

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52 As argued above, turnover thresholds form the most straightforward and objective criteria to assess a notification requirement. In case of other measurements, such information needs to be provided instead of turnover.
None of these recommended steps are especially hard to implement, and there is considerable agency or ICN precedent that recommend their adoption. There is always a certain amount of inertia that resists change, especially in larger organizations, but practice in peer agencies show that these recommendations are worth the investment and will result in positive returns. We hope that setting out these recommendations in a straightforward manner and in a simple list will encourage agencies to quickly convert them into operating procedures for the benefit of all stakeholders in the process—not least of whom are the agencies themselves.
Interview with James F. Rill, Former Assistant Attorney General for Antitrust

Editor’s Note: During his career, James Rill has played a uniquely important role in the development of global antitrust. From 1989 to 1992, Mr. Rill served as Assistant Attorney General (AAG) of the U.S. Department of Justice (DOJ) Antitrust Division, during which time the DOJ and Federal Trade Commission (FTC) for the first time issued joint Horizontal Merger Guidelines. As described in this interview, it was also an important time for the expansion of competition law internationally and for U.S. relations with other competition regimes. As AAG, Mr. Rill directed structural impediment talks with the Japanese government, using competition law to ensure market access; assisted newly liberated Eastern European countries in their efforts to establish new free-market systems; and helped negotiate a landmark antitrust cooperation agreement between the United States and the European Union.

In 1997, then-Attorney General Janet Reno and Assistant Attorney General for antitrust Joel Klein appointed Mr. Rill as co-chair of the International Competition Policy Advisory Committee (ICPAC) to advise the DOJ regarding international antitrust policy in the 21st century. Foremost among ICPAC’s recommendations was its proposal to create a global competition forum for competition authorities throughout the world to confer on competition law issues. That recommendation was the impetus for establishing the International Competition Network in 2001, which in the past 19 years has contributed significantly to worldwide convergence of competition law and policies.

Mr. Rill served as Chair of the American Bar Association’s Antitrust Law Section from 1987–1988 and over the years has been a mentor and trusted advisor to many in the leadership of the Section and U.S. enforcement agencies.

The interview was conducted for The Antitrust Source by Deborah Garza, former Chair of the ABA Antitrust Law Section, on October 15, 2019.

DEBORAH GARZA: Jim, you were confirmed as the Assistant Attorney General for the DOJ Antitrust Division in 1989. What was the state of antitrust or competition law enforcement outside the U.S. at that time?

JAMES RILL: Very sporadic and somewhat meager. About that time, there were a little over a dozen antitrust regimes in place with very spotty enforcement records. Of course, the U.S. had an antitrust program and, prominently, Canada and the European Union, which had the Treaty of Rome with its antitrust provisions.

The European Commission had just recently issued the Merger Regulation. Interestingly, Japan had the Antimonopoly Act, which was a very comprehensive antitrust statute that was adopted in 1947, but which had not been enforced. So, let’s say that the action as of the spring and summer of 1989 was somewhat episodic, scattered and not, overseas, marked by particularly vigorous enforcement.

Then, 1989 was really a seismic year. In November of 1989, the Berlin Wall came down. In Poland, in August, the first non-communist government in Eastern Europe since 1947 was put into office.

In Hungary, in September, the name was changed from the Peoples’ Republic to the Republic of Hungary. The remains of Imre Nagy, who had led the 1956 Hungarian Revolution, were exhumed and he was given a state burial that he was denied after he had been executed in 1956 by the Soviets. The first open party election was conducted in Hungary in October of 1989.
Very significantly, in November of 1989, demonstrations occurred in Wenceslas Square in Prague. The keys were rattled. The Communists were thrown out of the government. In the following few days, Václav Havel was installed as the president of what was then known as Czechoslovakia.

So, this massive change in the political landscape of Central and Eastern Europe had ramifications on a worldwide political basis, but also had very significant ramifications for competition policy.

At the same time, there were developments in the Far East. In 1989, the view was that Japan’s economy was going to dominate the world. There was considerable friction between the United States and Japan over the keiretsu policy whereby, at least according to the United States, the Japanese vertically integrated auto companies, for example, under government direction from the Ministry of International Trade and Industry (MITI), which would foreclose, or at least diminish the opportunities for American exports into Japan.

At that point a Section 301 process was also beginning to emerge under the Trade Act, which would accuse Japan of unfair trade practices. This development was on the brink of taking place in 1989, which led us to what became the Structural Impediments talks. But, I think we’ll talk about them a little bit later.

**DEBORAH GARZA:** What role did the U.S. have in the development of competition policy in these new eastern European market economies?

**JAMES RILL:** Very interesting. There was a great commitment at the very top level of the United States government from President George H.W. Bush on down, in undertaking to support the emergence of market economies in these formerly Soviet-dominated, command-and-control economies that ran across the entire panoply of various commercial and financial enterprises. As it became apparent, competition policy had a role in facilitating and endorsing the expansion of a market economy in the former eastern European Soviet-dominated countries.

Competition authorities were involved with all levels of the U.S. government. In April of 1990, the door was opened by an organized program led by Commerce Department General Counsel Wendell Willkie for the agency heads at the time, myself at DOJ and Janet Steiger, who was Chairman of the Federal Trade Commission, to lead a mission to Poland and Hungary shortly after the opening of the markets there.

The mission to Czechoslovakia was separately organized.

In Poland, we had a meeting with Anna Fornalczyk, who was then the new head of the Polish Antimonopoly Office. She was a professor from the University of Lodz. In Hungary, we met with Ferenc Vissi, who had just become head of the Hungarian Competition Authority.

In Prague—and this is particularly significant—we had the opportunity to meet with President Havel. This demonstrated the top-level interest of that country in competition policy. In our meeting with Václav Havel, his competition staff, and some of his economic advisors—actually, one of them was a Communist—we talked for 45 minutes to an hour about the benefits of a competition policy as an essential element of supporting the market economy. I have to say, that was one of the great experiences of our professional careers, to have that opportunity with that giant of a leader.

This initiative led to the development of technical assistance programs where we were invited by these countries to provide assistance, as well as other countries in Eastern Europe, Bulgaria and Romania, in particular.
Congress passed a law called the SEED Act. SEED stands, as I recall, for Support for East European Democracy. That Act provided some $300 million for technical assistance across the entire economic sphere—labor, finance, commercial enterprise. When we saw that that money was available, DOJ and FTC said, “Well, what about competition policy getting some of that for technical assistance?”

Russ Pittman at DOJ and Jim Langenfeld at the FTC developed a paper explaining the importance of competition policy to enhancing the overall move from a command-and-control economy to a market economy and so that former state enterprise would not simply become private monopolies without the benefit of competition and the enforcement of competition principles. As a result, the agencies got something like $3.6 million to support technical assistance to specifically, Poland, Czechoslovakia, Hungary and, later, the Baltic States as well as Romania, Ukraine, and Bulgaria.

There are really two characteristics of the technical assistance program that were established that stand out in my mind. One, this assistance involved not just short-term visits, but long-term advisors as well. The opportunity was there for long-term advisors to go to these countries and work with the antitrust agencies on specific cases, discuss substance and procedure, and give advice on how to develop a case.

The long-term advisors were particularly appreciated. One of the foreign agency heads said to me at the time, “You know, it’s very nice to see you guys for a cup of coffee. But, it’s really helpful that these people come in and give us the long-term assistance as we develop our analytical process and our cases.”

