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Novel Theories Emerge in Merger Enforcement

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Antitrust merger enforcement historically has focused on horizontal mergers — consolidation of two firms that compete directly in the same space. This is especially true in the U.S., where antitrust authorities have challenged few vertical mergers — those of a firm with one of its customers or suppliers — and are even less prone to scrutinize conglomerate mergers that marry complementary assets, or transactions that may impact innovation competition that isn't tied to specific products or markets.

The European Union's antitrust regulator, the European Commission, has been more apt to examine vertical issues, conglomerate effects and innovation competition, pushing the envelope of less traditional theories in their enforcement actions. Recent activity in Europe confirms this approach to nonhorizontal mergers, an enforcement trend that the U.S. may be unlikely or unwilling to adopt.

A fundamental difference between the two jurisdictions is that the European Commission's decisions are self-enforcing and subject to judicial review only after the Commission has issued its decision, whereas a U.S. enforcer's decision to block a merger must be sanctioned by a federal court before it can take effect. Because U.S. antitrust officials bear the burden of proof in merger litigation, and courts are bound by existing precedent, dramatic changes in U.S. merger enforcement are unlikely over the short term, even while the Commission continues its current trend of aggressively pursuing a broader range of theories of competitive harm.

Merger Decisions in the EU and US

As in the U.S., the European Commission's merger decisions are typically focused on horizontal mergers. In its nonhorizontal merger guidelines, the Commission states that conglomerate mergers — mergers involving complementary rather than overlapping products or services — generally do not raise competition concerns. However, several recent Commission decisions and pending investigations reveal an aggressive pursuit of vertical and conglomerate cases in spite of this view.

In 2016, the Commission approved a number of nonhorizontal mergers subject to the parties making commitments to address competition concerns, including in relation to dental equipment (*Dentsply/Sirona*), payment services (*Worldline/Equens/Paysquare*) and social networking services (*Microsoft/LinkedIn*). For example, the Commission cleared Microsoft/LinkedIn subject to a commitment that competitors would be assured continued interoperability with and access to Microsoft's products for a transitional period.

In 2017, the Commission opened in-depth investigations in relation to three transactions based at least in part on conglomerate theories of harm. It expressed concern that the merged entities might:

- in *Qualcomm/NXP Semiconductors* (June 2017), exclude rival suppliers through bundling or tying practices, including by potentially modifying current intellectual property licenses (for example by bundling one of NXP's technologies to Qualcomm's patent portfolio);

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- in *Bayer/Monsanto* (August 2017), bundle or tie their sales of pesticide products and seeds and prevent competitors' access to distributors and farmers, which would be aggravated by the increased reliance on digital agriculture in which the merging parties have a particularly strong position; and
- in *Luxottica/Essilor* (September 2017), use Luxottica's prominent brands, including Ray-Ban, to convince opticians to buy Essilor lenses to the detriment of other lens suppliers.

The U.S. antitrust authorities' treatment of these cases was markedly different. U.S. regulators cleared *Dentsply/Sirona* and *Microsoft/LinkedIn* without remedies, and *Qualcomm/NXP Semiconductors* just months after the deal was announced, without an in-depth investigation.

Innovation Competition

A similar contrast can be drawn in relation to recent decisions involving innovation competition. The European Commission has long made clear that loss of innovation can be "at the heart of the anti-competitive effects of a merger," according to an April 2016 EU policy paper on EU merger control and innovation. But in past decisions, it focused its merger analysis on actual products in a merging firm's pipeline, *e.g.*, an analysis of whether a deal could lead to the elimination of products under development that otherwise would have been commercialized.

More recently, the Commission broadened its analysis to examine whether a transaction could reduce innovation more generally. In *Dow/DuPont*, the Commission pursued what many critics consider an entirely novel and speculative theory of harm, including the allegation that post-merger, the parties would have fewer incentives to maintain research and development (R&D) spending and develop new pesticide products, even in relation to products that had not yet been identified and that would be marketed at an undetermined future date. The Commission cleared the merger subject to DuPont's commitment to divest its global R&D organization. Following its decision, and likely in response to criticisms, the Commission rejected the notion that its innovation theory of harm was novel or speculative, referring to an economic study authored by its own economists that concludes that any merger "tends to reduce overall innovation."

In the U.S., *Dow/DuPont* was cleared subject to a narrow set of divestitures related to horizontal overlaps in herbicides, pesticides and performance polymer materials. And while the U.S. authorities have recognized the importance of innovation competition, the antitrust agencies have rarely initiated merger challenges on the basis of threats to innovation, with the Federal Trade Commission's 1997 review of the *Ciba-Geigy/Sandoz* merger noted as one possible exception. Even then, the concerns were focused on specific, albeit nascent, overlapping technologies.

Potential for Changes to US Enforcement

In November 2017, the Antitrust Division of the U.S. Department of Justice filed a challenge to service provider AT&T's vertical merger with Time Warner, a creator of content for distribution via cable and internet by firms like AT&T. The challenge raises the question of whether less traditional merger enforcement will become more prevalent in the U.S., and whether doctrines involving innovation market analysis, vertical integration and conglomerate effect theories will gain ground in the current political environment.

Such a shift in U.S. antitrust enforcement would be a significant departure from the policies traditionally embraced by Republican administrations, which have been less enforcement-oriented than their Democratic counterparts. Indeed, congressional Democrats recently espoused radically increased enforcement on the basis of vertical and conglomerate theories as a central principle of their "Better Deal" platform. The antitrust-specific bill calls for greater investigation of nonhorizontal mergers and proposes other dramatic deviations from well-established antitrust laws, including changing the standard for merger challenges altogether to account for a broader variety of effects on consumer welfare rather than focusing on a merger's impact on price and quality. Many political commentators view the proposed legislation as an effort by Democrats to attract voters leading up to the midterm elections, with little realistic chance of passing under the current Republican-controlled Congress and White House.

While both the "Better Deal" legislation and *AT&T/Time Warner* challenge are certainly worth noting, a radical shift in U.S. policy is highly improbable. The U.S. has not litigated a vertical case or any merger case based on conglomerate effects or innovation markets in decades, and there is little recent precedent to support these theories of competitive harm. Under these circumstances, with little precedent to the contrary and with the courts as gatekeepers, a shift in the U.S. toward the theories of harm that are gaining traction in the EU is unlikely. Parties contemplating transactions should be aware that less conventional theories of antitrust may nevertheless impede their ability to fully realize their goals if the transaction is subject to multijurisdictional review.