The other significant aspect of the technical assistance program was that the people that went over from both the FTC and DOJ were very senior, experienced antitrust lawyers and economists. It was a matter of such significance to Janet Steiger and me that we were able to send over people like, from the FTC, Terry Winslow, Howard Morse, and Liz Callison, and from DOJ, Craig Conrath, M.J. Moltenbrey, and Hays Gorey. Craig spent 18 months working with the Polish agencies in Warsaw and Krakow, and I believe that time produced very significant results.

This assistance helped establish vibrant, ongoing, strong antitrust regimes in these countries; they were anxious to have that help and they made good use of it. In addition, since salaries for the long-term advisors were actually paid out of the AID money, it did not impact our domestic enforcement budget very much to provide this level of assistance.

The relative success of these programs spread from the countries of eastern and central Europe to Russia, South Africa, Latin America, Indonesia, and Southeast Asia with long-term assistance.

Obviously, the political dimensions in each of these countries were quite different, one from the other, as was the extent to which they were amenable to accepting our advice.

I have to give enormous credit to Janet Steiger for all that she did to promote this effort.

I would like to share one particular anecdote to demonstrate the highest-level support provided by the United States government. There was a request from the quite-different-then government of Venezuela, which was a free market government under President Perez, to participate in the technical assistance program. For one reason or another, the State Department was somewhat reluctant. So, Janet wrote a letter to President George H.W. Bush advising him that this is something that ought to be done. Lo and behold, the President advised the State Department that Venezuela was, yes indeed, eligible for technical assistance. A copy of that letter is available. At that point, as I say, the Venezuelan climate was quite different from what it is now. It was then very much a free market economy.
Today the competition regimes, to varying degrees, by and large are firmly established in these countries, particularly in Central and Eastern Europe. I think that is in some measure attributable to the overall commitment and technical assistance provided by the United States agencies—by the Federal Trade Commission and the Department of Justice and making their assistance available on a continuing basis—not just dropping in for a cup of coffee but assisting the gradual development of antitrust procedure and substance in those countries on a continuing basis. Importantly, this was a commitment of the United States government. There may be some disagreement with this, but it was viewed that a strong competition policy was indeed essential to the development of free markets, as these markets moved from command-and-control, particularly under the former Soviet regimes, to market economies. Competition policy principles supported the development of market economies in these formerly command-and-control directed national economies under the Soviet dictatorship.

I have to say, it was one of the more rewarding experiences that a lot of us had in trying to help foment that principle.

DEBORAH GARZA: Let's go back to Asia, then, and U.S. interactions with Japan and South Korea. What was happening at the time with those two countries?

JAMES RILL: Let’s talk about Japan first. As I mentioned earlier, Japan had a very well-crafted, carefully articulated antitrust law, the Antimonopoly Act of 1947 which, as you can well imagine, was a gift of the supreme Allied headquarters and, in fact, was not very well received as Japan itself moved from the authoritarian dictatorship, if you will, into a liberal form of government. They were still very skeptical about the efficacy of having an antitrust program. In fact, perhaps the most prominent post-war Japanese Prime Minister, Yoshida Shigeru, in his memoir said that one of the worst parts of the Allied occupation was the Antimonopoly Act, which slowed their economic development.

Gradually, the Japanese Fair Trade Commission became sort of a dead end. Somebody from the Finance Ministry ordinarily ran it. They were very much under the influence of MITI.

As I mentioned earlier, there was considerable concern in 1989 with the extent to which corporate Japan, the keiretsu system of relationships, operated to inhibit United States exports into Japan—for example, autos, semiconductors and other products. A petition was filed to proceed under Section 301 of the Trade Act accusing the Japanese of violating the trade agreement by this exclusionary practice.

Then-President George H.W. Bush didn't necessarily want to go that far, which could have led to a serious trade dispute, to put it mildly. So, it was suggested that there should be talks to see if there were ways to get around that particular problem. This led to the Structural Impediments Initiative talks, or SII talks, which were conducted at the sub-cabinet level.

Initially, the SII talks were headed by State, Treasury, Commerce, U.S. Trade Representative (USTR), and the Council of Economic Advisers. The USTR at that time, Carla Hills, being an outstanding antitruster in her own right, said, “Well, what about Justice?” She called then-Attorney General Dick Thornburgh and said, “Can we get you guys to help out here?”

Attorney General Thornburgh thought it was a good idea. He called me and said, “You are going to Japan.” I asked, “General, you’ve tired of me already?” So, in September of 1989, only four months after I joined DOJ, we had the first SII talks in Tokyo. Japanese counterparts at their sub-cabinet level, vice minister level, were participants. They were very productive meetings.

It was quite interesting. I think at age 56, I was probably one of the older members of our six-member delegation.
I looked across the table and they were all older than I was. On the U.S. side, we had all been in office maybe six months, while they had all been in office 10 years or more.

And it seemed to me quite early on that they knew a lot more about us than we knew about them.

But, they did want to reach a resolution. The first interim report that came out of the SII talks contained a strong endorsement of strengthening the JFTC and an agreement to go after cartel practices, including vertical cartel practices and boycotts and to really increase enforcement of the antitrust law.

Now, this may not have produced so many immediate, tangible results, but in the long term, I was told by JFTC commissioners the talks helped to create a respect within the Japanese government for the JFTC that had not been there before. The JFTC then became a functioning and respected part of the Japanese government. Beyond that report, I think the SII talks resulted in strengthened relationships between Japan and the United States on antitrust issues, which, under Attorney General Janet Reno and Assistant Attorney General Joel Klein, led to a well formulated antitrust cooperation agreement between the U.S. antitrust agencies and the government of Japan.

Korea came somewhat later. Korea had not been particularly involved in antitrust enforcement, but gradually became imbued with the notion of becoming a leader in antitrust enforcement, some would say not always in the proper consumer welfare-oriented direction. But, ultimately, there was an agreement which led to a trade agreement—KORUS—between the United States and Korea. It was a very significant development, and one that is getting a lot of attention right now in light of the USTR complaint that the agreement’s due process provisions are not being honored by the Korean Fair Trade Commission (KFTC).

DEBORAH GARZA: You mentioned that in 1989 the European Union had a system of competition law enforcement through the Treaty of Rome. Here, the issues and points of friction were different from what you experienced in Eastern Europe and Asia. Can you talk about those frictions and what steps were taken to resolve them?

JAMES RILL: Sure, Deb. A lot has been written about this area. In particular, I commend everyone’s attention to a recent paper by Greg Werden and Luke Froeb entitled, “Antitrust and Tech: Europe and the United States Differ, and It Matters.”

There are structural, institutional elements of the relationship between the U.S. and Europe that will always create some kind of friction, or at least different perceptions of how enforcement ought to operate. Europe works more on an administrative system.

Some of the common law procedures that are available in the United States—witness presentation, cross-examination and so forth, and the adversarial system that operates in the United States—are not part of the system in Europe. The hearings before the Directorate General of Competition (DG COMP) are more like congressional hearings or speeches and not so much a presentation of witnesses and evidence, subject to cross examination.

Judicial review is considerably more limited in Europe than it is in the United States. That’s the view of many European observers, as well as U.S. observers. And there are those who think that there is more focus on competitors than competition in Europe than there is in the U.S. because European activities are primarily generated by competitor complaints. So, there is a question of whether or not Europe’s focus is on harm to competitors rather than on harm to competition. These differences will always create some disparity on substance, and certainly of procedure.
There has been continued effort and cooperation between the U.S. and Europe to at least be able to discuss and air these disagreements, so that one would understand specific enforcement decisions. In 1991, DOJ and FTC negotiated the U.S.-European antitrust cooperation agreement, which I think was one of the landmark cooperation agreements between the U.S. and a foreign agency—between the governments, actually, not just the agencies.

Among other things, it initiated and included the opportunity for positive comity, pursuant to which one country could ask the other country to take action against an antitrust violation that affected the important interest of the requesting country. That was a landmark aspect of that agreement. The agreement has been implemented on at least one occasion—not formally—but it provided a lodestone for more informal cooperation.

A formal application occurred once in a case involving Air France and Amadeus, and conduct inhibiting information available to U.S. computer reservation systems.

In any case, the agreement provided a good basis for cooperation. Now, we all know that the relationship has not always been peace and light. In 1997, there was a dispute over Boeing and McDonnell Douglas, in which the early position of the European Commission was to block the transaction.

That escalated to the level of President Clinton (a former Arkansas antitrust enforcer) getting directly involved in the matter to persuade Europe that there ought to be a better resolution than blocking the transaction, which of course happened.

Subsequently, in the early days of the George W. Bush Administration, when Charles James headed the Antitrust Division, there was the GE/Honeywell case in Europe, which many think was based on a very questionable foundation of conglomerate merger analysis. It produced a rather sharp criticism of the European decision by Bill Kolasky, who was then a Deputy Assistant Attorney General, in the middle of an OECD competition policy meeting. I was sitting next to EU Competition Commissioner Mario Monti at that time and I could see that as Bill was talking, Commissioner Monti was visibly agitated.

Nevertheless, since then, the harmonization in the area of cartel and merger enforcement has been quite substantial, some of it generated by European court decisions.

There have been substantial moves in the right direction of convergence, if not harmonization, at least approaching an understanding between the U.S. and Europe. But, the frictions are still there as the Werden and Froeb article discusses. As that article indicates, there are structural issues that will always be there. And we have to understand those and try to move towards greater convergence in the broad sense of the word of the various institutional differences that may produce different results.

DEBORAH GARZA: Tell us about the road to the development of the International Competition Network. How did that come about? You obviously had a huge role in that. Can you talk about it a bit?

JAMES RILL: Yes. I have to say that a lot of people had a role, but I think it has been one of the major accomplishments that U.S. antitrust efforts have been able to produce. It really started with the World Trade Organization (the WTO). There was a WTO committee, a competition task force, headed by Prof. Frédéric Jenny, who is a very widely respected global antitrust thought leader.

That task force was charged with recommending what role the WTO could play in formulating global antitrust principles. There was a lot of skepticism about the appropriate role for the WTO, frankly.
The enforcement mechanism—the way that the WTO operated—might have led to results that would have been somewhat inconsistent at times with the kinds of results you might get from an antitrust regime. One can think of trading market access for brandy for chickens as part of the WTO activity. That raised some eyebrows as to how the WTO would handle antitrust.

About this time, in 1997, Attorney General Janet Reno and Assistant Attorney General Joel Klein created an advisory committee, the International Competition Policy Advisory Committee—acronym ICPAC—to advise the Department of Justice on the appropriate avenues it might pursue with the very rapidly increasing global impact of antitrust and enforcement that tracks across multiple jurisdictions. ICPAC members were non-governmental individuals. It was a committee of advisors to the Department of Justice. It consisted purely of private sector individuals who were academics, business people, practitioners, and former government officials who put together a report after several hearings, including a hearing in Washington in which half a dozen leading antitrust officials from other countries around the world participated.

There were several recommendations. The report touched on cartel activity, merger activity, and the trade and antitrust interface.

One of the recommendations of the report was to create what was referred to as the Global Antitrust Forum, which would provide a mechanism or forum for antitrust officials around the world (just antitrust officials, not trade officials) to meet and act on an informal basis. It was not intended to be a structured agency. Rather it was intended as an informal agency that would meet on a regular basis to discuss better avenues for promoting, if not harmonization, at least broader understanding of antitrust across the globe, with the help of non-governmental advisors. That recommendation was in the report that was issued in February of 2000 (the Final Report of the International Competition Policy Advisory Committee to the Attorney General and Assistant Attorney General for Antitrust).

Some of the recommendations in the report were in the merger area and those were pretty rapidly adopted by DOJ. FTC by the way, was always an observer at the sessions of ICPAC.

The global forum recommendation was not immediately adopted. All of this history is set forth in an article prepared by Merit Janow and me. Merit was the executive director of the ICPAC and really the godmother, if you will, of this entire program.

We met with Assistant Attorney General Joel Klein and urged him to take a position on the global forum. I suggested that that would be an important part of something he could do before he left DOJ—we were going into the summer of 2000, which was an election year. He agreed. At the anniversary of the European Merger Regulation in Brussels, Joel made a speech in which he endorsed the creation of the global forum along the lines as recommended in the ICPAC report. I’m not sure what the prior conversation or exchange was with then-Commissioner Mario Monti, who was vice president of the European Commission, with antitrust as one of his responsibilities. But, at any rate, the very next day, Commissioner Monti endorsed the Klein proposal. That gave the endorsement of the European and U.S. antitrust authorities to the creation of the global forum.

Still, the global forum didn’t happen overnight. It was the topic of a meeting in February of 2001, at Ditchley Park, which had been a retreat of Winston Churchill during World War II, well outside of London. A lot of credit goes to a leader of antitrust for the International Bar Association, Bill Rowley. He arranged it and facilitated attendance of the heads of a number of antitrust agencies, including Commissioner Mario Monti and Acting Assistant Attorney General for Antitrust John Nannes (Charles James had not yet taken his seat). The Ditchley Park conference provided a real spark for the creation of the global initiative because it was an opportunity for antitrust experts to talk all antitrust all the time. Later in 2001, the focus on the issue by the new heads of the agencies in
the United States began to take off. Charles James was over at DOJ; he had been a deputy assistant attorney general in the prior Republican administration. At the Federal Trade Commission you had Tim Muris as Chairman and General Counsel, Bill Kovacic, who, of course, is legendary for his contributions to global antitrust convergence. They devoted time to supporting moving forward with this global forum, or global initiative. It was finally announced by the leaders of the U.S. agencies and European Commission Director General Alexander Schaub at the Annual Conference on International Antitrust Law and Policy at Fordham University in October of 1991. It was called the International Competition Network (ICN). The initial signatories were from 14 jurisdictions, including the United States.

It was designed as an informal organization and the membership was to be strictly antitrust agencies. The only qualifications were that the country had to have an antitrust law and agency, but otherwise, it was wide open.

You can see where it’s gone now. That’s how it got started.

DEBORAH GARZA: Let’s fast forward to almost two decades later. How do you assess the way that the ICN is operating today? Has it fulfilled the vision that you had for the global forum?

JAMES RILL: Certainly directionally and in large part it has. There are now over 130 agency members of the ICN and a large body of non-governmental advisors—you have been one. The ICN has produced enormously good work, such as the best practices guidance. One of the early efforts was merger notification and procedure. And, a lot of work has been done on predatory pricing.

One of the paramount achievements has been the development of the guidance document on agency investigative procedures, produced by the Agency Effectiveness Working Group, which provided for transparency and consultation and independent review of agency procedures. A lot of work was done on that by Paul O’Brien and Randy Tritell of the FTC. That was adopted, I believe at Sydney.

Be that as it may, whether it represents soft convergence or not, it is convergence. And it’s convergence on very, very important, concrete principles, not just verbal assurances. It’s not just asking a jurisdiction if it offers due process, accepting its answer, and moving on.

The ICN is continuing to develop principles for due process. I think the non-government advisor (NGA) participation there has been very helpful. A lot of NGA work went into the agency investigation documentation that was produced by the Agency Effectiveness Working Group. So, I think, in large measure, the ICN is fulfilling its objectives.

The ICN is not alone in its efforts. The Organization for Economic Cooperation and Development (OECD) has a global forum once a year. The members of the OECD collaborate on best practices and they created a merger notification procedure document that was adopted by the OECD. The OECD Competition Committee has a task force that deals with interagency international cooperation. The OECD also produced a landmark document on antitrust enforcement with respect to mergers that have international implications which Professor Richard Whish and now-Judge Diane Wood authored when I was the Assistant Attorney General for Antitrust at the DOJ and working with the OECD. But the OECD has made limited efforts to achieve accountability for any of the information, guidance, and suggestions that it makes. And it is, of course, at least in theory, limited to participation by industrial nations. The ICN has much broader representation and includes as members less developed economies. The United Nations Conference on Trade and Development (UNCTAD) also has limitations. The ICN is much more broadly based, more widely open.
Going beyond the ICN, the U.S. has entered into 15 cooperation agreements with foreign jurisdictions including our agreement with Japan, and even a generalized agreement with China. And we have antitrust chapters now in trade agreements. I mentioned earlier the KORUS agreement, the South Korea-U.S. agreement. That's a landmark. There is a substantial antitrust component to the Trans-Pacific Partnership Agreement. Unfortunately, the U.S. withdrew. In my personal view, that was very unfortunate. There is a competition tranche in the U.S.-Canada-Mexico Agreement that is pending approval. One can question the efficacy of trade agreements containing antitrust tranches and the extent to which enforcement mechanisms are consistent with antitrust principles. But it shows a continuing recognition of a need for due process and international harmonization or at least convergence of antitrust principles.

DEBORAH GARZA: As successful as the ICN and these other efforts have been, we still face some challenges in the global antitrust ecosystem, don't we? What issues do you see today and on the horizon?

JAMES RILL: I think there is a significant need for greater convergence and some level of accountability in the extent to which these global instruments of convergence and harmonization are actually being followed.

It's not simply satisfied by perfunctory government review, as we see in the OECD, but some levels of sound accountability, to test the extent to which agencies both here as well as overseas, are actually following recognized global principles of antitrust procedures as well as substance.

You co-chaired a blue ribbon committee, Deb, endorsed by the U.S. Chamber of Commerce, really an independent committee, ICPEG, in which I participated. One of the recommendations we made highlights another questionable issue for the future of competition enforcement—that is, to what extent are we going to depart from the model of the ICN, which is all competition all the time among the competition agencies, to involve other agencies in what could be considered competition issues. I think the question was sparked by some issues involved in the Far East. In 1989, you had criticism of Japan by the State Department for alleged discriminatory antitrust enforcement. More recently, we have the USTR filing a formal paper under the KORUS against the KFTC for procedural default in their enforcement process. That paper was filed under the auspices of the USTR, though the Antitrust Division of the Justice Department participated. The question is to what extent the other agencies should have a role to play in this effort? It's a controversial issue.

ICPEG recommended a cabinet-level organization. Some of us who were members of that group raised some question about that recommendation.

There is now some thought of maybe a sub-cabinet level group headed by DOJ so that at least some kind of conversation might take place, as an attempt to foment greater accountability or at least some review process and ability to bring by reputational force, if you will, on agencies who depart from global standards of either process or even substance in enforcement. I think this may have in large measure motivated Assistant Attorney General Makan Delrahim's proposal to establish a multilateral framework for antitrust procedure. That concept was adopted by the ICN with the establishment of the Competition Agency Procedure process, or the CAP.

CAP is a major step by the ICN that approaches the level of accountability that might be desirable through the force of reputational influence that can be brought to bear where there has been a clear and undefeatable departure from global standards of due process or substantive enforcement. It remains to be seen how far that goes. There are about 70 signatories now.

Signing jurisdictions are to provide a template showing the extent to which each are adopting the CAP consensus on global standards of process, particularly, and, also substance.
Those templates, I think, will be posted on the ICN website and subject to review. What’s not clear is the extent to which there will be an objective third-party review of the extent to which those templates are actually expressive of what is really done by the agency. I think that is a subject undergoing some discussion and some debate. I know that the U.S. Chamber of Commerce is very much involved. I think the ABA Antitrust Law Section is also quite interested in that. There was a task force established within the ABA Antitrust Law Section to evaluate conformance with antitrust standards.

DEBORAH GARZA: Your colleague John Taladay and Melanie Aitken chaired that task force, which assessed whether or not jurisdictions were living up to best practices of process and transparency.

JAMES RILL: That report has been filed and I think it’s a very good report. Now, there is an ABA follow up on appropriate antitrust standards and a task force headed by Dick Steuer and Cal Goldman. So, we’ll see where that leads. From conversations with Assistant Attorney General Delrahim and recently departed Deputy Assistant Attorney General Roger Alford, I understand that the DOJ is sympathetic to the view that there needs to be some form of at least reputational accountability established. How that’s going to work out, I don’t know. But, I think it’s very important to the continuing credibility of the international effort.

DEBORAH GARZA: Well, I think that’s a good place to end the interview. Thank you very much.

JAMES RILL: I appreciate the opportunity.
A Legal Practitioner’s Guide to Event Studies

Allan Shampine

An event study examines changes in share prices of companies associated with the release of new information. In its simplest form, the researcher estimates a “predicted” share price based on past performance relative to a market index and the actual movement of the index on each date, then looks to the actual share price around the dates when new information of interest became known to the market to see what, if any, share price reaction can be discerned. ¹

Event studies are commonly used by both academic researchers and expert witnesses and may appear in both antitrust merger and conduct cases to support or refute claims of competitive harm when there is a relatively clear announcement of the conduct in question, e.g., announcement of an allegedly anticompetitive merger or of an allegedly anticompetitive settlement in a “pay-for-delay” case. While event studies can provide useful support for an expert’s conclusions, the results can be sensitive to a variety of study design elements, several of which are amenable to examination by legal practitioners. ² An understanding of those elements may be useful to legal practitioners when evaluating possible uses or criticisms of event studies.

A Legal Practitioner’s Checklist

The “event” refers to the release of new information to the market. That new information might be contemporaneous news of an event, such as an earthquake, or it might be information that was privately known for some time but is only now being publicly disclosed. Particularly for events of the latter type, determining when exactly they become known to the market can be trickier than it sounds. ³ For example, consider an event study trying to look at the impact on competitors of a merger. The new information might be the announcement of the merger. There is usually a formal announcement, so that can provide an obvious anchor point, but is that really when the market first learns about the merger? Often news about negotiations or rumors of a deal are present prior to the official announcement.

The choice of window to study can involve trade-offs—a longer window may help capture important information leakages that occur over time but also may increase “the noise due to the

¹ See, e.g., Daniel R. Fischel, Use of Modern Finance Theory in Securities Fraud Cases Involving Actively Traded Securities, 38 Bus. L., Nov. 1982, at 18 (“The model is based on the observable correlation between the return on a particular security and the return on the entire market when viewed over time. Once this historically observed correlation is determined, it is possible to predict what the return of a given security should be on a certain date given the return for the market as a whole. . . . Moreover, by comparing the predicted return with the actual return on the date of release of the supposedly correct information or immediately thereafter, the test attempts to isolate the change in the return earned by investors that is attributable solely to the allegedly withheld or false information.”).

² For a more technical discussion of areas “a defence attorney armed with the knowledge of statistics might question,” see, e.g., Charles J. Corrado, Event Studies: A Methodology Review, 51 ACCT. & FIN., Mar. 2011, at 207.

³ See, e.g., G. William Schwert, Using Financial Data to Measure Effects of Regulation, 24 J. L. & ECON. 121, 122 (1981) (“The main difficulty with measuring the effects of regulatory change on security prices is identifying when the market first anticipates the effects of the change on future profitability.”).
occurrence of other” events. For example, an official announcement might simply confirm what the market has known for some time, but extending the window of analysis may sweep in confounding events as well.

So the very first item a practitioner may wish to check when evaluating an event study is whether the event study is, in fact, looking at the right date. It is not necessary that the “new” information have been completely unanticipated in order to conduct an event study. For example, confirming a rumor may be sufficient new information to be worth studying. However, when news comes out over a period of time in small increments, it may be difficult to identify a sufficiently sharp change in market expectations to perform an event study. The practitioner may thus wish to examine whether there is sufficient new information released on the identified date to be of use in an event study.

Given a distinct event, is there a clear, testable hypothesis as to the effects of that event on share prices? An event study looks at what happens to share price. But that means such a study is only useful if there is a clear, testable hypothesis as to how the event is expected to impact share price. In some cases the expected share price effect given a theory of competitive harm is clear, but that is not always the case. Some new information may have ambiguous effects on share prices even under a single theory. (It is also important to bear in mind that at most an event study can provide information about what the market expects to happen. That does not mean the market’s initial expectation is borne out.) For example, new regulations may both benefit and harm companies. The net effect may be ambiguous, although an event study might be of use in determining whether the market predicts the net effect will be positive or negative.

A more difficult situation presents itself when multiple theories can yield the same prediction. Consider the impact on share prices of a horizontal merger. Many event studies have found that shareholders of acquired firms tend to earn large positive abnormal returns, consistent with increased value for the merged firm, but researchers have also pointed out that one “generally cannot distinguish the sources of these gains”—whether efficiencies or increased market power. Studies have attempted to distinguish between those hypotheses by looking at the share price returns for rival firms after the merger announcement or upon later antitrust challenges, on the grounds that efficiencies likely mean a stronger competitor and hence negative returns for rivals if the merger proceeds, while increases in market power if the merger proceeds may benefit rivals as the entire industry becomes less competitive. However, other researchers have pointed out

4 See, e.g., John Y. Campbell, Andrew W. Lo & A. Craig Mackinlay, The Econometrics of Financial Markets 151, 176 (1997) (“The period prior to or after the event may also be of interest and included separately in the analysis. For example, in the earnings-announcement case, the market may acquire information about the earnings prior to the actual announcement and one can investigate this possibility by examining pre-event returns. . . . [I]n some studies it may be difficult to identify the exact date. . . . . The usual method of handling this problem is to expand the event window.”); Tomaso Duso, Klaus Gugler & Burcin Yurtoglu, Is the Event Study Methodology Useful for Merger Analysis? A Comparison of Stock Market and Accounting Data, 30 Int’l Rev. L. & Econ. 186, 187 (2010) (“The choice of the event window is a much debated issue. While a long window might help to capture important information leakages that affect firms’ returns, a shorter window helps to reduce the noise due to the occurrence of other non-merger-related events, which might also affect firms’ valuations.”).

5 Campbell et al., supra note 4, at 179 (“An important characteristic of a successful event study is the ability to identify precisely the date of the event. In cases where the date is difficult to identify or the event is partially anticipated, event studies have been less useful.”).

6 See, e.g., Schwert, supra note 3, at 133 (“[I]t is entirely possible that the actual effects of regulation will turn out to be very different from what was expected at the time of the regulatory change.”).

alternative explanations for such observed patterns of abnormal returns. Thus, there can be situations where different studies observe the same pattern of abnormal returns but draw different inferences from that pattern.\(^8\)

Assuming the study is looking at the right time period and has a testable hypothesis, the third item a practitioner may wish to check is whether the event study is looking at the right companies which may be affected by the event at issue.\(^9\) This question can hinge both on whether a company is likely to be affected as well as on whether the effect is likely to be detectable in light of the company’s overall operations and structure. In some cases this may be a trivial question, such as in a securities case where the relevant question is news regarding a particular company and the impact on that company’s share price. But in other cases it can be a difficult question. For example, when doing event studies related to regulation or merger impacts, which companies are likely to be impacted? And if they are likely to be impacted in different ways, then the researcher needs to sort them out appropriately. For example, a proposed regulation might open up a new geographic area for development, but might only allow certain companies in, while explicitly or implicitly barring others. One would expect the two groups to be impacted differently, and the researcher should make clear which companies are in which group.\(^10\)

This step can provide several areas for the practitioner to examine. Are the companies analyzed consistent with other evidence concerning product and geographic market definition? If the study does not explicitly discuss market definition, is it taking an implicit position through the choice of companies to study, and is that position reasonable in light of the facts of the case? Are groups of companies being mixed together that are likely to be impacted in different ways? If so, what happens to the companies individually or if they are grouped together in different ways? (More on this below.) Are some potentially relevant companies being excluded from the analysis? If so, a practitioner may wish to learn if any excluded companies yield different results than the event study claims for the included companies. Conversely, is it plausible that an included company will be impacted sufficiently that the impact can be detected? That is, some events may be expected to have only a modest impact on a small division of a huge, diversified company. If an event study nonetheless claims to find a statistically significant deviation from the predicted share price, a practitioner may wish to question the researcher’s inference that the two are related.

Following up on the question of how multiple companies are handled, the literature suggests, for example, that if there are multiple companies that are likely to be impacted in similar ways, then the researcher may wish to see if there is a jointly significant deviation on the relevant day—that is, looking at a group can yield greater precision than looking at individual firms.\(^11\) If an event study

\(^8\) See, e.g., id. at 693 (“Nevertheless, our analysis indicates that the conclusions drawn by these earlier studies do not necessarily follow from their results. It is possible to tell a reasonable story in which the pattern of abnormal returns reported in Eckbo and Eckbo and Wier are consistent with mergers that lessened competition with creating efficiencies.”).

\(^9\) See, e.g., CAMPBELL ET AL., supra note 4, at 151 (“After identifying the event of interest, it is necessary to determine the selection criteria for the inclusion of a given firm in the study. The criteria may involve restrictions imposed by data availability such as listing on the NYSE or AMEX or may involve restrictions such as membership in a specific industry. At this stage it is useful to summarize some characteristics of the data sample (e.g., firm market capitalization, industry representation, distribution of events through time) and note any potential biases which may have been introduced through the sample selection.”). Selecting the right companies or market indices to use as benchmarks for overall market trends is also important but can be a more technically oriented topic.

\(^10\) See, e.g., Schwert, supra note 3, at 132 (“Of course, it is important to group securities into portfolios based on the similarity of the impact of regulation.”); Schuman, supra note 7, at 686–87 (noting that, for example, the impact of a merger on other firms can vary substantially from firm to firm); CAMPBELL ET AL., supra note 4, at 167 (discussing pros and cons of examining portfolios and individual securities).

\(^11\) See, e.g., Schwert, supra note 3, at 132 (“Thus, the portfolio return will provide a more precise estimate of the effect of regulation when the abnormal return is the same for each security in the portfolio.”).
has multiple companies with a common expected impact and does not look at their joint performance, the practitioner may wish to inquire as to why, and whether the study’s results are robust when looking at a group. Similarly, if the joint results are not statistically significant but an event study disregards the joint results in favor of one or two individual companies with statistically significant results, that calls into question the study’s inference that the share price deviations are related to the event of interest. If that were so, why is it impacting only some of the companies where impact is predicted? There may well be reasons why that is so, but inconsistency between individual and joint results is an area the practitioner may wish to pay close attention to.

The final area to look at is what else is going on during that time period. Are there confounding events that may make it difficult, or even impossible, to tease out the impact of the event of interest? For example, consider a company that releases new information that a mining operation has petered out. (As noted above, it is possible that such information might have become known to the market prior to the official announcement, e.g., because researchers or reporters visited the mine and observed that it was being shuttered. But assume here that the announcement is, in fact, new information.) An event study might find that the share price on that day falls by a statistically significant amount relative to the predicted share price level, which the researcher doing the event study might interpret to mean that news of the loss of the mining operation has had a material adverse effect on the company’s future profitability. But what if that announcement had been part of a quarterly earnings call, and on the same call the company made multiple other announcements containing negative new information, such as earnings being lower than the market had expected or that the CEO would resign soon because of health issues?

The event study itself simply tests whether there is a statistically significant deviation from predicted performance on a given day. If one sees what may plausibly be important new information released on that day, one can draw an inference that the two are related, but it is important to look at what other information may have been released that day. For this reason, it is common for researchers to do news searches for possible confounding events. The practitioner may wish to look into any failure to do so.

Case Study

I use a recent working paper by Zimmerman et al. as a case study of how a legal practitioner might evaluate an event study. The paper focuses on the AT&T/Time Warner merger—a merger between a multichannel video programming distributor (AT&T/DIRECTV) and a provider of video content (the Turner networks). The U.S. Department of Justice claimed that the merger would result in Turner charging DIRECTV’s rival MVPDs more to carry the Turner networks (e.g., TNT, TBS, CNN). The paper’s hypothesis is that if the market agreed with the Department of Justice’s theory, then the share prices of rival MVPDs should have declined when the merger was announced and that the share prices of other content providers should have increased.

Going through the areas discussed above in order, first, how do the authors determine when the market first becomes aware of the merger? The authors are not entirely clear on their method-

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12 See, e.g., Nicholas I. Crew, Kevin L. Gold & Marnie A. Moore, Federal Securities Acts and Areas of Expert Analysis, in LITIGATION SERVICES HANDBOOK 24-1, 12-13 (Roman Weil, Daniel Lentz & David Hoffman, eds., 5th ed. 2012) (An “expert’s analysis includes a news search [and] examination of industry and market conditions over the period” in order to establish “that the relevant industry and market factors did not change” and “no confounding news events occurred. . . .”).

ology or what news sources they reviewed, but they claim that initial reports appeared on October 20, 2016, with more definitive reports the following day and an official announcement on October 22.\textsuperscript{14} Given the rolling nature of the disclosures, the authors focus on a five trading day window starting two days before the Oct. 20, and extending two days after, and look at both individual day estimates and cumulative estimates. As discussed above, using a window is a common practice, particularly when the release date of the news is not clear cut. However, also as discussed above, longer windows may be more prone to confounding events.

The next question is whether the authors have a clear, testable hypothesis. One might think this question would rarely be a fruitful avenue for examination, but in fact in an antitrust context it may often be worth looking at closely. Here, the authors devote 17 pages to discussing the predicted share price impacts of a large number of economic theories.\textsuperscript{15} In short, the authors note that any particular pattern of observed share price impacts can be explained by multiple theories.

The practitioner may also wish to consider whether there are additional explanatory theories not discussed by an expert. Here, for example, the authors cite literature to argue that if the price for Turner content went up, prices received by other content providers should also go up.\textsuperscript{16} However, an argument can be made that the bargaining model put forward by the Department of Justice implies that if MVPDs are made worse off by Turner raising price to them, then the “pie” that the remaining content providers are negotiating over with the MVPDs will shrink, resulting, under the DOJ’s theory, in lower prices for other content providers, not higher. Thus, it can be the case that authors identify multiple hypotheses that can explain particular observed patterns of abnormal returns, and there can also be additional hypotheses not discussed that can do so as well.

The authors attempt to solve the problem of multiple hypotheses that can explain a particular observed set of results by turning to the record to dismiss some hypotheses on grounds unrelated to the event study. For example, the authors note that negative abnormal returns for rival firms may be explained by either the merging firm becoming a stronger competitor (e.g., DIRECTV lowering its prices for video services due to elimination of double marginalization) or the merging firm engaging in some form of raising rivals’ costs (e.g., Time Warner raising the price of Turner networks to MVPDs competing with DIRECTV). The authors claim that they can dismiss the possibility of the merging firm becoming a stronger competitor because the efficiencies could be expected to be small—a price reduction of about $1.20/month according to the DOJ.\textsuperscript{17}

This sort of effort to distinguish between hypotheses based on external analysis can be difficult, and the practitioner should look to see whether there is a dispute as to the factual basis for dismissing a particular hypothesis. Here, for example, there is such a dispute. The authors fail to note that the claimed impact on rivals’ costs was also of small magnitude—a price increase of about $0.76/month for the Turner networks\textsuperscript{18}—and that the sizes of the efficiencies and harm were both contested. The government claimed that, on net, content price increases would dominate, and AT&T/Time Warner claimed the government’s predicted price increases were speculative and inconsistent with the outcomes of prior vertical integration events and that efficiencies would be

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\textsuperscript{14} Id. at 25.

\textsuperscript{15} Id. at 6–22.

\textsuperscript{16} Id. § 2.2.

\textsuperscript{17} Id. at 14.

important. The practitioner might ask how the authors can reasonably claim that negative abnormal share price changes for rival firms support the government’s theory when the merging parties’ theory can explain the same pattern, and the court in fact found in favor of the merging parties.\textsuperscript{19}

As discussed above, this problem of multiple hypotheses being able to explain an observed set of results is not unique to this working paper and may be particularly common with respect to merger-related event studies. One researcher has noted that “practically any pattern of rivals’ abnormal returns can be consistent with some story of predominately procompetitive or anticompetitive mergers.”\textsuperscript{20} That researcher was discussing horizontal mergers, but the working paper’s extensive discussion of hypotheses illustrates that the same concern applies with respect to vertical mergers.

The next question is whether the event study is looking at a relevant group of companies. The authors examine a variety of upstream and downstream firms, including content providers, traditional MVDPs, virtual MVDPs, and subscription video on demand firms. There is little explicit discussion of market definition, but the authors have the advantage of being able to refer to a litigated case where market definition was extensively discussed. That will not generally be the case for ongoing litigation, of course. Nonetheless, perusal of the specific list of companies analyzed in the working paper suggests several areas a practitioner might want to explore.

First, why these MVDPs and not others? That is, if a company was considered part of the relevant product and geographic markets, why is it not being analyzed? The answer may be as simple as that other MVDPs were not publicly traded during the relevant time frame, but the practitioner should look closely at the stated criteria for choosing the firms analyzed and, just as importantly, the criteria for excluding other firms. Here, the discussion of firm selection is relatively limited, inviting further inquiry from the practitioner.

Second, some of the firms fit into multiple categories, raising concerns about how to interpret results for those firms. For example, Comcast is an MVPD that is vertically integrated with a content provider (NBCU) and is also partial owner of a virtual MVPD (Hulu). This is an illustration of the sorts of practical difficulties that can arise when large companies have diversified operations. The practitioner may wish to examine the relative importance of different divisions to the overall company and whether predicted impacts vary for the different divisions.

Third, as a related matter, one might ask whether it is plausible that a small increase in the price of Turner content or a small decrease in the retail price of a single rival MVPD would have any detectable share price impact given the size and diversity of some of the firms. For example, the authors include Google because of Google’s launch of YouTube TV, a virtual MVPD. If the authors found a statistically significant result for Google, a practitioner might reasonably ask whether the authors were claiming that the tail is wagging the dog—that it is more likely that any such finding was due to other factors that the authors failed to consider. (In fact, the authors did not find a statistically significant result for Google, which is not surprising for the reasons just discussed.)

As discussed above, it may be useful to look at firms both individually and in groups, and the authors in the working paper do so. The authors’ results also provide a useful example of the tension that can arise between the two approaches. None of the groups examined by the authors had statistically significant cumulative abnormal returns for any of the periods analyzed. On an indi-

\textsuperscript{19} Memorandum Opinion at 170–72, United States v. AT&T, Case No. 1:17-cv-02511-RJL (June 12, 2018).

\textsuperscript{20} Schumann, supra note 7, at 694.
vidual firm basis, the authors essentially had only three statistically significant results—negative abnormal returns at Verizon, positive, then negative, abnormal returns at DISH, and a positive abnormal return at Fox for the day after the merger announcement. (The day of the announcement is referred to as “time t,” and the day after as “t+1.”)

One question the practitioner may wish to ask is why, if MVPDs are expected to be harmed by the merger, should that effect not show up for other cable companies? That is, how is it plausible that Verizon, which is a diversified company with very large wireless and telecom operations, should show an impact while more narrowly focused cable companies like Charter and Cable One do not? The general principle is that if different results are found for companies that are allegedly in the same situation, the practitioner may find it useful to inquire whether there are other things going on besides the event being studied that are driving the results.

This leads to the final topic: confounding events. The authors devote substantial space to discussing other news for DISH that may explain why there were positive statistically significant returns at time t and negative ones at t+1, but no statistically significant cumulative abnormal returns. Attempting to parse out the effects of acknowledged confounding news events can be a difficult exercise. The working paper’s discussions also highlight the perils of selectively engaging in such parsing of other news. The authors discuss at length why they believe that the DISH result at time t, which would contradict their hypothesis, can be dismissed as being the result of confounding news, while the t+1 result that they claim is consistent with their hypothesis is actually related to the announcement at time t. However, they also claim that the Verizon results fit their theory but provide no discussion of possible confounding news. The practitioner might ask why a discussion of other news was provided to dismiss a result contradicting the authors’ hypothesis while no such discussion was provided for results confirming the authors’ hypothesis.

In this sort of situation, the practitioner might conduct their own news search to see whether there might be any confounding events. Here, for example, Verizon released its quarterly earnings in the middle of the period the authors are studying.21 Were there factors anticipated or discussed related to those earnings that might explain the authors’ results for Verizon? The practitioner might well explore that further.

**Conclusion**

To sum up, event studies are very useful in many circumstances and commonly appear in expert testimony. Legal practitioners working with experts putting forward or responding to such studies may find it helpful to “kick the tires” by asking several lay-friendly questions:

- (1) Does the expert identify the right time period?
- (2) Does the expert have a clear, testable hypothesis, or is there more than one explanation for the results?
- (3) Is the expert looking at a relevant group of companies where an impact could plausibly be detected?
- (4) Given more than one company in the analysis, are the results internally consistent? And
- (5) Are there confounding events occurring at the same time?

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Book Review
Redefining the Antitrust Paradigm

Jonathan B. Baker
The Antitrust Paradigm: Restoring a Competitive Economy
2019

Reviewed by Barak Orbach

Professor Jonathan Baker is one of the leading antitrust thinkers of our time. During the past three decades, Baker’s voice has been a prominent force in the antitrust discourse and the evolution of antitrust policies. Baker’s new book, The Antitrust Paradigm,¹ is an informed, thoughtful, and provocative antitrust manifesto that every antitrust thinker should read.

The Antitrust Paradigm calls on antitrust to address the “market power paroxysm” in America—namely, the growing prevalence of oligopolies and monopolies in the economy.² The “substantial and widening market power” in the economy, Baker writes, has produced significant social costs: economic disparities have been soaring, business dynamism has declined, the national economic growth has slowed down, and the confidence in democratic institutions has eroded. Baker recognizes that technological change contributed to market concentration in numerous industries, but places much of the blame on the Chicago School. To restore the competitive character of the U.S. economy and reverse unhealthy trends, Baker proposes to reinvigorate antitrust enforcement.

Baker’s operational recommendations focus on the relaxation of judicial premises that are excessively favorable to antitrust defendants, including “the assumptions that markets self-correct, that the harms from unwise judicial precedents outweigh those of market power, and that antitrust institutions are subject to manipulation by complaining competitors.”³ Another set of recommendations that Baker advances addresses changes in the economy that, according to Baker, require modernization of antitrust standards. The key changes that Baker discusses are increased market concentration, a growing use of algorithms to replace human decision making, and the unique characteristics of digital platforms. Additionally, Baker points out that, although antitrust applies to buying power, present enforcement standards and norms neglect problems with buying power, thereby resulting in anticompetitive effects in upstream markets, including labor markets. Baker does not spell out what standards could or should replace the existing ones, and for good reasons, I believe. Informed reforms must begin with a consensus about the problems that should be addressed. The Antitrust Paradigm offers an excellent overview of present problems.

The “antitrust paradigm” is Baker’s normative prescription for U.S. competition law: a national commitment to competition policy that fosters economic growth whose benefits are shared by all Americans, not only by monopolies, other dominant firms, and a small number of individuals. This

² Id. at 12–95.
³ Id. at 5.
proposed paradigm encapsulates Baker’s criticism of present antitrust jurisprudence, which can be called the “Chicago paradigm.” The principal difference between Baker’s proposed paradigm and the Chicago paradigm, I believe, lies in the treatment of welfare effects. The Chicago paradigm builds on premises that markets discipline anticompetitive conduct and that antitrust enforcement tends to be cost-ineffective. Baker’s proposed paradigm prescribes a balanced analysis of welfare effects that relies on fewer premises.

The motivation behind the writing of the *Antitrust Paradigm* is the costly failure of the Chicago paradigm:

> We now know that the Chicagoans lost their bet. Since the implementation of antitrust deregulation, market power has widened, without accompanying long-term gains in consumer welfare. Instead, economic dynamism and the rate of productivity growth have been declining. The harms from the exercise of market power have extended beyond the buyers and suppliers directly affected to include slowed economic growth and a skewed distribution of wealth. Whatever efficiency gains the Chicago-inspired changes may have achieved have not compensated for the market-power effects of the antitrust deregulation they sought. 4

Baker’s proposed antitrust paradigm is insightful and, with some tweaks and clarifications, may be embraced by courts and scholars. To illustrate the potential advantages of the proposed paradigm, consider an economy in which one entity, the “benevolent monopolist,” owns all production, distribution, and retail means. Under certain assumptions about the diffusion of wealth, it can be shown that that the benevolent monopolist would optimize profit to the benefits of all members of the economy. The preference for market competition rests on the understanding that benevolent monopolists of this kind don’t exist: centrally planned economies have persistently failed to serve prosperity. In reality, the intensity of competition in the economy, or lack thereof, is a determinant of prosperity and a determinant of economic inequalities. It is, therefore, somewhat puzzling that the idea that competition policy has nothing to do with the distribution of wealth in society is part of present antitrust law. This idea is a key element of the Chicago paradigm. 5 The assertion that “consumer welfare” means “total surplus” reflects this idea. The intuition underlies Baker’s proposed paradigm is that national prosperity and the distribution of wealth in society are interrelated.

The *Paradigm* explores four characteristics of antitrust law:

1. Present antitrust jurisprudence is captured by anti-enforcement convictions disguised as sound economic principles.

2. Present economic and social conditions, including the rise of digital platforms and concentration of economic power, require reassessment of the antitrust enterprise and, at the very least, refinement of core premises and adaptation to the digital economy.

3. Populist calls to reform antitrust suggest replacing ideological hostility to antitrust enforcement with ideological hostility to business.

4. There are significant institutional impediments to the modernization of antitrust law, chiefly the Supreme Court’s skepticism of the virtues of antitrust enforcement.

Contemporary antitrust literature presents significant disagreements over the assessment of

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4 Id. at 2.

5 See ROBERT H. BORK, THE ANTITRUST PARADOX 90 (1978) (arguing that antitrust “has a built-in preference for material prosperity, but it has nothing to say about the ways prosperity is distributed.”).
these characteristics but no real controversy that they are core features of antitrust law. For example, enforcement skeptics (“Skeptics”) and progressive advocates (“Brandeisians”) tend to have opposite views about the ideological capture but probably agree that it is pervasive. Skeptics believe that the capture rests on a “rigorous,” “objective,” and “evidence-based” “economic framework.”6 By contrast, Brandeisians believe that the capture is the source of “America’s monopoly problem.”7

My criticism of the Paradigm concerns the characterization of the proposed paradigm’s two elements: (1) a national commitment to competition policy and (2) the fostering of economic growth that benefits all Americans.

A National Commitment to Competition Policy

Baker interprets the decline in antitrust’s political salience and rise of antitrust technocracy as a sort of “political bargain”—an “informal political understanding” among consumers, farmers, small businesses, and large businesses that competition policy is the “primary approach to economic regulation.”8 This political bargain, Baker writes, represents a national commitment to competition policy, although it “does not have clearly specified terms,” and “should be understood metaphorically, not literally.”9

I believe that Baker’s proposal for a political bargain could be helpful, but am not persuaded that, in the 20th century, a metaphorical political bargain about competition policy formed in America. First, competition, not competition policy, is a defining characteristic of American capitalism.10 In the second and third quarters of the 20th century, during antitrust’s “fairness era,” the Supreme Court often identified a national commitment to competition policy, describing antitrust as the “Magna Carta of free enterprise”11 and a “charter of economic liberty.”12 But, for many people in America, antitrust is and has always been antithetical to economic liberty and free enterprise. This hostility to antitrust enforcement governs the Supreme Court’s antitrust jurisprudence today and governed the Court’s jurisprudence before the fairness era.

Second, in the United States, the commitment to competition is derived from an allegiance to freedom of trade. Paradoxically, the strength of this commitment is in its amorphous nature. It accommodates a diverse spectrum of convictions and preferences about freedom of trade. A dogmatic commitment to freedom from government interference (hostility to government’s oversight of markets) is on one end of this spectrum. A dogmatic commitment to fairness (hostility to big business) is on the opposite end of this spectrum. The continuum between these ends, in turn, repre-

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6 Joshua D. Wright et al., Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust, 51 ARIZ. ST. L.J. 293 (2019) (offering a rich set of adjectives to praise present antitrust standards and ridicule alternative standards).


9 BAKER, supra note 1, at 11, 13, 40.


Baker argues that, in the 1940s, a consensus about focusing antitrust on welfare tradeoffs emerged.

Such consensus is yet to form in the United States. In the first five decades of the Sherman Act, the trustbusting narrative masked political unwillingness to enforce antitrust law. Enforcement actions, including the big trustbusting campaigns, were consistent with the narrative, not with the spirit of enforcement policies. Then, for about four decades, antitrust law and policy focused on fairness, discounting the costs of excessively intrusive enforcement policies. Thereafter, for about four decades, antitrust law and policy focused on freedom from government’s oversight of markets, premising that market institutions tend to eliminate the ability of firms to extract rent (namely, gains resulting from positional advantages). Present debates about the future of antitrust law may reshape the governing norm of tradeoffs in antitrust law.

Putting aside interpretations of the past, Baker’s prescription for the antitrust paradigm and emphasis on political bargains are good ones. A political bargain that embraces a balanced approach to welfare tradeoffs will move antitrust forward. Antitrust thinkers who believe that sound public policies should consider welfare tradeoffs will enjoy reading the Paradigm and will find it informative and useful.

**Economic Growth That Benefits All Americans**

Entrepreneurship and innovation are the primary engines of growth in the modern economy. The decline in business dynamism in the United States, therefore, raises concerns about the health of the economy. The Paradigm summarizes and explains this concern and the complex relationship between dynamism and competition policy. Antitrust thinkers, I believe, will find Baker’s overview of the topic informative and useful. No book could review all aspects of the topic. Here, I focus on a theme that, in my view, is not developed enough in the book: the relationship between dynamism and economic inequalities. The appreciation of this theme is critically important to the implementation of Baker’s proposed antitrust paradigm.

In periods of rapid technological change, the distribution of welfare gains and losses is heavily skewed: successful entrepreneurs and their backers capture a portion of the gains and accumulate wealth, while large segments of the population experience losses arising from automation and displacement of old technologies. This pattern is often described as a “technological divide,” or “digital divide” in the context of the digital revolution. When the welfare losses are large, the productivity growth may be disappointing. Economists call this phenomenon the “productivity paradox.”¹³ It is not a coincidence that the antitrust impulse—public pressures to act against big business—appeared in periods of rapid technological change: the Second Industrial Revolution at the turn of the 19th century and the digital revolution at the turn of the 20th century.

The neglect of welfare losses associated with technological divides proved costly. First, the neglect extends misery and hardship that could be mitigated. Second, the neglect creates political capital for ideologues and opportunists who use the populist playbook. Such ideologues and populists mobilize people on one side of the technological divide (the “people” in the populist argot) to act against those on the other side of the divide (the “establishments” and the “elites”).

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Competition policy could potentially mitigate the costs of technological divides, but other public policies are likely to be more effective. For example, investments in infrastructure, education, and professional training could narrow the divide, while trustbusting is more likely to disrupt the system. Similarly, antitrust enforcement does not have good tools to address the draining of manufacturing jobs in the United States caused by globalization and automation.

Concentration and market power are also problems whose neglect proved costly. Companies that drive technological divides are often associated with both concentration and market power. The distinction between problems associated with technological divides and problems associated with concentration and market power is an important one. The Paradox, I believe, pays too little attention to the significance of technological divides.

To illustrate the significance of the distinction, consider the talking points that Skeptics and Brandeisians use to explain disruptive technologies. Skeptics insist that the concerns about both sets of problems reflect “pseudo-economic demagoguery and anticorporate paranoia.” Technological divides, Skeptics argue, are incidental costs of creative destruction. Under their trickle-down theories, market power and technological divides dissolve quickly, and their temporary existence incentivizes people to embrace progress. By contrast, Brandeisians bundle the problems, as well as other problems, and argue that all problems associated with concentration and market power are the direct consequence of greed and untamed power. Both approaches are too flawed to guide policies that seek to foster innovation and prosperity.

Conclusion

The potential significance of the Paradigm is that the book was released during what seems to be an historical inflection point in antitrust law. Baker’s analysis and views are consistent with the likely reorientation of antitrust law, I believe. Baker offers an in-depth analysis of the corrosive effects of Chicago’s erroneous premises on antitrust law, identifies several areas that require reform, and advances several policy prescriptions that intend to implement his proposed antitrust paradigm.

My observations are possibly overly academic. In this review, I summarized my understanding of Baker's proposed antitrust paradigm, which, in essence, is a welfare tradeoff paradigm: a national commitment to competition policy that fosters economic growth whose benefits are shared by all Americans. This proposed paradigm is dynamic by nature and flexible enough to accommodate the evolving understanding of markets and economic activities. Importantly, Baker’s proposed antitrust paradigm escapes the dogmatic rigidity of ideological and populist approaches that continue to threaten the vitality of the antitrust enterprise. I believe that Baker’s proposed paradigm is brilliant in its simplicity, promising, and deserves serious consideration.

14 Wright et al., supra note 6, at 295.